ORAL ARGUMENT NOT YET SCHEDULED

Nos. 07-5360, 07-5361

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS,

Plaintiff-Appellee,

vs.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

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

PRINCIPAL AND RESPONSE BRIEF FOR CHRISTOPHER SHAYS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES (D.C. Cir. R. 28(a)(1))

(A) Parties and *Amici*. All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the brief for the Federal Election Commission. As the Commission notes, Martin Meehan was a co-plaintiff in the District Court but has since resigned from Congress.

(B) Ruling Under Review. References to the ruling at issue appear in the brief for the Federal Election Commission.

(C) Related Cases. There are no "related cases," as that term is defined in this Court's Rule 28(a)(1)(C), currently pending in this or any other Court. The Commission is correct that an earlier version of 11 C.F.R. 109.21(c)(4) was previously before this Court in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I*"). The Commission omits that earlier versions of several other challenged regulations—specifically, 11 C.F.R. 100.24(a)(2)-(3) and 300.64(b)—were also initially before this Court in *Shays I* by virtue of the cross-appeal filed by Representatives Shays and Meehan from the District Court's judgment in that case. *See* No. 04-5373. Plaintiffs voluntarily dismissed their cross-appeal, however, when the Commission announced that it would not appeal the District Court's rulings with respect to 11 C.F.R. 100.24(a)(2)-(3) and 300.64(b) (among other regulations) and would instead initiate new proceedings on those rules. Given the Commission's election not to appeal on those regulations and to initiate new proceedings instead, plaintiffs' cross-appeal was no longer ripe. *See, e.g.*, *EPA v. Brown*, 431 U.S. 99, 103-04 (1977); *McConnell v. FEC*, 251 F. Supp. 2d 176, 260-64 (D.D.C.) (three-judge District Court) (per curiam), *aff'd*, 540 U.S. 93, 223 (2003). Plaintiffs accordingly moved on November 23, 2004 for voluntary dismissal of their cross-appeal in No. 04-5373, and this Court granted that motion in a December 2, 2004 Order.

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GLOSSARY

AO	=	FEC Advisory Opinion
APA	=	Administrative Procedure Act
AR	=	Administrative Record
BCRA	=	Bipartisan Campaign Reform Act of 2002
BR	=	Initial Brief for the Federal Election Commission (Jan. 15, 2008)
CCPBR	=	*Amicus* Brief for the Center for Competitive Politics (Jan. 24, 2008)
CMAG	=	Advertising data licensed by the FEC from TNS Media Intelligence/CMAG
D	=	Democratic
DCCC	=	Democratic Congressional Campaign Committee
DMA	=	Designated Market Area
DNC	=	Democratic National Committee
E&J	=	Explanation & Justification
FEA	=	Federal election activity
FEC	=	Federal Election Commission
FECA	=	Federal Election Campaign Act
GOTV	=	Get-out-the-vote
JA	=	Joint Appendix
MUR	=	FEC Matter Under Review
NARAL	=	National Abortion Rights Action League
NPRM	=	Notice of Proposed Rulemaking
NRSC	=	National Republican Senatorial Committee
PAC	=	Political Action Committee

PX	=	Plaintiffs' Exhibit submitted in support of motion for summary judgment, D.D.C. Dkt. No. 18
R	=	Republican
RGA	=	Republican Governors' Association
RNC	=	Republican National Committee
SJA	=	Supplemental Joint Appendix

Jurisdictional Statement

The Commission's Jurisdictional Statement is correct. Following the Commission's October 16, 2007 notice of appeal, plaintiff filed a timely notice of cross-appeal on October 23, 2007. JA120-21.

Issues Presented

In addition to the five issues presented by the Commission, plaintiff presents a sixth: Whether the regulation governing solicitation at state party fundraising events, 11 C.F.R. 300.64(b), is lawful.

Statutes and Regulations

Except for the statutes and regulations included in this brief's Addendum, all applicable statutes and regulations are found in the Addendum to the Commission's principal brief.

Statement of Facts

The Commission's Statement of Facts contains several significant errors. For example, the Commission claims that *Shays I* held that the prior coordination "content" regulation "passed both steps of *Chevron*." BR4. In fact, this Court emphasized that it "affirm[ed] the district court's invalidation on APA grounds without reaching *Chevron* step two." *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005); *see also id.* at 97 ("we need not decide" *Chevron* step two).

The Commission also omits material details about the remand. It moved in October 2004 to stay the District Court's mandate in *Shays I* so that it would not have to undertake new rulemakings while the case was on appeal, but the District Court denied that motion and ordered the Commission to develop "new, fully compliant regulations" that would be "ready for immediate implementation after the expiration of its appeals process," *in time for the 2006 election cycle*. 340 F. Supp. 2d 39, 51 (D.D.C. 2004). The Commission did not appeal from this order. Instead, over plaintiff's repeated objections, it delayed for another *fourteen months* before

even beginning a rulemaking on the coordination issues in December 2005—*after* the appeal process was over. JA291-304.

Having granted itself the stay that the District Court denied, the Commission then conducted a rushed rulemaking that cut many corners. For example, after the close of the public comment period, the record evidence demonstrated that many campaign ads in recent election cycles have been aired far outside the Commission's 120-day pre-election windows. *See* pp. 13-20 *infra*. Lacking *any* record support for its short pre-election windows, the Commission at the *end* of the process *sua sponte* introduced into the record an enormous mass of selected new data that it had licensed from TNS Media Intelligence/CMAG ("CMAG") regarding some TV ads run by candidates during a portion of the 2004 election cycle. It issued a Supplemental NPRM that gave interested parties only *five business days* to analyze and comment on this massive new data set. JA372. Although commenters pointed out many glaring defects in the Commission's proposed use of the CMAG data (SJA548-60), the Commission barreled ahead, relied solely on these data, and dismissed all other record evidence as "unscientific" and "anecdotal" rather than "empirical." JA421; BR14.

Turning to the cross-appeal, plaintiff challenges the Commission's regulation regarding solicitations by federal officeholders and candidates at state party fundraisers. 11 C.F.R. 300.64(b). The District Court observed in *Shays I* that this regulation "likely contravenes what Congress intended" and "creates the potential for gross abuse," and struck the regulation down under the APA because the Commission had not provided a rational explanation. *Shays v. FEC*, 337 F. Supp. 2d 28, 91 (D.D.C. 2004). After issuing a new NPRM and taking comments on remand, the Commission stood by the challenged rule and issued a revised E&J. JA276-79, 285-90.

Summary of the Argument

This Court should review the District Court's grant of summary judgment *de novo*, affirm the judgment with respect to all issues raised in the Commission's appeal, and reverse the judgment with respect to the single issue raised in plaintiff's cross-appeal, the legality of 11 C.F.R. 300.64(b).

A. The revised coordination "content" standards, 11 C.F.R. 109.21(c), continue to violate *Chevron* step two and the APA. They fail in numerous respects to respond adequately to this Court's instructions in *Shays I*, and continue to authorize a "coordinated communication free-for-all" for most of each election cycle. 414 F.3d at 99-100. They fail to capture the "universe of electorally oriented communication," and authorize unrestricted coordinated advertising outside of their small pre-election windows so long as the ads avoid express advocacy and the republication of campaign materials—"functionally meaningless" standards in this context. *Id.* at 100. Neither the relevant statutory provisions, their legislative history and purposes, First Amendment concerns, nor the administrative record justify the "weak restraints" that the Commission continues to apply to early coordinated campaign advertising. *Id.*

B. The coordination "conduct" standards, 11 C.F.R. 109.21(d), (h), also violate *Chevron* step two and the APA. They authorize former campaign employees and vendors to share *material* inside information with outside spenders so long as more than 120 days have passed since their campaign affiliation. The rules also create a vague, undefined "safe harbor" that shields outside spenders from meaningful regulation so long as they claim to use an "effective firewall" with respect to their employees and vendors who possess material inside campaign information. Both of these loopholes undermine FECA and BCRA, and neither has been reasonably explained or justified by the Commission.

C. So too with the FEA regulations defining "voter registration activity" and "get-out-the-vote activity." 11 C.F.R. 100.24(a)(2)-(3). These narrow definitions purport to exempt many of the most far-reaching and sophisticated voter registration and GOTV activities—including automated telephone calls and mass mailings encouraging people to register and vote made just days before an election in which federal candidates are on the ballot—from the scope of FEA, thereby undermining Congress's goal of preventing state and local parties from using soft money to fund such activities. Nor has the Commission offered a "reasoned analysis" in support of its constricted definitions.

D. The regulation authorizing federal officeholders and candidates to engage in unrestricted solicitation and direction of soft money while attending state and local party fundraisers, 11 C.F.R. 300.64(b), fails under both prongs of *Chevron* as well as the APA. It violates BCRA's statutory language, structure, purposes, and legislative history, and creates the potential for gross abuse. The Commission's claim that a more rigorous regulation might violate the First Amendment is unconvincing given that the Commission routinely provides guidance about how federal officeholders and candidates can attend and speak at *other* types of fundraisers without engaging in forbidden soft money fundraising.

Argument

I. Standards of Review.

The most pertinent standards of review are in this Court's *Shays I* opinion. The state party fundraiser regulation violates *Chevron* step one because it "runs counter to the 'unambiguously expressed intent of Congress,'" as expressed through "'the statute's text, legislative history, and structure[,] as well as its purpose.'" 414 F.3d at 96, 105 (citations omitted); *see also id.* at 105-09.

All of the challenged regulations also violate *Chevron* step two because they are "unreasonable" interpretations. *Id.* at 96. They "are inconsistent with the statutory mandate [and] frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). They also repeatedly ignore this Court's admonition that the Commission may not use "objective, bright-line test[s]" if such tests "*unduly compromise the Act's purposes*" or "*create the potential for gross abuse.*" *Orloski v. FEC*, 795 F.2d 156, 164-165 (D.C. Cir. 1986) (emphasis added).

All of the challenged regulations also violate the APA's standards of "reasoned analysis." The Commission repeatedly failed on remand to consider all relevant factors and rationally respond to the evidence before it, failed adequately to respond to this Court's concerns and instructions, failed to articulate its rationale or to justify its premises on key points, and failed to explain or even acknowledge striking departures from its prior positions. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 52 (1983). Instead, in this Court's words in *Shays I*, the Commission once again has issued E&Js that provide no "rational" or "cogent explanation[s]" for its actions, include numerous "bromides" rather than reasoned analysis, advance arguments that "make[] no sense," and fail to establish that its regulations "rationally separate[]" federal electioneering activities that Congress intended to regulate from other activities falling outside the scope of FECA and BCRA. 414 F.3d at 97, 100-02, 108, 112, 115; *see also RNC v. FEC,* 76 F.3d 400, 407-08 (D.C. Cir. 1996); *Chamber of Commerce v. FEC*, 69 F.3d 600, 606 (D.C. Cir. 1995) (rejecting E&J that "provides no explanation" for "differential treatment"); *Bush-Quayle '92 Primary Comm. v. FEC*, 104 F.3d 448, 453-54 (D.C. Cir. 1997) (rejecting E&J that "'glosses over' precedent and is essentially a bare assertion that the two cases are different").

II. The Revised Coordination "Content" Standards Remain Unlawful.

This Court in *Shays I* emphasized the "obvious" importance of FECA's coordination provisions: "Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly—say, paying for a TV ad or printing and distributing posters." 414 F.3d at 97. Congress and the courts have long recognized that, to be effective, any restrictions on "contributions" to a candidate or political party must also govern expenditures by outside spenders made in coordination with that candidate or party. *See Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (underscoring the importance of "prevent[ing] attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions"); *see also McConnell v. FEC*, 540 U.S. 93, 221 (2003) ("expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash'") (citation omitted). FECA's statutory language recognizes that coordinated expenditures are the functional equivalent of contributions: any "expenditure"—money spent "for the purpose of influencing any election for Federal office"—"shall" be subject to FECA's contribution limits, source prohibitions, and disclosure requirements if it is "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate or political party. 2 U.S.C. 431(9)(A)(i); 441a(a)(7)(B)(i)-(ii).

Congress in BCRA Section 214 repealed the Commission's existing coordination regulations as too lax. The Commission responded by promulgating new regulations containing various "content" and "conduct" standards that must be met before coordinated spending will be deemed to be a "contribution." Under the "content" standards, coordinated political ads run more than 120 days before an election are treated as "contributions" *only* if they contain "express advocacy" or republish a candidate's own materials, no matter how much actual collaboration occurs. This Court found that such "functionally meaningless" standards "allowed a coordinated

communication free-for-all for much of each election cycle." 414 F.3d at 100. By "resurrect[ing]" the express advocacy standard in the context of *coordinated* communications, the rule "allow[ed] unrestricted collaboration outside the 120 days so long as the communication's paymasters avoid magic words and redistribution" of campaign materials. *Id.* at 99. This would give a safe harbor to massive, unreported contributions by corporations, unions, foreign governments, and wealthy individuals in the guise of TV, radio, newspaper, Internet, and other advertising promoting a candidate and fully coordinated with him, run right up until 120 days before the election. As this Court bluntly observed (*id.* at 98):

> Under the new rules, more than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, "Why don't you run some ads about my record on tax cuts?" The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the "magic words" of express advocacy—"vote for," "vote against," "elect," and so forth—the ads won't qualify as contributions subject to FECA. Ads stating "Congressman X voted 85 times to lower your taxes" or "tell candidate Y your family can't pay the government more" are just fine.

This Court noted that "it seems hard to imagine that Representatives and Senators voting for BCRA would have expected regulations like these," and it emphasized that, if a coordinated communication is made "for the purpose of influencing" a federal election—the statutory standard—"the FEC *lacks discretion* to exclude that communication from its coordinated communication rule." *Id.* at 98-99 (emphasis added). This Court did not reach the *Chevron* step two issues, "because in any event the FEC has given no rational justification" as required by the APA. *Id.* at 97.

A. The "Weak Restraints" That Apply During Most of Each Election Cycle Continue To Be Unlawful.

The Commission's latest E&J and briefs read as if this Court gave the Commission only one assignment on remand: to identify and justify *when* a pre-election period of heightened

regulation of coordinated expenditures should begin. But as the District Court emphasized, this Court made clear that the Commission was required to address *two* distinct issues: (1) "the 120-day time-frame," and (2) "the weak restraints applying outside of it." 414 F.3d at 100; *see* JA95-96. As to the latter issue, this Court concluded that the "express advocacy" and "republication" tests are "weak restraints" that "allow[] unrestricted collaboration outside the 120 days," and that give a "safe harbor" to "a coordinated communication free-for-all for much of each election cycle." 414 F.3d at 99-100; *see* SJA517. The Commission would have to demonstrate on remand, through evidence and "cogent explanation," why it "deem[s] these two categories adequate by themselves to capture the universe of electorally oriented communication outside the 120-day window." 414 F.3d at 100. In other words, it had to establish that these two categories "*rationally separate[] election-related advocacy from other activity falling outside of FECA's expenditure definition.*" *Id.* at 102 (emphasis added). The Commission had to prove—no matter where it drew the time line for heightened regulation—that coordinated nonexpress advocacy beyond that line "*likely relates to purposes other than 'influencing' a federal election*—the line drawn by the statute's 'expenditure' definition, 2 U.S.C. § 431(9)(A)." 414 F.3d at 101 (emphasis added).

The Commission's arguments, on their face, do not meet this mandate. Rather than seeking "to capture the *universe* of electorally *oriented* communication outside the 120-day window," the Commission merely claims that its revised rule captures "nearly all" political ads and excludes only a "small number" of early ads. *Compare* 414 F.3d at 100 (emphasis added) *with* BR19, 26; JA422-23. Nor does the Commission even attempt to demonstrate that coordinated nonexpress advocacy occurring outside its pre-election windows "*likely* relates to purposes other than 'influencing' a federal election." 414 F.3d at 101 (emphasis added).

The Commission admits that FECA, including the dictate that coordinated expenditures are to be treated as "contribution[s]," 2 U.S.C. 441a(a)(7)(B), applies to media advertising that is run "for the purpose of influencing any election for Federal office" 365 days a year, every year of the election cycle, without *any* temporal limitation, *id.* 431(9)(A)(i). If such a temporal limitation could be found in FECA, the Commission would have no statutory authority to regulate even coordinated express advocacy ads outside its pre-election windows. But the Commission concedes that such ads are subject to FECA and BCRA "*at any time*" and "*no matter when such communications are made*," because such ads "*can be reasonably construed only as for the purpose of influencing an election.*" JA420 (emphasis added). The Commission thereby concedes that *some* ads run outside its pre-election windows *do* have value to candidates and thus *do* present a risk of corruption or the appearance of corruption if they are coordinated. The question then becomes whether the Commission is correct that early ads are "effective" and of "value" to a candidate *only* when they contain express advocacy or republish campaign materials. JA425; BR17. There is no support for such a proposition, and abundant record evidence against it.

Although ads containing express advocacy are surely subject to regulation as "contributions" when they are coordinated with a candidate or party, express advocacy does not mark either the statutory or constitutional limit of the permissible regulation of such coordinated spending. In the context of *independent* spending, the Supreme Court has recently held that only express advocacy and its "functional equivalent" can be subject to FECA's source prohibitions. *FEC v. Wis. Right to Life* ("*WRTL*"), 127 S. Ct. 2652, 2667 (2007). But no court has ever held that a similarly limited standard applies in the very different context of *coordinated* expenditures. Indeed, this Court has held just the opposite. *See Orloski v. FEC*, 795 F.2d at 167 ("To be sure,

the [Supreme] Court limited these definitions [regarding express advocacy] to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those provisions limiting contributions, *see Buckley* at 78-80[.]"); *see also FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 88 (D.D.C. 1999) ("[I]mporting the 'express advocacy' standard into § 441b's contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions.").[1]

The Commission has failed to carry its burden of demonstrating why its revised rule—which, for Presidential campaigns, maintains the *same* 120-day pre-primary period as the rule invalidated in *Shays I*, and for Congressional campaigns, *shrinks* the applicable time frame from 120 to 90 days—will not, outside those periods, authorize the same "coordinated communication free-for-all" condemned in *Shays I*. 414 F.3d at 99-100. The undeniable legal effect of the Commission's rule is that any spender—a corporation, labor union, wealthy individual, or even foreign government—can freely collaborate with a candidate on the text, timing, or target

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[1] Thus, the Commission's contention that its "express advocacy" definition is "broader than the wooden test of 'magic words' found wanting in *McConnell*," BR24 n.7 (citing 11 C.F.R. 100.22), even if true, misses the mark in this case, which is about *coordinated* rather than *independent* spending. The reference is presumably to subsection (b) of that rule, which codifies the so-called "*Furgatch* test" for defining express advocacy. *See FEC v. Furgatch,* 807 F.2d 857 (9th Cir. 1987). *Furgatch* express advocacy must contain an "electoral" message that is "unmistakable, unambiguous, and suggestive of only one meaning," and must "encourage[] *actions to elect or defeat*" a clearly identified candidate. 11 C.F.R. 100.22(b) (emphasis added). As the Commission emphasized in its E&J for subsection 100.22(b), it is not enough to meet this test that an ad "discuss a candidate's character, qualifications, or accomplishments," such as stating "that the candidate has been caring, fighting and winning for his or her constituents," or that the candidate has "miss[ed] many votes" or committed "specific acts of misfeasance or malfeasance while in office." JA125. Thus, under the Commission's approach, outside spenders could fund these kinds of ads in full coordination with candidates and parties without being subject to FECA's contribution limits, source prohibitions, or disclosure requirements.

audience of an ad campaign, and spend an unlimited amount of undisclosed soft money at the direct behest of the candidate to run those ads outside the regulation's time frame, no matter how overtly the ads promote the candidate or attack his opponent, so long as the ads avoid express advocacy.

B. Substantial Record Evidence Demonstrates That the Content Standards Do Not Capture the "Universe" of Early Campaign Advertising.

The Commission attempts to justify its content standards by arguing that, as an "empirical" matter, (1) "*effective* political party, Congressional, and Presidential election-related advertising" does not "occur[]" outside the revised 90- and 120-day pre-election windows; (2) ads run outside of these windows are of "*little*" or "*minimal* value" to candidates; (3) ads using nonexpress advocacy are "*unlikely to be for the purpose of influencing Federal elections*" if run outside these windows; and (4) such ads "therefore do not present the potential for corruption or the appearance of corruption that BCRA and [FECA] intend to prevent." JA423, 425-26 (emphasis added).

This so-called "empirical" analysis ignores the Commission's own data and extensive other record evidence showing that early advertising often has substantial value to candidates; that candidates, political parties, and outside spenders sometimes spend millions of dollars on such early advertising; and that such ads often use nonexpress advocacy but are nevertheless clearly run "for the purpose of influencing" a federal election.

1. The Commission's Own Data Show That Substantial Campaign Advertising Occurs Outside Its Pre-Election Windows.

The Commission's own CMAG data undermine its claim that early campaign advertising lacks any "value." For example, the Commission's data show that 8.56% of all TV ads run by candidates in 2004 House primary races fell outside the 90-day pre-primary window. SJA452. Similarly, 8.44% of all candidate TV ads run prior to the 2004 Presidential primaries/caucuses in

the selected media markets studied by the Commission were outside the 120-day pre-election window. SJA451. In addition, fully *sixteen percent* of all Presidential candidate TV ads run in Iowa before the January 2004 caucuses were aired outside the Commission's 120-day pre-caucus window. *See* JA446-447, 498.

The Commission nowhere attempts to explain why 8% of all House primary advertising, 8% of all pre-primary Presidential advertising, and *16%* of all pre-caucus Presidential advertising in Iowa are somehow *de minimis* amounts. Even using the Commission's substantially underinclusive data, these figures logically translate to thousands of ads and millions of dollars outside the pre-election windows. As the District Court found, for example, the Commission's subset of CMAG data shows that Presidential candidates spent $486,709 on TV advertising in Iowa more than 120 days before the January 2004 caucuses. JA83. The true amount of spending on early political advertising was indisputably much larger, given that (1) the Commission only included the Cedar Rapids and Des Moines Designated Marketing Areas ("DMAs") in its figures, and excluded TV ads broadcast from stations in Davenport, Sioux City, Mason City, and Waterloo; and (2) the Commission omitted all forms of non-TV advertising such as radio, Internet, newspaper, and mass mailings. *See* JA385, 387-90, 421. Under the Commission's rules, all of this early pre-caucus advertising in Iowa could have been run by corporations, unions, wealthy individuals, and even foreign governments working in close coordination with the candidates, without being subject to FECA's contribution limits, source prohibitions, or disclosure requirements, so long as the ads avoided express advocacy or the republication of campaign materials.[2]

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[2] Similarly, according to the Commission's analysis of a subset of CMAG data, a total of $802,544 was spent by Presidential candidates on TV advertising outside the 120-day window in the subset of markets it examined. *See* JA96-97, 382 (4.89% of $16,411,945). By extrapolation,

(Footnote continued)

The Commission is also inconsistent in what it treats as a "substantial" versus a "minimal" expenditure. For example, it justifies its decision to close the Presidential election-year "gap period"—the period between the primary and the beginning of the pre-general election window—by noting that 14% of President Bush's 2004 post-primary TV advertising occurred during that period, a figure the Commission deems "appreciable." JA424; BR16. Why is 14% an "appreciable" number but 16%—the percentage of Presidential candidate TV ads run in Iowa more than 120 days before the 2004 caucuses—a "minimal" and "very small number"? BR17, 26. Similarly, the Commission explains that it closed the Presidential election-year gap period in part because "Democratic Presidential candidates spent $1,221,045" during that period. JA424-25; BR16. Why is that an "appreciable" sum, but not the millions of dollars spent during the pre-primary windows? *See* n.2 above. The Commission's unexplained inconsistencies reinforce the illegality of its revised content rule.

2. The Commission Ignored Extensive Record Evidence of Early Campaign Advertising.

As the District Court discussed, the administrative record before the Commission included evidence "describing the scripts, timing, cost, and strategy of 236 television and radio advertisements by federal candidates, political parties, and outside interest groups from the 2004 and 2006 congressional elections and the 2000 and 2004 presidential elections." JA79; *see*

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this suggests pre-window Presidential advertising expenditures of at least several million dollars nationwide (again, excluding all forms of advertising other than TV). The figures in JA382 only reflect TV ads in a small subset of 23 DMAs—those media markets fully contained within a single "battleground" state's boundaries. This excludes the vast majority of the 101 media markets monitored by CMAG (including many of the largest and most expensive media markets like New York, Los Angeles, Chicago, Houston, *et al.*), together with all spending that occurs outside of CMAG-monitored markets or through all paid media other than over-the-air TV. Thus, the $802,544 in early TV ads in 23 DMAs logically translate into total early TV advertising of several million dollars.

JA79-80, 315-59, 453-96; SJA546-60; AR1011-1429, 2071-98. This evidence responds directly to the Commission's request in its NPRM for "examples of communications from previous election cycles demonstrating that an alternative may be either underinclusive or overinclusive," and information as to whether "early electoral communications, for example, that occur more than 120 days before an election, have an effect on election results." JA294; *see* JA78. Although the Commission dismisses these compendia of early ads as "unreliable" and "unscientific," the District Court correctly concluded that there was no dispute that these were actual ads that were actually run and actually paid for. "[T]hey provide irrebuttable evidence that candidates produce advertisements outside the pre-election windows—presumably for the purpose of influencing federal elections." JA96. Nor did the Commission make any effort to show that *any* of these early ads—many of which ran six months or a year before the relevant primary or caucus—"were aired for purposes *other than* influencing federal elections." JA97.

a. Early Presidential campaign advertising.

The 1995-96 campaign.[3] After the Democrats lost control of Congress in the 1994 mid-term elections, President Clinton and the DNC turned to early TV advertising in the critical swing states. The Clinton/Gore '96 Primary Committee, Inc., began broadcasting campaign ads in June 1995—eight months before the first primary—and spent $2.3 million on such ads between June 27 and July 24, 1995 alone. D.D.C. Dkt. No. 18, PX15 at 19, PX17 at 15. In mid-August 1995, the DNC began spending millions of dollars for heavy TV advertising in key battleground states in support of Clinton's reelection. *Id.*, PX15 at 19, PX16 at 50-51, PX17 at

[3] The District Court discounted the relevance of the 1995 Clinton-DNC advertising campaign because the "legal landscape in which federal candidates and outside spenders interact" has changed since then. JA92. That may be so, but it does not detract from the value of this evidence in demonstrating that candidates and their supporters sometimes spend millions of dollars outside the Commission's 120-day pre-election window.

9-16, 24, 31. The early TV ads were widely regarded as Clinton's "secret weapon" and "the key to success" in 1996 over Senator Dole.[4]

The 1999-2000 campaign. The first candidate ads in the next Presidential campaign cycle were run by Steve Forbes beginning in late March 1999 in Iowa and New Hampshire, nearly ten months before the Iowa caucuses. JA454. Mr. Forbes began a "national ad blitz" two months later, running millions of dollars of cable TV, radio, and newspaper ads during the summer of 1999. AR1025-27; JA455. Senator John McCain aired his first ads in June 1999, and Lamar Alexander began running TV ads the following month. JA457-58.

Political parties and interest groups also ran early ads. The Republican Leadership Council ran a series of TV ads in the spring and summer of 1999 ridiculing Democratic frontrunner Al Gore. JA456. Similarly, NARAL ran TV ads in Iowa and New Hampshire beginning in March 1999 attacking various GOP candidates—over ten months before the Iowa caucuses and New Hampshire primary. JA453.

The 2003-04 campaign. With President Bush assured of his party's renomination, the early primary advertising in the 2004 cycle took place among Democrats. Former Vermont Governor Howard Dean led the way with a $300,000 TV ad buy in Iowa that ran from June 17 through July 2, 2003—well over half a year before the Iowa caucuses. JA461; *see also* AR1105-06. Dean followed in August with extensive ad campaigns in many key primary states. AR 1070-71, 1075-76, 1087-88, 1094-95. The earliest primary in any of those states was over five

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[4] Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties*, at 138-39 (1997) ("Why did Clinton win so easily in 1996? Why did his lead hardly vary? What was his strength with the voters that Dole could never shake? In my opinion, the key to Clinton's victory was his early television advertising. ... Week after week, month after month, from early July 1995 more or less continually until election day in '96, sixteen months later, we bombarded the public with ads. ... This unprecedented campaign was the key to success.").

months after the ads began running. Four other Democratic candidates—Senators John Kerry and John Edwards, and Representatives Richard Gephardt and Dennis Kucinich—began broadcasting ads in strategic primary and caucus states between late July and early September 2003, well outside the 120-day window in any state. JA463-67; AR1079-83, 1091-93.

Parties and interest groups were also active once again in early political advertising. The DNC began airing ads attacking President Bush in July 2003, half a year before the first caucuses and nearly *sixteen months* before the general election. AR1096-97; *see also* JA468. The most notable outside spender was MoveOn.org, which began saturation advertising (10 times/daily) in mid-May 2003 of anti-Bush commercials on cable news channels in 21 markets throughout the country—eight months before the Iowa caucuses and *nearly a year* before the primaries in some of the targeted states. JA460, 462; AR1101-02, 1109-10. MoveOn.org continued in November 2003 with saturation TV advertising in nine battleground states—some of whose primaries were still well over four months away. JA469, AR1064-67. Under the Commission's "content" standard, all of these ads could have been closely coordinated with the DNC so long as they avoided express advocacy.

b. Early Congressional campaign advertising.

The record also includes dozens of examples of early Congressional campaign advertising. Some of these ads were run by incumbents perceived as being particularly vulnerable. For example, former Senate Majority Leader Tom Daschle (D-SD) began running 2004 reelection ads on TV on July 9, 2003, nearly eleven months before the South Dakota primary (in which he was unopposed) and *sixteen months* before the general election. JA477-78; *see also* JA479; AR1358-59, 1362-65. Similarly, Senator Arlen Specter (R-PA), who faced a strong conservative primary challenger in his 2004 reelection campaign, began airing radio ads

in the first week of September 2003 (nearly eight months before the primary) and began statewide TV ads on November 5 (nearly six months before the primary). JA473, AR 1341-42.[5]

Many other early TV and radio ads are run by Congressional candidates who are challenging an incumbent. Senator Arlen Specter's 2004 primary challenger, Representative Pat Toomey, began running TV and radio ads on June 23, 2003, more than ten months before the Republican primary. JA472-73. Similarly, Cranston, Rhode Island Mayor Stephen Laffey began running TV ads in his primary challenge to incumbent Republican Senator Lincoln Chafee on September 13, 2005—*a full year* before the primary. JA491. On the Democratic side of the Rhode Island Senate race, campaign ads began running in early January 2006, more than nine months before the primary. AR 2079-84.[6]

Another type of Congressional race that often features early advertising is where the incumbent announces his retirement or candidacy for another office, setting off a contest in both parties to fill the open seat. For example, after incumbent Senator Peter Fitzgerald (R-IL) announced his retirement in April 2003, an expensive ad war broke out in June 2003—nearly

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[5] *See also* JA488-89 (Sen. Kent Conrad (D-ND) began running reelection ads nearly nine months before the 2006 primary); JA485 (Sen. Conrad Burns (R-MT) began running reelection ads more than four months before the 2006 primary); AR1270-76 (Sen. Lisa Murkowski (R-AK) began running reelection ads more than six months before the 2004 primary); AR2091-95 (reporting on a $1 million TV ad buy for Sen. Herb Kohl (D-WI) that began airing more than six months before the 2006 primary).

[6] *See also* JA487 (challenger in New York Senate race began running ads *over a year* before the 2006 primary); JA482 (challenger in Pennsylvania House race began running ads over eight months before the primary); AR1428-29 (challenger in Wisconsin House race began running ads nearly a year before the 2006 primary); AR1373-74 (challenger in Washington Senate race began running ads five months before the 2004 primary); AR1376-77 (challenger in Wisconsin Senate race began running ads more than 4-1/2 months before the 2004 primary); AR1381-82 (challenger in Maine House race began running ads immediately after winning his party's primary and nearly five months before the general election); AR1404-05 (TV advertising began in Nebraska Senate race nearly six months before the 2006 primary); AR1424 (challenger in Illinois House race began running ads over 4-1/2 months before the 2006 primary).

nine months before the primary—with six candidates ultimately airing TV and radio ads during the summer and fall of 2003.[7] Similarly, after Senator Ernest Hollings (D-SC) announced his retirement in August 2003, one Republican Senate candidate began a statewide TV ad campaign on September 2—over nine months before the primary—and another began airing primary ads in early January 2004. AR 1351-57. Likewise, after Senator James Jeffords (I-VT) announced that he would not seek reelection in 2006, one Republican Senate candidate began airing TV ads in mid-December 2005 and another began his ad campaign in late January 2006—although the primary was not held until the following September. AR 1420-21, 2087-90.[8]

Political parties also engage in early Congressional campaign advertising. During the 2004 cycle, for example, the South Dakota Republican Party began airing statewide radio ads on December 1, 2003 attacking Democratic incumbent Senator Tom Daschle—a full six months before the primary and over eleven months before the general election. JA481. During the 2006 cycle, the NRSC launched its first TV ads against Democratic Senator Robert Byrd in July 2005, more than nine months before West Virginia's primary and almost eighteen months before the

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[7] Democratic businessman Blair Hull was first on the air on June 23, 2003, with a $750,000 statewide TV and radio ad campaign. JA471; *see also* AR1318-27. Between August and October 2003, two other Democratic Senate candidates and three Republican candidates began extensive radio and TV ad campaigns, including several statewide TV ad buys. *See* AR1296-1317.

[8] *See also* JA483 (radio advertising in open 2006 Minnesota Senate race began more than half a year before the primary); AR1280-81 (TV advertising in open 2004 Colorado Senate race began more than ten months before the primary); AR1285-95 (TV advertising in 2004 open Georgia Senate race began over 5-1/2 months before the primary); AR1328-29 (a "heavy rotation" of radio ads in the open 2004 Louisiana Senate race began nearly five months before the primary); AR1383-84 (radio ads in open Michigan House race began six months before the 2004 primary); AR1385-86 (radio ads in open Louisiana House race began nearly six months before 2004 primary); AR1389-95 (ads in open North Carolina House race began over eight months before the 2004 primary); AR2096-98 (TV ads in open 2006 Maryland Senate race began six months before the 2006 primary); AR2085-86 (TV ads in open 2006 Tennessee Senate race began five months before the 2006 primary).

general election. JA494. The NRSC also ran early ads attacking Steve Laffey, the conservative challenger to incumbent Lincoln Chafee (R-RI), nearly eleven months before the 2006 Republican primary. JA492-93. The Montana Democratic Party began running ads attacking Republican Senator Conrad Burns's integrity in August 2005, ten months before the primary and over fifteen months before the general election. JA484, 486.

Outside spenders also run early political ads in key Congressional races. Some special interest groups run early ads praising incumbents who have promoted their agendas. In the 2004 Alaska Senate race, for example, the U.S. Chamber of Commerce began airing TV ads supporting Republican incumbent Lisa Murkowski in mid-November 2003—nine months before the GOP primary and nearly a full year before the general election. JA470 ("Call Lisa Murkowski. Thank her for fighting for Alaska jobs."). Likewise, a group calling itself "Americans for Job Security" made a $500,000 TV ad buy in November 2005 touting the virtues of incumbent Senator Rick Santorum (R-PA)—nearly half a year before the Pennsylvania primary and nearly a full year before the general election:

> **ANNOUNCER** [v/o]: Most Saturdays they get together in the park, 8 a.m. sharp. Pennsylvania families relax a little more these days because Rick Santorum is getting things done everyday. Over $300 billion in tax relief, eliminating the marriage penalty, increasing the per child tax credit – all done. And now Rick Santorum is fighting to eliminate unfair taxes on family businesses. Call and say thanks because Rick Santorum is the one getting it done.

JA490. Under the Commission's "content" standards, there would have been no restrictions on this group fully coordinating this ad with Senator Santorum, because it did not expressly advocate his reelection. The Senator could have written this ad himself and asked the group to run it on his behalf without restraint.

Other ads run by outside spenders focus on attacking a clearly identified candidate. The Club For Growth, for example, began airing TV ads in South Dakota in August 2003—fifteen

months before the general election—ridiculing Democratic Senator Tom Daschle as a rich elitist out of touch with his state who "entertain[ed] Hollywood liberals, politicians and lobbyists" at his "new $2 million house on Washington's ritzy Foxhall Road." JA480; AR1368-69. The Club For Growth began airing radio ads attacking incumbent Lincoln Chafee (R-RI) in January 2006—nearly nine months before the primary—calling him "amazingly liberal" and an ally of "liberal Democrats John Kerry and Hillary Clinton." AR2075-76 ("Call Sen. Chafee. Tell him Rhode Island can't afford high taxes."). The Club also simultaneously began airing TV ads praising Chafee's primary opponent and urging viewers: "Tell Steve Laffey to keep fighting for taxpayers." AR 2077.[9]

c. The Commission Has Not Disputed That Most of the Early Political Ads Documented In the Record Would Go Unregulated Under Its Content Standards.

Few of the early campaign ads discussed above used express advocacy, confirming the observations of this and other courts: candidates *themselves* rarely use express advocacy in their own ads because it is "an ineffective campaign strategy," so any restriction of the coordination regulation to ads using express advocacy will inevitably set off "a coordinated communication free-for-all" during the portion of the cycle that this "meaningless" standard governs. *Shays I,* 414 F.3d at 100 and 337 F. Supp. 2d at 58 n.28; *see also McConnell*, 540 U.S. at 193-94 & n.77. Even though for the most part they avoided words of express advocacy, the ads discussed above

[9] *See also* JA474-75 (the "Republican Main Street Partnership" began airing ads against Pennsylvania Senate challenger Pat Toomey in early November 2003, over five months before the primary); JA476 (the American Conservative Union began airing ads in early December 2003 in support of Toomey); JA495 (October 2005 TV ad run by "American Family Voices and Public Campaign Action Fund," accusing Representative Roy Blunt (R-MO) of money laundering); AR1282-83 (radio ad run by "People for a Better Florida" accusing Republican candidate Mel Martinez of being "on the wrong side" of the medical liability reform issue; ad began airing over five months before the 2004 primary).

were clearly broadcast for the purpose of influencing federal elections: they praised or attacked clearly identified federal candidates; they were targeted at the candidates' relevant electorates; and in many instances they were paid for by the candidates themselves, who presumably knew what was valuable to them.

Yet the Commission would have this Court conclude that *all* of these ads were "*unlikely to be for the purpose of influencing Federal elections*" since they were run early in the campaign cycle and avoided words of express advocacy. JA426 (emphasis added). That is absurd. Because the Commission has once again failed to "establish, consistent with APA standards, that its rule rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition," its revised content standards must be invalidated for this reason alone. *Shays I*, 414 F.3d at 102.

3. The Commission May Not Treat the Hundreds of Examples of Early Campaign Advertising, Representing the Expenditure of Millions of Dollars, as *De Minimis* Amounts That May Be Exempted from FECA's Coverage.

The Commission dismisses the hundreds of examples of early political advertising involving the expenditure of millions of dollars as mere *de minimis* amounts—as a "very small number" of ads that were not "substantial" or "appreciable," and that had only "minimal value" when considered in the context of *aggregate* advertising run during the *entire* 2004 election cycle. BR9, 15-17, 19, 26; *see* JA424. The Commission misstates the proportion of early ads to total ads by comparing the number of separate early *ads* to the number of total separate *airings* of ads (*e.g.*, comparing "'236 discrete [early] ads" with "over 500,000 *airings* of ads" during the entire 2004 cycle, BR19). This compares apples to oranges, because any given "discrete" ad was "*aired*" dozens or hundreds of times, so the ratio of early ads to total ads is not nearly as small as the Commission implies.

And even accepting the undisputed fact that *most* ads are run within several months of an election, the Commission's *de minimis* argument fails for at least two reasons. *First*, the relevant statutory provisions are "extraordinarily rigid." *Shays I*, 414 F.3d at 113-14 (internal quotation marks and citations omitted); *see also Shays I*, 337 F. Supp. 2d at 116-17. FECA's definition of "expenditure" reaches to "*any* purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by *any* person for the purpose of influencing any election for Federal office" (with specified exceptions); *any* such "expenditure" that is coordinated with a candidate or political party is deemed to be a contribution. 2 U.S.C. 431(9)(A)(i), 441a(a)(7)(B) (emphasis added). Section 441b's ban on corporate and union contributions likewise extends to "*any* contribution," without hint of a *de minimis* exemption. Surely the Commission, in implementing the flat ban on corporate and union contributions, could not promulgate a rule *authorizing* such contributions up to a certain "*de minimis*" amount, or *authorizing* such contributions so long as they occurred outside a three-month pre-election window. By the same token, there is no statutory room for the Commission to treat hundreds of political ads representing *millions* of dollars in expenditures as a *de minimis* figure that can be excused from compliance with meaningful coordination regulations.

Second, as this Court explained in another context in *Shays I*:

> [E]ven absent [statutory] rigidity, "[t]he authority to create these [*de minimis*] exceptions does not extend to 'a situation where the regulatory function does provide benefits, in the sense of furthering regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs.'" ... Instead, situations covered by a de minimis exemption must be truly de minimis. That is, they must cover *only situations where "the burdens of regulation yield a gain of trivial or no value,"* ... for otherwise the exemption reflects impermissible "second-guessing [of] Congress's calculations[.]"

414 F.3d at 114 (citations omitted, emphasis added). The Commission has not even attempted to carry its burden of demonstrating why the first *16%* of pre-caucus Presidential candidate TV

advertising in Iowa should be excluded from effective coordination regulation, or why the first 8% of House primary TV advertising should be deemed too "trivial" to warrant such regulation. Plaintiff's counsel are unaware of any case in which potential statutory violations involving the expenditure of hundreds of thousands and millions of dollars have ever been treated as *de minimis* matters. *See Shays I*, 414 F.3d at 115 ("Nor does $5,000 strike us as an obviously trivial amount.").[10]

C. The Commission Also Has Failed To Demonstrate Why Spending Will Not Simply Shift Outside Its Pre-Election Windows.

This Court instructed the Commission that "perhaps [the] most important" question of all was, "to the extent election-related advocacy now occurs primarily within 120 days, would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged rules' restrictions?" 414 F.3d at 102. The Commission's only response to this query was to offer the "bromide," *id.* at 101, that, since the CMAG data show that candidates themselves place "little" or "minimal" value on early advertising, "there is little risk that coordinated activity presents the risk or appearance of corruption." JA425-26. This argument fails for all the reasons discussed above: candidates place substantial "value" on such ads because they have spent millions of dollars on early advertising in recent election cycles, whether analyzed using the Commission's own limited statistical analysis or using case studies of early advertising in Presidential, Senate, and House campaigns. *Sixteen percent* of all pre-caucus Presidential TV advertising in Iowa is a substantial figure, and the millions of dollars in early advertising documented in the CMAG data are

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[10] *See also EDF, Inc. v. EPA*, 82 F.3d 451, 466 (D.C. Cir. 1996); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1556-57 (D.C. Cir. 1989) (striking down agency's *de minimis* exemption for "personal utilitarian item[s], such as a pencil or cap or T-shirt or golf ball"); *Ala. Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979).

"appreciable" sums, even if they represent only "a small number" of all campaign TV ads when considered in the aggregate. BR16, 19; *see* pp.11-13 above. There is every reason to believe that, if the Commission's "safe harbors" are allowed to remain, they will be exploited. This is the repeated lesson of campaign finance regulation. *See, e.g.*, *McConnell*, 540 U.S. at 224 ("Money, like water, will always find an outlet."); *Shays I*, 414 F.3d at 115 ("[I]f regulatory safe harbors permit what BCRA bans, we have no doubt that savvy campaign operators will exploit them to the hilt, reopening the very soft money floodgates BCRA aimed to close."). The Commission insists that its predictive acumen is entitled to deference (BR18-19), but it offers absolutely no reason to believe that the outcome will be any different here than in response to its previous loopholes.

Nor is there any reason to believe that soft money will not flow into the election-year "gap periods" in House and Senate races, which often extend for several months during the spring and summer of an election year. Indeed, the Commission's revised rules have made these Congressional "gap periods" even *larger* by shrinking the pre-general election window from 120 days to 90 days. The revised rule on its face authorizes House and Senate nominees to coordinate with corporations, unions, wealthy individuals, and foreign governments during these "gap periods" so long as the coordinated advertising avoids express advocacy. If (as the Commission acknowledges) such "gap period" ads have value in *Presidential* races, why not potentially in House and Senate races as well?

The Commission also argues that its "safe harbors" will not be exploited because there is "no evidence" that candidates, parties, and their supporters have *actually* taken advantage of them in recent years and *actually* coordinated their advertising efforts. JA425-26. The Commission chides critics of the regulation for having failed to "file[] any administrative

complaints with the Commission alleging acts of coordination." BR18. But as the District Court responded, the Commission's whole point was to *legalize* such activity; why would anyone file an enforcement action claiming that someone had taken advantage of what is now *authorized* by the agency's regulation? JA97.[11]

D. The Commission Did Not Historically Use, and Congress in 2002 Did Not Authorize, an "Express Advocacy" Standard in Regulating *Coordinated* (As Opposed to *Independent*) Expenditures.

The Commission and its *amicus*, the Center for Competitive Politics ("CCP"), argue that Congress intended through BCRA to *authorize* the use of an express advocacy standard in regulating *coordinated* advertising campaigns. CCP claims that, "[p]re-BCRA, the Commission *consistently*, if not formally, applied the express advocacy and republication of campaign materials content standards when determining whether allegedly coordinated expenditures qualified as 'contributions,'" and that Congress legislated based on this understanding. CCPBR2 (emphasis added). The Commission adds that there was "a considered congressional choice *not* to require" anything beyond an express advocacy standard for most of each election cycle. BR21 (emphasis added).

These arguments, as applied to *coordinated* expenditures, are frivolous. The Commission during the 1980s and 1990s *repeatedly* rejected the use of an express advocacy test in connection

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[11] Moreover, it is well established that, where a rule authorizes secrecy and nondisclosure, the plaintiff is not required to point to evidence of any secret activity. "[I]t would be absurd to require [a plaintiff] to guess about when secret communications" authorized by the rule in violation of the statute were taking place; "[t]he mere statement of the suggestion exposes its absurdity." *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1262-64 (D.C. Cir. 2004); *see also Regular Common Carrier Conference v. United States*, 793 F.2d 376, 378-79 (D.C. Cir. 1986) (Scalia, J.).

with coordinated expenditures.[12] Although some Commissioners (including Bradley Smith, now head of the CCP) began pushing in the late 1990s to adopt an express advocacy test for coordinated expenditures, the Commission *repeatedly* rejected that approach in the years leading up to BCRA.[13]

Indeed, the actual position of "the Commission" is best illustrated by its successful advocacy on this very point in *FEC v. Christian Coalition.* In October 1998, the Commission filed a brief responding to the Coalition's arguments for the use of an express advocacy content standard in regulating coordinated communications. The Commission's own brief then, in

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[12] *See especially* AO 1990-5, AO 1988-22, AO 1983-12, and AO 1982-56. For a much more accurate analysis than that contained in the CCP's brief of the Commission's traditional refusal to use an express advocacy standard in regulating coordinated expenditures, *see* Scott E. Thomas & Jeffrey J. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 Cath. U. L. Rev. 133, 152-60 (1999). As then-Commissioner Thomas and his coauthor demonstrated, the Commission as of 1999—after a quarter century of administering and enforcing FECA—"has never adopted an express advocacy requirement when it considers coordination." *Id.* at 152.

[13] To be sure, some Commissioners (led by Mr. Smith) voted to block investigations of alleged coordination that did not involve express advocacy. But Mr. Smith's 2001 Statement for the Record in MUR 4624, on which the CCP heavily relies, was not joined by *any* other Commissioner. Moreover, Mr. Smith recognized in that statement that a majority of the Commission did *not* support an express advocacy test for coordinated communications. *See* CCPBR, Ex. C at 13 n.22. The CCP also relies heavily on the 2002 Statement of Reasons by Messrs. Mason and Smith in MUR 4538, but that document was just that—the views of two individual Commissioners. *Amicus* attempts to transform then-Commissioner Sandstrom's vote in this same MUR into an imagined three-vote bloc for an express advocacy content standard. *See id.* at 5. (Curiously, the brief then stretches beyond reason to surmise that a fourth member, Commissioner Wold, *would have* signed this Statement of Reasons and thus supposedly *would have* created a Commission majority, but was "unable" to do so "because he left the Commission before the Statement of Reasons was issued." *Id.* at 5 n.1.) Mr. Sandstrom did *not* adopt an express advocacy standard, but simply concluded that the Commission's then-current content analysis was not clear enough to meet his concerns. *See* Ex. D to CCP Brief. And the 1999 statements in connection with the Dole and Clinton campaign audits, discussed on page 4 of the *amicus* brief, did not adopt an express advocacy test but merely argued that something more than an "electioneering message" test was required. At best, as of 2001 there was no majority on the Commission for any particular content test. *See* JA227-42 (Thomas Statement of Reasons in MUR 4994, summarizing the tortured history of the FEC's unraveling of legal standards in the area of coordinated communications).

summarizing why that standard would eviscerate FECA, still stands as the best refutation of the Commission's position now:

> If coordinated expenditures could be regulated as contributions only if they paid for communications that contain express advocacy, the Act's regulation of contributions would be narrowed to the point of ineffectiveness. ... [Christian Coalition's] construction would allow all corporations, labor organizations, wealthy individuals, and even foreign interests, to work out a specific plan with a candidate to spend unlimited funds to help the candidate's election, as long as the resulting communications avoid express advocacy. *See Buckley*, 424 U.S. at 44 n.52. Such spending could include advertisements promoting the candidate or savaging his opponent, as well as providing a fully equipped campaign office or a private jet. [Christian Coalition's] construction would also render the Act's recordkeeping and reporting requirements ineffective, open the door to the secret political deals the Act was designed to foreclose, and flout the "'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." *Colorado Republican*, 518 U.S. at 609.

JA130-31. Judge Greene found the Commission's reasoning compelling, and rejected the arguments for limiting the regulation of coordinated communications to express advocacy as "untenable," "fanciful," "unpersuasive," "pernicious," and threatening to "frustrate both the anti-corruption and disclosure goals of [FECA]." 52 F. Supp. 2d at 87-88 & n.50. Far from attacking the decision and reasoning in *Christian Coalition* (as do Mr. Smith and the CCP, *see* CCPBR4), the Commission in its 2000 rulemaking on coordination *embraced* that decision in once again rejecting an express advocacy content test. JA146.

The Commission argues that Congress intended through BCRA to *overrule* these views and to *authorize* content standards restricted to express advocacy for most of each election cycle. The Commission relies on the fact that an earlier version of BCRA would have prohibited the use of express advocacy in regulating coordinated communications, whereas the final version contained no such express prohibition. BR20-23. Such an express prohibition would have been unnecessary, however, because, as BCRA's sponsors explained in their floor statements just before final passage, "[e]xisting law provides that a campaign-related communication that is

coordinated with a candidate or party is a contribution to the candidate or party, *regardless of whether the communication contains 'express advocacy.'*" SJA506 (statement of Sen. Feingold) (emphasis added). "[T]he purpose of passing Section 214 of BCRA was not to exempt certain acts of coordination, but rather to *enlarge* the concept of what constitutes 'coordination' under campaign finance law." 337 F. Supp. 2d at 64 (emphasis added). The sponsors emphasized that the old rules "set[] too high a bar to the finding of 'coordination'" and "miss many cases of coordination"; that the new rules "need to make more sense in light of real life campaign practices than do the current regulations"; and that "we expect the FEC to cover 'coordination' *whenever it occurs*[.]" SJA505-06 (statements of Sens. Feingold and McCain). The sponsors also stressed that, far from authorizing more restrictive tests, Section 214 "*does not change the basic statutory standard* for coordination, which defines and sets parameters for the FEC's authority to develop [these] rules[.]" SJA506 (remarks of Sen. Feingold, emphasis added).[14]

E. This Court Already Has Rejected the Commission's Constitutional Avoidance Arguments.

The Commission contends that an express advocacy standard is necessary because "a less objective test *could* unnecessarily chill speech on public issues" by threatening to "punish" speech about "'legislative and political issues involving only a weak nexus to any electoral campaign.'" BR25 (quoting *Shays I*, 414 F.3d at 99) (emphasis added). The Commission and its supporting *amicus* warn that anything more than an express advocacy standard *could* be abused

[14] These floor explanations by the sponsors on the eve of final passage are an "authoritative guide" entitled to "substantial weight." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

by political opponents or overzealous regulators, thereby further chilling genuine issue advocacy. *See* BR25, 27; CCPBR8-14.[15]

This Court disposed of these arguments in *Shays I*, where the Commission also argued that its "weak restraints" outside the 120-day pre-election window "preserve[d] space for political activities unrelated to elections." 414 F.3d at 101. The Court responded:

> True enough, but so would regulating nothing at all, and that would hardly comport with the statute. Notwithstanding its obligation to "attempt to avoid unnecessarily infringing on First Amendment interests," *AFL-CIO*, 333 F.3d at 179, the Commission must establish, consistent with APA standards, that its rule rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition. ... The record before us, however, provides no assurance that the FEC's standard does not permit substantial coordinated expenditure, thus tossing out the proverbial baby (spending qualifying as contributions) with the bath water (political advocacy).

Id. at 101-102; *see also Christian Coalition*, 52 F. Supp. 2d at 88-89.[16]

The Commission's reliance on *Orloski v. FEC* is misplaced. The D.C. Circuit in that case allowed the Commission to adopt an "objective, bright-line test" only because, in that specific context, the test did *not* "create the potential for gross abuse." 795 F.2d at 165. At issue was "corporate funding of legislative events sponsored by a congressman" close to an election. *Id.* "[T]he corporate donations consisted of 'in excess of one thousand hamburgers, an unknown

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[15] The CCP, in fact, complains that the Commission *did* abuse the nonexpress advocacy standard by engaging in "invasive file review, public disclosure of confidential strategies, and depositions of leaders" of such groups as the National Republican Congressional Committee in connection with allegations of coordinated expenditures by the "Coalition" business group in the 1996 campaign. CCPBR13. This overlooks the substantial evidence of coordination between the NRCC and the Coalition, which "presented the potential for massive violations of the campaign finance laws." *See* JA220 (Statement of Reasons of Comm. Thomas and Chmn. MacDonald in *The Coalition*, MUR 4624); *see* JA210-22.

[16] The Commission's First Amendment avoidance argument waives its claim to *Chevron* deference, because determining the requirements of the First Amendment is the province of the judiciary. *See, e.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

quantity of salad and potato salad and bus transportation.'" *Id.* (citation omitted). *Orloski* allowed the use of a bright line only because corporate sponsors of such events "can make little more than insignificant, indirect donations to a candidate's political warchest" and were "unlikely" to "significantly increase the level of campaign spending." *Id.* at 165-66. Here, on the other hand, the Commission's bright line has opened an enormous loophole that invites massive coordinated advertising expenditures.

F. The Commission's Pre-Election Windows Are Too Small, Especially Given The "Weak Restraints" That Govern Outside Those Windows.

The Commission relied upon its selected CMAG data sets in arguing that only a "very small number" of election-related ads are aired outside its pre-election windows. BR26. But the Commission's selected data sets are manifestly unreliable and do not support its conclusions about the lack of "value" of early political advertising.

1. The Commission's 2004 House and Senate Data Sets Exclude All Ads Run in 2003 Relating to the 2004 Campaign.

The most egregious flaw in the Commission's data sets is that they inexplicably fail to include the very ads they are designed to capture. There is no dispute that the Commission's merged data sets on House and Senate primaries do not contain a *single* ad by a *single* 2004 House or Senate candidate that was broadcast in 2003. *See* JA446, 498. The Commission *admitted* below that its merged House and Senate data sets for some unexplained reason omit all 2003 data with respect to ads broadcast by candidates in connection with the 2004 campaign. *Id.* The administrative record demonstrates that many such ads were aired during 2003 in hotly contested races around the country—for example, the races for the seats held by Senators Tom Daschle (D-SD) and Arlen Specter (R-PA), and the races to fill open Senate seats in Colorado, Georgia, Illinois, Louisiana, and South Carolina. *See* JA470-82; AR1280-81, 1296-1326, 1331-

35, 1341-42, 1345-50, 1355-57, 1362-67, 1370-72, 1389-95. None of these ads is accounted for in the Commission's data sets.

The Commission's only defense is that it "requested" the missing 2003 data. JA498. Be that as it may, the fact remains that the Commission's merged data sets exclude millions of dollars of TV advertising run during 2003 in connection with the 2004 Senate and House races discussed on pp. 16-20 above. The Commission's House and Senate data sets are worthless. They exclude *precisely* those early ads they are supposed to test for.

2. The Commission Improperly Excluded New Hampshire From Its Analysis of Early Advertising in Presidential Primaries.

New Hampshire's first-in-the-nation Presidential primary has arguably been the most important Presidential primary for over half a century. *See, e.g.*, Michael Barone & Richard E. Cohen, *The Almanac of American Politics 2008*, at 1025 (2007). Yet the Commission entirely *excluded* that primary from its analysis of pre-primary Presidential TV advertising because it did not fit within the Commission's modeling methodology. That is, although New Hampshire is one of the 21 "battleground" states selected for inclusion by the Commission, it does not have a single Nielsen "Designated Market Area" ("DMA") that is monitored by CMAG, and therefore is completely *excluded* from the Commission's analysis. *See* JA381-82, 385, 388-90. Yet the record demonstrates that candidates, political parties, and special interest groups have all run significant early TV advertising in the nation's first primary state, in some cases nearly a year before the primary. *See* p.15-16 above. The Commission ignored this evidence. A study that purports to evaluate the significance of early advertising in the Presidential primaries without considering New Hampshire deserves as much deference as a study purporting to rank the great Presidents without considering Lincoln. "An agency's use of a model is arbitrary if that model 'bears no rational relationship to the reality it purports to represent,'" and if the modeling

methodology is challenged, "'the agency must provide a *full analytical defense*.'" *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (citations omitted). The Commission has not even attempted to carry this burden, other than saying that this is the way its modeling methodology works. That is not a permissible answer under the APA.

3. The Commission's Methodology Improperly Focuses on the *Aggregate* of Federal Campaigns Rather Than *Strongly Contested* Campaigns.

Randall v. Sorrell, 126 S. Ct. 2479, 2496 (2006), instructs that campaign finance laws must be evaluated not on the basis of their impact on "the *average* campaign," but from the perspective of their impact on "*strongly contested*" races (emphasis in original). In other words, "the critical question concerns not simply the *average* effect" of a campaign finance measure, "but, more importantly," its effect in "*competitive*" races. *Id.* (emphasis in original). Yet the Commission entirely fails to consider the *concentration* and *intensity* of early political advertising in strongly contested races, focusing instead on aggregate numbers.[17]

"Value" is measured at the margin—in the most "strongly contested" races—not in the broad aggregates. The Commission's own CMAG data demonstrate this point. Of the 3,838 early TV ads included in the Commission's partial sample of Presidential campaign ads in 2003-04, 2,968 (77%) ran in Iowa, representing expenditures of $486,709. *See* JA446-47, 498. One would expect that early advertising would be similarly concentrated in the first-in-the-nation New Hampshire primary—had the Commission bothered to include that state in its analysis. The

[17] The District Court believed that *Randall*'s analysis in this regard was limited to the "particular factual context" of that case and involved "a distinguishable factual and legal predicate." JA93. Although plaintiff agrees that the specific issue in *Randall* was different from the issues here, the decision stands for a broader principle—that campaign finance laws cannot be judged based only on "the average campaign." 126 S. Ct. at 2496.

administrative record contains many examples of early Iowa and New Hampshire campaign ads aired well outside the Commission's pre-election window. *See* pp. 15-16 *supra*.

Other examples of "strongly contested" campaigns that generate early advertising include highly competitive Senate races with national dimensions (*e.g.*, the 2004 Daschle and Specter re-election campaigns, the 2006 Santorum, Chafee, and Burns re-election campaigns, etc.), and campaigns to fill open House or Senate seats. *See* pp. 16-20, *supra*. There is no basis in the CMAG data, or otherwise in the record, for the Commission to conclude that such campaign advertisements, clustered in open seat or highly competitive races of national significance, are rendered insignificant simply because, when averaged, they constitute "a very small percentage" of total advertisements run in every district nationwide. BR28.

III. The Revised Coordination "Conduct" Standards Are Unlawful.

Although plaintiff only challenged the coordination "content" standards in *Shays I*, the Commission on remand took the opportunity to relax certain "conduct" standards. The District Court correctly held that these revised "conduct" standards are unlawful. JA76, 99-105.

A. The Weakened Former Employee and Common Vendor Regulation Is Unlawful.

Section 214(c) of BCRA requires the Commission's coordination regulations to address "payments for the use of a common vendor ... [and] payments for communications directed or made by persons who previously served as an employee of a candidate or political party." The concern was that a highly placed campaign staffer or common vendor could use his inside knowledge to shape spending by an outsider, thus resulting in *de facto* coordination. BCRA's sponsors intended for the new regulation to "cover 'coordination' *whenever it occurs*." SJA506 (remarks of Sen. McCain) (emphasis added). As first promulgated in 2003, the conduct standards met this mandate: for the *current election cycle*, former vendors and employees were

prohibited from using or sharing "*material information*" about "campaign plans, projects, activities, or needs" with any outside person or entity paying for an ad. 11 C.F.R. 109.21(d)(4)-(5) (2003); *id.* 100.3(b); *see also* JA272.

On remand, however, the Commission revised this provision in response to complaints from "political consultants and employees" who claimed the rule had a "chilling effect" on their ability to switch jobs during an election cycle. BR29-30; JA433. The revised regulation shrinks the temporal application of the rule from the "current election cycle" down to a period of only the first 120 days following campaign involvement. 11 C.F.R. 109.21(d)(4)(ii); JA433. Instead of barring former employees or vendors from sharing "material information" about campaign strategy or plans with outside spenders during the entire election cycle, the rule now affirmatively *authorizes* these individuals to use or share material information with outside spenders so long as this occurs beyond the 120-day window. The Commission does not deny that, under the revised rule, a campaign's communications director could leave the campaign and then, after only 120 days, freely use her inside knowledge of the candidate's strategy, message, opposition research, and advertising plans to craft unlimited "independent" spending by an outside group.

This revised regulation fails *Chevron* step two because it is "inconsistent with the statutory mandate [of BCRA and] frustrate[s] the policy that Congress sought to implement." *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32. The Commission's E&J nowhere addresses why it would further the purposes of BCRA to allow, for example, a high-level campaign strategist to use or convey strategic, *material* information gained while working for a Presidential candidate to an organization running supposedly "independent" ads for that candidate simply because 120 days have elapsed since his campaign employment. The

Commission's admitted goal of "not attempting to 'create any prohibition on the use of common vendors'" and "not seek[ing] to 'unduly intrud[e] into existing business practices,'" BR30 (citations omitted), is a far cry from a rational consideration of BCRA's purpose "to cover coordination *whenever* it occurs." JA262 (emphasis added).[18]

The revised regulation also violates the APA because, as the District Court determined, the Commission "revers[ed] its earlier position ... without adequately explaining how its revised regulation will capture the universe of [coordinated] communications." JA101-02. "[P]ursuant to the APA, the agency at all times retains a responsibility to 'provide a reasoned analysis for its change in course.'" JA101 (citation omitted). "In the case where an agency has 'change[ed] its course[, it] must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" *Id.* (quoting *Bush-Quale '92 Primary Comm.*, 104 F.3d at 453).

The Commission's justifications are unavailing. *First*, the Commission argues that it had to "more carefully tailor[]" the regulation "to reflect the actual marketplace for political consultants and employees"—individuals who complained that the regulation was interfering with their business development. BR29-30. As the District Court held, however, "because BCRA was not enacted for the benefit of political consultants and employees, the Commission is certainly not at liberty to accommodate such individuals at the expense of BCRA's statutory goals." JA101. Moreover, contrary to the Commission's characterizations, the 2003 version of

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[18] The District Court rejected plaintiff's *Chevron* step two challenge because it lacked "evidence sufficient to determine that the revised temporal limit represents the potential for gross abuse or unduly compromises the Act's purpose." JA100. As this Court concluded in *Shays I*, however, "if regulatory safe harbors permit what BCRA bans, we have no doubt that savvy campaign operators will exploit them to the hilt, reopening the very soft money floodgates BCRA aimed to close." 414 F.3d at 115; *see also McConnell*, 540 U.S. at 224.

the rule did not bar *employment* for an entire election cycle, but merely the actual use of "*material*" inside information obtained from the former employer or client when working on public communications for the new employer or client. Many professionals are subject to enduring post-employment restrictions on the use of their former employer's material inside information in their new jobs, and there is no reason why political consultants and employees cannot observe similar ethical norms. Nor is there any reason that political consultants and employees, unlike other professionals in the "marketplace," require only an abbreviated 120-day time period in which meaningful post-employment restrictions apply.[19]

Second, the Commission argues that drawing a line at 120 days is permissible because "information that could be the basis of a coordinated expenditure has a very short 'shelf life' in politics." BR30. But as the District Court emphasized, "if information becomes stale over the passage of time, it will not be '*material* to the creation, production or distribution of the communication' ... [and] therefore, will always fall outside the reach of the common vendor and former employee conduct standards." JA101 (quoting 11 C.F.R. 109.21(d)). Moreover, "the Commission's generalization that material information does not remain material for long overlooks the possibility that *some* information—for instance, a detailed state-by-state master plan prepared by a chief strategist—may very well remain material for at least the duration of a campaign." JA101. This is yet another example of the Commission imposing an arbitrary 120-day line without any justification. "[T]he proposition that 120 is twice 60 and four times 30,

[19] If the Commission's concern is that hiring a former campaign employee or vendor might open an outside spender up to attack, it can prescribe standards for how to insulate the new employee or vendor from any work on overlapping matters, thereby giving the outside spender a safe harbor from a finding of unintended coordination. For the reasons discussed in Part III-B below, the Commission's present "firewall safe harbor" does not adequately serve this purpose.

though arithmetically indisputable, is no reason to select that number over any other. Why not triple 60, or multiply 30 by one-and-a-half?" *Shays I,* 414 F.3d at 101.

The Commission's analogy to its polling regulations (BR30) is misplaced; the observation that polling data loses its value "'has no bearing on the issue before'" the Court because "[t]he Commission adduces no evidence that polling data and other types of information lose value at the same rate." JA101 (quoting *Shays I,* 414 F.3d at 100). Moreover, the Commission fails to note that the cited regulation recognizes that polling data remains material for 180 days; why not use that as the benchmark? *Id.* The District Court correctly concluded that "the Commission provides absolutely no justification for its conclusion that 'a limit of *120 days* is more than sufficient to reduce the risk of circumvention of the Act.'" *Id.*

B. The "Firewall Safe Harbor" Is Unlawful.

The Commission also took advantage of the *Shays I* remand to promulgate new Section 109.21(h), a "safe harbor" that creates a "rebuttable presumption" that *none* of the coordination conduct standards are met where "a commercial vendor, former employee, or political committee has designed and implemented an effective firewall[.]" JA435. According to the E&J, "[o]nce a firewall has been established, for the firewall to be vitiated and the safe harbor to be inapplicable, material information about the candidate's or political party committee's plans, projects, activities, or needs must pass between persons on either side of the firewall." JA436.

The District Court correctly held that this "safe harbor" fails both *Chevron* step two and APA review. It establishes only two requirements: an "effective firewall" must be (1) "designed and implemented to prohibit the flow of information" between those who are assisting the entity paying for the communication and those who have previously provided services to the candidate or party identified in the communication; and (2) "described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy." 11 C.F.R.

109.21(h)(1)-(2); BR33. As the District Court observed, "[t]hese so-called 'requirements' ... are far from concrete—they provide 'no details about how, precisely the policy must be implemented, what the policy must say, or what measures an organization must take to ensure that the policy is not breached.'" JA102 (citations omitted).

Nor does the E&J provide any additional guidance. Indeed, it advises that the "safe harbor provision *does not dictate specific procedures* required to prevent the flow of information referenced in new 109.21(h)." JA435 (emphasis added). Although it may be true that "one size does not fit all when it comes to firewalls" (BR33), the Commission has provided absolutely *no* guidance regarding what features an effective firewall must have or what factors the Commission will consider in a challenge to a firewall. The Commission's reliance on MUR 5506 (EMILY's List), which the safe harbor was intended to codify, is also unavailing. The General Counsel's Report in that MUR "does not actually supply concrete guidelines" for the regulated community; it merely notes that individuals in that organization were "barred as a matter of policy, from interacting with Federal candidates, political party committees, or the agents of the foregoing ... [and] with others within EMILY's List regarding specified candidates or officeholders." JA103; *see* JA309-12. There is no mention of what the policy said, how it was implemented, or how it was enforced internally. The District Court properly concluded that "neither the E&J, including its description of the EMILY's List MUR, nor the General Counsel's Report on the EMILY's List MUR establishes the features a firewall must have to be deemed 'effective.'" JA103.[20]

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[20] The Commission argues that its vague regulation can be saved because "[a]ny organization unsure whether its firewall is adequate can seek an advisory opinion[.]" BR35. But the problem here is not that a spender lacks clarity, but that it will take advantage of the lack of clarity. By simply claiming that it has an "effective" firewall, a spender is able to create what the Commission calls "a rebuttable presumption" of *non*-coordination that can be overcome only by "specific information" demonstrating that material inside information has been conveyed. JA435-36. As the District Court demonstrated, the firewall safe harbor "effectively shift[s] the

(Footnote continued)

As the District Court also held, the E&J's assertion that "common leadership or overlapping administrative personnel does not defeat the use of a firewall" compounds the potential for abuse. JA104, 436. For the Commission to advise the regulated community that common leadership does not defeat a firewall while simultaneously failing to provide guidance as to how to "prevent the flow" of material information where the *same person* is orchestrating independent and coordinated expenditures is simply a further indication that this new "safe harbor" invites circumvention.[21]

The District Court also correctly struck down the firewall safe harbor under the APA. The Commission asserted in its E&J that it was seeking to "reduce the 'chilling effect' of the coordination rules with regard to organizations conducting lobbying related meetings with office holders who are also candidates," and to provide "a way for organizations to respond to speculative complaints alleging coordination." JA435. But "because BCRA was not enacted to benefit political consultants or lobbyists, these concerns cannot overcome the Commission's obligation to remain faithful to its statutory mandate." JA104. "[T]he Commission cannot simply point to the First Amendment in support of its rule, rather it must 'establish, consistent with APA standards,' that its rule furthers—and certainly does not impede—BCRA's purposes." JA104 (quoting *Shays I*, 414 F.3d at 101-02). It has failed to give any rational explanation why

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burden from the organization seeking to invoke the safe harbor to a party seeking to challenge an organization's alleged firewall." JA103.

[21] The Commission's reliance on *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207 (D.C. Cir. 2007) (BR34), is misplaced. This Court explained that a regulation should be upheld "so long as it establishes an identifiable standard governing the information that permitting authorities may request" and should be set aside "if it creates no standard at all, instead delegating the decision regarding what information is required of permit applicants to permitting authorities." *Id.* at 220-21. Because the EPA had enunciated *nine specific factors* that would guide application of the rule, it succeeded in establishing an "identifiable standard." *Id.* at 218-221. The Commission here provided no such specific guidelines in either its regulation or E&J.

its new safe harbor furthers BCRA's purposes or "how its concern for the First Amendment rights of political consultants, lobbyists, and political parties relates to the concerns that occupied Congress when it enacted BCRA." JA104.

Here again, the Commission has "chang[ed] its course" without "supply[ing] a reasoned analysis." *State Farm*, 463 U.S. at 57. In 2003, when first promulgating the coordination "conduct" standards, the "Commission considered and rejected proposals to establish rebuttable presumptions and safe harbors in the common vendor conduct standard." JA300. The Commission rejected the argument "that the mere existence of a confidentiality agreement or ethical screen should provide a *de facto* bar to the enforcement of the limits on coordinated communication imposed by Congress," because "[w]ithout some mechanism to ensure enforcement, these private arrangements are unlikely to prevent the circumvention of the rules." SJA524. Yet now it has adopted such a device without providing "some mechanism to ensure enforcement," offering no reason why such a mechanism is no longer required.[22]

IV. The "Federal Election Activity" Regulations Remain Unlawful.

"BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations." *McConnell*, 540 U.S. at 161. BCRA thus contains a series of special provisions governing so-called "Federal election activity"—those activities by state and local parties that Congress

[22] The Commission argues that its 2003 discussion of ethical screens "differed from the new regulation because it concerned the effect of a common vendor's signing of a confidentiality agreement, not the specific requirement of a firewall." BR37. But the 2003 E&J considered a broader range of proposals, and evinced a general skepticism about the efficacy of firewalls and self-regulation that is wholly absent from the latest E&J. As the District Court found, "[t]he E&J does not even discuss the proposal rejected in 2003, let alone attempt to distinguish it from the firewall safe harbor, and certainly does not provide a 'persuasive justification' for the Commission's apparent conclusion that the fear of circumvention that caused it to reject the 2003 proposal is no longer of concern." JA105.

deemed most likely to influence federal elections. *See id.* at 161-71; *Shays I*, 414 F.3d at 109-112. "Voter registration activity" and "get-out-the-vote activity" are two types of FEA. 2 U.S.C. 431(20)(A)(i)-(ii). Activities falling within the reach of these terms must be financed exclusively with hard money or, in certain circumstances, with a mixture of hard money and so-called "Levin funds." Activities falling outside the definitions of "voter registration" and "GOTV" activity—and therefore outside the definition of FEA—can be funded by state and local parties in large part with unregulated soft money. Accordingly, the scope given to the definitions of "voter registration" and "GOTV" activity by the Commission largely determines the reach and effectiveness of BCRA's FEA provisions—and thus the effectiveness of its ban on soft money.[23]

The Commission's regulations define "[v]oter registration activity" to mean "contacting individuals by telephone, in person, or by other *individualized means* to *assist* them in registering to vote," and they define "[g]et-out-the-vote activity" to mean "contacting registered voters by telephone, in person, or by other *individualized means*, to *assist* them in engaging in the act of voting." 11 C.F.R. 100.24(a)(2)-(3) (emphasis added). These definitions open up two distinct loopholes. *First*, they require that an activity actually "*assist*" people in registering or voting before it is treated as FEA, as opposed to *encouraging* people to register or vote. This is flatly inconsistent with the common usage of "voter registration activity" and "GOTV activity" as

[23] The Commission claims that these definitional issues are unimportant because 11 C.F.R. 106.7(b) and (c)(5) would in any event require many activities to be financed "with an allocation of federal and nonfederal dollars." BR42. But Congress has instructed that FEA must be paid for *entirely* with hard money *or* a mixture of hard money and Levin funds. The "non-Federal" funds referred to in 11 C.F.R. 106.7(b)-(c) and relied upon by the Commission are *not* Levin funds—they are unregulated soft money. *See McConnell*, 540 U.S. at 162-63; *Shays I*, 414 F.3d at 110.

reflected in other Commission regulations and advisory opinions.[24] *Second*, the definitions require that this "assistance" must be rendered through "*individualized means*," as opposed to mass communications targeted to many people. State and local party activities thus constitute "voter registration activity" and "GOTV activity" only if they provide "*personal assistance*" to individuals in helping them to register or vote. JA368.

A recent Commission Advisory Opinion illustrates how these definitions dramatically narrow the range of activities treated as FEA. In AO 2006-19, the Commission considered a local party's plan to "make pre-recorded, electronically dialed telephone calls and send direct mail to all voters registered as Democrats" in Long Beach, California "between four and fifteen days prior to [an] election" that involved both local and federal candidates. Both the telephone script and the direct-mail piece informed registered Democrats of the date of the election and urged them to vote for a local candidate. JA409. The Commission concluded that these activities did not constitute FEA because they neither "*assisted*" voters in going to the polls nor provided "*individualized means*" in doing so (JA411):

> [T]here is no indication that the [local committee] has engaged in any activity to target these communications to any specific subset of Democratic voters. Rather, [the local committee] intends to send the communications to all registered Democrats in Long Beach. The proposed direct-mail piece is a "form letter" that will not provide any individualized information to any particular recipient (such as the location of the particular recipient's polling place). The proposed pre-recorded, electronically dialed telephone calls are the functional equivalent of a

[24] *See, e.g.*, 11 C.F.R. 100.133 (voter registration and GOTV activities are those "designed to *encourage* individuals to register to vote or to vote") (emphasis added); AO 1980-64 (voter registration and GOTV activities "generally connote efforts to increase the number of persons who register to vote and once registered, to maximize the number of eligible voters who go to the polls"). The Commission relies on the legislative history of an unrelated 1971 enactment dealing with non-partisan GOTV efforts. BR39-40. What Congress understood non-partisan GOTV efforts to encompass in 1971, decades before the advent and proliferation of automated robocalls and similar efforts, is of little significance to the state and local party activities at issue here.

> "form letter" and, similarly, do not provide any individualized information to any particular recipient. Thus, the planned communications are generic in nature and do not provide any individualized assistance to voters.

Thus, although "common sense dictates" that "any efforts [by state or local parties] that increase the number of like-minded registered voters who actually go to the polls" will "directly assist [a] party's candidates for federal office," *McConnell*, 540 U.S. at 167-68, under the Commission's construction, a state party within days of a federal election can send out multiple direct mailings to every potential voter sympathetic to its cause urging them to vote, and can blanket the state with automated telephone calls by celebrities identifying the date of the election and exhorting recipients to get out to vote, without being deemed to be engaged in GOTV activity. Likewise, large-scale efforts encouraging potential supporters to register to vote and directing them how they may do so are not "voter registration activities" under the Commission's definitions. Indeed, the more people that a communication is intended to reach, and the more money the party spends, the less likely it is that the communication will be an "individualized means" of "assist[ance]" subject to BCRA's restrictions on FEA. As the District Court concluded, by omitting many of the most far-reaching and sophisticated voter registration and GOTV activities and leaving unaddressed a "vast gray area of activities that state and local parties may conduct and that may benefit federal candidates," the Commission's definition "'unduly compromises the Act['s]'" purposes and therefore fails under *Chevron* step two. JA112 (quoting *Orloski*, 795 F.2d at 164).

The Commission argues that the interpretations of "assist" and "individualized means" that it applied in AO 2006-19 were "fact-dependent" and could have been "decided otherwise if the facts had differed." BR41. That makes no sense. Automated telephone calls and mass mailings made just days before an election in which a federal candidate appears on the ballot

informing voters of the election's date and urging them to vote are either "individualized means" of "personal assistance" or they are not. Notwithstanding the equivocation in its brief, the Commission's advisory opinion concludes that these operations do *not* constitute FEA under the challenged definitions, and therefore may be funded with soft money. The District Court gave the advisory opinion proper weight in its analysis.[25]

Equally problematic, several claims in the Commission's brief cannot be reconciled with AO 2006-19. The Commission maintains that "[p]roviding individual voters with information such as *the date of the election*, the times when polling places are open, and the location of particular polling places comes within the regulation[.]" BR39 (emphasis added). But it is undisputed that the communications at issue in AO 2006-19 provided recipients with the date of the election and were nonetheless deemed to be outside the regulation's scope and therefore could be bankrolled with soft money. JA114, 409. The Commission also contends that its GOTV regulation "applies without time limitation." BR39. In AO 2006-19, however, the Commission determined that because the local party would "conduct the proposed communications four or more days prior to the election" they were not likely to "assist[] a voter in engaging in the act of voting by individualized means." JA410-11. Indeed, the Commission reasoned that communications made just four days before the polls open are *not* "made in close proximity to the date of the election." JA408; *see also* BR41 (noting that "the timing of the

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[25] The Commission dismisses plaintiff's hypothetical as a "sketchy scenario" and criticizes the District Court for "fail[ing] to see [its] weaknesses." BR41. But the Commission *does not dispute* plaintiff's reading of its regulations. Rather, it merely questions whether such a situation is "likely" to occur, notwithstanding the similarity of the hypothetical to the facts at issue in AO 2006-19. The Commission's position is reminiscent of *Shays I*, where the Commission "refused to disavow" plaintiffs' construction of its rules or to "reassure" this Court that plaintiffs' reading was wrong, but simply argued instead that every situation would turn on its own facts. 414 F.3d at 103, 105.

communications" at issue in AO 2006-19 was a "decisive" fact). As the District Court concluded, this result cannot be squared with the Commission's *post hoc* assurance that its regulations apply without time limitation. JA114-15.

The Commission's definitions also violate the APA. Rather than focusing on how its narrow definitions might affect Congress's goal of preventing the use of state and local parties to circumvent BCRA's soft money ban, the E&J merely sets up what the District Court called "straw men"—examples "falling at the far ends of the spectrum" without focusing on "the gray area between the two extremes" that may well benefit federal candidates and affect federal elections. JA111-13. For example, the Commission insists that its definitions are necessary so that, whenever a speaker at a state or local party event "ends a speech with the exhortation, 'Don't forget to vote!,'" the event is not automatically deemed to be FEA. *See* BR38, 43-44. But a definition could surely be crafted that would exempt such routine or spontaneous speech-ending exhortations without opening a gaping loophole permitting state parties to use soft money to saturate voters with unlimited direct mail and robocalls that unquestionably benefit federal candidates, so long as those activities do not use "individualized means" to "assist" voters in registering or voting. *See* JA112 (Commission's "E&J provides no assurance that its definition encompasses the universe of activity that the Supreme Court concluded Congress could constitutionally regulate, and indeed intended to regulate in BCRA[.]").[26]

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[26] The Commission similarly argues in its brief that "permitting nonfederal funds to be used for a state or local party event at which a speaker concludes his remarks with 'Don't forget to register to vote!' will not lead to any actual or apparent corruption of any federal candidates." BR43-44. Plaintiff does not argue that it will. Rather, this is simply another of the Commission's "straw men"—unenlightening examples which fall "at the far end[] of the spectrum of potential voter registration activity." JA113. Plaintiff's objection is not, as the Commission would have it, to the regulation's "level of detail." BR40, 45. What plaintiff objects to—and what the District Court held is inconsistent with the APA—is the Commission's continued failure to rationally explain why a rule could not accommodate these types of

(Footnote continued)

The Commission also quotes the E&J's unadorned statement that "no legislative history or administrative record [supports the notion] that general encouragement to register to vote or to vote is similar to the corrupting activity Congress was concerned with when it required certain activity to be funded with Federal dollars." BR44 (citing JA368). But this cursory statement fails entirely to present a reasoned explanation as to *how* the rule will effectuate Congress's goal of preventing "state committees [from] function[ing] as an alternate avenue" for the flow of soft money into federal elections. *McConnell*, 540 at 164; *see also Shays I*, 414 F.3d at 111; *Chamber of Commerce*, 69 F.3d at 606 (statement that rule "is 'consistent with the FECA's legislative history'" without "further elaboration" is insufficient under the APA).

Finally, the Commission insists that its narrow definitions of voter registration and GOTV activities serve an important "policy to support and encourage voter registration" and to promote "the importance of GOTV." BR40, 45 n.13. But these are not policy calls for the Commission to make. Congress already has struck a detailed, highly reticulated balance through the Levin Amendment, whose specific purpose was to encourage party voter registration and GOTV activities by allowing, for these two activities alone, "far less onerous controls than those for hard money," subject to detailed restrictions and safeguards to prevent circumvention and abuse. *Shays I*, 414 F.3d at 113. This careful Congressional balancing was intended to accommodate *precisely* those concerns that the Commission now raises. It is not for the FEC to re-jigger the balance. *See* JA113, 115.

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innocuous activities without exempting all proactive registration efforts undertaken by parties except those that succeed in actually registering voters through "individualized means." JA112-13.

V. The Regulation Governing Solicitation at State Party Fundraisers Remains Unlawful.

BCRA provides that federal candidates and officeholders shall not "solicit, receive, direct, transfer, or spend" soft money. 2 U.S.C. 441i(e)(1). "[N]otwithstanding" this prohibition, candidates and officeholders may still "attend, speak, or be a featured guest" at a state party fundraising event without violating the ban. *Id.* 441i(e)(3). The Commission seized on these provisions to carve out a "complete exemption" from the Act's prohibition against solicitation or direction of soft money. JA287-88. Title 11 C.F.R. 300.64(b) provides that federal candidates and officeholders may attend and speak at such events "*without restriction or regulation*" (emphasis added). Accordingly, in purportedly implementing a statute that bars solicitation by federal officeholders and candidates, the Commission has authorized federal officeholders and candidates to engage in unrestricted solicitation and direction of soft money in connection with federal elections so long as they do so in the context of what is deemed a "fundraising event for a State, district, or local committee of a political party." 11 C.F.R. 300.64.

The District Court concluded that "the Commission's interpretation likely contravenes what Congress intended when it enacted the provision, as well as what the Court views to be the more natural reading of the statute," and that "there can be little doubt that this provision creates the potential for abuse." *Shays I*, 337 F. Supp. 2d at 91; JA105. It nevertheless upheld the regulation under *Chevron* because "Congress, not the Commission, singled out attendance by federal officeholders and candidates at [state] party fundraising events for special treatment under the statute." JA108. But it cannot be that simply because Congress wrote an express provision for federal candidates to "attend" and "speak" at party fundraisers, any "special treatment" (*i.e.*, any implementation of this provision, no matter how far-fetched) of federal candidates at state party fundraisers is therefore justified.

Under the basic rules of construction that are used at *Chevron* steps one and two—the statutory language, structure, legislative history, and underlying purposes—the Commission's construction must fail. BCRA's authorization for federal candidates and officeholders to "attend, speak, or be a featured guest" at state party fundraisers does not state that they may "solicit" — a word Congress knew how to use, as is evident throughout BCRA—but is most naturally read as permitting them to attend and speak at such events without *per se* violating BCRA, so long as they do not "solicit" or "direct" soft money. A "notwithstanding" clause overrides a general prohibition *only* to the extent there is a conflict between the two. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). This reading is supported by BCRA's language and structure, which provide that a federal candidate may "speak" at a fundraising event but separately set forth explicitly the limited situations in which "solicitations" are actually permitted. *Compare* 2 U.S.C. 441i(e)(3) (entitled "Fundraising events") *with* 2 U.S.C. 441i(e)(4) (entitled "Permitting certain solicitations"). The statute plainly "[p]ermit[s] certain solicitations," but not at state party fundraisers. This construction is strongly reinforced by BCRA's legislative history, *see* SJA503 (statement of Sen. McCain), 253, 258 (statement of Sen. Feingold) (section-by-section analysis of BCRA expressly describing when federal candidates are "permitted to solicit" soft money but describing Section 441i(e)(3) as merely not "prevent[ing]" candidates from "speaking at" a fundraiser), as well as Congress's "evident purpose" to "shut down the soft-money system." *Shays I*, 414 F.3d at 105.[27]

[27] The Commission's initial proposed regulation relied on this legislative history and purpose in providing that, "while [federal candidates or officeholders] may attend, speak, or be a featured guest at a State or local party fundraising event, they cannot solicit funds at any such event." 67 Fed. Reg. at 35,672. The Commission has given no good reason for abandoning this reading.

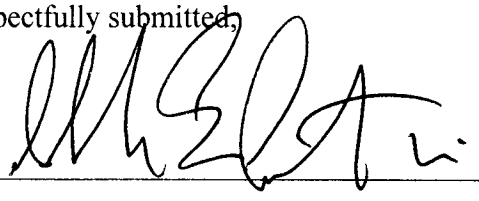
The Commission's explanations also fail APA review. The Commission reasoned in its first E&J that anything other than a total exemption would require it to monitor what candidates and officeholders say at such events, "rais[ing] serious constitutional concerns." 67 Fed. Reg. at 49,108. The District Court in *Shays I* held that this explanation was arbitrary and capricious because the Commission had failed to explain why examining speech would "in any way [be] more vexing in the context of state political party fundraisers than ... outside of such venues where nonfederal money solicitation is almost completely barred." 337 F. Supp. 2d at 92. On remand, the Commission issued a revised E&J that again insists that distinguishing between solicitations and informational speech "at a State party fundraising event is more difficult than in other contexts." JA288. The revised E&J claims that three factors make a state or local party fundraising event distinctive: the essential fundraising nature of the event, the unique relationship between federal officeholders or candidates and their state and local party organizations, and the role that federal officeholders and candidates traditionally play in supporting state and local party organizations. JA287-89, *see also* JA106-07. Yet all of these "distinctive factors" apply with equal force to state *candidate* fundraisers, which fall outside the terms of the statutory safe harbor regarding state *party* fundraisers. The Commission has not hesitated in the context of state *candidate* fundraisers to provide guidance about how federal candidates can be featured guests at, attend, speak at, and help publicize such events *without* engaging in forbidden soft money fundraising. *See* AO 2003-03. It has done the same in providing guidance with respect to federal officeholder and candidate appearances in other non-federal fundraising contexts. *See* AO 2003-05 (participation in PAC fundraising activities); AO 2003-36 (participation in RGA fundraising activities). There is no reason why its guidance in

these contexts could not just as readily be followed in the context of state *party* fundraising events.

Conclusion

For the reasons set forth above and in the District Court's decision, this Court should affirm the judgment below with respect to 11 C.F.R. 109.21(c), (d), and (h) and 11 C.F.R. 100.24(a)(2) and (3). The Court should reverse the judgment below with respect to 11 C.F.R. 300.64(b).

Respectfully submitted,



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February 15, 2008

ADDENDUM

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Note: This addendum does not include provisions that were previously provided in the FEC's addendum.

SEC. 214. COORDINATION WITH CANDIDATES OR POLITICAL PARTIES.

(a) IN GENERAL.—Section 315(a)(7)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(7)(B)) is amended—

(1) by redesignating clause (ii) as clause (iii); and

(2) by inserting after clause (i) the following new clause:

"(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and".

(b) REPEAL OF CURRENT REGULATIONS.—The regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees adopted by the Federal Election Commission and published in the Federal Register at page 76138 of volume 65, Federal Register, on December 6, 2000, are repealed as of the date by which the

Commission is required to promulgate new regulations under subsection (c) (as described in section 402(c)(1)).

(c) REGULATIONS BY THE FEDERAL ELECTION COMMISSION.— The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address— 2 USC 441a note.

(1) payments for the republication of campaign materials;

(2) payments for the use of a common vendor;

(3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and

(4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

(d) MEANING OF CONTRIBUTION OR EXPENDITURE FOR THE PURPOSES OF SECTION 316.—Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b(b)(2)) is amended by striking "shall include" and inserting "includes a contribution or expenditure, as those terms are defined in section 301, and also includes".

(8) (A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include–

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises

or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does exceed $2000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation...[1] or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan—

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii) any legal or accounting services rendered to or on behalf of—[2]

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26, but amounts paid or incurred by the regular employer

[1] The omitted language is an obsolete reference to the Federal Savings and Loan Insurance Corporation, which in past years provided account or deposit insurance. This corporation was abolished and its functions transferred in 1989. See note at 12 U.S.C. § 1437 for a fuller explanation.

[2] Section 103(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 431(8)(B) to strike subsection (viii) (regarding donations to party building funds) and redesignate subsections (ix) through (xv) as subsections (viii) through (xiv) respectively. This amendment is effective as of November 6, 2002.

for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(ix) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the cost of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(x) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or reference to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): *Provided*, That such payments are made from contributions subject to the limitations and prohibitions of this Act;

(xi) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection

with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

(xii) payments made by a candidate or the authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access;

(xiii) any honorarium (within the meaning of section 441i[1] of this title); and

(xiv)[2] any loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, if such a loan is made in accordance with applicable law and under commercially reasonable terms and if the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business.

(9) (A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station,

[1] This is an obsolete reference to a section of the law repealed in 1991 and not to current section 441i.

[2] Section 502(6) of the Department of Transportation and Related Agencies Appropriations Act, 2001, Pub. Law No. 106-346 amended 2 U.S.C. § 431(8)(B) by adding new subsection (xv). Section 103(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 431(8)(B) to redesignate subsection (xv) as subsection (xiv). This amendment is effective as of November 6, 2002.

newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an

amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b);

(vii) the payment of compensation for legal or accounting services—

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-

out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner

to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of title 15,[1] the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes[2] any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

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[1]15 U.S.C. § 79*l*(h) provides:

(h) Political contributions forbidden.

It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—

(1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

The term "contribution" as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution.

[2]Sections 203(a) and 214(d) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 441b(b)(2). These amendments are effective as of November 6, 2002.

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail

addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(c) *Rules relating to electioneering communications.*[1]

(1) *Applicable electioneering communication.* For purposes of this section, the term 'applicable electioneering communication' means an electioneering communication (within the meaning of section 304(f)(3)) (2 U.S.C. § 434(f)(3)) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) *Exception.* Notwithstanding paragraph (1), the term 'applicable electioneering communication' does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) made under section 304(f)(2)(E) or (F) of this Act (2 U.S.C. § 434(f)(2)(E) or (F)) if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20))). For purposes of the preceding sentence, the term 'provided directly by individuals' does not include funds the source of which is an entity described in subsection (a) of this section.

(3) *Special operating rules.*

(A) *Definition under paragraph (1).* An electioneering communication shall be treated as made by an entity described in subsection (a) if an entity described in subsection (a) directly or indirectly disburses any amount for any of the costs of the communication.

(B) *Exception under paragraph (2).* A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 304(f)(2)(E) (2 U.S.C. § 434(f)(2)(E)).

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[1]Section 203(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 441b to add paragraphs (c)(1) through (5). This amendment is effective as of November 6, 2002.

(4) *Definitions and rules.* For purposes of this subsection—

(A) the term 'section 501(c)(4) organization' means—

(i) an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) *Coordination with Internal Revenue Code.* Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 to carry out any activity which is prohibited under such Code.

(6) *Special rules for targeted communications.*[1]

(A) *Exception does not apply.* Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) *Targeted communication.* For purposes of subparagraph (A), the term 'targeted communication' means an electioneering communication (as defined in section 304(f)(3)) (2 U.S.C. § 434(f)(3)) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) *Definition.* For purposes of this paragraph, a communication is 'targeted to the relevant electorate' if it meets the requirements described in section 304(f)(3)(C) (2 U.S.C. § 434(f)(3)(C)).

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[1]Section 204 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 441b(c) to add paragraph (6). This amendment is effective as of November 6, 2002.

§ 441i. Soft money of political parties[1]

(a) *National committees.*

(1) *In general.* A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Applicability.* The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

(b) *State, district and local committees.*

(1) *In general.* Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Applicability.*

(A) *In general.* Notwithstanding clause (i) or (ii) of section 301(20)(A) (2 U.S.C. § 431(20)(A)), and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to

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[1]Prior to its repeal on August 14, 1991, by Section 6(d) of the Legislative Branch Appropriations Act, 1991, Pub. L. No. 102-90, section 441i regulated the acceptance of honoraria by Senators and officers and employees of the U.S. Senate. Section 309 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended the Act to add a new section 441i, concerning nonfederal funds of political parties. This amendment is effective as of November 6, 2002.

the extent the amounts expended or disbursed for such activity are allocated (under regulations prescribed by the Commission) among amounts—

(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

(B) *Conditions.* Subparagraph (A) shall only apply if—

(i) the activity does not refer to a clearly identified candidate for Federal office;

(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—

(I) any other State, local, or district committee of any State party,

(II) the national committee of a political party (including a national congressional campaign committee of a political party),

(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

(C) *Prohibiting involvement of national parties, federal candidates and officeholders, and state parties acting jointly.* Notwithstanding subsection (e) (other than subsection (e)(3)), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts—

(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e); and

(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committees of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

(c) *Fundraising costs.* An amount spent by a person described in subsection (a) or (b) to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(d) *Tax-exempt organizations.* A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to—

(1) an organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

(2) an organization described in section 527 of such Code (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(e) *Federal candidates.*

(1) *In general.* A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend 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; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 315(a) (2 U.S.C. § 441a(a)); and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) *State law.* Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

(3) *Fundraising events.* Notwithstanding paragraph (1) or subsection (b)(2)(C), a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) *Permitting certain solicitations.*

(A) *General solicitations.* Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application

for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 301(20)(A)) (2 U.S.C. § 431(20)(A)) where such solicitation does not specify how the funds will or should be spent.

(B) *Certain specific solicitations.* In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 301(20)(A) (2 U.S.C. § 431(20)(A)), or for an entity whose principal purpose is to conduct such activities, if—

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

(f) *State candidates.*

(1) *In general.* A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Exception for certain communications.* Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.

§ 100.3 Candidate (2 U.S.C. 431(2)).

(a) *Definition. Candidate* means an individual who seeks nomination for election, or election, to federal office. An individual becomes a candidate for Federal office whenever any of the following events occur:

(1) The individual has received contributions aggregating in excess of $5,000 or made expenditures aggregating in excess of $5,000.

(2) The individual has given his or her consent to another person to receive contributions or make expenditures on behalf of that individual and such person has received contributions aggregating in excess of $5,000 or made expenditures aggregating in excess of $5,000.

(3) After written notification by the Commission that any other person has received contributions aggregating in excess of $5,000 or made expenditures aggregating in excess of $5,000 on the individual's behalf, the individual fails to disavow such activity by letter to the Commission within 30 days of receipt of the notification.

(4) The aggregate of contributions received under 11 CFR 100.3(a) (1), (2), and (3), in any combination thereof, exceeds $5,000, or the aggregate of expenditures made under 11 CFR 100.3(a) (1), (2), and (3), in any combination thereof, exceeds $5,000.

(b) *Election cycle.* For purposes of determining whether an individual is a candidate under this section, contributions or expenditures shall be aggregated on an election cycle basis. An election cycle shall begin on the first day following the date of the previous general election for the office or seat which the candidate seeks, unless contributions or expenditures are designated for another election cycle. For an individual who receives contributions or makes expenditures designated for another election cycle, the election cycle shall begin at the time such individual, or any other person acting on the individual's behalf, first receives contributions or makes expenditures in connection with the designated election. The election cycle shall end on the date on which the general election for the office or seat that the individual seeks is held.

§ 100.133 Voter registration and get-out-the-vote activities.

Any cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure 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, except that corporations and labor organizations shall engage in such activity in accordance with 11 CFR 114.4 (c) and (d). *See also* 11 CFR 114.3(c)(4).

§ 106.4 Allocation of polling expenses.

(a) The purchase of opinion poll results by a candidate or a candidate's authorized political committee or agent is an expenditure by the candidate. Regarding the purchase of opinion poll results for the purpose of determining whether an individual should become a candidate, see 11 CFR 100.131(a).

(b) The purchase of opinion poll results by a political committee or other person not authorized by a candidate to make expenditures and the subsequent acceptance of the poll results by a candidate or a candidate's authorized political committee or agent or by another unauthorized political committee is a contribution in-kind by the purchaser to the candidate or other political committee and an expenditure by the candidate or other political committee. Regarding the purchase of opinion poll results for the purpose of determining whether an individual should become a candidate, see 11 CFR 100.72(a). The poll results are accepted by a candidate or other political committee if the candidate or the candidate's authorized political committee or agent or the other unauthorized political committee—

(1) Requested the poll results before their receipt;

(2) Uses the poll results; or

(3) Does not notify the contributor that the results are refused.

(c) The acceptance of any part of a poll's results which part, prior to receipt, has been made public without any request, authorization, prearrangement, or coordination by the candidate-receipient or political committee-recipient, shall not be treated as a contribution in-kind and expenditure under paragraph (b) of this section.

(d) The purchase of opinion poll results by an unauthorized political committee for its own use, in whole or in part, is an overhead expenditure by the political committee under §106.1(c)(1) to the extent of the benefit derived by the committee.

(e) The amount of a contribution under paragraph (b) of this section or of any expenditure under paragraphs (a) and (b) of this section attributable to each candidate-recipient or political committee-recipient shall be—

(1) That share of the overall cost of the poll which is allocable to each candidate (including State and local candidates) or political committee, based upon the cost allocation formula of the polling firm from which the results are purchased. Under this method the size of the sample, the number of computer column codes, the extent of computer tabulations, and the extent of written analysis and verbal consultation, if applicable, may be used to determine the shares; or

(2) An amount computed by dividing the overall cost of the poll equally among candidates (including State and local candidates) or political committees receiving the results; or

(3) A proportion of the overall cost of the poll equal to the proportion that the number of question results received by the candidate or political committee bears to the total number of question results received by all candidates (including State and local candidates) and political committees; or

(4) An amount computed by any other method which reasonably reflects the benefit derived.

(f) The first candidate(s) or committee(s) receiving poll results under paragraph (b) or (d) of this section and any candidate or political committee receiving poll results under paragraph (b) of this section within 15 days after receipt by the initial recipient(s) shall compute the amount of the contribution in-kind and the expenditure as provided in paragraph (e) of this section.

(g) The amount of the contribution and expenditure reported by a candidate or a political committee receiving poll results under paragraph (b) of this section more than 15 days after receipt of such poll results by the initial recipient(s) shall be—

(1) If the results are received during the period 16 to 60 days following receipt by the initial recipient(s), 50 percent of the amount allocated to an initial recipient of the same results;

(2) If the results are received during the period 61 to 180 days after receipt by the initial recipient(s), 5 percent of the amount allocated to an initial recipient of the same results;

(3) If the results are received more than 180 days after receipt by the initial recipient(s), no amount need be allocated.

(h) A contributor of poll results under paragraph (b) of this section shall maintain records sufficient to support the valuation of the contribution(s) in-kind and shall inform the candidate-recipient(s) or political committee-recipient(s) of the value of the contribution(s).

[41 FR 35944, Aug. 25, 1976, as amended at 45 FR 21209, Apr. 1, 1980; 67 FR 78681, Dec. 26, 2002]

§ 106.7 Allocation of expenses between Federal and non-Federal accounts by party committees, other than for Federal election activities.

(a) National party committees are prohibited from raising or spending non-Federal funds. Therefore, these committees shall not allocate expenditures and disbursements between Federal and non-Federal accounts. All disbursements by a national party committee must be made from a Federal account.

(b) State, district, and local party committees that make expenditures and disbursements in connection with both Federal and non-Federal elections for activities that are not Federal election activities pursuant to 11 CFR 100.24 may use only funds subject to the prohibitions and limitations of the Act, or they may allocate such expenditures and disbursements between their Federal and their non-Federal accounts. State, district, and local party committees that are political committees that have established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate expenses between those accounts according to paragraphs (c) and (d) of this section. Party organizations that are not political committees but have established separate Federal and non-Federal accounts, or that make Federal and non-Federal disbursements from a single account, shall also allocate their Federal and non-Federal expenses according to paragraphs (c) and (d) of this section. In lieu of establishing separate accounts, party organizations that are not political committees may choose to use a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) pursuant to 11 CFR 102.5 and 300.30.

(c) *Costs allocable by State, district, and local party committees between Federal and non-Federal accounts.*

(1) *Salaries, wages, and fringe benefits.* State, district, and local party committees must either pay salaries, wages, and fringe benefits for employees who spend 25% or less of their time in a given month on Federal election activity or activity in connection with a Federal election with funds from their Federal account, or with a combination of funds from their Federal and non-Federal accounts, in accordance with paragraph (d)(2) of this section. *See* 11 CFR 300.33(d)(1).

(2) *Administrative costs.* State, district, and local party committees may either pay administrative costs, including rent, utilities, office equipment, office supplies, postage for other than mass mailings, and routine building maintenance, upkeep and repair, from their Federal account, or allocate such expenses between their Federal and non-Federal accounts, except that any such expenses directly attributable to a clearly identified Federal candidate must be paid only from the Federal account.

(3) *Exempt party activities that are not Federal election activities.* State, district, and local party committees may pay expenses for party activities that are exempt from the definitions of contribution and expenditure under 11 CFR 100.80, 100.87 or 100.89, and 100.140, 100.147 or 100.149, that are conducted in conjunction with non-Federal activity, and that are not Federal election activities pursuant to 11 CFR 100.24, from their Federal accounts, or may allocate these expenses between their Federal and non-Federal accounts.

(4) *Certain fundraising costs.* State, district, and local party committees may allocate the direct costs of joint fundraising programs or events between their Federal and non-Federal

accounts according to the funds received method described in paragraph (d)(4) of this section. The direct costs of a fundraising program or event include expenses for the solicitation of funds and for the planning and administration of actual fundraising programs and events.

(5) *Voter-drive activities that do not qualify as Federal election activities and that are not party exempt activities.* Expenses for voter identification, voter registration, and get-out-the-vote drives, and any other activities that urge the general public to register or vote, or that promote or oppose a political party, without promoting or opposing a candidate or non-Federal candidate, that do not qualify as Federal election activities and that are not exempt party activities, must be paid with Federal funds or may be allocated between the committee's Federal and non-Federal accounts.

(d) *Allocation percentages, ratios, and record-keeping*—(1) *Salaries and wages.* Committees must keep a monthly log of the percentage of time each employee spends in connection with a Federal election. Allocations of salaries and wages shall be undertaken as follows:

(i) Except as provided in paragraph (d)(1)(iii) of this section, salaries, wages, and fringe benefits paid for employees who spend 25% or less of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must either be paid only from the Federal account or be allocated as administrative costs under paragraph (d)(2) of this section.

(ii) Salaries, wages, and fringe benefits paid for employees who spend more than 25% of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must be paid only from a Federal account. *See* 11 CFR 300.33(d)(1), and paragraph (e)(2) of this section.

(iii) Salaries, wages, and fringe benefits paid for employees who spend none of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election may be paid entirely with funds that comply with State law.

(2) *Administrative costs.* State, district, and local party committees that choose to allocate administrative expenses may do so subject to the following requirements:

(i) *Presidential election years.* In any even year in which a Presidential candidate, but no Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 28% of administrative expenses to their Federal accounts.

(ii) *Presidential and Senate election year.* In any even year in which a Presidential candidate and a Senate candidate appear on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 36% of administrative expenses to their Federal accounts.

(iii) *Senate election year.* In any even year in which a Senate candidate, but no Presidential candidate, appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 21% of administrative expenses to their Federal account.

(iv) *Non-Presidential and non-Senate year.* In any even year in which neither a Presidential nor a Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 15% of administrative expenses to their Federal account.

(3) *Exempt party activities and voter drive activities that are not Federal election activities.* State, district, and local party committees that choose to allocate expenses for exempt activities conducted in conjunction with non-Federal activities and voter drive activities, that are not Federal election activities, must do so subject to the following requirements:

(i) *Presidential election years.* In any even year in which a Presidential candidate, but no Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 28% of these expenses to their Federal accounts.

(ii) *Presidential and Senate election year.* In any even year in which a Presidential candidate and a Senate candidate appear on the ballot, and in the

preceding year, State, district, and local party committees must allocate at least 36% of these expenses to their Federal accounts.

(iii) *Senate election year.* In any even year in which a Senate candidate, but no Presidential candidate, appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 21% of these expenses to their Federal account.

(iv) *Non-Presidential and non-Senate year.* In any even year in which neither a Presidential nor a Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committee must allocate at least 15% of these expenses to their Federal account.

(4) *Fundraising for Federal and non-Federal accounts.* If Federal and non-Federal funds are collected by a State, district, or local party committee through a joint fundraising activity, that committee must allocate its direct fundraising costs using the funds received method and according to the following procedures:

(i) The committee must allocate its fundraising costs based on the ratio of funds received into its Federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its Federal and non-Federal revenue from that program or event, and must be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant to 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event must be allocated according to this estimated ratio.

(ii) No later than the date 60 days after each fundraising program or event from which both Federal and non-Federal funds are collected, the committee shall adjust the allocation ratio for that program or event to reflect the actual ratio of funds received. If the non-Federal account has paid more than its allocable share, the committee shall transfer funds from its Federal to its non-Federal account, as necessary, to reflect the adjusted allocation ratio. If the Federal account has paid more than its allocable share, the committee shall make any transfers of funds from its non-Federal to its Federal account to reflect the adjusted allocation ratio within the 60-day time period established by this paragraph. The committee shall make note of any such adjustments and transfers in its report for any period in which a transfer was made, and shall also report the date of the fundraising program or event that serves as the basis for the transfer. In the case of a telemarketing or direct mail campaign, the date for purposes of this paragraph is the last day of the telemarketing campaign, or the day on which the final direct mail solicitations are mailed.

(e) *Costs not allocable by State, district, and local party committees between Federal and non-Federal accounts.* The following costs incurred by State, district, and local party committees shall be paid only with Federal funds:

(1) Disbursements for State, district, and local party committees for activities that refer only to one or more candidates for Federal office must not be allocated. All such disbursements must be made from a Federal account.

(2) *Salaries and wages.* Salaries and wages for employees who spend more than 25% of their compensated time in a given month on activities in connection with a Federal election must not be allocated. All such disbursements must be made from a Federal account. *See* 11 CFR 300.33(d)(2).

(3) *Federal election activities.* Activities that are Federal election activities pursuant to 11 CFR 100.24 must not be allocated between Federal and non-Federal accounts. Only Federal funds, or a mixture of Federal funds and Levin funds, as provided in 11 CFR 300.33, may be used.

(f) *Transfers between accounts to cover allocable expenses.* State, district, and local party committees may transfer funds from their non-Federal to their Federal accounts or to an allocation account solely to meet allocable expenses under this section and only pursuant to the following requirements:

(1) *Payments from Federal accounts or from allocation accounts.* (i) State, district, and local party committees must pay the entire amount of an allocable

expense from their Federal accounts and transfer funds from their non-Federal account to the Federal account solely to cover the non-Federal share of that allocable expense; or

(ii) State, district, or local party committees may establish a separate allocation account into which funds from its Federal and non-Federal accounts may be deposited solely for the purpose of paying the allocable expenses of joint Federal and non-Federal activities.

(2) *Timing.* (i) If a Federal or allocation account is used to make allocable expenditures and disbursements, State, district, and local party committees must transfer funds from their non-Federal to their Federal or allocation account to meet allocable expenses no more than 10 days before and no more than 60 days after the payments for which they are designated are made from a Federal or allocation account, except that transfers may be made more than 10 days before a payment is made from the Federal or allocation account if advance payment is required by the vendor(s) and if such payment is based on a reasonable estimate of the activity's final costs as determined by the committee and the vendor(s) involved.

(ii) Any portion of a transfer from a committee's non-Federal account to its Federal or allocation account that does not meet the requirement of paragraph (f)(2)(i) of this section shall be presumed to be a loan or contribution from the non-Federal account to the Federal or allocation account, in violation of the Act.

[67 FR 49118, July 29, 2002, as amended at 67 FR 78681, Dec. 26, 2002; 70 FR 75384, Dec. 20, 2005]

announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications; and

(b) Candidates and individuals holding Federal office may speak at such events without restriction or regulation.

§ 300.64 Exemption for attending, speaking, or appearing as a featured guest at fundraising events (2 U.S.C. 441i(e)(3)).

Notwithstanding the provisions of 11 CFR 100.24, 300.61 and 300.62, a Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including but not limited to a fundraising event at which Levin funds are raised, or at which non-Federal funds are raised. In light of the foregoing:

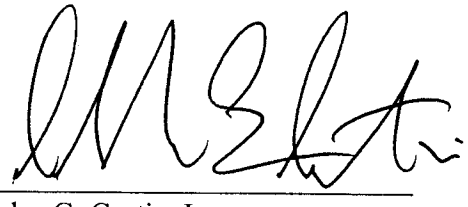
(a) State, district, or local committees of a political party may advertise,

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)
AND D.C. CIR. R. 32(a)(2)**

As required by Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing brief complies with the length requirements of Fed. R. App. P. 28.1(e)(2)(B) and D.C. Cir. R. 32(a)(2). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 16,319 words.

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and D.C. Cir. R. 32(a)(1), and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionately space typeface using Microsoft Word 2000 in Times New Roman font size 12.

Dated: February 15, 2008



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2008, I caused to be served by hand two copies of the foregoing "Principal and Response Brief for Christopher Shays" upon the following counsel:

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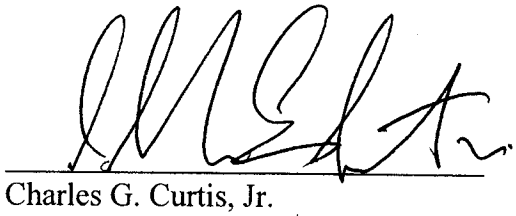

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