funding, the informational interests served by BCRA's disclosure requirements provide an independent basis on which to uphold their constitutionality. See Bellotti, 435 U.S. at 792 n.32 (noting that state may require disclosure of ballot initiative advertising sources in order to serve informational interests, even while it may not restrict corporate financing of such advertising).

II. BCRA'S COORDINATION PROVISIONS ARE CONSTITUTIONAL.

A. The Choice Afforded to Political Parties Under Section 213 of BCRA Is Constitutional.

Section 441a(a) of FECA sets out dollar limits on contributions and coordinated expenditures that may be made to a candidate or a political committee by an individual (generally $1,000, raised to $2,000 in BCRA), or by a multicandidate political committee (generally $5,000, unamended by BCRA). In addition to the $5,000 in § 441a(a) applying to all multicandidate political committees, national and state party committees receive "special treatment," Colorado I, 518 U.S. at 610-11, and under § 441a(d) may make substantial additional coordinated expenditures.[123] In 2000, the limits on these additional coordinated expenditures ranged from $33,780 to $67,560 for House of Representative races and, for Senate races, from $67,560 to $1.6 million. See Colorado II, 533 U.S. 431, 439 n.3 (2001).

Section 213 of BCRA amends § 441a(d) and provides that, once a candidate has been nominated, a party can choose to take advantage of the more generous limits on coordinated expenditures if it is willing to forgo independent expenditures. Alternatively, a party can elect to make unlimited independent expenditures, but then its coordinated expenditures will be subject to

[123] Section 441a(d) authorizes national and state party committees to make coordinated expenditures equal to 2 cents multiplied by the voting age population of the United States for a Presidential candidate; the greater of $20,000 or 2 cents multiplied by the voting age population of a State for the State's candidate for Senator; and $10,000 for a candidate for Representative. See 2 U.S.C. 441a(d)(2), (3). These limits are adjusted each year for inflation. 2 U.S.C. 441a(c). The FEC interprets Section 441a to permit national and state political parties to take advantage of both the $5,000 limit on contributions set out in Section 441a(a) and the higher limits on coordinated expenditures in Section 441a(d). See, e.g., 11 C.F.R. 110.7(b)(3).

the same $5,000 contribution limit that applies to coordinated expenditures of all other multicandidate political committees.

Plaintiffs maintain that § 213 violates the First Amendment and the due process and equal protection components of the Fifth Amendment. These claims lack merit. Section 213 gives political parties the opportunity, available to no one else, to choose between (1) making coordinated expenditures in amounts much greater than FECA ordinarily permits, and (2) making expenditures, including independent expenditures, under the rules generally applicable to multicandidate committees. Accordingly, § 213 is fully consistent with the First and Fifth Amendments.

When Congress enacted the predecessor of § 441a(d) in 1974, it did not intend to allow political parties to support their candidates by making both significantly higher coordinated expenditures and unlimited independent expenditures, since at that time it was generally believed that national political parties could not make independent expenditures. See S. Rep. No. 689, 93d Cong., 2d Sess. 7, 15, 18-19 (1974); H.R. Rep. No.1438, 93d Cong., 2d Sess., 54, 56 (1974). Congress reaffirmed that view when it reenacted § 441a(d) after the Buckley decision generally invalidated limits on independent expenditures. H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976); see also FEC v. DSCC, 454 U.S. 27, 28 n.1 (1981) (noting FEC's position that "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates").

Twenty years later, however, the Supreme Court, in Colorado I, held that political parties could make independent expenditures and that, as for other entities, those expenditures could not be limited. The Court's plurality opinion stated that, for purposes of coordinated and independent

expenditures, there was no reason to treat political parties any differently from any other multicandidate organization. See Colorado I, 518 U.S. at 619, 621.

Nonetheless, FECA still treated political parties differently from other organizations: parties were permitted to make coordinated expenditures subject to the much higher limits in Section 441a(d). Parties challenged those limits in Colorado II, arguing that they should not be subject to any limits on coordinated expenditures whatsoever. The Supreme Court disagreed, concluding that coordinated expenditures by parties are particularly likely to lead to circumvention of the Act's contribution limits, while a party's interest in making coordinated expenditures is entitled to no greater constitutional protection than the interest of anyone else. 533 U.S. at 455. The Court accordingly applied the same scrutiny to the limits on political party coordinated expenditures that it had applied to limits on other political actors. In accordance with the basic approach applied in prior cases not involving corporations and unions "routinely str[iking] down limitations on independent expenditures . . . while repeatedly upholding contribution limits," id. at 441 the Court upheld the limitations set out in § 441a(d) and held that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits," id. at 465. The Supreme Court already had upheld the $1,000 contribution limits for individuals and the $5,000 limit for multicandidate party committees in Buckley, recognizing that "[t]hese limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions." 424 U.S. at 58.

The holdings in Buckley, Colorado I, and Colorado II make clear that Congress may constitutionally regulate contributions and coordinated expenditures by political parties, and that the

pre-BCRA contribution limits in §§ 441a(a) and 441a(d) are constitutional. It also is clear that political parties need not be treated differently from other multicandidate committees for purposes of imposing contribution limits. Congress was therefore entitled to apply to political parties the same $5000 limit on contributions and coordinated expenditures it had imposed on other multicandidate political committees. That is one of the options a party committee has under BCRA: to make unlimited independent expenditures in support of a candidate, but only the $5000 in contributions and coordinated expenditures permitted by 2 U.S.C. 441a(a)(2)(A), just like other multicandidate committees.

In BCRA, however, Congress gave party committees another option, not available to anyone else: if the committee voluntarily chooses to forgo making independent expenditures, it can make coordinated expenditures up to the much higher limits set out in § 441a(d). A party committee choosing this option would be in the same position Congress intended when it first enacted those higher limits in 1974, making coordinated expenditures at the higher limit but not independent expenditures. Providing such an option, which a party committee is free to accept or decline, does not constitute a restriction of First Amendment rights. Cf. Maher v. Roe, 432 U.S. 464, 476 (1977) ("Constitutional concerns are greatest when the [government] attempts to impose its will by force of law; the [government]'s power to encourage actions deemed to be in the public interest is necessarily far broader.").

The Court's ruling in Buckley, in sustaining FECA's public financing provisions, is instructive. The Court upheld a restriction on candidate expenditures imposed on publicly financed candidates, even though it had invalidated the same restriction on expenditures by other candidates, because participation in public financing was a voluntary option. "Congress may condition

acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding." 424 U.S. at 57 n.65. Similarly, Congress is entitled to offer party committees a higher limit on coordinated expenditures, if they voluntarily agree to forgo independent spending.

Plaintiffs contend that § 213 requires the national party and the political parties established by the State that want to take advantage of the higher limits in § 441a(d) to make a single, unified choice between coordinated and independent expenditures. This may not be the case, however. Both FEC's pre-BCRA regulations and its proposed post-BCRA regulations make clear that the statute is intended to distinguish between two groups within a particular party: (1) national party committees and (2) all State and local committees of that party. See, e.g., 11 C.F.R. 110.7(b)(1) ("The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate . . . ." (emphasis added)); 67 Fed. Reg. 60,042, 60,067 (proposed 11 C.F.R. 109.32(b)(1)) (Sep. 18, 2002). Under the proposed regulation, each group would be able to make its own selection.[124]

[124] To prevent circumvention, § 213 prohibits a party committee choosing the higher coordination limit from transferring funds to, or receiving funds from, a committee choosing the option of making unlimited independent expenditures. The California Democratic Party contends that Section 213 is unconstitutional because it bars all such transfers, even where the money is not earmarked for independent expenditures. This argument, however, ignores the fungibility of money. Allowing such transfers would free a committee's other funds for independent expenditures. The California Democratic Party also contends that § 213 violates the equal protection component of the Fifth Amendment. However party committees are actually treated better than any other multicandidate committee because they are given the option of choosing a higher coordinated expenditure limit if they consider that more beneficial than making independent expenditures. Cf. Republican National Committee v. FEC, 487 F.Supp. 280, 285 (S.D.N.Y.) (three-judge court) ("Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will enhance the candidate's power of communication and association."), aff'd mem., 445 U.S. 955 (1980).

Even under a construction of the provision that would require a unified choice on spending by the national and state-level committees of a political party, the statute would be fully consistent with the Constitution. Only committees that are "established and maintained" by the official state or national party committee are among those "considered to be a single political committee" under this provision. 2 U.S.C. 441a(d)(4)(B). In light of that close structural relationship established by the parties themselves, Congress can properly require such committees to make a single unified choice. And the statute leaves the parties free to establish any internal structure or procedure they believe necessary to govern the manner in which the spending decision with respect to each candidate is to be made. Even if the statute "prompts parties to structure their spending in a way that they would not otherwise choose to do," Colorado II, 533 U.S. at 450 n.11, it is not unconstitutional.

B. Section 214 of BCRA Is Consistent with the First Amendment.

Since 1976, 2 U.S.C. 441a(a)(7)(B)(i) has provided that an expenditure coordinated with a candidate is a contribution, and since Buckley, the Supreme Court has recognized that such expenditures may constitutionally be limited. See 424 U.S. at 46-47; see also Colorado II, 533 U.S. at 446.[125] Sections 214(b) and (c) of BCRA repeal the FEC's current regulations defining coordinated communications and require the FEC to promulgate new regulations. Although the statute sets out four criteria that the FEC must address in the new regulations, it does not require that the new regulations define coordinated communications by reference to any of them.

[125] In § 214(a) of BCRA, Congress incorporated into the statute the principle previously set out in the Commission's regulations, 11 C.F.R. 100.23(b),(c), that expenditures coordinated with a political party, like expenditures coordinated with a candidate, are treated as contributions.

Under the former regulations, an expenditure for a communication was to be considered coordinated if the communication was created, produced, or distributed (1) at 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" between the creator, producer, distributor, or payer of the communication and the candidate or party about the content or distribution of the communication, the result of which is "collaboration or agreement." 11 C.F.R. 100.23(c). Congress concluded "that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill." 148 Cong. Rec. S2096, S2145 (Mar. 20, 2002) (Sen. McCain). Rather than legislate a new definition of coordination itself, however, Congress repealed the existing coordination regulations and directed the FEC to promulgate new ones. See, e.g., 147 Cong. Rec. S3183-01, S3193 (Mar. 30, 2001) (Sen. McCain) ("[W]e are asking the FEC to promulgate regulations to crack down on the abuses of coordination.").

It is doubtful that plaintiffs' challenge to § 214(c) raises an issue ripe for judicial resolution, and plaintiffs will suffer no hardship by this Court's withholding consideration of their challenge until after the new regulations are promulgated. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). Section 214(c) of BCRA neither requires nor prohibits any actions by plaintiffs. It makes no substantive revision to 2 U.S.C. 441a(a)(7)(B), the statutory provision that governs plaintiffs' coordinated spending. Indeed, the provision is addressed solely to the Commission, directing it to revise its regulatory construction of the statute. Cf. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998) (no "significant"

hardship where the provisions "do not command anyone to do anything or to refrain from doing anything"); cf. also American Trucking Ass'n v. ICC, 747 F.2d 787, 790 (D.C. Cir. 1984) (sua sponte finding agency policy statement not ripe for judicial consideration where the statement was ambiguous and "neither imposes any obligation upon these petitioners, nor in any other respect has any impact upon them 'felt immediately . . . in conducting their day-to-day affairs'" (quoting Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967))). Until those regulatory revisions are completed, neither the Court nor plaintiffs can know how the revised regulations will affect plaintiffs or have any basis for evaluating whether those regulations will contravene constitutional principles.[126]

Similarly, plaintiffs lack Article III standing to challenge § 214(c). Plaintiffs have not alleged any concrete and particularized injury from § 214(c)'s instructions to the Commission to promulgate a new regulation. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). They have also failed to show a causal connection between any alleged injury and § 214(c). Id. The provision by itself causes plaintiffs no legally cognizable harm. Cf. Metcalf v. National Petroleum Council, 553 F.2d 176, 186-87 (D.C. Cir. 1977) (consumers asserting that statutorily required composition of federal advisory committee would lead to higher costs for petroleum products lacked standing because the occurrence of the harm was "speculative and conjectural"). If, after the Commission promulgates the new regulations, plaintiffs have concerns about the regulations' applicability to specific activities they wish to undertake, they may use the Commission's "chill-reducing advisory opinion mechanism[,] . . . a relatively riskless controversy-ripening tool," set forth in 2 U.S.C. 437f. Martin Tractor, 627 F.2d at 388. If

[126] Indeed, even the terms in the statute on which plaintiffs purport to base their claim, "agreement or formal collaboration," were not defined by Congress and are subject to interpretation in the Commission's rulemaking.

plaintiffs believe that the regulations on their face or as applied infringe their First or Fifth Amendment rights, they may challenge those regulations in a single-judge district court, not the special three-judge court convened in this case.

A favorable decision by this Court also would not redress any alleged injury, see Lujan, 504 U.S. at 561, because eliminating Congress's directive to the Commission would not make the existence of an "agreement or formal collaboration" the defining characteristic of a coordinated expenditure. Section 441a(a)(7)(B)(i) of FECA explicitly provides that expenditures made "at the request or suggestion of a candidate" will be treated as contributions to the candidate.[127] A "request" or a "suggestion" is not synonymous with either an "agreement" or "formal collaboration." The person to whom a request or suggestion is made can act on it without entering into an agreement or engaging in a formal collaboration with the person who made the request or suggestion, as evidenced by the following hypothetical: A candidate suggests to a wealthy individual, "If you want to help, you might finance some political advertisements advocating my election"; the individual does not reply, but a week later, buys $100,000 worth of air time to advocate the candidate's election. Invalidating § 214(c) would not preclude a finding that those advertisements could be treated as contributions under the plain language of FECA § 441a(a)(7)(B)(i).

Even if the Court concludes that plaintiffs present a justiciable challenge to § 214 (b) or (c), such a challenge clearly fails on the merits. Section 214(b) and (c) do nothing more than (1) repeal existing regulations, (2) require the FEC to promulgate new regulations, and (3)

[127] See 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. Feingold) ("The bill does not change the basic statutory standard for coordination, which defines and sets parameters for the FEC's authority to develop rules describing the circumstances in which coordination is deemed to exist.").

mandate that the agency in the new regulations address four explicit factors and not require "agreement or formal collaboration" to establish coordination. Plaintiffs have not alleged that either the first or second of these actions has violated their constitutional rights. Nor could they. Congress clearly has the authority to repeal existing regulations and require an agency to promulgate new ones. Plaintiffs could only articulate a challenge to the facial validity of the statute on the ground that any regulations the FEC might promulgate will necessarily be unconstitutionally vague and overbroad. In order to succeed on such a facial challenge, however, plaintiffs would have to demonstrate that there is no possible way for the FEC to constitutionally promulgate regulations that comply with the statute. See, e.g., Salerno, 481 U.S. at 745. In this case, no such showing can be made.

The Supreme Court has taken a "functional" rather than a "formal" approach in identifying contributions and coordinated expenditures. Colorado II, 533 U.S. at 438, 443. The Court adopted that approach in Buckley, and 2 U.S.C. 441a(a)(7)(B)(i), added to FECA in 1976, see Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, Title I, § 112(2), 90 Stat. 475, 486 (1976), incorporates that decision's conclusions on how to differentiate expenditures that may constitutionally be treated as contributions from those that may not. The Supreme Court discussed the matter in responding to the government's concern that, in the absence of expenditure ceilings, FECA's contribution limits could easily be avoided through expenditures coordinated with candidates and their campaigns. Buckley, 424 U.S. at 46. The Court found that FECA's contribution limits "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." Id. at 47.

In reaching these conclusions, the Court relied on FECA's legislative history for "guidance" on how to differentiate expenditures that are contributions from expenditures that are not. See id. at 46 n.53. The Court noted that the House report on the 1974 amendments to FECA "speaks of independent expenditures as costs 'incurred without the request or consent of a candidate or his agent.'" Id. (citing H.R. Rep. No. 93-1239, at 6 (1974) (emphasis added)). It quoted approvingly from the Senate report that discussed the example of an individual's purchasing billboard advertisements to endorse a candidate: "'If he does so completely on his own, and not at the request or suggestion of the candidate or his agent[ ] that would constitute an "independent expenditure" . . . . However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter . . . .'" Buckley, 424 U.S. at 46 n.53 (quoting S. Rep. No. 93-689, at 18 (1974)) (emphases added); see also id. at 36-37 & n.43.

Thus, unlike plaintiffs here, the Court in Buckley adopted a practical rather than a restrictive, formalistic approach. Instead of treating an agreement or formal collaboration as the sine qua non of an expenditure that the government could regulate consistent with the Constitution, the Court in Buckley focused on the circumstances leading to an expenditure. In particular, the Court agreed with Congress that an expenditure made at the request or suggestion of a candidate is, in practical effect, the equivalent of a contribution; like a contribution, it can create an opportunity for corruption or the appearance of corruption.

The Court exhibited the same sensitivity to factual circumstances in Colorado I, where, for the first time in an enforcement action, the Court considered whether particular expenditures by a spender were "independent" or "coordinated." Before the Colorado Republican Party had

selected its senatorial nominee from among several individuals vying for the nomination, it had bought radio advertisements attacking the Democratic Party's likely senatorial nominee. 518 U.S. at 613-14. The Court found that the Colorado Republican Party had in fact made those expenditures "independently, without coordination with any candidate." Id. at 608.

The sparse record on the preparation of the advertisements included no evidence that the Party had communicated at all with any of its senatorial candidates about the advertising campaign. The Court found the following points decisive: the expenditure occurred prior to nomination; the Party chairman arranged for the development of the advertisement script on his own initiative and alone approved the script; only the Party's staff read the script; and all relevant discussions took place at meetings attended only by the Party's staff. Colorado I, 518 U.S. at 613-14. The Court discounted a statement by the Party's Chairman that "it was the practice of the Party to 'coordinat[e] with the candidate' 'campaign strategy.'" Id. at 614. That statement was just a "general description of Party practice" and did "not refer to the advertising campaign at issue here or to its presentation." Id. Hence, "the uncontroverted direct evidence [showed] that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate." Id.

In sum, the Supreme Court has eschewed a rigid, formalistic approach and instead has emphasized the factual circumstances of an expenditure, for "[c]oordinated spending . . . covers a spectrum of activity." Colorado II, 533 U.S. at 445. "[F]acts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify." Id. at 442-443. To resolve the facial challenge in this case, however, this Court need not identify all the

activities that are part of the coordinated spending spectrum. It is enough that, under the Supreme Court's functional approach, the existence of an agreement or formal collaboration is not constitutionally required for an expenditure to be deemed coordinated and hence subject to the statutory contribution limits. Indeed, even a new regulation that included only the first two prongs of the old regulation communications created, produce d, or distributed at the request or suggestion of the candidate or after the candidate has exercised control or decision-making authority over the content or distribution wo uld, without requiring agreement or formal collaboration, satisfy both the statute and the First Amendment.[128] See Buckley, 424 U.S. at 46 n.53. Accordingly, plaintiffs' facial attack on the statute plainly lacks merit.[129]

The statute also requires the FEC to address the following four factors in promulgating its new regulations: (1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed by former employees of a candidate or political party; and (4) payments made after substantial discussion with a candidate or political party. See BCRA § 214(c). As Congress emphasized, however, none of the factors need be included in the definition of coordination: "[T]he bill does not provide a new definition of 'coordination.' The bill repeals recently adopted FEC regulations on coordination and directs the FEC to issue new regulations. It requires the FEC to address certain topics in the

[128] This is not to suggest that the FEC should or will promulgate such a regulation; it simply demonstrates that § 214 can easily be satisfied without raising any First Amendment concerns. The FEC's proposed regulations set out a three-part test for determining whether a communication is coordinated, focusing on: (1) who paid for the communication; (2) the content of the communication; and (3) the conduct and interactions between the payer and the candidate or the political party committee. See 67 Fed. Reg. 60,065-66 (proposed 11 C.F.R. 109.21) (Sep. 18, 2002).

[129] Although the D.C. Circuit generally has invoked the broader "no-set-of-circumstances" test in evaluating facial challenges, see Amfac Resorts v. Department of the Interior, 282 F.3d 818, 826 (D.C. Cir. 2002), some cases have suggested an alternative, more lenient standard under which a plaintiff might succeed on a facial challenge without demonstrating that the statute is invalid in every conceivable application, see id. Even under that more lenient standard, however, plaintiffs' facial challenge in this case lacks merit, since there are numerous possible ways for the FEC to satisfy both the statutory mandate and the Constitution.

rulemaking, but does not dictate what the FEC should decide." 148 Cong. Rec. S1530 (Mar. 5, 2002) (Analysis of Changes Proposed By Senator McConnell to Pending Campaign Finance Reform Legislation); see also 147 Cong. Rec. S3185 (Mar. 30, 2001) (Sen. Feingold) (the amendment "doesn't require the FEC to come out any certain way or come to any definite conclusion one way or another").

In order to succeed in their challenge, plaintiffs must demonstrate that there is no constitutionally permissible way in which the FEC can even consider the listed factors. Plaintiffs can make no such showing. Congress is entitled to provide guidance to agencies when it directs them to promulgate regulations, and although Congress certainly could have identified additional or different criteria, the legislative record fully supports Congress's choice. See, e.g., 147 Cong. Rec. S2423 (Mar. 19, 2001) (Sen. Specter) (discussing the shared use of campaign consultants); Thompson Comm. Rep. at 128 (same); id. at. 120 (discussing shared advertisements); id. at 4005 (discussing activities of former campaign employees); id. at 4010-11 (discussing common vendors); id. (Minority Views) at 6295 (discussing common vendors). Accordingly, § 214 is entirely consistent with the First Amendment.[130]

[130] Included among the plaintiffs challenging § 214 are the Paul plaintiffs. See Paul Compl. ¶ 33. The claims presented in the Paul complaint more generally, however, can be described as omnibus in nature: the Paul plaintiffs take issue with virtually every aspect of FECA from coordination, id., to contribution limits in general, see id. ¶¶ 11(b)(iii), 13(a), 17(b)(iii), 56; to all disclosure and reporting requirements, see id. ¶¶ 11(b), 12(b), 13(b), 47; to BCRA's provisions concerning soft money, see id. ¶¶ 18, 40, and electioneering communications, see id. ¶¶ 13(c), 14, 35-36. To the extent the Paul claims concern amendments made by BCRA, the claims are addressed by defendants' arguments with respect to those amendments. To the extent the Paul claims address FECA requirements apart from those occasioned by BCRA, however, such as the imposition of contribution limits in general, those claims are either outside the jurisdiction of this Court, see BCRA § 403 (three-judge court available only for actions challenging constitutionality of BCRA "or any amendment made by" BCRA), or are foreclosed by Buckley and its progeny.