



All of the exhibits which are the subject of this motion are identified and authenticated in the accompanying Declaration of Michelle M. Umberger in Opposition to FEC's Motion for Summary Judgment ["Second Umberger Decl."]. Further support for this motion is set forth in the following memorandum.

#### MEMORANDUM IN SUPPORT OF MOTION

Each of the new exhibits tendered with this motion is material to plaintiffs' opposition to the Commission's motion for summary judgment. Because the underlying record, judicial notice, and other exhibit issues were extensively briefed in connection with plaintiffs' earlier motion and the Commission's corresponding motion to strike, we largely confine ourselves to a discussion of which categories the new exhibits fall into.

*First*, PXs 30-31 are additional excerpts from the Commission's administrative record, filed pursuant to this Court's January 8, 2004 Order at 1-2 (Dkt. No. 16). *See* Second Umberger Decl. ¶¶ 2-3.

*Second*, PXs 183-184, 190-191, and 194-196 are the same kinds of exhibits as to which the Commission has raised no objections in response to plaintiffs' earlier motion. PXs 183 and 184 are excerpts from BCRA's legislative history as published in the *Congressional Record*; PXs 190 and 191 are FEC Advisory Opinions; and PXs 194-196 are the Commission's own rules and proposed rules as published in the *Federal Register*. *See* Second Umberger Decl. ¶¶ 4-5, 8. It is appropriate to consider all of these materials for the reasons set forth in Plaintiffs' Mot. *Re* Exhibits at 3-4.

---

the record filed by the Commission are numbered in sequence beginning with PX 100. Thus, PXs 30 and 31 are two additional excerpts from the Commission's record, and PXs 183-196 are additional non-record materials that plaintiffs believe may appropriately be considered by the Court.

*Third*, PXs 185-189 are law review articles dealing with the issues of informational standing (*see* PX 187) and the Internal Revenue Service's regulation of political spending by Section 501(c)(3) organizations (*see* PXs 185-186 and 188-189). *See* Second Umberger Decl. ¶ 5. It is perfectly appropriate for the Court to consider law review literature in deciding how best to resolve the legal issues presented in this action. *See* Pls.' Mot. *Re* Exhibits at 3-5; Pls.' Mem. in Opp. to Mot. to Strike at 9-10, 12.

*Fourth*, PXs 192-193 are General Accounting Office reports containing statistical information about the Internal Revenue Service's regulation of Section 501(c)(3) organizations. *See* Second Umberger Decl. ¶ 7. These GAO data are no different in nature from the IRS statistical data the Commission has included in its summary judgment submission. *See* FEC Summ. J. Mem. at 67 & n.24 (Dkt. No. 27). There is no reason why the Court should take judicial notice of government data showing how many Section 501(c)(3) organizations there are (as the FEC requests), but not take judicial notice of government data showing how many such groups have had their charitable status revoked by the IRS or otherwise have been penalized for conducting non-exempt activities (as plaintiffs request). *See* Pls.' Mem. in Opp. to FEC Mot. for Summ. J. at 56 & n.89. The Commission may not have it both ways.

*Finally*, plaintiffs note for the Court that, in addition to the new exhibits which are the subject of this motion, their memorandum in opposition to the Commission's motion for summary judgment also cites to several of the exhibits plaintiffs cited in their opening summary judgment submission, and which are the subject of the pending motion regarding consideration of exhibits (Dkt. No. 30). Plaintiffs will not repeat the arguments in favor of considering those earlier exhibits.

CONCLUSION

For these reasons, the Court should consider Plaintiffs' Exhibits 30-31 and 183-196. The Court should take judicial notice of these materials to the extent required.

Dated this 31<sup>st</sup> 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*

## APPENDIX A

### Supplemental Exhibits in Support of Plaintiffs' Opposition to Defendant FEC's Motion for Summary Judgment

#### Exhibits From The Certified Administrative Record:

- PX 30 June 4, 2002 Transcript of Public Hearing on Proposed Rulemaking on Prohibited and Excessive Contributions Non-Federal Funds or Soft Money (Doc. No. 66)
- PX 31 Oct. 11, 2002 Comments of AFL-CIO (Doc. No. 265)

#### Additional Exhibits:

- PX 183 148 Cong. Rec. E178-179 (Feb. 15, 2002)
- PX 184 148 Cong. Rec. S1992 (Mar. 18, 2002)
- PX 185 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 (Spring 1990)
- PX 186 Frances R. Hill, *Newt Gingrich and Oliver Twist: Charitable Contributions and Campaign Finance*, 66 Tax Notes 237 (Jan. 1995)
- PX 187 Cass. R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613 (Jan. 1999)
- PX 188 Robert Paul Meier, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. Pa. L. Rev. 971 (Apr. 1999)
- PX 189 Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 Fla. L. Rev. 1 (Jan. 2002)
- PX 190 FEC Advisory Opinion 1978-50
- PX 191 FEC Advisory Opinion 1978-28
- PX 192 GAO, *Tax-Exempt Organizations: Improvements Possible in Public, IRS, and State Oversight of Charities*, GAO-02-526 (Apr. 2002)
- PX 193 GAO, *Political Organizations: Data Disclosure and IRS's Oversight of Organizations Should be Improved*, GAO-02-444 (July 2002)

- PX 194      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)
- PX 195      Public Financing of Presidential Primary and General Election Candidates; Proposed Rules, 59 Fed. Reg. 64,351 (Dec. 14, 1994)
- PX 196      Political Committee Status; Proposed Rule, 69 Fed. Reg. 11,736 (Mar. 11, 2004)