IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christopher Shays and Martin Meehan, Plaintiffs, v. United States Federal Election Commission, Defendant.	Civil Action No. 02-CV-1984 (Judge Kollar-Kotelly)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT (DKT. NO. 27)

Roger M. Witten (Bar No. 163261)
David A. O'Neil (*pro hac vice*)
WILMER CUTLER PICKERING LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800

Charles G. Curtis, Jr. (*pro hac vice*)
Michelle M. Umberger (Bar No. 480620)
Michael M. Markman
Sarah E. Reindl
HELLER EHRMAN WHITE & McAULIFFE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
(608) 663-7460

Randolph D. Moss (Bar No. 417749)
Stacy E. Beck (Bar No. 480540)
WILMER CUTLER PICKERING LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Brent N. Rushforth (Bar No. 331074)
Carl S. Nadler (Bar No. 395279)
Martina M. Stewart
HELLER EHRMAN WHITE & McAULIFFE LLP
1666 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 912-2000

Donald J. Simon (Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Fred Wertheimer (Bar No. 154211)
Alexandra Edsall (Bar No. 453518)
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, D.C. 20006
(202) 429-2008

Attorneys for Plaintiffs Christopher Shays and Martin Meehan

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Table of Abbreviations

The following abbreviations are used in this memorandum in opposition to the Commission's motion for summary judgment:

- Defendant Federal Election Commission's Memorandum in Support of Its Motion for Summary Judgment, Dkt. No. 27, *abbreviated as* FEC Mem.
- Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 29, *abbreviated as* Pls.' Mem.
- May 3, 2002 Order Granting Motion to Intervene, Dkt. No. 40, *McConnell v. FEC, abbreviated as* May 3, 2002 Order.
- Brief *Amicus Curiae* of the AFL-CIO, Dkt. No. 35, *abbreviated as* AFL-CIO *Amicus* Br.
- Brief *Amicus Curiae* of the Michigan Democratic Party and Michigan Republican Party, Dkt. No. 43, *abbreviated as* Michigan Parties' *Amicus* Br.
- Brief *Amicus Curiae* of OMB Watch, Dkt. No. 44, *abbreviated as* OMB Watch *Amicus* Br.
- General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures; Final Rule, 65 Fed. Reg. 76,138 (Dec. 6, 2000) (codified at 11 C.F.R. pts. 100, 109 and 110), *abbreviated as* 65 Fed. Reg. at _____.
- Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 421 (Jan. 3, 2003) (codified at 11 C.F.R. pts. 100, *et al.*), *abbreviated as* 68 Fed. Reg. at ___.
- Political Committee Status; Proposed Rule, 69 Fed. Reg. 11,736 (Mar. 11, 2004), *abbreviated as* 69 Fed. Reg. at _____.
- FCC Database on Electioneering Communications; Final Rules, 67 Fed. Reg. 65,190 (Oct. 23, 2002) (codified at 11 C.F.R. pts. 100 and 114), *abbreviated as* 67 Fed. Reg. at _____.
- Public Financing of Presidential Primary and General Election Candidates; Proposed Rules, 59 Fed. Reg. 64,351 (Dec. 14, 1994), *abbreviated as* 59 Fed. Reg. at _____.
- Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting; Final Rules, 55 Fed. Reg. 26,058 (June 26, 1990) (codified at 11 C.F.R. pts. 102, 104 and 106), *abbreviated as* 55 Fed. Reg. at _____.
- Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49,064 (July 29, 2002) (codified at 11 C.F.R. pts. 100, *et al.*), *abbreviated as* 67 Fed. Reg. at _____.

- Explanation and Justification, *abbreviated as* E&J.
- Plaintiffs' Exhibit, *abbreviated as* PX ___.

Introduction

The Federal Election Commission's motion for summary judgment (Dkt. No. 27) is striking on many levels. Perhaps most notable is its failure even to acknowledge Congress's overriding purposes in enacting BCRA: to close the soft-money and sham "issue ad" loopholes, and to put a halt to the subversion, erosion, and circumvention of the federal campaign finance laws brought about by the Commission's own regulations. *See* Pls.' Mem. at 1 & n.2. The challenged regulations must be judged on the basis of how "sympathetic[ally]" and effectively they promote this "statutory mandate."[1] The challenged rules fail to pass muster. Indeed, they respond to Congress's historic loophole-closing legislation not only by failing to close many of the old loopholes, but by opening many new loopholes along the way. Nothing in *Chevron* or any other principle of administrative law allows the Commission to promulgate regulations that violate the language, structure, legislative history, and underlying purposes of FECA and BCRA, and that so clearly threaten to repeat history. *See id.* at 4-7.

Because the Commission has made standing and ripeness the centerpiece of its motion, plaintiffs first address those justiciability issues. Plaintiffs then address the challenged regulations in the order of presentation followed in their opening summary judgment submission (Dkt. No. 29) — the coordination rules promulgated pursuant to BCRA Section 214, the soft-money rules implementing BCRA Title I, and the rules on electioneering communications promulgated to implement BCRA Title II-A.[2]

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[1] *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 455 (1989) ("'[S]tatutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'") (quoting Learned Hand, J.); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (courts "must reject administrative constructions ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement").

[2] As previously advised, plaintiffs have elected not to press the challenges to 11 C.F.R. §§ 100.24(a)(1) and 300.35 set forth in ¶¶ 63-64 and 71(d) of their First Amended Complaint (Dkt. No. 7). *See* Pls.' Mem. at 65

(Footnote continued)

Argument

I. Plaintiffs' APA Claims Are Immediately Justiciable.

The Commission once again makes "a breathtaking attack on the legitimacy of virtually all judicial review of agency action." *Akins v. FEC,* 101 F.3d 731, 738 (D.C. Cir. 1996) (*en banc*) (*re* FEC's position on Article III's "redressability" requirement), *affirmed as to standing, vacated on other grounds,* 524 U.S. 11 (1998). Under the Commission's approach, only those who are directly regulated by the challenged rules may bring an APA claim, and since the rules *deregulate* private conduct and *authorize* actions that are forbidden under FECA and BCRA, those who are directly regulated will have no cause or incentive ever to bring such a challenge. The Commission contends that, if Representatives Shays and Meehan disagree with this outcome, they have a simple remedy — get out of public life:

> [I]f plaintiffs find participation in the rough and tumble of politics to be morally repugnant, or fear that their public reputations will suffer from being members of Congress, they are free not to run. Nothing in the Commission's regulations "force[s]" these plaintiffs "to undertake ... public responsibilities" at all ...; any diminution in their reputations resulting from their membership in Congress "stems not from the operation of [the Commission's regulations], but from their own personal 'wish'" to hold public office.

FEC Mem. at 9 (citations omitted). This approach to a statute intended to restore confidence in our political system and to keep good people in public life is as wrong as it is offensive.

A. Plaintiffs Have Standing To Challenge Unlawful Commission Regulations.

The Commission's opening submission does not even acknowledge, let alone attempt to distinguish, the authority that is most directly on point — the three-judge District Court's May 3,

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n.114, 72 n.125. In addition, the FEC has now confirmed that 11 C.F.R. § 300.2(c)(2) applies to "Leadership PACs." *See* FEC Mem. at 44 ("[T]he Commission [has] clearly indicated that its regulations were intended to ensure that statutory restrictions on the raising of soft money by Federal officeholders apply to their leadership PACs."). Plaintiffs therefore do not brief this issue further, since the parties are in agreement. *See* First Am. Compl. ¶¶ 43-47; Pls.' Mem. at 54 n.89; FEC Mem. at 44-45.

2002 decision in *McConnell* holding that Representatives Shays and Meehan had Article III standing to defend the constitutionality of BCRA. *See* PX 163.[3] That decision held that Representatives Shays and Meehan met all three requirements for Article III standing — injury-in-fact, causation (*i.e.*, "traceability"), and redressability. *See* May 3, 2002 Order at 5-8 (applying *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992)). Plaintiffs' opening brief demonstrated that, just as they had a "concrete and particularized" personal interest in defending BCRA's interrelated provisions from constitutional attack, so too do they have a strong personal stake in seeking to overturn unlawful agency regulations that threaten to subvert, erode, and circumvent the reforms enacted by BCRA. *See* Pls.' Mem. at 84-87.[4]

Before turning to a refutation of the Commission's arguments, plaintiffs offer two points that help frame the analysis. *First,* the Commission has not disputed that plaintiffs meet the "prudential standing requirement" of § 10(a) of the APA, 5 U.S.C. § 702, because they clearly fall "within the zone of interests to be protected or regulated by the statute."[5] Representatives Shays and Meehan are directly regulated by FECA and BCRA, and fall within several of the classes intended to be protected — they are elected officials, candidates, fundraisers, party

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[3] The Commission's failure to address this key decision was no oversight, because plaintiffs made clear in their December 23, 2003 Joint Status Report that they believe the three-judge *McConnell* decision on standing controls the outcome here. *See* Dkt. No. 14 at 2-3.

[4] The Commission's only implicit reference to the three-judge *McConnell* standing decision appears on page 10 of its memorandum, where the Commission argues that "we are now at the summary judgment stage, when allegations will no longer do, and standing must be proven with admissible evidence." *McConnell,* on the other hand, was decided on the pleadings. However, plaintiffs have tendered admissible evidence in the form of their declarations (*see* Dkt. No. 29) and a variety of exhibits demonstrating the real-world impacts that the Commission's regulations have already caused. Ironically, the Commission has moved to *exclude* all of this evidence at the same time it claims there is no evidence of real-world impacts. *See* Pls.' Mem. in Opp. to Mot. to Strike at 2-3, 12-14, 18-21 (Dkt. No. 41). Moreover, the three-judge District Court held that Article III standing was "clear from the face of the pleadings" and that no hearing was necessary because the "result was clear from [the] face of [the] application." May 3, 2002 Order at 8-9 (citing *Sam Fox Publ'g Co. v. United States,* 366 U.S. 683, 693-94 (1961)). That conclusion does not change at the summary judgment stage.

[5] *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 488 (1998) (citation and internal quotation marks omitted); *see* Pls.' Mem. at 87 n.146.

members, and voters. Thus, the Article III question is whether Congress, through the APA, may grant standing to members of these classes to challenge illegal Commission regulations that erode, subvert, and circumvent federal campaign finance reform legislation.[6]

Second, although the Commission characterizes plaintiffs' claims as resting on their personal beliefs, policy disputes with FEC "experts," moral repugnance, and "fear" of the "rough and tumble of politics," FEC Mem. at 8-9, this Court in deciding the question of standing must assume the truth of plaintiffs' allegations on the merits — that each one of the challenged regulations violates FECA and BCRA and threatens to subvert, erode, and circumvent Congress's comprehensive and interrelated reform efforts. In other words, the Court must evaluate standing by assuming that the practices allowed by the challenged regulations "are *already* illegal by statute," and that the Commission's decision to "permit" these practices "violate[s] the agency's statutory mandate."[7]

Injury-in-Fact. The Commission directs most of its attack to the issue of plaintiffs' injury-in-fact. Plaintiffs' pleadings, declarations, and other evidence, however, establish multiple forms of cognizable injury:

(a) ***Political competitor/elected official injury.*** The Commission raises several objections to plaintiffs' standing as "political competitors." *First,* it contends that "the D.C.

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[6] For additional authority supporting plaintiffs' prudential standing, *see FEC v. Akins,* 524 U.S. 11, 19-20 (1998) (Congress intended in both the APA and FECA "to cast the standing net broadly — beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested"); *Nat'l Credit Union Admin.,* 522 U.S. at 488-99; *Amgen, Inc. v. Smith,* 357 F.3d 103, 108 (D.C. Cir. 2004) (under the APA's zone-of-interests test, "[q]ualified plaintiffs include not only those who are themselves the 'subject of the contested regulatory action,' ... but also those whose interests are not 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit'") (citation omitted); *Animal Legal Def. Fund, Inc. v. Glickman,* 154 F.3d 426, 444-45 (D.C. Cir. 1998) (*en banc*); *Akins,* 101 F.3d at 739.

[7] *Animal Legal Def. Fund,* 154 F.3d at 442 (emphasis added); *see also Warth v. Seldin,* 422 U.S. 490, 500-01 (1975); *La. Energy & Power Auth. v. FERC,* 141 F.3d 364, 367-68 (D.C. Cir. 1998).

Circuit has not determined whether the economic competitor standing doctrine is even applicable to political competitors." FEC Mem. at 7. As the three-judge *McConnell* standing opinion demonstrates, however, the doctrine has been extended to elected officials and candidates by many courts in this Circuit and elsewhere. *See* May 3, 2002 Order at 7-8. Those decisions discuss at length the many reasons for analogizing political competition with market competition, and for applying similar principles of standing.[8]

Second, relying on *Gottlieb v. FEC,* 143 F.3d 618 (D.C. Cir. 1998), the Commission contends that, even if principles of "competitive standing" can be applied in the political world, an elected official may only complain about advantages directly granted to other elected officials or candidates, and may not pursue "claims of competitive injury from the possible activities of party committees, corporations, political committees and individuals — none of whom are candidates running against them in the upcoming election[.]" FEC Mem. at 7. This misreads *Gottlieb* and subsequent competitive injury decisions, which focus on "the *consequences* of the FEC's actions": where the Commission allows third parties to confer benefits on candidates or political parties, competing candidates or political parties have standing to challenge the Commission's authorization of the third-party actions.[9] Here, the Commission's loopholes in the regulation of coordinated communications, soft money, and issue advertising enable third parties — individuals, corporations, unions, and other organizations — to flood the political arena in

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[8] *See especially* the analyses in *Buchanan v. FEC,* 112 F. Supp. 2d 58, 63-66 (D.D.C. 2000), and *Natural Law Party of the U.S. v. FEC,* 111 F. Supp. 2d 33, 45-47 (D.D.C. 2000); *see also* cases cited in Pls.' Mem. at 85 n.143.

[9] *See, e.g., Becker v. FEC,* 230 F.3d 381, 387 n.5 (1st Cir. 2000) (rejecting Commission's identical argument in connection with Ralph Nader's challenge of rule regulating the Commission on Presidential Debates: "[T]he corporate funds that the FEC has allowed the CPD to solicit in the end pay for free television exposure for the debate participants; and obviously Nader competes in the same arena with these other candidates."), *cert. denied sub nom. Nader v. FEC,* 532 U.S. 1007 (2001); *Buchanan,* 112 F. Supp. 2d at 66 (same with respect to Pat

(Footnote continued)

which plaintiffs compete with money free from the source prohibitions, contribution limits, and disclosure requirements imposed by FECA and BCRA. This obviously threatens to have competitive impacts on elected officials like Representatives Shays and Meehan, just as it had in the past. *See* Pls.' Mem. at 1 & n.2.[10]

Third, the Commission argues that plaintiffs may invoke principles of "competitive standing" only if they identify specific parties who either have already engaged or will engage in specific activities authorized by the rules "in their specific districts," and demonstrate that "such activity would be likely to harm their chances for reelection." FEC Mem. at 5. The Commission questions whether plaintiffs may complain about *any* political effects of a regulation without first showing that they "face serious opposition for reelection." *Id.* This argument is wrong for many reasons. Courts have never required plaintiffs in election law cases to demonstrate that the challenged government action might determine the outcome of the election; some of the most significant standing decisions in this area involve minor-party candidates and parties who had no realistic chance of success.[11]

In addition, the D.C. Circuit has repeatedly rejected the Commission's argument that Article III standing requires actual competitive injury. Rather, plaintiffs have standing where the challenged agency action "*authorizes* allegedly illegal transactions that have the clear and

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Buchanan's standing: given the alleged operation of the CPD, "the benefit being conferred upon the CPD as a debate-staging organization is being conferred upon the plaintiffs' direct competitors").

[10] Consider also *Becker,* noting that, under the Commission's view that "only those directly governed by the regulations can challenge them," when the rules are "*permissive*" with respect to regulated parties, "the regulations might effectively be immune from judicial review" because those directly subject to the rules will have no incentive to bring suit (because they benefit from the illegal relaxation of the standards), while those who are harmed by the relaxed rules will have no standing because they are not directly subject to the regulations. 230 F.3d at 386-87 (emphasis added).

[11] What is required, instead, is "a fair opportunity to compete" in accordance with governing law. *Buchanan,* 112 F. Supp. 2d at 65; *see also Natural Law Party,* 111 F. Supp. 2d at 44.

immediate *potential* to compete" with them; there is no need to wait for third parties to commit "specific, allegedly illegal transactions [that] hurt [plaintiffs] competitively" before bringing suit. *Associated Gas Distribs. v. FERC,* 899 F.2d 1250, 1259 (D.C. Cir. 1990) (plaintiffs face "the likely possibility" of competitive injury) (emphasis added); *see also La. Energy & Power Auth. v. FERC,* 141 F.3d 364, 367 (D.C. Cir. 1998) ("We repeatedly have held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition. ... The lifting of such restrictions alone is generally sufficient, and we have not required litigants to wait until increased competition actually occurs.") (citing numerous D.C. Circuit decisions).[12] These cases control. Just as the D.C. Circuit considers economic principles in gauging the "*potential*" competitive impacts when agency action simply "*authorizes*" market actors to engage in certain conduct, so too should this Court look to campaign finance principles when evaluating the *potential* results of loopholes in the challenged regulations that *authorize* the conduct in question. *McConnell* teaches that "[m]oney, like water, will always find an outlet." [13] Accordingly, leaving the loopholes created by these rules unplugged is certain to result in real-world adverse impacts that are contrary to the reforms mandated by Congress.

Fourth, the Commission fails to respect Congress's power to create legal rights that federal courts can enforce in accordance with Congressional intent, rather than agency will. *See*

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[12] *See generally New England Pub. Comm. Council, Inc. v. FCC,* 334 F.3d 69, 73-74 (D.C. Cir. 2003) (challengers of agency order need not await actual competitive injury); *Wabash Valley Power Ass'n v. FERC,* 268 F.3d 1105, 1113 (D.C. Cir. 2001) (firm may challenge agency action that enables a competitor to gain "market power"); *Investment Co. Inst. v. FDIC,* 815 F.2d 1540, 1543 (D.C. Cir. 1987) (plaintiffs had Article III standing to challenge rule that "plainly *threatens*" competitive injury by "*allowing*" competitors to take certain actions) (emphasis added).

[13] *McConnell v. FEC,* 124 S. Ct. 619, 706 (2003); *see also id.* at 673 ("the hard lesson of circumvention" that is "taught" by "the entire history of campaign finance regulation" is that soft-money donors will react to the plugging of one loophole "by scrambling to find another way to purchase influence").

especially Akins, 524 U.S. at 21-23. As in *Akins*, this is a case in which FECA "seek[s] to protect individuals such as [plaintiffs] from the kind of harm they say they have suffered." *Id.* at 22. Thus, while the Commission scoffs at plaintiffs' argument that BCRA was intended to help insulate them, as elected officials and candidates, from the corrupting nature and appearance of the soft-money system, that is exactly what the legislation was intended to accomplish, among many other goals.[14] And while the Commission argues that plaintiffs must show how each specific challenged rule causes a measurable increase in the level of corruption or apparent corruption (FEC Mem. at 5-6) — a test plaintiffs can meet given the importance of the challenged regulations[15] — this is not the standard applied by Congress and the courts. "Congress enacted § 323 as an integrated whole[,]" and each challenged regulation allows illegal soft money back into federal elections, thereby undermining Congress's "delicate and interconnected regulatory scheme." *McConnell v. FEC,* 124 S. Ct. 619, 659, 677 (2003). Each "outlet" for soft money — separately and in combination — creates threats of actual corruption and the appearance of corruption that give rise to plaintiffs' injury.

The D.C. Circuit has held *en banc* that Congress may create enforceable legal standards

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[14] "In this case, Congress concluded that donations of nonfederal money to the political party committees had the same coercive influence on candidates' positions and on their actions if elected to office as the large contributions to candidates permitted prior to the enactment of the individual contribution limits in 1974." *McConnell v. FEC,* 251 F. Supp. 2d 176, 658-59 (D.D.C. 2003) (Kollar-Kotelly, J.) (internal quotation marks omitted); *see also id.* at 671 ("'no official can ignore the fundraising ambitions of his or her party'") (quoting expert testimony); *id.* at 681 ("'You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.'") (quoting former Senator Rudman); *McConnell,* 124 S. Ct. at 660 (one goal of BCRA was "to prevent the actual and apparent corruption of federal candidates and officeholders"); *id.* at 662 (support that officeholder received from her party often turned on the amount of her soft-money fundraising for the party); *id.* at 667-68, 686 (discussing party influences over federal officeholders); *see generally* 251 F. Supp. 2d at 658-93 (Kollar-Kotelly, J.).

[15] Contrary to the Commission's argument, the challenged regulations are not simply "adjustments" in the overall campaign finance system — they go to the very heart of the system (*e.g.,* determining what conduct and which media are subject to the coordination regulations, what is the scope of the soft-money solicitation ban, what is the scope of FEA, whether Section 501(c)(3) corporations are subject to Title II-A, and so on). These are core issues, not matters of fine-tuning "adjustments."

protecting citizens' "aesthetic interests in observing animals living in humane habitats, or in using pristine environmental areas that have not been despoiled[.]" *Animal Legal Def. Fund, Inc., v. Glickman,* 154 F.3d 426, 437 (D.C. Cir. 1998) (*en banc*). If such interests support Article III standing, surely Congress may confer enforceable rights among the intended beneficiaries of BCRA's reforms to insist that those reforms are properly enforced.

(b) ***Informational injury.*** The Commission relies on *FEC v. Akins*, 524 U.S. 11 (1998), and subsequent "informational standing" cases such as *Wertheimer v. FEC,* 268 F.3d 1070 (D.C. Cir. 2001). *See* FEC Mem. at 3-4. But these cases support plaintiffs, not the Commission. Plaintiffs' First Amended Complaint repeatedly recites, and seeks redress for, the violation of numerous disclosure requirements in FECA and BCRA that the challenged rules allow.[16] "The whole theory of [FECA] is that voters are benefited insofar as they can determine who is contributing what to whom." *Akins,* 101 F.3d at 737. BCRA seeks to preserve and expand these disclosure requirements. For example, as the *McConnell* District Court *per curiam* opinion explained, one of BCRA's principal goals was to end the widespread "abuse" of FECA's disclosure provisions, "so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections."[17] Disclosure implications permeate most of the challenged regulations. An "electioneering communication" under Title II-A is subject to comprehensive new disclosure provisions.[18] Whether a communication is

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[16] *See, e.g.,* First Am. Compl. ¶¶ 3-4, 6, 17, 21, 73, 80, 95, 98.

[17] 251 F. Supp. 2d at 237 (*per curiam*); *see generally id.* at 227-33 (Findings ¶¶ 43-54), 237-49. *See also McConnell,* 124 S. Ct. at 690 ("We agree with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements — providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions — apply in full to BCRA."); *Buckley v. Valeo,* 424 U.S. 1, 68 (1976) (*per curiam*).

[18] *See* BCRA § 201(a); FECA § 304(f); 2 U.S.C. § 434(f).

"coordinated" determines whether it is subject to FECA's "contribution" disclosure requirements.[19] Whether a state or local party activity constitutes Federal election activity determines whether and to what extent that activity is subject to FECA's disclosure requirements.[20] And, of course, one of the expressed purposes of Title I's soft-money ban is to limit officeholders and candidates to soliciting, directing, and spending hard money — contributions that are fully subject to FECA's disclosure requirements.[21] Representative Shays and Meehan have expressly challenged the "depriv[ation] of information to which [they are] entitled under FECA and BCRA" caused by the challenged regulations.[22]

The Supreme Court held in *Akins* that even individual voters have Article III and prudential standing to complain about violations of FECA's "extensive recordkeeping and disclosure requirements," and reiterated the rule that "plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." 524 U.S. at 14-15, 21. The Court reasoned that the FEC's failure to require the disclosure of information as required by FECA interferes with voters' ability "to evaluate candidates for public office" and the role of various donors in the election; this informational deprivation is a

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[19] If an expenditure is coordinated and therefore constitutes a "contribution," *see* 2 U.S.C. § 431(8), it is subject to the reporting requirements of § 434(b).

[20] If a state or local party activity is not considered Federal election activity, the parties may pay at least part of the cost of this activity with unregulated soft money — the identities of the donors of which are not disclosed to the FEC. *See* 2 U.S.C. §§ 434(e)(2)(B), 441i(b). Thus, the narrower the definition of FEA, the broader the exemption from FECA's reporting requirements.

[21] *See* BCRA § 101(a); FECA § 323(e)(1)(A); 2 U.S.C. § 441i(e)(1)(A) (prohibiting federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending funds "in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, *and reporting requirements* of this Act") (emphasis added).

[22] *See* Shays and Meehan Decls. ¶ 9 ("Many FECA and BCRA provisions require the disclosure of campaign finance information by covered persons and entities. If the FEC regulations do not faithfully implement these disclosure provisions, I will be deprived of information to which I am entitled under FECA and BCRA.").

"concrete and particular" injury. *Id.* at 21. The Court also rejected the Commission's claim that such "informational injury" is simply a "generalized grievance" shared by the entire voting populace; "where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Id.* at 23-24 (citation omitted).

Akins thus reinforces plaintiffs' standing in this case. Plaintiffs have specifically pleaded their standing as voters[23] and have challenged the Commission's failure to enforce the disclosure provisions of FECA and BCRA, so this case falls squarely within the rule of *Akins*. Moreover, as candidates and officeholders, plaintiffs are injured by the Commission's failure to enforce the statute's disclosure requirements. The information required to be disclosed not only assists a candidate in planning his own campaign strategy and activities, but also may help differentiate him from his opponents.[24] The *Wertheimer* decision, cited by the Commission, is readily distinguishable because the D.C. Circuit emphasized there that appellants sought merely "*duplicative* reporting of information that under existing rules is already required to be disclosed." 268 F.3d at 1075 (emphasis added).[25] Here there is no such duplication: the

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[23] *See* First Am. Compl. ¶ 12; Shays and Meehan Decls. ¶ 3.

[24] To paraphrase *Buckley*, a candidate will often want to point out to the electorate "where political campaign money comes from and how it is spent by the candidate[s] in order to aid the voters in evaluating those who seek federal office"; a candidate will seek to use such information to place his opponent "in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches"; and the candidate will seek to use such information to "alert the voter to the interests to which [his opponent] is most likely to be responsive and thus facilitate predictions of future performance in office." 424 U.S. at 66-67 (internal quotation marks omitted). *See also* Cass R. Sunstein, *Informational Regulation & Informational Standing: Akins & Beyond,* 147 U. Pa. L. Rev. 613, 654 (1999) ("After *Akins,* there are, with respect to information, many easy cases. If Congress granted standing to citizens in general to seek information and [that] information has been withheld, citizens in general can bring suit. Certainly this is clear if the information bears directly on their behavior as voters. It seems equally clear if the information bears directly on the plaintiffs' activities in their individual or organizational capacities.") (PX 187).

[25] *See also id.* (Garland, J., concurring) ("Because appellants' briefs fail to articulate how a judicial declaration would provide them with additional information" beyond what "political party committees are already required to report and to identify," "they have failed to satisfy their burden of establishing standing to bring this action."); *Judicial Watch, Inc. v. FEC,* 293 F. Supp. 2d 41, 45-47 (D.D.C. 2003) (Leon, J.) (denying Article III

(Footnote continued)

Commission's challenged regulations shield many significant categories of campaign finance activities from the disclosure requirements imposed by Congress.

Causation/traceability. The Commission claims that "the unusual nature of this lawsuit is pivotal," and that plaintiffs are raising an unprecedented challenge to an administrative agency's "failure to regulate the activities of *other people* more strictly." FEC Mem. at 4 (emphasis in original). But claims involving an agency's failure to regulate and police "the activities of *other people*" are common under the APA (for example, environmental, zoning, and business competitor actions). As the D.C. Circuit has emphasized, "one narrow proposition at least is clear: injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality." *Tel. & Data Sys., Inc. v. FCC,* 19 F.3d 42, 47 (D.C. Cir. 1994). "This circuit's case law confirms the proposition that a plaintiff satisfies the causation prong of constitutional standing by establishing that the challenged agency rule permitted the activity that allegedly injured her, when that activity would allegedly have been illegal otherwise." *Animal Legal Def. Fund,* 154 F.3d at 440-41 (citing numerous cases).[26] This is all that is required to establish "traceability" and causation, and plaintiffs readily satisfy this criterion. The challenged regulations authorize, permit, and purport to establish the legality of a variety of campaign finance practices that Congress intended to outlaw. Causation could not be more clear.

The Commission responds by arguing that there can be no causation where, as here, plaintiffs are free to engage in the same misconduct they allege is illegal under FECA and

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"informational standing" where plaintiff "is already aware of" the information he sought through the disclosure laws, and it "appears unlikely" that disclosure "will yield additional facts").

[26] *See also America's Cmty. Bankers v. FDIC,* 200 F.3d 822, 827 (D.C. Cir. 2000) ("the causation element is satisfied by a demonstration that an administrative agency authorized the injurious conduct"); *Buchanan,* 112 F. Supp. 2d at 67-68; *Natural Law Party,* 111 F. Supp. 2d at 47-49.

BCRA. In other words, since the plaintiffs are just as free to exploit the Commission's new loopholes as anyone else, "the regulations cannot, therefore, be said to provide plaintiffs' opponents any competitive advantage." FEC Mem. at 7. The causal chain is broken by plaintiffs' own principles, which the Commission mocks as a collection of personal beliefs and wishes, moral repugnance, and policy disagreements with the FEC's "experts." *Id.* at 8-11. The Commission unsuccessfully advanced these same arguments in a case it does not cite, *Becker v. FEC,* 230 F.3d 381 (1st Cir. 2000), *cert. denied sub nom. Nader v. FEC,* 532 U.S. 1007 (2001). In that case, Ralph Nader and others challenged FEC debate regulations that allowed corporate funding of certain debate staging organizations, claiming that the regulations violated FECA's prohibitions on corporate contributions. Mr. Nader claimed that the regulations exposed him to a "Faustian dilemma": if he were invited to participate in a debate, he could either join in what he viewed to be illegal activity underwritten by corporate money or he could sit out the debate, which would place him at a competitive disadvantage, require him to spend more on advertising, and force him to make other "significant adjustments to his campaign strategy and use of funds." *Id.* at 385-86. The First Circuit rejected the identical argument the FEC is advancing here — that the challenger's harm was "self-imposed" because he could have simply taken advantage of the corporate soft money made possible by the allegedly illegal regulation. *Id.* at 388. The First Circuit explained:

> Such a view would raise too high a bar for standing; clearly, one who challenges a governmental action may not be denied standing merely because his challenge in a sense stems from his own choosing. For example, if instead of involving corporate sponsorship, this case instead involved regulations allowing the CPD to impose speech restrictions on debate participants — *e.g.,* a requirement that the participants say a word of gratitude to the CPD's underwriters — there would hardly be question that the debate participants would have standing to challenge such regulations, even though their objection might stem purely from a choice of conscience.

Id. (citations omitted). The D.C. Circuit and other courts have agreed that it is no response to a claim that the law is being violated to say the plaintiff is free to join in the unlawful spoils. Such a rule would not only promote illegality, but would dramatically shrink the scope of standing.[27]

The Commission compares plaintiffs' claims with those of the Adams plaintiffs in the *McConnell* litigation, whose claims were rejected by both the three-judge District Court and the Supreme Court for lack of Article III standing. *See* FEC Mem. at 8-9. Plaintiffs already have refuted this argument. *See* Pls.' Mem. at 86-87. The Commission claims that, like the Adams plaintiffs, Representatives Shays and Meehan seek recognition of a right "to participate in a political system free of *anything they personally believe to be improper influences*." FEC Mem. at 9 (emphasis added). Plaintiffs seek no such thing. Rather, they have sued to vindicate their right to participate in a campaign system that is regulated as intended by Congress; they seek nothing more than to enforce federal statutory law, not their "personal beliefs." The Adams claim in *McConnell* is readily distinguishable, as demonstrated by the fact that the three-judge District Court unanimously held that the Adams candidates lacked Article III standing while unanimously holding in the same case that Representatives Shays and Meehan had standing. *See*

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[27] *See also Boehner v. Anderson,* 30 F.3d 156 (D.C. Cir. 1994), holding that a Member of Congress had Article III standing to challenge what he claimed to be an illegal pay increase. Although defendant argued that a pay *increase* can never be considered an "injury," the Congressman "says that in the context of his constituency it is." *Id.* at 160. The D.C. Circuit found standing, emphasizing that "[w]e do not think it the office of a court to insist that getting additional money compensation is a good when the recipient, a congressman, says that in his political position it is a bad."). (Plaintiffs note for the Court that the Tenth Circuit has declined to follow *Boehner*'s conclusion on standing, without discussing the precise analysis quoted above. *See Schaffer v. Clinton,* 240 F.3d 878, 885-86 (10th Cir. 2001).) Consider also the "oath of office" standing cases, in which public officials face a choice between committing an act they believe to be illegal and violative of their oaths, and risking loss of their offices or similar tangible injuries. *See, e.g., Bd. of Educ. v. Allen,* 392 U.S. 236, 241 & n.5 (1968); *Clarke v. United States,* 705 F. Supp. 605, 608 (D.D.C. 1988), *aff'd,* 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot,* 915 F.2d 699 (D.C. Cir. 1990). This also is analogous to "unconstitutional condition" cases, in which the government uses the offer of a benefit to coerce people into giving up constitutionally protected activity. Standing is never denied in such a case on the grounds that the plaintiff could take it or leave it; the whole point is that plaintiffs should not be *put* to such a choice. *See generally* 4 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 20.11, at 284-88 (3rd ed. 1999).

citations in Pls.' Mem. at 86 & n.145. As the Supreme Court emphasized in *McConnell,* there is no "legally cognizable right" to equality of "participation in the electoral process." 124 S. Ct. at 708-09. The Adams candidates nevertheless argued that the increased contribution limits approved in BCRA caused them "competitive injury" and a "fundraising disadvantage" because they would not accept the larger contributions authorized by BCRA out of personal and philosophical conviction. *Id.* at 709. The Supreme Court unanimously rejected this claim of standing because the appellants' alleged injury was not caused by the "operation" of any particular law, but by "their own personal 'wish' not to solicit or accept large but lawful contributions, *i.e.*, their personal choice" not to take advantage of that which Congress had *authorized.*

Here, plaintiffs are claiming injury from regulations that are specifically *forbidden* by Congress. The challenged rules violate not simply personal beliefs, but federal statute. There is no hint in *McConnell* that standing may be defeated by the argument that the plaintiff is welcome to join in violating the law.

Redressability. The three-judge District Court in *McConnell* held that the injury claimed by Representatives Shays and Meehan — "that they will be forced to raise money in a corrupt system *in the event the Act is struck down* — plainly would be redressed by a favorable decision *upholding* the Act's provisions." May 3, 2002 Order at 8 (emphasis in original) (PX 163). In the same manner, the injuries claimed here — that the challenged regulations authorize campaign finance activities that subvert, erode, and circumvent FECA and BCRA — plainly would be redressed by a judicial decree plugging the loopholes and ordering that the rules be corrected to

comply with the statute. [28]

B. Plaintiffs' Facial Challenges To The Regulations Are Ripe For Immediate Judicial Review.

The Commission bases its ripeness argument on an inapposite decision. *See* FEC Mem. at 11-12. *National Park Hospitality Ass'n v. Department of the Interior* dealt with the ripeness of a challenge to an agency policy statement that (i) "cannot be a legislative regulation with the force of law," (ii) was issued by an agency that "is not empowered to administer" the statute in question, and (iii) was "nothing more than a 'general statemen[t] of policy' designed to inform the public of [the agency's] views on the proper application" of the statute it did not administer. 123 S. Ct. 2026, 2030-31 (2003). The challenged regulations here are just the opposite: they are (i) final legislative rules that have the force and effect of law, (ii) issued by the agency responsible for rulemaking under the statute, and (iii) purport to create "safe harbors" and "bright lines" that immediately and without any further agency action permit a variety of practices that Congress prohibited. *See* Pls.' Mem. at 87-89. The Supreme Court and D.C. Circuit have repeatedly held that challenges to such rules, involving purely legal questions of statutory construction and compliance with the APA, are fit for immediate judicial review. *See id.* at 87 n.147 (citing cases).

The Commission continues to rely on "pre-enforcement" cases that are entirely off-point.

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[28] Moreover, the Supreme Court emphasized in *Akins* that, even if an issue is merely remanded to the FEC for further action that may or may not ultimately be favorable to plaintiffs, this still satisfies the redressability requirement. *See* 524 U.S. at 25 ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case — even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. ... Thus respondents' 'injury in fact' is 'fairly traceable' to the FEC's decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully. For similar reasons, the courts in this case can 'redress' respondents' 'injury in fact.'"). *See also Animal Legal Def. Fund,* 154 F.3d at 443-44; *Akins*, 101 F.3d at 738 ("[I]t has *always* been an acceptable feature of judicial review of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning.") (emphasis in original); *Nat'l Mining Ass'n v. Slater,* 167 F. Supp. 2d 265, 277-78 (D.D.C. 2001); *Buchanan,* 112 F. Supp. 2d at 68-69; *Natural Law Party,* 111 F. Supp. 2d at 49-50.

As discussed in plaintiffs' opening submission, this is not a case in which plaintiffs fear that the rules may be enforced against them in the future, but rather one in which the agency has already *deregulated* the activities of others and decided *not* to enforce the campaign finance laws with respect to certain persons and activities *at the present time.* Plaintiffs fear not the prospect of future enforcement, but the current *absence* of proper enforcement. The D.C. Circuit has specifically held that, where agency regulations authorize third-party conduct to occur "*without further [agency] action*," and the plaintiff claims potential injury from that authorized conduct, a challenge to the rules authorizing the conduct is immediately ripe for judicial determination. *La. Energy & Power Auth.*, 141 F.3d at 368 (emphasis added). That is precisely the case here. *See* Pls.' Mem. at 88-89 & n.148 (distinguishing other cases cited by the Commission).[29]

II. The Challenged Coordination Regulations Are Illegal.

A. The Commission's "Content Standards" Are Unlawful And Invite Gross Abuse And Circumvention.

The Commission does not dispute plaintiffs' description of the scope and effect of the new coordination rules: for the first time ever under FECA, candidates, parties, and outside spenders may now engage in coordinated communications during much of each election cycle — exempt from all contribution limits, source prohibitions, and disclosure requirements — so long as they avoid express advocacy or the republication of campaign materials. *See* FEC Mem. at 76-79. Moreover, the Commission admits that the new rules exempt from FECA's provisions advertising that is run at *any* time — even in the final days before an election — "so long as [it] avoid[s] any mention of a candidate or party on the ballot[.]" *Id.* at 79. It is not difficult to

[29] The public interest also favors prompt judicial resolution of these facial challenges to the Commission's regulations. This Court need only consider what happened the last time that misguided FEC regulations were allowed to remain in force. *See* Pls.' Mem. at 1 & n.2.

imagine the gross abuse and circumvention that will result from these enormous new loopholes. *See* Pls.' Mem. at 10-13, 17-20.

Statutory Language and Structure. The Commission argues that "Congress placed only two restrictions on [its] discretion in formulating the new regulations": that (1) they "'shall not require agreement or formal collaboration,'" and (2) they "'shall'" address at least four specified issues. FEC Mem. at 73 (quoting § 214(c)). The Commission argues that "BCRA is totally silent on what other factors [it] should use in defining coordination," leaving the Commission free to do as it pleases in the absence of any "specific language" to the contrary. FEC Mem. at 74, 80. This argument fails on many grounds. To begin, it violates the plain language and structure of FECA and BCRA construed *as a whole*. As this Court and the Supreme Court have explained, BCRA must be construed as a part of Congress's "steady improvement of the national election laws" — as one part of "Congress' 'careful legislative adjustment of the federal election laws, in a cautious advance, step by step.'"[30] Section 214 repealed the old FEC coordination rules because they did not, in Congress's considered judgment, comply with FECA's basic definitions of "contribution" and "expenditure." *See* Pls.' Mem. at 15-17. A "contribution" includes *any* "expenditure" that is "made by any person *in cooperation, consultation, or concert, with, or at the request or suggestion of*," a candidate or party, with no hint of any restriction to certain periods of the election cycle. 2 U.S.C. § 441a(a)(7)(B)(i)-(ii) (emphasis added). An "expenditure," in turn, is "*any*" money that is spent

[30] *McConnell*, 124 S. Ct. at 645 (citation omitted). *See also* 251 F. Supp. 2d at 435 ("It is within this historical framework that the incremental changes Congress strives to accomplish in enacting the [BCRA] are properly understood. BCRA is yet another step in the careful evolution of the campaign finance laws targeted at addressing exceptions to the constitutionally permissible laws that are already in force. ... In other words, it must be remembered that the statutory provisions at issue were designed by Congress as a comprehensive approach to the abuses of FECA that legislators and candidates were acutely aware of their capacity as political actors. BCRA was designed to ameliorate FECA's most glaring abuses, while staying true to the constitutional boundaries set forth by the judiciary.").

"*for the purpose of influencing any election for Federal office,*" subject to specified exemptions that are inapplicable here, and again without any hint of a timeframe limitation. *Id.* § 431(9)(A)(i) (emphasis added). The new rules thus violate the plain definitions of "contribution" and "expenditure" by excluding certain coordinated communications that are made "for the purpose of influencing any election to Federal office." Indeed, the Commission *admits* that the new rules "potentially narrow[] the reach of 2 U.S.C. 441a(a)(7)(B)(i) and (ii)." 68 Fed. Reg. at 426 (PX 3).[31]

The Commission argues that it is "follow[ing] Congress' lead in this matter," and that its new timeframe test for coordinated expenditures is implicitly authorized by Congress's use of similar timeframes in other campaign finance areas — the 30/60 day test imposed on *independent* expenditures under Title II-A, and the definition of "Federal election activity" that includes voter registration activity within 120 days of a federal election. *See* FEC Mem. at 79. Plaintiffs already have addressed and refuted these analogies. *See* Pls.' Mem. at 13-15. These other statutory provisions contain time lines; the statutory provisions dealing with *coordinated* expenditures do not. *Expressio unius est exclusio alterius.* The statutory provisions dealing with *coordinated* expenditures expressly reach "*any*" coordinated payment "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i) (emphasis added).[32] There is nothing to suggest that Congress, in authorizing the use of timeframes to *expand* the regulation of independent expenditures and state party activities, thereby intended *sub silentio* to authorize

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[31] In BCRA, Congress not only built upon FECA's underlying coordination standard, it expressly extended that standard to expenditures undertaken "in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party[.]" BCRA § 214(a); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii).

[32] *See Salinas v. United States,* 522 U.S. 52, 57 (1997) ("[t]he word 'any,' which prefaces the [operative] clause, undercuts the attempt to impose this narrowing construction"); Pls.' Mem. at 23 n.40 (citing D.C. Circuit decisions construing "any"); p. 27 *infra.*

the use of other unmentioned timeframes so as to *constrict* the traditional regulation of coordinated communications.[33] The Commission takes plaintiffs' rulemaking comments completely out of context in claiming that plaintiffs "explicitly acknowledged" that the statute is silent on these issues. FEC Mem. at 76. In fact, plaintiffs argued that the proposed content standards would violate FECA and BCRA.[34]

Legislative History and Purposes. The Commission's argument that it has discretion to do whatever it wishes in the absence of a statutory "shall" or "shall not" completely misapprehends *Chevron*. The challenged regulations fail *Chevron* step one not only because they conflict with express statutory language, but also because they conflict with principles implicit in the statutory scheme, with the legislative history, and with Congress's underlying purposes and objectives. *See especially* Pls.' Mem. at 4-5. As documented in plaintiffs' opening brief, the legislative history unmistakably demonstrates that Congress concluded that the old rules did not comply with FECA's treatment of coordinated expenditures, and that the new rules should be *strengthened* to reach *more*, rather than fewer, instances of coordination.[35] The

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[33] Even the AFL-CIO, which appears as an *amicus* here in support of the Commission, acknowledged during the rulemaking that the "temporal guideposts" used elsewhere in BCRA are inapplicable to the regulation of coordinated expenditures. *See* Oct. 11, 2002 Comments of AFL-CIO, at 9 (PX 31) ("Obviously, the BCRA definitions of 'electioneering communication' and 'federal election activity' entail similar temporal guideposts, but, their wisdom and constitutionality aside, Congress drew no such lines in § 214.").

[34] The sponsors noted that "Congress remained silent on exactly what the new rules should say and instead set out general topics that they should address," and thus limited their remarks to "general comments." Those "general comments," however, included the admonition that, "even when a communication is made a significant amount of time before an election, if it is based on information from or discussion with a campaign, and deals with a candidate's qualifications, character, or fitness for office, it could very well be considered coordinated. A key factor in making this determination is whether a communication is targeted to the electorate of the candidate from whom information was obtained." Oct. 11, 2002 Comments, at 4-5 (PX 6). The sponsors likewise argued that, "[i]f such communications by outside groups derive from internal campaign information or strategy provided by a candidate or a political party, then it should not matter whether a candidate is specifically mentioned in those ads." *Id.* at 4.

[35] The sponsors emphasized that the old rules "set[] too high a bar," "miss many cases of coordination," and "need to make more sense in light of real life campaign practices"; "we expect the FEC to cover 'coordination' *whenever it occurs* ... ." 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statements of Sens. Feingold and McCain) (emphasis added) (PX 102). When read in full, the sponsors' remarks quoted by the Commission show

(Footnote continued)

challenged regulations do just the opposite. Moreover, Congress enacted Section 214 with the understanding that a finding of coordination never turns on an express advocacy standard, yet the Commission has now adopted essentially that standard to govern most of the election cycle. *See* Pls.' Mem. at 15-16.

The expansion of the express advocacy standard into the regulation of *coordinated* communications also violates Congress's longstanding purposes. The Supreme Court and this Court found that the express advocacy standard is "*functionally meaningless*" and "*has not aided the legislative effort to combat real or apparent corruption*" in the context of *independent* expenditures. *McConnell,* 124 S. Ct. at 689 (emphasis added, citing this Court's findings). The Commission cannot plausibly contend otherwise in the context of coordination. Judge Green thoroughly demonstrated why "express advocacy" cannot be "import[ed]" into the regulation of contributions, *see FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 87-88 & n.50 (D.D.C. 1999), and the Commission itself warned in 2000 that using such a test in the regulation of coordinated expenditures would allow circumvention that "could 'give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions,'" 65 Fed. Reg. at 76,141 (quoting *Christian Coalition,* 52 F. Supp. 2d at 88) (PX 160). The Commission has not even acknowledged, let alone explained, this about-face.

Constitutional Avoidance Arguments. The Commission argues that its timeframe test is necessary to avoid violating the First Amendment because, "[p]lainly, without some temporal limit, the Act's restriction on coordinated expenditures would limit a great deal of interaction

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that Congress was not seeking to "dictat[e] the result" with respect to the matters named for further study, but there is absolutely nothing in the legislative history to imply that Congress intended to *loosen* the standards with respect to unnamed aspects of coordination, or to use the new rulemaking to *deregulate* large areas that had previously been regulated. FEC Mem. at 75 (quoting Sen. Feingold in 2001); *see id.* at 76 (Section 214 "does not dictate how the Commission is to resolve those four subjects") (quoting Sen. Feingold in 2002).

between private organizations and members of Congress to promote their common positions on issues and legislation, which is not undertaken for the purpose of influencing a Federal election." FEC Mem. at 79; *see generally id.* at 76-80.[36] This proposition is not "plain[]" at all, since FECA specifically *prohibits* the regulation of coordinated activities *unless* they are undertaken "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). If coordinated activities are genuinely directed to legislative lobbying or issue advocacy rather than influencing a Federal election, they are not regulated by FECA whether undertaken three or three hundred days before an election. Conversely, coordinated activities aimed at influencing a federal election are "contributions" no matter when they occur during the campaign cycle. Although it is logical to apply heightened scrutiny as an election approaches, there is no warrant for applying a *per se* exemption — a "safe harbor," in the Commission's words — based simply on distance in time from an election. Just look at the current Presidential campaign!

All sides agree that the coordination rules should not reach genuine legislative lobbying and issue advocacy.[37] But agreement on the ultimate end does not authorize the Commission to pursue whatever means it wishes, no matter how under-inclusive, how much circumvention may result, and how sharply the new standards depart from agency precedents dating back to the Ford and Carter Administrations. There are many other ways in which genuine lobbying and issue advocacy may be protected without resort to an under-inclusive timeframe test that invites major

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[36] This defense waives the Commission's claim to *Chevron* deference, because determining the requirements of the First Amendment is the province of the judiciary. *See* cases collected in Pls.' Mem. at 6 n.11; *see especially Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988) (no deference to agency's regulatory "gloss" that it adopts to avoid purported constitutional problems).

[37] BCRA's sponsors emphasized in their comments that, although Congress had determined "that the existing rule was too narrow," there was no desire to "discourage legitimate non-campaign related interactions between groups and candidates or parties." Oct. 11, 2002 Comments, at 4 (PX 6). "[T]he legislative history is very clear that a lobbying meeting between a group and a candidate should not trigger a finding that subsequent communication is coordinated." *Id.* at 5.

circumvention. *See especially Orloski v. FEC,* 795 F.2d 156, 165 (D.C. Cir. 1986) (Commission may not employ an "objective, bright-line test" that would "unduly compromise the Act's purposes" or "create the potential for gross abuse").[38]

Additional Flaws. (1) The new rules mark a sharp departure from a generation of Commission precedents holding that an express advocacy test does not apply to the regulation of coordinated communications. The Commission has failed to provide the required "reasoned analysis" of why it has abandoned these precedents — it did not even *acknowledge* the departure. *See* Pls.' Mem. at 16 & n.30, 19. (2) Even assuming *arguendo* that the Commission had authority to adopt additional timeline tests not mentioned by Congress, its 120-day test is arbitrary, capricious, unsupported, and irrational. It would have authorized some of the most notable examples of coordinated issue advertising in American political history, including much of the Clinton-DNC "issue ad" campaign during 1995-96 and the early stages of the AFL-CIO's 1995-96 "issue ad" campaign. *See* Pls.' Mem. at 11-12 & n.23. It speaks volumes that the Commission has moved to strike all references to these historical examples of coordinated ads that would completely escape regulation under the new rules. Indeed, the AFL-CIO itself acknowledged in its rulemaking comments that "[t]here is no empirical support" for the 120-day timeline. *See* Oct. 11, 2002 Comments, at 9 (PX 31). (3) The Commission concedes that FECA's "for the purpose of influencing any election" standard governs throughout the election cycle; otherwise, there would be no statutory basis for the Commission to regulate express

[38] The AFL-CIO argues that such a restriction is necessary "to avoid broadly intrusive FEC investigations into protected political activities," such as the "massive" investigation into its own "issue advocacy" activities during the 1995-96 election cycle. *See* AFL-CIO *Amicus* Br. at 18-19. The union complained at length about this investigation to the Supreme Court, which responded that "[s]uch meager evidence does not support the claim that [FECA] § 315(a)(7)(B)(ii) will 'foster arbitrary and discriminatory application.'" *McConnell,* 124 S. Ct. at 706 (citation omitted). *See also McConnell,* 251 F. Supp. 2d at 539-42 (Findings ¶¶ 2.6.1 to 2.6.1.6), 612-13 (Kollar-Kotelly, J.).

advocacy and the republication of campaign materials without reference to any timeframe test. *See* FEC Mem. at 80 n.28; 68 Fed. Reg. at 428-30 (PX 3). Yet the Commission makes no effort to explain why its timeframe limitation is an effective standard in defining what constitutes an effort to "influenc[e] any election." The new regulation relegates the coordination standard during most of the election cycle to little more than an "express advocacy" test – a test that is "functionally meaningless" and does not effectively "aid[] the legislative effort to combat real or apparent corruption ... ." *McConnell*, 124 S. Ct. at 689; *see also* Pls.' Mem. at 17 & n.32.

B. The Commission's *Per Se* Exclusion Of The Internet From The New Regulations Is Unlawful.

Plaintiffs' opening submission demonstrated that the Commission's *per se* exclusion of the Internet from the new coordination and FEA regulations is impermissible on many grounds. Paid political advertising over the Internet plainly falls within the realm of "*any other form* of general public political advertising," which the Commission contends is the governing statutory standard. 2 U.S.C. § 431(22) (emphasis added); *but see* Pls.' Mem. at 21-22. Moreover, the Commission's old regulation — repealed by Section 214(b) of BCRA for being too *under*-inclusive — expressly *included* coordinated communications over the Internet, consistent with longstanding agency policy. The Commission has not even acknowledged this about-face, let alone offered a "reasoned analysis" for its sharp departure from prior rules and precedents. In addition, Congress repeatedly rebuffed attempts by BCRA's opponents (including some of the Commissioners themselves) to exempt the Internet from campaign finance regulation. The Commission's *per se* exclusion of the Internet is thus an attempt to smuggle in through the back door that which Congress clearly turned away at the front. The Commission's deregulation of political advertising over the Internet also violates the "functional" approach to campaign finance regulation followed by Congress and the courts, ignores political and technological realities

obvious to anyone who uses the Internet, and opens dangerous opportunities for circumvention and abuse. *See generally* Pls.' Mem. at 20-29.

Misuse of prior statements by plaintiffs and their counsel. The Commission's opening brief does not even address most of these points. Instead, it repeatedly mischaracterizes statements by Representatives Shays and Meehan, and some of the members of their *pro bono* legal team, to suggest that plaintiffs and their counsel have made comments inconsistent with their arguments in this case. The Commission contends that, "*[t]ellingly*, plaintiffs' own [rulemaking] comments ... did not claim that an Internet exclusion would be an impermissible construction of the Act." FEC Mem. at 36-37 (emphasis added). That is incorrect. The sponsors specifically noted that "BCRA contains no *per se* exclusion" for the Internet, and warned that such an exclusion would allow the "exploit[ation]" of "rapidly developing technology and new communications media to re-create or prolong the current soft money system."[39]

Similarly, the Commission misquotes an interview that Representative Shays gave to *Forbes*, arguing that his quoted comments "run[] counter" to his position in this litigation. FEC Mem. at 39. Plaintiffs already have refuted this misuse of the *Forbes* article. *See* Pls.' Mem. at 27 n.48. Representative Shays's comments to *Forbes* explained why Congress decided to limit Title II-A's electioneering communication provisions to broadcast, cable, and satellite ads. *See* PX 164. Congress's decision to limit its new Title II-A provisions regarding *independent* expenditures to certain "broadcast, cable, or satellite communication[s]," 2 U.S.C. § 434(f)(3)(A), says nothing about an entirely separate statutory provision that reaches

[39] May 29, 2002 Comments of Sen McCain *et al.*, at 10 (PX 17). The sponsors continued by urging the Commission to adopt "appropriate disclosure requirements *and funding restrictions*" with respect to communications "via electronic means." *Id.* (emphasis added).

coordinated expenditures for "*any* ... form of general public political advertising." For this same reason, there is nothing inconsistent in plaintiffs' failure to challenge the limitation of the Title II-A regulations to broadcast, cable, and satellite ads. *See* FEC Mem. at 38. Title II-A is expressly limited to ads over those specific media, whereas "public communications" embrace "*any* ... form of general public political advertising."[40]

The Commission also relies on the hearing testimony of Attorney Simon (now serving as one of plaintiffs' counsel), who stated that regulation of the Internet presents an "extremely difficult" issue requiring careful study and thought; the Commission apparently views this as an admission that the issue is simply a "policy" matter for it to resolve. *See* FEC Mem. at 39 n.12. But the Commission has failed to quote what Mr. Simon said next: "I don't think you can on a *per se* basis exclude the Internet from the scope of public communication," because there is no functional difference between, *e.g.,* a video that is broadcast "to a million people" and "attach[ing] that video as a file to an e-mail and sen[ding] that e-mail to a million people"; in either case, "you'd want to have the same result because that is a public communication that would effectively result in dissemination of a promotional video."[41] The Commission has not even attempted in its E&Js or its opening brief to provide a "reasoned analysis" in response to

[40] *See also* the rulemaking testimony of former FEC Chairman and Commissioner Trevor Potter, emphasizing the distinction between the electioneering communications provisions "where Congress exempted a whole range of tools for public communication from those provisions and only addressed TV and radio advertising and I think that is different than ... where Congress is addressing public communications in general, newspapers and all the rest, and that's where ... the Internet is as much a tool of communication if used to address the general public as would be a newspaper or a magazine or indeed radio or television." June 4, 2002 Public Hrg. Tr. at 91-92 (PX 30).

[41] *Id.* at 86-87. As former FEC General Counsel Larry Noble similarly observed, the Internet "should be treated like you treat every other type[] of communication and fit under the general rules. ... [T]he Internet does not have a special place in the political sphere that it should be exempt from all sorts of rules in order to just foster more political speech. I mean, that can be said of newspapers, that can be said of virtually anything." *Id.* at 88.

Mr. Simon's functional analysis or the similar views of many other commenters.[42]

Plain language. The Commission argues that the words "*any other form* of general public political advertising" are "*words of limitation* that must have been intended to exclude some kinds of election-related communications." FEC Mem. at 36 (emphasis added). The Supreme Court has ruled just the opposite, holding that the statutory phrase "any other" is "expansive language" that creates "no uncertainty," is *not* subject to limitation, and "must be construed to mean exactly what it says, namely, *any other* ... ."[43] The Commission's *ejusdem generis* argument is similarly unavailing. Its analysis simply paraphrases its soft-money E&J, which plaintiffs already have refuted. The Commission's rhetoric about "'meaningful, two-way dialogue,'" "'inexpensive communication,'" and "'open, decentralized platform[s]'" does not withstand scrutiny; there is no meaningful functional difference between paid advertising over the Internet (in the form of incoming e-mails, banner and pop-up ads, webcasts, etc.) and a letter in the mailbox, a telephone call, or a paid ad in traditional media. *Id.* at 37 (quoting 67 Fed. Reg. 49,071-72); *see* Pls.' Mem. at 22-23.

Prior Commission precedents. There are also glaring inconsistencies between the Commission's new rule and its prior precedents. The Commission acknowledges in passing that it previously construed "general public political advertising" to include the Internet and e-mail

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[42] The Commission notes that, during the coordination rulemaking, "neither plaintiffs nor any other rulemaking commenter specifically opposed" the exclusion of the Internet from the scope of coordinated "public communications." FEC Mem. at 40 n.15. But the coordination rulemaking came well after the soft-money rulemaking, in which the Commission already had rejected plaintiffs' arguments and excluded the Internet from the definition of "public communications." Indeed, by the time of the public comments in the coordination rulemaking, plaintiffs had already filed suit in this Court challenging the exclusion of the Internet from "public communications." Plaintiffs have amply preserved their objections to the unlawful definition of "public communications" in all of its applications.

[43] *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980) (emphasis added); *see also* Pls.' Mem. at 23 n.40 (citing D.C. Circuit decisions construing "any"); p. 19 *supra*.

communications, but argues that this was a "*limited interpretation*" restricted to "requiring disclaimers for certain web and mass e-mail communications containing express advocacy or solicitations, *but not addressing their financing.*" FEC Mem. at 39-40 (emphasis added). This is both beside the point and false. The Commission's previous rules and Advisory Opinions repeatedly emphasized that political communications over the Internet are subject to all of FECA's basic architecture, including contribution limits, source prohibitions, and disclosure requirements, whether undertaken in coordination or otherwise.[44] Because the Commission does not even acknowledge the scope of its prior regulation of Internet communications, it is not surprising that the agency offers no reasoned explanation for its decision to deregulate these communications — even when coordinated to the hilt and paid for with corporate, union, or even foreign money. This is cause enough to set aside the Commission's new Internet regulations. *See* Pls.' Mem. at 6-7 & n.13.

Legislative history. The Commission fails even to acknowledge that the House of Representatives decisively rejected an amendment to BCRA that would have accomplished *precisely* what the new rule provides: complete deregulation of political advertising over the

[44] *See especially* 11 C.F.R. § 100.23(e)(1) (2001) (applying coordination rules to communications made through "the Internet or on a web site"); 65 Fed. Reg. at 76,144 (E&J for same) (PX 160); FEC Advisory Op. 1998-22 (costs of web site operated "in cooperation, consultation or concert with" a candidate's campaign would be an in-kind contribution) (PX 126); FEC Advisory Op. 1999-17 (repeatedly concluding that answers to various Internet-related FECA questions turned in part on whether the Internet activities were coordinated with a candidate; also concluding that volunteer's use of corporate equipment or facilities to distribute campaign messages over the Internet on more than an "occasional, isolated, or incidental" basis would, absent reimbursement to the corporation, result in prohibited corporate contribution) (PX 122). For Internet expenditure and contribution issues outside the coordination context, *see, e.g.*, FEC Advisory Op. 1996-2 (concluding that Compuserve's proposed offer of free member accounts to federal candidates "on a nonpartisan basis" would constitute illegal in-kind contributions because the accounts would be "valuable services which enable [the candidates] to communicate with voters and advocate their candidacies") (PX 131); FEC Advisory Op. 1997-16 (corporate use of Internet to engage in express advocacy on behalf of endorsed candidates would violate FECA and Commission rules; corporation may use Internet to communicate with its "restricted class") (PX 127); FEC Advisory Op. 1999-7 (Internet services may, depending upon the nature and purpose of the communication, constitute "expenditures" or "contributions" under FECA) (PX 124). *See generally* the sources cited in Pls.' Mem. at 24 & n.41.

Internet. *See id.* at 25 (discussing the DeLay amendment). The Commission may not allow by rule that which Congress rejected. *See id.* at 26 & n.47 (collecting numerous authorities). The Commission relies on a letter from Commissioners Mason and Smith that supposedly put Congress on "*explicit (albeit last minute) notice*" that BCRA was "*susceptible*" to a reading that *excludes* the Internet. FEC Mem. at 39 (emphasis added). The Commission reasons that, since no objections to this letter were "forthcoming" from Congress, it was authorized to proceed with its Internet deregulation. *Id.* This completely distorts the Mason-Smith letter, which plaintiffs analyzed in their opening submission. *See* Pls.' Mem. at 26.[45]

Other flaws. (1) The new rules make no sense under the "functional" analysis followed by Congress, the Supreme Court, and this Court in analyzing campaign finance issues. They also open obvious avenues for circumvention and abuse. The Commission has repeatedly failed even to *address* these concerns. *See* Pls.' Mem. at 27-28. (2) The Commission defends itself by noting that it *still* construes the phrase "general public political advertising" as applying to certain Internet and e-mail communications in the context of *disclaimer* requirements. *See* FEC Mem. at 40 & n.14. This unexplained inconsistency, however, *undermines* the Commission's position. The agency has offered no explanation why Internet advertising is "general public political advertising" for purposes of the disclaimer rules but not the coordination or FEA rules. This is precisely the sort of inconsistency that violates the APA. *See* Pls.' Mem. at 22 & n.38. (3) The Commission has failed to consider alternative approaches that might protect individual

[45] Messrs. Mason and Smith argued that, because Congress was using a phrase ("general public political advertising") that previously had been construed to include the Internet and "widely-distributed e-mail," this "*could command regulation of Internet and e-mail communications.*" Feb. 25, 2002 Letter from Chairman David M. Mason and Commissioner Bradley A. Smith to Hon. Mitch McConnell (emphasis added), *reprinted in* 148 Cong. Rec. S2340 (daily ed. Mar. 22, 2002) (PX 101). Far from being an agency plea for "guidance" that Congress ignored, this was a last-minute lobbying attempt, unsuccessfully arguing that BCRA should be rewritten. The Senate ignored the Commissioners' objections and adopted the House version.

First Amendment activity, while still reaching paid political advertising and efforts by corporations and unions to engage in electioneering over the Internet. The Commission was aware of many such alternative approaches emphasizing the difference between paid and individual Internet communications, but simply ignored them.[46]

III. The Challenged Soft-Money Regulations Are Illegal.

A. The FEC's Definitions Of "Solicit" and "Direct" Violate Congressional Intent And Invite Gross Abuse And Circumvention.

As plaintiffs demonstrated in their opening submission, the definitions of "solicit" and "direct" in 11 C.F.R. § 300.2(m)-(n) contravene the clearly expressed intent of Congress and, as a result, undermine BCRA's primary goal of insulating federal elections, candidates, and officeholders from the corrosive effects of soft money. In particular, the Commission's constricted definition of "solicit" — to "ask" — departs without justification from both the ordinary understanding of that term and the Commission's traditional definition, creating a large new loophole that Congress plainly did not authorize. In addition, the FEC's definition of "direct" — again, to "ask" — is inconsistent with Congressional intent, renders that term superfluous, and bears no relationship to the word's plain meaning. *See* Pls.' Mem. at 30-41.

Text and Structure. The Commission's attempt to seize on the D.C. Circuit's description 25 years ago of "solicit" as an "inherently vague" term — and therefore as a Congressional invitation to agency policymaking — is fundamentally misguided. It is no doubt true that, in the abstract, solicit "'can ... mean a variety of things.'" *See* FEC Mem. at 48 (quoting *Martin Tractor Co. v. FEC*, 627 F.2d 375, 383 (D.C. Cir. 1980)). The question here, however, is not whether the FEC's definition of "solicit" is plausible in the abstract — although

[46] *See* Pls.' Mem. at 25 & n.42; *id.* at 29 & n.51; *see also* June 4, 2002 Public Hrg. Tr. at 85-94 (test. of Messrs. Potter, Simon, and Noble) (PX 30).

it is not[47] — but rather whether that definition is consistent with Congress's intended meaning in BCRA's statutory scheme. *See Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125-27 (D.C. Cir. 1995). The answer is no. As we have previously shown, Congress did not intend that pinched meaning. Moreover, the FEC's definition is far narrower than either the common understanding of that term or the realities of campaign finance. The FEC's definition of "solicit" requires an outright, express request contained in a single communication. As the Supreme Court explained 12 years after *Martin Tractor*, however, "'[s]olicitation,' commonly understood," includes "*not just explicit verbal requests*," but also "*any speech or conduct that implicitly invites*" the desired result. *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992) (emphasis added). The Commission itself has long interpreted "solicit," as used elsewhere in FECA, in accord with that ordinary meaning, to include encouragement, suggestion, or recommendation. *See* Pls.' Mem. at 35-36. Given this background, and "interpret[ing] the statute 'as a symmetrical and coherent regulatory scheme,'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citation omitted), the Commission's stretch to find a more constricted definition of "solicit" than Congress intended, dictionaries provide, and its own practice supports "makes no sense." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465-68 (2001). At bottom, it is fundamentally irrational to conclude that in enacting a provision intended to *expand* existing prohibitions against raising soft money, and in choosing the word "solicit" to define the scope of those broadened prohibitions, Congress intended to

[47] The FEC purports to rely on dictionary definitions in support of its regulations, but it fails to address in any meaningful way the sources on which it relies. Thus, it simply lists the entries for "solicit" in a single dictionary and concludes that those entries are synonymous with "ask." FEC Mem. at 48. As plaintiffs demonstrated, a careful comparison of the dictionary definitions of "ask" and "solicit" reveals that the latter term is significantly broader than the former. *See* Pls.' Mem. at 32-34. According to Webster's, for example, "solicit, in modern usage, commonly means no more than calling attention to one's wants or desires," while "ask" "implies little more than the *statement* of the desire." Webster's Third New International Dictionary 128 (2002) (emphasis added) (PX 110). In addition, as explained *infra*, at page 32, the dictionary definition of "direct" bears no relationship to that of "ask."

allow a definition of that term *narrower* than both its plain meaning and its longstanding interpretation in other parts of FECA.

The Commission's attempt to defend its definition of "direct" is similarly irrational and inadequate. Without explanation, the FEC asserts that dictionary definitions of "direct" — "to give authoritative instructions to; command; order or obtain" — are consistent with "ask." FEC Mem. at 48. That is obviously not so. And the Commission fails to respond to plaintiffs' observation that the FEC's definition of "direct" renders that term superfluous and therefore subverts Congress's clearly expressed intent. The Commission's argument that its definition of "direct" "properly reflects its placement in close association with 'solicit,'" *id.*, is particularly baffling. Congress would not have used two terms if it intended both to carry the same meaning. *See* Pls.' Mem. at 34-35.

Remaining Justifications. As for the FEC's supposed constitutional concerns (*see* FEC Mem. at 48-49), the Commission has no authority to elevate its own views of constitutional law over the views of the Congress of the United States. Where, as here, Congress has clearly indicated that a particular meaning is intended or foreclosed, the FEC must give effect to that intent and leave the work of constitutional adjudication to the courts. Constitutional concerns are not a "policy" consideration uniquely within the FEC's purview or a matter of discretion entrusted to its judgment.[48]

As for the Supreme Court's comment in *McConnell* (*see* FEC Mem. at 49), plaintiffs showed in their opening brief that the Court's reference to the FEC's definitions was limited and inconsequential for present purposes. *See* Pls.' Mem. at 40-41. In observing that BCRA did not,

[48] *See, e.g., Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) ("[C]onstitutional concerns [are] an area of presumed judicial, rather than administrative, competence."); *see also* Pls.' Mem. at 6 & n.11 (citing additional cases).

as plaintiffs there argued, "outlaw[] *any* participation" by national parties in state-party activities, the Court merely noted that the current FEC definitions "are consistent with that view." 124 S. Ct. at 670 (emphasis in original). That passing reference is not an endorsement or an expression of approval.

B. The FEC's Narrowed Definition Of "Agent" Violates Congressional Intent And "The Settled Rule In The Federal System."

The leading case on the application of apparent authority principles in the enforcement of federal statues is *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). *ASME* emphasizes "[t]he wisdom of the apparent authority rule," that "[t]he apparent authority theory has long been the settled rule in the federal system," and that principles of apparent authority should be applied where "consistent" with the purposes of the federal statute in issue. *Id.* at 567, 570, 573. Plaintiffs demonstrated in their opening submission that all of the factors present in *ASME* are present here: Congress intended for BCRA to "sweep broadly"; situations involving apparent authority are "rife with opportunities" for abuse and circumvention; and imposing liability on principals for those whom they have cloaked with apparent authority creates appropriate "'pressure'" on principals to ensure that "systematic steps" are taken to comply with the law. *Id.* at 570-73 & n.11 (citations omitted). The realistic, functional analysis in *ASME* applies with equal force to BCRA. *See generally* Pls.' Mem. at 41-48.

The Commission has ignored *ASME* and all of the relevant considerations identified by the Supreme Court in that decision. Instead, the Commission claims that applying apparent authority principles to BCRA would lead to "open-ended and undefined" liability for candidates and political committees because "*[v]irtually anyone* associated with" a campaign — even low-level volunteers from *prior* campaigns — "*might reasonably be viewed by someone as having*

'apparent authority' to represent the candidate or committee." FEC Mem. at 42 (emphasis added). Similar concerns about "be[ing] at the mercy of errant volunteers" are repeated by the Michigan political parties in their *amici* brief. Michigan Parties' *Amici* Br. at 13; *see also id.* at 12. These arguments completely misconstrue the nature of apparent authority. As the D.C. Circuit has emphasized, a principal is liable on an apparent authority theory *only* if the third person *reasonably* believes that the agent has the principal's authority *and* "either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief."[49] On prior occasions, the Commission's Office of General Counsel has acknowledged that liability based on an apparent authority theory arises only "where the principal has held the agent out as having such authority or has permitted the agent to represent that he has such authority, so that a reasonable person would believe the agent to have such authority."[50] The Commission's warnings about "open-ended" liability are without foundation, and the Michigan parties' claim that "[m]ere assertions of volunteers could establish an agency relationship" is wrong as a matter of law.[51]

Plaintiffs demonstrated in their opening brief that the rule of apparent authority applies in the enforcement of a broad range of federal statutes, and that BCRA should not be treated any differently. *See* Pls.' Mem. at 45-46 & n.77. The Commission points to a single case, *Makins v.*

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[49] *Overnite Transp. Co. v. NLRB,* 140 F.3d 259, 266 (D.C. Cir. 1998) (quoting Restatement (Second) of Agency § 27 & cmt. a (1958)).

[50] Nov. 10, 1994 FEC Gen. Counsel's Rep., MUR 3585, at 40 (PX 156).

[51] Michigan Parties' *Amici* Br. at 12. Although most volunteers will not be cloaked by candidates or parties with apparent authority, those who are should be subject to federal campaign finance laws, and it is perfectly appropriate to require principals to take reasonable steps to train and supervise anyone acting with apparent authority, whether an employee, a consultant, or a volunteer. The leading case on apparent authority, in fact, involved a nonprofit organization whose work was done largely "through volunteers from industry and government"; the Supreme Court found that the efforts of these self-interested volunteers were "rife with opportunities" for abuse. *ASME,* 456 U.S. at 559, 571.

District of Columbia, 277 F.3d 544 (D.C. Cir. 2002) (cited in note 77 of plaintiffs' opening brief), that it claims demonstrates that "apparent authority is not *invariably* sufficient to bind a purported principal even under common law." FEC Mem. at 43 (emphasis added). *Makins* is a Title VII case, and the Supreme Court has emphasized that apparent authority principles apply fully in the Title VII context.[52] *Makins* concluded that, in determining whether to enforce an in-court agreement settling a Title VII case, the issue of settlement authority is controlled by local law, may fall within "*the special category of matters* reserved exclusively for the client's decision," and thus may not be subject to principles of apparent authority. 277 F.3d at 552 (emphasis added).[53] There is no reason to treat the candidate-agent relationship as falling into a comparable "special category."

The Commission claims to have "substantial policy reasons" for declining to apply the normal rule of apparent authority to the enforcement of federal campaign finance laws. FEC Mem. at 41. The Commission's opening brief simply quotes at length from its E&J, which plaintiffs already have refuted sentence-by-sentence. *Compare id.* at 42 *with* Pls.' Mem. at 45-46.

The Commission's arguments against apparent authority fail on many additional grounds: (1) Here again, the Commission has sharply departed from its prior rules and precedents without even acknowledging the change, let alone explaining why such a change is appropriate. The

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[52] *See, e.g., Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 759-60 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 801-03 (1998). These cases make clear that an employer may be held liable for the discriminatory actions of either a person acting with the requisite "apparent authority" or a person who abuses agency powers that he actually has been granted by the principal. *Id.*

[53] The District of Columbia Court of Appeals, on certification from the D.C. Circuit, subsequently confirmed that the local rule is that in-court civil settlements require the client's actual authorization. *Makins v. District of Columbia,* 838 A.2d 300 (D.C. Ct. App. 2003). The Court of Appeals emphasized that apparent authority provides the usual rule of decision in contract and agency cases, but that special rules govern in the context of the attorney-client relationship. *Id.* at 304-05.

Commission for the past generation repeatedly defined "agent" to include those acting with apparent authority. *See* Pls.' Mem. at 43-44 & n.75. Yet it fails even to contend that this longstanding definition of "agent" *ever* led to "open-ended liability" for principals and therefore needed to be changed. (2) It is simply irrational to construe a statute designed to combat the *appearance* of corruption as leaving unregulated the acts of agents exercising *apparent* authority. *See id.* at 43 & n.74. (3) Neither the Commission's E&J nor its opening brief analyze any of the factors identified as relevant by *ASME* or *McConnell*: whether allowing those with apparent authority to escape regulation would invite abuse and circumvention; whether applying the doctrine would increase compliance with BCRA by encouraging principals to train and monitor those whom they cloak with apparent authority; and whether such incentives would be consistent with Congressional goals. The Commission has not engaged in a "reasoned analysis" of any of these important issues.[54]

C. The Challenged Regulation Governing State Party Fundraisers Violates Congressional Intent And Invites Gross Abuse And Circumvention.

Plaintiffs demonstrated in their opening submission how 11 C.F.R. § 300.64(b), which allows federal candidates and officeholders to speak "without restriction or regulation" at state party fundraising events, threatens to undermine the central purposes of BCRA. That regulation cannot be squared with the statutory text, is foreclosed by BCRA's structure, defies logic and common sense, and finds no support in any of the Commission's purported justifications. *See* Pls.' Mem. at 48-53. The Commission attempts to defend this provision on two grounds that plaintiffs have already conclusively refuted.

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[54] As previously discussed, plaintiffs challenge the Commission's definition of "agent" both in connection with the Title I regulations and in connection with the coordination rules. For comments and testimony focusing on the problems with the "agent" definition in the coordination context, *see* Pls.' Mem. at 9 n.17.

First, the Commission contends that BCRA requires its rule, because 2 U.S.C. § 441i(e)(3), which allows candidates and officeholders to attend and speak at state party fundraisers, "is written as an exception to the soft money solicitation limits in section 441i(e)(1)." FEC Mem. at 61. As plaintiffs have shown, however, that is simply incorrect. Section 441i(e)(3) states only that candidates and officeholders "may attend, speak, or be a featured guest" at a state party fundraising event; it does not say that they may solicit soft-money donations, nor is it styled as an "exception" to the general solicitation ban. The FEC reads § 441i(e)(3) as if it stated: "Notwithstanding § 441i(e)(1), a candidate or an individual holding Federal office may *solicit or direct* [soft money] at a fundraising event for a State, local, district, or local committee of a political party." The actual provision, of course, says nothing of the kind. Had Congress intended to allow solicitation, it would have done so explicitly, as it did in both the subsection immediately preceding § 441i(e)(3) and the one immediately following. These provisions confirm that Congress knew how to create exceptions to the general solicitation ban when it so intended. Section 441i(e)(2) allows "solicitation" by a federal officeholder or candidate who is "also a candidate for a State or local office solely in connection with such election for State or local office," subject to various restrictions, while Section 441i(e)(4) allows a federal officeholder or candidate to make solicitations in certain circumstances and for certain purposes.[55]

[55] The Commission's further suggestion that § 441i(e)(3) would have no purpose if it were not construed as a wholesale exception to the general solicitation ban is particularly telling. This assertion rests entirely on the FEC's unlawful definitions of "solicit" and "direct," which encompass only outright, express requests contained in a single communication. *See* pp. 30-33 *supra*. Under those definitions, the activities listed in § 441i(e)(3) — attending, speaking, or being a featured guest at a state party fundraiser — could not plausibly be deemed "solicitation" or "direction," and therefore the provision would have little use were it not interpreted as the type of "total exemption" the FEC has created. But if "solicit" and "direct" are interpreted more broadly, consistent with their ordinary meaning, § 441i(e)(3) makes perfect sense: Congress recognized that merely attending, speaking, or being a featured guest at a state party fundraiser might be viewed as solicitation or direction, and clarified that such activities are

(Footnote continued)

Second, the FEC repeats its familiar invocation of supposed "general constitutional concerns." FEC Mem. at 62. Constitutional law, however, is not the FEC's domain, and the Commission's views on the subject are entitled to no deference. *See* Pls.' Mem. at 6 & n.11. And in any event, the FEC has failed to identify a single reason why it would be more difficult or constitutionally problematic to monitor candidate speech at state party fundraising events than in any of the other many contexts in which the Commission must enforce the law and guard against illegal solicitations. Finally, the Supreme Court's passing reference to § 441i(e)(3) in *McConnell* avails the FEC nothing. The Court's unremarkable observation that the provision allows "limited opportunities for federal candidates and officeholders to associate with their state and local colleagues," 124 S. Ct. at 683, is by no means an endorsement of the Commission's position.

D. The "Grandfather" Provision Violates Congressional Intent And Invites Gross Abuse And Circumvention.

Plaintiffs' opening submission details the patent unlawfulness of 11 C.F.R. § 300.2(c)(3), which categorically and arbitrarily excludes from consideration any activity predating November 6, 2002 in determining whether an entity has been "directly or indirectly established, financed, maintained, or controlled" by a national party. That rule is contrary to statutory language and demonstrably at odds with BCRA's basic purpose of closing loopholes that had allowed soft money to corrupt the federal election process. *See* Pls.' Mem. at 53-57.

The Commission chooses not to address the obvious real-world consequences of this "grandfather" provision (even as it moves this Court to dismiss this suit on the purported ground that the challenged regulations have produced no such consequences). Its only response to the

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permitted. The state party fundraiser provision is thus a good example of how far the FEC has been required to twist various parts of BCRA to fit its regulations.

stark illustration of the regulation's effect in cases such as the Leadership Forum is to urge this Court to blind itself to such realities by "striking" this episode from its consideration. Beyond this plea, the FEC offers only one defense of the "grandfather" provision: it asserts that the rule is necessary to ensure "'that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed,'" and thus "that groups currently operating independently from a national party committee should not *forever be bound* by statutory restrictions applicable to the party committee because of activities that ceased before BCRA even went into effect." FEC Mem. at 46 (emphasis added, citation omitted). This argument is fundamentally incorrect, both factually and legally.

As an initial matter, it is not true that, absent the grandfather provision, entities now operating independently from national parties would "forever be bound" by BCRA on the basis of pre-BCRA conduct. To the contrary, the regulation immediately following the grandfather provision, 11 C.F.R. § 300.2(c)(4), specifically "provides a mechanism for a sponsor or an entity to request a determination by the Commission through the advisory opinion process that the sponsor is no longer deemed to finance, maintain, or control an entity, even if the sponsor established the entity." 67 Fed. Reg. at 49,084 (PX 1). This provision, in its own right – without a blanket grandfather clause – suffices to ensure that an entity is not "forever bound" by its pre-BCRA conduct.

More fundamentally, taking pre-BCRA conduct into consideration when determining whether an entity is subject to BCRA's soft-money prohibitions is not "retroactive application" of the statute. Section 441i(a)(2) regulates and "penalizes" only purely prospective activity: raising, receiving, or spending soft money after BCRA's effective date. To be sure, the scope of that provision (like that of virtually every other statutory provision on the books) is determined

in part by reference to facts that predate it — in particular, whether an entity's history demonstrates that it is affiliated with a national party. It is black letter law, however, that "a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n.24 (1994) (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)).[56] A law is retroactive only if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Ass'n of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992) (internal quotation marks and citation omitted). That does not occur when a law imposes purely prospective duties tied to classifications based on antecedent facts. As the Supreme Court has observed,

> [e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards.

Landgraf, 511 U.S. at 269 n.24. Section 441i(a)(2) "unsettles expectations" only in this narrow and innocuous sense. "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." *Landgraf*, 511 U.S. at 269 n.24 (internal quotation marks and citation omitted). In sum, the FEC had no warrant to carve out a "grandfather" exception to § 441i(a)(2) on the basis

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[56] *See also Lewis v. Fid. & Deposit Co.*, 292 U.S. 559, 571 (1934); *Reynolds v. United States*, 292 U.S. 443, 449 (1934) (holding that "[a] statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment"); *Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 73 (1915); *Ass'n of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 865 (D.C. Cir. 1992); *Neild v. District of Columbia*, 110 F.2d 246, 255 (D.C. Cir. 1940) (holding that a law is not retroactive simply because it depends on "'antecedent facts for its operation'") (quoting *Lewis*, 292 U.S. at 571).

of a "retroactivity" rationale, for that provision would not amount to retroactive application in any event.

E. The Commission's Regulations On "Federal Election Activity" Violate Congressional Intent And Invite Massive Circumvention Of BCRA's Soft-Money Restrictions On State, District, And Local Party Committees.

As demonstrated in plaintiffs' opening brief, the Commission's "Federal election activity" regulations impermissibly narrow the scope of BCRA. They ignore the plain language of the statute and, most fundamentally, work in demonstrable contravention of Congress's unambiguous purpose to close the soft-money loophole. *See* Pls.' Mem. at 58-70. In its brief, the Commission continues to ignore Congress's manifest purpose and seeks to justify its own policy judgments without regard for the careful balance Congress struck. In each instance, the Commission's efforts to narrow the reach of BCRA will serve to reopen the loophole that Congress intended to close, completely.

Statutory Language, Structure, and Purpose. In support of its narrowing of the meaning of "Federal election activity," the Commission announces a startling proposition of law — that, where Congress has failed expressly to define a particular term, any disagreement over the meaning of that term is simply a "disagreement about policy," and "the Commission's policy choices are," without more, "reasonable [and] not arbitrary or capricious." *E.g.*, FEC Mem. at 27. In making this argument, the Commission ignores that Congress took pains to define the phrase "Federal election activity" in extraordinary detail, and that, in doing so, Congress made the "policy choices" that the Commission purports to supplant with its own. The Commission also ignores that phrases like "voter identification," "get-out-the-vote activity," and "voter registration activity" have widely accepted, longstanding, common-sense meanings.

Most fundamentally, the Commission misunderstands the nature of *Chevron* deference. *Chevron* does not ask whether it is possible to construe the words of a statute in a manner that

invites some ambiguity. Rather, the appropriate inquiries are whether, after exhausting all the "traditional tools of statutory construction" and legislative history, some gap exists that Congress left to the agency to fill[57] and whether the manner in which the agency has filled that gap is consistent with Congress's overall purpose.[58] Here, the Commission does not even attempt to meet this standard.

First, the Commission has arbitrarily defined "voter registration" and "get-out-the-vote" ("GOTV") activity in a manner that includes solely affirmative assistance and excludes encouragement.[59] In the Commission's view, a telephone call to a potential voter — who the party believes will likely support its candidates for federal office — urging the voter to register or to vote, is not a "voter registration" or "GOTV" activity. This bizarre interpretation is not only at odds with experience and common usage, but with the Commission's own long-standing use of these terms. *See* Pls.' Mem. at 61-64.

In defense of this unprecedented departure from common usage (and common sense), the Commission makes three arguments, none of which carry any weight. It first argues that Congress did not define these terms, and thus left it to the Commission to make its own policy judgment. Yet, as noted, nothing in *Chevron* or its progeny suggests that an agency is free to make its own policy judgments whenever Congress fails to define a term. The agency must give

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[57] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-43 nn. 7, 9 (1984).

[58] *See Orloski v. FEC,* 795 F.2d 156, 164 (D.C. Cir. 1986) ("If the FEC's interpretation unduly compromises the Act's purposes, it is not a 'reasonable accommodation' under the Act, and it would therefore not be entitled to deference.") (quoting *Chevron*, 467 U.S. at 845); *see also Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987) ("[W]here the agency interprets its statute in a way that flatly contradicts Congress's express purpose[s], the court may — indeed must — intervene and correct the agency."); Pls.' Mem. at 4-5.

[59] The Commission's crabbed view of the meaning of "GOTV" — and, in particular, the notion that GOTV involves only activity designed to *assist* in getting potential voters to the polls — is further reflected in the Commission's suggestion that GOTV will typically occur only in the last 72 hours of a campaign. *See* 11 C.F.R. § 100.24(a)(3)(i); Pls.' Mem. at 65-66. That suggestion is not only baseless, but invites circumvention of a provision that was enacted to close, rather than open, a loophole.

the term its plain and commonly accepted meaning. If an agency must turn to "policy" to flesh out the meaning, it is *Congressional* policy that controls. Here, Congress's policy judgment is clear: it intended to close the soft-money loophole, not to perpetuate it. Tellingly, the Commission does not identify any support in the legislative record for an interpretation of either "voter registration" or "GOTV" activity that would support the exclusion of activity designed to encourage individuals to register or to vote.

Next, the Commission argues that BCRA is best construed to exclude "encouragement" from the meaning of "voter registration" and "GOTV" activity because, elsewhere in FECA, Congress expressly referred to "'activity designed to encourage individuals to vote or register to vote.'" FEC Mem. at 26-27 (quoting 2 U.S.C. § 431(9)(B)(ii)). One need look no further than the Commission's own regulations, however, to grasp the utter implausibility of this contention. The section of the Commission's regulations implementing § 431(9)(B)(ii) is entitled: "Voter registration and get-out-the-vote activities."[60] Plainly, the Commission itself recognized that activities that "encourage" individuals to vote or to register to vote are "voter registration and get-out-the vote activities," and its regulations so provide. *See also* Pls.' Mem. at 61 (citing 11 C.F.R. § 106.5(a)(2)(iv) (treating "[g]eneric voter drives, including voter identification, voter registration, and get-out-the-vote drives" as "activities that *urge* the general public to register, vote or support candidates") and FEC Advisory Op. 1980-64 (PX 152) (recognizing that "registration" and "GOTV" "are terms of art used in campaign or election parlance ... [to] connote efforts to increase the number of person who register to vote and once registered, to maximize the number of eligible voters who go to the polls.")). Moreover, as explained in plaintiffs' opening brief, this Court has likewise recognized the common-sense notion that

[60] 11 C.F.R. § 100.133; *see also* Pls.' Mem. at 61-62.

GOTV and voter registration include acts of encouragement. *See id.* (citing *McConnell*, 251 F. Supp. 2d at 702 (Kollar-Kotelly, J.)).

Finally, the Commission's sole remaining argument to support its exclusion of "encouragement" from the meaning of "voter registration" and "GOTV" activity is the baseless contention that a "'more expansive definition would run the risk that thousands of political committees and grassroots organizations that merely encouraged voting as a civic duty, who have never been subject to Federal regulation for such conduct' would have their activities subject to the fundraising restrictions that apply to Federal election activity."[61] The Commission fails to note, however, that the definition of "Federal election activity" applies primarily to fundraising by state and local committees of political parties, which have long been subject to federal regulation and which, by definition, engage in partisan activity.[62] Moreover, regardless of whether the regulatory definitions of "GOTV" and "voter registration" are defined to include "encouragement" of voting and registration, independent groups that conduct such activities in a non-partisan manner may continue to spend unlimited amounts of their treasury funds on such activities.[63] Accordingly, genuine nonpartisan efforts are fully protected.

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[61] FEC Mem. at 27 (quoting 67 Fed. Reg. at 49,067); *see also* FEC Mem. at 29.

[62] *See McConnell*, 124 S. Ct. at 675 n.64 (holding that all "actions taken by political parties are presumed to be in connection with election campaigns") (citing *Buckley*, 424 U.S. at 79). A secondary application of the definitions of "Federal election activity," including "GOTV" and "voter registration," is in Sections 441i(d) and (e), which among other things restrict political parties and federal officeholders and candidates from making soft money solicitations for and transfers to Section 501(c) organizations engaged in "Federal election activity." Even if the regulatory definitions of "GOTV" and "voter registration" are defined to include encouragement of these activities, political parties may still transfer unlimited amounts of hard money to 501(c) organizations engaged in such activities, as well as solicit hard money contributions to federal PACs these groups maintain. *See* 2 U.S.C. § 441i(d); *McConnell*, 124 S. Ct. at 680-82. Moreover, federal officeholders and candidates may solicit $20,000 per year from individuals specifically for such GOTV and voter registration efforts carried out by Section 501(c) organizations. *See* 2 U.S.C § 441i(e)(4)(B). Thus, any contention that defining "GOTV" and "voter registration" to include "encouragement" of these activities would prevent political parties and federal candidates and officeholders from significantly helping Section 501(c) groups raise funds for these activities is without foundation.

[63] FECA has long exempted from the definition of "expenditure" costs incurred for "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii). *See also* 11 C.F.R. § *(Footnote continued)*

Second, the Commission's defense of its decision to narrow the plain meaning of "GOTV" even further — by creating a wholesale exclusion for GOTV communications by associations of state or local candidates or officeholders that refer only to state or local candidates — fares no better. Congress made the express judgment to require "association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office" to pay for "Federal election activity" with hard money. 2 U.S.C. § 441i(b)(1). This includes *all* GOTV efforts "conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)." *Id.* § 431(20)(A)(ii). Congress recognized that, absent such a restriction, massive amounts of soft money might be raised and expended purportedly to turn out the vote for state and local candidates, but with the real purpose of assisting federal candidates. *See* 148 Cong. Rec. S2139 (Mar. 20, 2002) (statement of Sen. McCain) (PX 102). The Commission, however, improperly rejected this Congressional judgment in favor of its own.

The Commission contends that, under pre-existing allocation rules, "a GOTV communication that featured only state and local candidates was treated as a wholly non-federal activity subject only to state campaign finance laws if it was paid for by a State or local committee." FEC Mem. at 29. Yet, tellingly, the Commission cites no support for this proposition, which, at a minimum, is at odds with prior pronouncements of the Commission.[64]

100.133 (regulatory exemption from definition of "expenditure" for costs incurred for "activity designed to encourage individuals to register to vote or to vote ... if no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote").

[64] *See* FEC Advisory Op. 1978-50 ("expenditures of the [Michigan Democratic] Party for the purpose of ... motivating persons to support the Party's Gubernatorial nominee are, in part, for the additional purpose of influencing the election of persons to Federal office," and thus must "be allocated on a reasonable basis between the two classes of candidates who appear on the same election ballot — those seeking Federal office and those seeking other elective public office") (PX 190). *See also* 55 Fed. Reg. at 26,061 (noting that new allocation rules are "consistent with the Commission's position in Advisory Opinion[ ] ... 1978-50") (PX 194).

Moreover, the question of prior practice is irrelevant in the present circumstances, where Congress expressly decided that the BCRA's soft money rules should apply to *all* GOTV efforts "conducted in connection with an election in which a candidate for Federal office appears on the ballot." 2 U.S.C. § 431(20)(A)(ii). To exclude from this provision these types of communications is an impermissible attempt to rewrite the statute.

The Commission alternatively points to the fact that the statute permits state candidates to use soft money for "public communications" that refer only to candidates for state or local office, FEC Mem. at 30 (discussing 2 U.S.C. § 441i(f)), and argues that the challenged GOTV regulation parallels that exclusion. *Id.* Far from supporting the Commission's decision, that exemption merely shows that where Congress wanted to draft a narrower provision, it was perfectly capable of doing so. Under settled rules of statutory construction, the Commission has no authority to imply additional exclusions.[65]

Third, for similar reasons, the Commission's decision to limit "generic campaign activity" to "public communications" cannot stand. Here, Congress expressly defined "generic campaign activity" to include "a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." 2 U.S.C. § 431(21). Yet the Commission has again tried to narrow the law by adding the condition that the "campaign activity" involve a "public communication." 11 C.F.R. § 100.25.

The Commission defends this rewriting of the statute by claiming it needed to "'ensure[] that the definition encompasses only the external activities of a political party.'" FEC Mem. at 33 (quoting 67 Fed. Reg. at 49,071). However, by narrowing the definition to encompass only

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[65] *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted); *see also* Pls.' Mem. at 60.

"public communications," the Commission excludes a great deal more than simply internal party communications — it excludes many external ones as well, including mailings and phone banks directed to fewer than 500 people, all e-mail communications, and all Internet communications. *See* FEC Mem. at 34. The FEC acknowledges this, but then argues that it is entitled to make "*de minimis*" exclusions, characterizing mailings and phone banks directed at fewer than 500 people as *de minimis*. *See id.* at 35. The Commission, however, conveniently ignores the fact — conceded on the prior page of its brief — that its exclusion also covers *all* e-mail and Internet communications, which might reach millions of potential voters. *See also* Part II-B *supra.*

Fourth, the Commission's claim that it properly excluded the purchase of voter lists from the definition of "voter identification" is without merit. The Commission argues that "'the act of acquiring a voter list in and of itself does not *constitute* voter identification'" and observes that there are other uses for voter lists, such as "'fundraising and off-year party building activities.'" FEC Mem. at 31-32 (emphasis added). However, the Commission does not deny that acquiring voter lists is a core *aspect* of voter identification. Moreover, the fact that voter lists are sometimes used for additional purposes does not support excluding their purchase from the definition of "voter identification." There is no evidence that Congress intended to exclude any activity from the definition of "voter identification" simply because it might serve additional purposes. Voter lists are also created and enhanced for purposes other than voter identification, yet the Commission included creating and enhancing voter lists in its definition of "voter identification." There is simply no nexus between the Commission's proffered explanation and its regulation.

Finally, the Commission's decision to create a safe-haven for the salaries of employees of state and local parties who spend less than 25 percent of their time "in connection with a Federal

election" further demonstrates the Commission's disregard for the text and purposes of the statute. FECA unambiguously forbids state and local parties from using funds raised outside the source and amount limitations of the Act (other than Levin funds, where authorized) for activities that affect federal elections. *See* 2 U.S.C. §§ 441a-b. It was this statutory command — a command that remains unchanged today — that led the Commission initially to require state parties to allocate their expenditures for mixed federal and state activities on a reasonable basis[66] and ultimately to promulgate specific allocation formulas for such activities.[67] It borders on the perverse to suggest that BCRA undercut or implicitly repealed this requirement.[68]

Moreover, the contention that abandoning the allocation requirement for employees who work less than 25 percent of their time on federal elections is necessary to create a "bright line test" is mistaken. FEC Mem. at 58. The statute itself provides abundant clarity. If an employee spends more than 25 percent of his or her time on federal elections, then that employee's entire salary must be paid with hard money. If the employee spends 25 percent or less of his or her time on federal elections, the party must pay the salary using an allocation of soft and hard money, just as it does to pay its rent, utilities, and office equipment.

Finally, the loophole the Commission has opened is far from trivial. State and local parties can now avoid Congress's carefully crafted rule by arranging their affairs so that all employees work as close to 25 percent of their time on federal elections as possible. Plainly, that

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[66] *See* FEC Advisory Ops. 1978-28 (PX 191) and 1978-50 (PX 190).

[67] *See* 55 Fed. Reg. at 26,058 ("These regulations implement the contribution and expenditure limitations and prohibitions established by 2 U.S.C. 441a and 441b ... by providing for allocation of expenses for activities that jointly benefit both federal and non-federal candidates and elections.") (PX 194); *see also Common Cause*, 692 F. Supp. at 1391 (requiring the Commission to promulgate regulations providing guidance on the appropriate allocation of state party funds for volunteer materials, voter registration, and GOTV activities).

[68] *See, e.g., Branch v. Smith*, 538 U.S. 254, 273 (2003) (citations omitted).

is precisely the type of loophole that Congress sought to close in BCRA and that Judge Flannery directed the Commission to close in *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987).

Prior Commission Precedents. The Commission's regulations are further flawed because they depart in numerous respects from the Commission's own precedents — for example, by adopting completely different understandings of GOTV, voter registration, and voter identification activities than those reflected in its own advisory opinions and regulations — without acknowledging, much less attempting to justify, these departures. Like the regulations themselves, the Commission's brief offers no explanation, much less a "reasoned analysis," for its change in position, as required by the APA. *See* Pls.' Mem. at 6-7. On this issue as with so many others, the Commission is "intolerably mute." *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970).

Constitutional Analysis. The Commission's brief also makes clear that its narrowing of the meaning of "Federal election activity" was driven, at least in part, by misplaced constitutional concerns. *See* FEC Mem. at 29, 34. For example, the Commission argues that it needed to narrowly define GOTV to avoid "federaliz[ing] a vast percentage of ordinary campaign activity." *Id.* at 28. The Commission, however, never explains how activity covered by its regulations — such as "[p]roviding to individual voters ... information such as the date of the election"[69] — raises any different constitutional issues than the activity that is excluded. In any event, because *McConnell* rejected the constitutional concerns that animate these policy choices, and because an agency is no better placed than a court to assess the constitutionality of a federal statute, this Court should not defer to the Commission's mistaken view of the Constitution.

[69] 11 C.F.R. § 100.24(a)(3)(i).

F. The Remaining Challenged Soft-Money Regulations Are Unlawful.

Subject to the following comments, plaintiffs elect, given space constraints, to stand on their previous arguments with respect to the remaining challenged soft-money regulations. *See* First Am. Compl. ¶¶ 71(a)-(e); Pls.' Mem. at 70-72. The Commission claims "inherent" authority to create a "*de minimus* exemption" to the statutory proviso that the Levin Amendment exception applies only "*to the extent the amounts* ... are allocated" between hard money and Levin funds. *See* FEC Mem. at 54-56. An agency has no such "inherent" authority, however, where, as here, such an exemption would "conflict[] with the express and clear mandate" of the statute in issue.[70] In addition, although the Commission contends that BCRA is sufficiently ambiguous so as to give it discretion to authorize the use of Levin funds to raise Levin funds (contrary to the most natural reading of 2 U.S.C. § 441i(c)), the Commission overlooks clear legislative history to the contrary demonstrating that Congress intended to require parties to use hard money to raise Levin funds.[71]

IV. The Commission's Regulations On "Electioneering Communications" Are Illegal.

A. The *Per Se* Exemption For Section 501(c)(3) Organizations Violates Congressional Intent And Invites Gross Abuse And Circumvention.

The Commission's brief, not surprisingly, tries to denigrate as "isolated" and "unsubstantiated" (FEC Mem. at 73) some of the clearest indications that its *per se* Section

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[70] *Sierra Club v. EPA,* 992 F.2d 337, 343 (D.C. Cir. 1993) (EPA had no discretion to exempt small landfills from general statutory monitoring requirements); *see also Kokechik Fishermen's Ass'n v. Sec'y of Commerce,* 839 F.2d 795, 802 (D.C. Cir. 1988) (statute left no authority for agency to create "a 'negligible impact' exception to its permitting requirements"); *Pub. Citizen v. Young,* 831 F.2d 1108, 1122 (D.C. Cir. 1987) (health statute did not allow for a "*de minimus* exception" for substances "with trivial risks to humans").

[71] Senator Feingold emphasized shortly before passage that 2 U.S.C. § 441i(c) "*[r]equires* national, state, and local parties *to use hard money to raise money* that will be used on Federal election activities ... ." 148 Cong. Rec. S1992 (daily ed. Mar. 18, 2002) (Exhibit No. 1) (emphasis added) (PX 184). The Commission's General Counsel concluded, based on this legislative history, that "it seem[s] ... pretty clear[]" that Congress "didn't want Levin funds to be raised with anything other than federal funds." June 22, 2002 Open Meeting Tr. at 55 (PX 183).

501(c)(3) exemption is contrary to law: the direct and specific floor statements, in both the House and the Senate, right before final passage of the bill in each chamber, by not one, but all four principal sponsors of BCRA, that the Commission was *not* authorized to create such an exemption. Representative Shays directly emphasized that "we do not intend that Section 201(3)(B)(iv) be used by the FEC to create any per se exemption from the definition of 'electioneering communications' for speech by Section 501(c)(3) charities."[72] Representative Meehan[73] and Senators Feingold[74] and McCain[75] explicitly concurred in this statement. Although "the statements of one legislator" during floor debate may not be "controlling," the remarks made by a "sponsor of the language ultimately enacted are an authoritative guide to the statute's construction." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982). Courts give particular weight to "precise analyses of statutory phrases by the sponsors of the proposed laws." *S&E Contractors, Inc. v. United States,* 406 U.S. 1, 13 n.9 (1972).[76] Here, the statutory language

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[72] 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002) (PX 100).

[73] 148 Cong. Rec. E178-79 (Feb. 15, 2002) (PX 183).

[74] 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002) ("Mr. Shays discussed how the provisions of the bill dealing with electioneering communications permit the FEC to promulgate regulations to exempt certain communications ... . I also endorse that discussion, which appears in the Record of February 13, 2002, at pages H410-411.") (PX 102).

[75] *Id.* ("I agree with my friend from Wisconsin that these statements express our intent in this bill quite well.").

[76] Indeed, the Court in *Bell* accorded particularly great weight to the floor statements of a sponsor because his statements there "were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks ... ." 456 U.S. at 527. Both of these "plus" factors are true here as well. *See also FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564-65 (1976); *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639-40 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt."); *White v. Dep't of Justice*, 328 F.3d 1361, 1366 (Fed. Cir. 2003) (floor explanations by author of the language in dispute "are entitled to probative weight as to the meaning of the terms he employed in the amendment, as statements by a non-authoring congressperson would not be").

in issue was identically construed by not one, but by *all four* principal sponsors.[77]

Beyond this, the regulation violates the plain statutory language. The Commission's clause (iv) authority is expressly bounded by the restriction that any regulation it issues cannot exempt a communication that "is described in" Section 431(20)(A)(iii), *i.e.*, a public communication that "promotes, supports, attacks or opposes" a clearly identified candidate. The Commission's regulation, however, makes no provision for this limitation, instead exempting *all* communications by Section 501(c)(3) groups regardless of their content.

The Commission's sole justification for this approach is that the tax code already bars Section 501(c)(3) groups "from making the sort of communications that the Commission lacks authority to exempt — those that promote, support, attack or oppose a federal candidate." FEC Mem. at 68. Thus, according to the Commission, Section 501(c)(3) groups cannot as a matter of tax law do that which its regulations permit as a matter of election law.[78] But the analysis is not so simple as the Commission would have it. It is true that Section 501(c)(3) of the tax code contains a broadly stated prohibition on "intervention" in a political campaign. But this prohibition is *not* co-extensive with the language or purposes of Title II-A and, even if it were,

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[77] The principal case relied on by the Commission, *United States v. McGoff*, 831 F.2d 1071 (D.C. Cir. 1987), examined "a solitary phrase of a single legislator's comments (which, of course, the members of the other House in our bicameral system would not have had occasion to hear)." *Id.* at 1090. "Under these circumstances," and where the remarks "are at best ambiguous and at worst internally inconsistent," the Court found them not to be "controlling." *Id.* Here, of course, by contrast, the remarks of the four sponsors are clear, on point, consistent — and bicameral.

[78] The Commission in another context, however, has acknowledged that this premise of its Title II-A rule is incorrect. It has recently published a Notice of Proposed Rulemaking regarding "Political Committee Status," 69 Fed. Reg. 11,736 (PX 196), which in part discusses the definition of the term "expenditure." The NPRM raises the question whether all payments by Section 501(c)(3) groups should be exempt from the term "expenditure." The Commission, however, notes: "In this regard, how should the Commission interpret the Internal Revenue Service's Technical Advice Memorandum 89-36-002 (Sept. 8, 1989), which permitted a 501(c)(3) organization to make advertisements that 'support or oppose a candidate in an election campaign,' without losing its 501(c)(3) status for intervening in a political campaign?" 69 Fed. Reg. at 11,742. Thus, the Commission itself has acknowledged that the IRS interprets tax law to allow a Section 501(c)(3) group to run ads that "support or oppose" candidates, an admission completely inconsistent with the premise of its Title II-A rule.

the Commission would not have the discretion to franchise out to the IRS its own responsibility to implement and enforce BCRA.

Section 501(c)(3) organizations can, consistent with their tax status, engage in public communications, including broadcast ads, that support or oppose legislation.[79] In so doing, they can refer to clearly identified candidates in broadcast communications aired in the period immediately before an election that are targeted to the electorate of the candidate mentioned. This proposition is true as a matter of longstanding tax law, and was recently and clearly restated by the IRS in Rev. Rul. 2004-6. *See* PX 162.[80] As discussed in plaintiffs' opening brief, the IRS applies a nuanced "facts and circumstances" test to draw the line between permitted advocacy and proscribed electioneering. The ruling, for instance, treats as advocacy, not electioneering, an advertisement that "identifies Senator C, appears shortly before an election in which Senator C is a candidate, ... targets voters in that election ... [and] identifies Senator C's position on the issue as contrary to" the sponsor of the ad. *Id.* (Situation 2). Although this sounds like the classic sham issue ad — even down to the "Call or write Senator C to tell him to vote for S. 24" tag line that was a hallmark of the abusive pre-BCRA regime — the IRS concluded that it would treat this ad as lobbying because, under the facts of the hypothetical, it is timed to appear before a Senate vote on the issue discussed. As such, it would *not* be subject to the absolute prohibition on campaign intervention that tax law applies to Section 501(c)(3) organizations.[81]

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[79] Although there is a cap on the substantiality of advocacy activities by Section 501(c)(3) groups, there is no question that they may engage in them. *See* 26 U.S.C. § 501(h).

[80] This is one of plaintiffs' exhibits that the Commission has moved to strike.

[81] The Revenue Ruling lists six generic "facts and circumstances" that would "tend to show" that an ad is an electioneering ad, and five other generic "facts and circumstances" that "tend to show" it is a lobbying ad. Applying these factors, the IRS identifies several other hypothetical ads as lobbying, not electioneering ads, that all have the characteristics discussed above — they identify a candidate, appear shortly before an election and are targeted to the electorate of the candidate. *See id.* (Situations 1, 2 and 5).

Title II-A was intended to encompass precisely these kinds of ads. As a matter of *election* law, the Supreme Court concluded that "the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *McConnell,* 124 S. Ct. at 696. Whether the IRS chooses to apply a different, and more fact-dependent, test for purposes of *tax* law is of no moment to how the FEC is required to implement the campaign finance regulatory regime that it bears sole responsibility for enforcing.[82]

Despite its disclaimers to the contrary, the Commission, as a functional matter, is delegating the enforcement of Title II-A to the IRS insofar as the activities of Section 501(c)(3) organizations are concerned. Yet the Commission simply *assumes* that IRS enforcement of this one prohibition in this one provision of the tax code will be effective — and timely — for purposes of the campaign finance objectives of Title II-A. The Commission has adduced no evidence to support this unlikely assumption (beyond conclusory assertions in the record, in the E&J, or in its brief). In fact, much scholarly commentary, as well as the Government's own studies, are to the contrary.[83]

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[82] To the extent that the Commission claims that the application of Title II-A will inhibit the work of Section 501(c)(3) groups, the response is the same as the Court made to all other entities subject to Title II-A: they "may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates" or by choosing non-broadcast media. *Id.* at 696.

[83] One academic notes of the pre-BCRA law, "[d]ue to loopholes in the IRC and FECA, charities and social welfare groups are able to engage in partisan activities, yet argue that their actions are nonpolitical." Robert Paul Meier, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds,* 147 U. Pa. L. Rev. 971, 985-86 (Apr. 1999) (discussing one Section 501(c)(3) group, "Vote Now '96," which "virtually operated as a Democratic Party subsidiary") (PX 188). Another says, "[c]haritable organizations that are exempt from tax under section 501(c)(3) are prohibited from intervention in a political campaign. Yet the record is equally clear that the muddled definition of educational advocacy on social issues versus campaign advocacy for or against specific candidates has permitted extensive political campaign activity by exempt charities." Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform,* 54 Fla. L. Rev. 1, 107-08 (Jan. 2002) (PX 189). Indeed, rather than the FEC deferring to the IRS, this author specifically argues that the contrary approach is more appropriate, and that the *inclusion* of charities within Title II-A will help resolve the problem: "Broadening and clarifying the definition of political intervention to include all campaign advocacy, *particularly advocacy that meets the definition of an electioneering communication under the McCain-Feingold*

(Footnote continued)

The IRS enforces the non-intervention standard of Section 501(c)(3) through either revocation of tax exempt status or the imposition of penalties. Yet "in reality, neither of these sanctions is meaningful[.]"[84] As one commentator explains:

> Revocation of the exempt status of a charitable organization that is intervening in political campaigns will not prevent abuse. The revocation process is long and difficult, revocation generally would be initiated after tax-free money has already been expended in the electoral process and after the charitable organization has attempted to accomplish its political purpose, and the promoters of the charitable organization are not restrained from the creation of a new organization to carry on the political activities.[85]

Indeed, the IRS itself has explicitly recognized that revocation is an ineffective sanction.[86] So too, the penalties Congress created to supplement revocation are themselves "a mere formalism" that "is as meaningless as revocation of exemption."[87] And this of course further assumes that even if meaningful sanctions were available to impose, the IRS has the resources to police its standard, and that it sets its priorities to do so. But "[p]olicing exempt organizations is something of a sideline for the IRS; '[t]he Service doesn't like it because it doesn't raise

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standard, will help identify charitable organizations that attempt to influence the outcome of elections." *Id.* at 108 (emphasis added).

[84] Francis R. Hill, *Newt Gingrich and Oliver Twist: Charitable Contributions and Campaign Finance*, 66 Tax Notes 237, 246 (Jan. 1995) (PX 186).

[85] Simmons, *supra* n.83, at 108; *see also* Hill, *supra* n.84, at 246 ("A section 501(c)(3) organization that loses its exempt status is required to dissolve and to transfer its assets to another section 501(c)(3) organization. If a political charity loses its exempt status, which is a protracted administrative process, those involved in the imperiled organization can simply establish a new organization, generally with a slightly altered board of directors, and, when the former organization's exemption is revoked, transfer any remaining assets to its successor. In this process, the organization itself can determine which section 501(c)(3) organization will receive its assets.").

[86] In a preamble to proposed regulations implementing new excise taxes for non-complying organizations, the IRS stated: "Congress enacted sections 4955, 6852 and 7409 because it determined that revocation of exemption was not a sufficient sanction to enforce effectively the prohibition on political intervention by section 501(c)(3) organizations. For example, if an organization engaged in significant, uncorrected political intervention, revocation could be ineffective as a penalty or deterrent, particularly if the organization used all its assets for political intervention and then ceased operations." 59 Fed. Reg. at 64,359-60 (PX 195).

[87] Hill, *supra* n.84, at 248.

revenue.'"[88] And government statistics bear this out. Although there were more than 850,000 Section 501(c)(3) groups operating in 2001, a total of only 96 organizations had their charitable status revoked in the six-year period from 1996-2001, and of these, only 16 were penalized for conducting non-exempt activities.[89]

The Commission's regulation, however, makes the enforcement of Title II-A entirely contingent on IRS enforcement of the tax law. It states that "if the Internal Revenue Service were to determine that an organization had 'acted outside its 501(c)(3) status,'" then the Commission's Title II-A regulation "would not shield it from application of the 'electioneering communication' rules." FEC Mem. at 70. This "if and only if" position reveals that the Commission is relying in the first instance on action by the IRS for enforcement of Title II-A, and thus abdicating its responsibility to "administer [and] seek to obtain compliance with" the campaign finance laws. 2 U.S.C. § 437c(b)(1).[90]

Finally, the Commission justifies the *per se* exemption for Section 501(c)(3) organizations because of the "chilling effect" on speech that inclusion within the Title II-A rules

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[88] Laura Brown Chisolm, *Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-exempt Organizations by Politicians*, 51 U. Pitt. L. Rev. 577, 593 (Spring 1990) (quoting former IRS Commissioner Sheldon Cohen) (PX 185).

[89] *See* GAO, Political Organizations: Data Disclosure and IRS's Oversight of Organizations Should Be Improved, GAO-02-444 (July 2002) at 44 (Table 5) (Number of Section 501(c) Tax-Exempt Organizations, Fiscal Years 1995-2001), and 48 (Table 9) (Revocations of Section 501(c)(3)-(6) Tax-Exempt Status, Fiscal Years 1995-2001) (PX 193); *see also* GAO, Tax-Exempt Organizations: Improvements Possible in Public, IRS and State Oversight of Charities, GAO-02-526 (Apr. 2002) at 68 (Table 21) (Primary Reasons for Revocations by Fiscal Year, 1996-2001) (PX 192). The GAO notes that the "IRS has not kept up with growth in the charitable sector. IRS staffing for overseeing tax-exempt organizations fell between 1996 and 2001 while at the same time the number of new applications for tax exemption and the number of Forms 990 filed increased." GAO-02-526 at 20. Thus, "the resources devoted to oversight dropped for fiscal years 1996 through 2001." *Id.* at 22.

[90] The Commission's General Counsel specifically advised against the Commission creating the Section 501(c)(3) exemption precisely because "the civil enforcement of BCRA lies within the jurisdiction and responsibility of this Commission and *cannot be left to another agency's policing of those subject to another statute.*" Agenda Doc. No. 02-68, "Final Rule, Interim Final Rule, and Explanation and Justification for Electioneering Communications," Sept. 24, 2002, at 49 (emphasis added) (PX 24).

might occasion. FEC Mem. at 70. This argument, of course, proves too much, for it would support an exemption from Title II-A for *any* group within its provisions: all Section 501(c)(4) organizations, for instance. And the "chill" is itself imagined: in rejecting a constitutional challenge to the Title II-A definition of "electioneering communication," the Supreme Court found that term to be "both easily understood and objectively determinable." *McConnell,* 124 S. Ct. at 689. Although the Commission argues that Section 501(c)(3) groups somehow uniquely "need particularly clear guidance," FEC Mem. at 70, the statute itself provides it. The Commission claims, correctly, that its *per se* exemption for charities provides a bright line, but this turns the test on its head. Any exemption to be drawn by the Commission under its clause (iv) authority must indeed provide a clear test. But not *any* clear test is a permissible exemption. *See especially Orloski v. FEC*, 795 F.2d at 164-65 (FEC may not use "objective, bright-line test[s]" if such tests "*unduly compromise the Act's purposes*" or "*create the potential for gross abuse*") (emphasis added). The *per se* exemption for Section 501(c)(3) organizations, although clear, is contrary to the statutory language and to the pellucid intent of Congress, and invites massive circumvention and abuse.

B. The "For A Fee" Exemption Violates Congressional Intent And Invites Gross Abuse And Circumvention.

The Commission's major argument in support of its narrowing of the definition of "electioneering communication" to only those broadcasts disseminated "for a fee," 11 C.F.R. § 100.29(b)(3)(i), is that such unpaid communications did not play "any significant role" prior to BCRA. FEC Mem. at 64. Yet as the Supreme Court said in a related context, Congress was entitled to "anticipate and respond to concerns about circumvention" of the campaign finance laws. 124 S. Ct. at 628. Simply because unpaid broadcast advertisements, such as public service announcements (or PSAs), were not a major avenue of abuse in the past does not mean that

Congress could not fairly include them within the scope of Title II-A in order to anticipate and forestall their becoming so in the future.[91]

The Commission itself acknowledged in its E&J that PSAs "could be easily abused by ... associat[ing] a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate." 67 Fed. Reg. at 65,202 (PX 2). For this reason, the Commission correctly concluded that PSAs "are appropriately subject to the electioneering communications provisions in BCRA." *Id.* But this rule now applies only when PSAs are broadcast "for a fee." When PSAs are broadcast without a fee — which the Commission recognizes is "generally speaking" the case, *id.* — they are exempted under the "for a fee" restriction. Thus, having acknowledged the potential abuse of PSAs, and on that basis having refused to create an exemption for them, the Commission nonetheless in a *de facto* fashion exempted the very same potentially abusive ads — but through another provision. This shows that the "for a fee" restriction is contrary to the scope of the Commission's exemption authority because it allows ads that the Commission recognizes could "promote, support, attack or oppose" a candidate.[92]

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[91] Technically, the Commission did not create an exemption under its clause (iv) authority here, but instead applied a limitation on the definition of the term "publicly distributed," which itself is an element of the definition of "electioneering communication." The Commission does, however, invoke its clause (iv) authority in support of the "for a fee" restriction. *See* FEC Mem. at 63. In any event, the fact that the Commission's rule opens the door to precisely the kinds of ads that clause (iv) explicitly prohibits should suffice as a basis for striking down the regulation.

[92] It is odd that the Commission now says that "neither the plaintiffs nor any other commenters offered any evidence to the Commission to support [the] conclusory assertion" that PSAs have shown federal candidates "in a 'favorable light,'" FEC Mem. at 64, when the Commission's E&J supports precisely this assertion, and indeed is the very basis the Commission relies on to *reject* a specific exemption for PSAs. 67 Fed. Reg. at 65,202. The Commission's brief is simply at war with its own E&J. *Compare* FEC Mem. at 66 ("there was no historical evidence that a federal candidate" had ever used a PSA to advance his candidacy) *with* 67 Fed. Reg. at 65,202 ("Other commenters explained that historically PSAs have been used for 'electorally related purposes' and that such communications are 'at the very heart of what the statute is trying to get to.'"). And while the brief argues that a rule including PSAs within Title II-A would mean they might not be run "for large parts of the election year," FEC Mem. at 66, the E&J notes that, even without an exemption, "an enormous array of communications could still promote PSA subject matters during the periods before elections, so long as Federal candidates are not clearly identified." 67 Fed. Reg. at 65,202.

The Commission claims that the "for a fee" restriction is justified because the statute's basic purpose is "to regulate the way in which campaign speech is *financed,* not to bar such speech itself." FEC Mem. at 63 (emphasis in original). This *non sequitur* ignores that there are multiple elements of "financing" a broadcast ad apart from the money used to pay for its distribution: a corporation or union could pay large sums for polling to test the message of an ad, the costs of political consultants to craft the ad, and the production costs of actually making the ad, quite apart from the money paid for simply "broadcasting" the ad. The Commission's exemption focuses only on the last element of financing, thus opening a loophole through which corporate and union funds can be used in promoting or attacking candidates while escaping Title II-A's requirements.[93]

Finally, the Commission recognizes, FEC Mem. at 65, that the statutory exemption for any "news story, commentary or editorial," 2 U.S.C. § 434(f)(3)(B)(i), is more than sufficient to encompass and exempt references to federal candidates in either documentaries or entertainment shows, particularly given that the Commission has now explicitly construed the exemption to do so. *See* FEC Advisory Op. 2003-34 (PX 116) (holding that this exemption covers incidental references to federal candidates in entertainment shows).[94] If there remains any "lack of

[93] By analogy, the Commission has never construed 2 U.S.C. § 441b(a), which prohibits corporate or union spending "in connection with" a federal election, to mean that a corporation or union could use treasury funds to pay for all of the costs of preparing and producing a broadcast ad so long as it then used PAC funds to pay for the costs of the broadcast itself. Such an interpretation would be absurd.

[94] Strikingly, in arguing that the "commentary" exemption does not cover entertainment programming, *amicus* OMB Watch fails even to acknowledge this recent advisory opinion which directly holds that it does. *See* Br. at 9. OMB Watch separately makes the odd argument that a broadly construed "commentary" exemption would allow "outside entities" to pay for re-airing "electioneering communications" that fall under the "commentary" exception. *Id.* at 6. But this is surely wrong. The FEC has long interpreted the press exemption to cover only a legitimate press entity which is acting in its capacity as press, *i.e.*, "acting in its 'legitimate press function.'" FEC Advisory Op. 2003-34 (quoting *Reader's Digest Ass'n v. FEC,* 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)); *see also FEC v. Phillips Publ'g, Inc.* 517 F. Supp. 1308, 1312-13 (D.D.C. 1981). Thus, the suggestion made by OMB Watch, Br. at 7, is flatly wrong that "a large corporation" which is not a press outlet could pay "television stations to re-air" an electioneering communication which is exempt as press commentary when aired by the press.

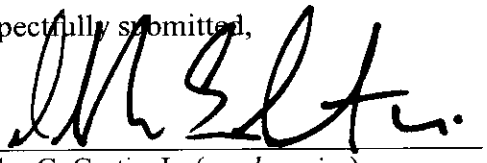
certainty on this point," FEC Mem. at 65, another broadcaster is free to seek yet another advisory opinion in which the Commission can again clarify this point. Certainly, the speculation of "chilling" in this context does not justify the Commission's major constriction of the statute.

Conclusion

For all of the reasons set forth above and in plaintiffs' opening submission, this Court should deny the Commission's motion for summary judgment, grant plaintiffs' motion for summary judgment, and enter the revised proposed order that accompanies this memorandum in opposition. For authority supporting the proposed relief, *see* Pls.' Mem. at 90 n.150.

Dated this 31st day of March, 2004.

Respectfully submitted,



Roger M. Witten (Bar No. 163261)
David A. O'Neil (*pro hac vice*)
WILMER CUTLER PICKERING LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800

Charles G. Curtis, Jr. (*pro hac vice*)
Michelle M. Umberger (Bar No. 480620)
Michael M. Markman
Sarah E. Reindl
HELLER EHRMAN WHITE & McAULIFFE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
(608) 663-7460

Randolph D. Moss (Bar No. 417749)
Stacy E. Beck (Bar No. 480540)
WILMER CUTLER PICKERING LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Brent N. Rushforth (Bar No. 331074)
Carl S. Nadler (Bar No. 395279)
Martina M. Stewart
HELLER EHRMAN WHITE & McAULIFFE LLP
1666 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 912-2000

Donald J. Simon (Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Fred Wertheimer (Bar No. 154211)
Alexandra Edsall (Bar No. 453518)
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, D.C. 20006
(202) 429-2008

Attorneys for Plaintiffs Christopher Shays and Martin Meehan