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

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March 21, 2008

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GLOSSARY

AO	=	FEC Advisory Opinion
APA	=	Administrative Procedure Act
BCRA	=	Bipartisan Campaign Reform Act of 2002
BR	=	Initial Brief for the Federal Election Commission (Jan. 15, 2008)
E&J	=	Explanation & Justification
FEC	=	Federal Election Commission
FECA	=	Federal Election Campaign Act
JA	=	Joint Appendix
PAC	=	Political Action Committee
RESP	=	Response and Reply Brief for the Federal Election Commission (Mar. 7, 2008)
RGA	=	Republican Governors' Association

Argument in Reply

Christopher Shays has cross-appealed solely from the portion of the District Court's judgment that sustains the Federal Election Commission's regulation interpreting the so-called "state party fundraising" provision. *See* 2 U.S.C. 441i(e)(3); 11 C.F.R. 300.64(b); JA 105-09. Representative Shays's reply is accordingly restricted to the legality of this single regulation.

The District Court acknowledged in *Shays I* that "the Commission's interpretation likely contravenes what Congress intended when it enacted" the state party fundraising provision, "as well as what the Court views to be the more natural reading of the statute." *Shays v. FEC*, 337 F. Supp. 2d 28, 91 (D.D.C. 2004). The District Court added that "there can be little doubt that this provision creates the potential for abuse." *Id.* In *Shays III*, the District Court again expressed its "continued suspicion that 'the Commission's interpretation likely contravenes what Congress intended when it enacted the provision.'" JA 109 (quoting *Shays I*). The District Court nevertheless upheld Section 300.64(b) under *Chevron* steps one and two and the APA, reasoning that it "cannot be disputed" that, "by enacting Section 441i(e)(3), Congress opted to treat state, district, and local party fundraisers differently from other fundraising events." JA 109; *see also* JA 108 n.32 (Congress "singled out" these kinds of fundraisers "for special treatment").

But to say that Congress intended to provide "special" protection for appearances at state party fundraising events in no way leads to the extreme conclusion that Congress thereby intended to create what the District Court called "a complete carve-out" from BCRA's ban against federal officeholders and candidates soliciting soft money, JA 108, thus authorizing the same unseemly practices that Congress had intended to prohibit so long as they occur at state and local party fundraisers. As this Court emphasized with respect to another lax soft money regulation that was struck down in *Shays I*, given Congress's manifest purpose to "shut down the

soft money system," it would be "absurd[]," and would "fly in the face of this purpose," to promulgate a regulation that "allow[s] parties and politicians to perpetuate" the soft money system by engaging in the very same practices, albeit in a more circumscribed manner. *Shays v. FEC*, 414 F.3d 76, 106 (D.C. Cir. 2005) (*re* definitions of "solicit" and "direct"). This Court should reach the same conclusion here. Section 300.64(b) violates *Chevron* step one, *Chevron* step two, and the APA.

I. The Commission's Construction of the State Party Fundraiser Provision Fails *Chevron* Step One Because It Violates BCRA's Language, Structure, Legislative History, and Underlying Purposes.

The Commission's "complete carve-out" does not survive scrutiny under *Chevron* step one because it conflicts with the language, structure, legislative history, and underlying purposes of BCRA. "[T]he courts are the final authorities on issues of statutory construction," and "must reject administrative constructions ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *see also Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Before giving any deference to the Commission's views, "the court must first exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue. ... If the court can determine congressional intent, then that interpretation must be given effect." *NRDC v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (internal citations and quotation marks omitted). As this Court emphasized in *Shays I*, "[i]n undertaking our *Chevron* step one inquiry into 'whether Congress has directly spoken to the precise question at issue,' we employ 'the traditional tools of statutory construction,' ... including 'examination of the statute's text, legislative history, and structure[,] as well as its

purpose.'" 414 F.3d at 105 (citations omitted); *see also AFL-CIO v. FEC,* 333 F.3d 168, 172-73 (D.C. Cir. 2003).

The Commission's "complete carve-out" fails *Chevron* step one whether it violates *express* statutory provisions or principles that are *implicit* in the statutory scheme. If the "traditional tools" indicate that BCRA "clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense." *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1088 (D.C. Cir. 1996); *see also Halverson v. Slater,* 129 F.3d 180, 186-87 (D.C. Cir. 1997) (citing numerous authorities); *Orloski v. FEC,* 795 F.2d 156, 162 (D.C. Cir. 1986) (FEC regulation may not violate Congressional intent "as expressed either explicitly or implicitly in the Act"). Moreover, "a reviewing court should not confine itself to examining a particular statutory provision in isolation," but must consider the language in "context" and "interpret the statute 'as a symmetrical and coherent regulatory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132-33 (2000) (citations omitted). Because the Commission's reading of the state party fundraising provision "makes no sense" and is "implausible" when analyzed in context using the "traditional tools," it fails at *Chevron* step one. *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 466-68 (2001); *see also MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225-34 (1994); *Indep. Ins. Agents of Am., Inc. v. Hawke,* 211 F.3d 638, 644-45 (D.C. Cir. 2000); *Halverson,* 129 F.3d at 183-89.

A. The Commission's "Complete Carve-Out" Violates BCRA's Language and Structure.

The Commission's entire argument hinges on the premise that Section 441i(e)(3) can plausibly be read to *authorize* federal officeholders and candidates to engage in a no-holds-barred, soft-money solicitation "free-for-all," *Shays I,* 414 F.3d at 100, so long as they do so only

while attending state and local party fundraisers. That is simply not a plausible construction given the statutory language, structure, and context.

The operative ban against soft money solicitations by federal officeholders and candidates is unqualified and absolute: such persons "*shall not* ... solicit, receive, direct, transfer, or spend funds in connection with" federal elections "unless the funds are subject to [FECA's] limitations, prohibitions, and reporting requirements." 2 U.S.C. 441i(e)(1)(A) (emphasis added). Nor may federal officeholders and candidates "solicit, receive, direct, transfer, or spend funds in connection with" state or local elections unless the funds comply with federal contribution limits and source prohibitions. *Id.* 441i(e)(1)(B). From these unqualified and sweeping prohibitions, Congress carved out three specified exceptions where certain soft money "solicitations" are allowed, but only within narrowly circumscribed limits:

- Section 441i(e)(2) expressly authorizes a federal officeholder or candidate to engage in "the solicitation, receipt, or spending of" nonfederal money if that person is *also* a candidate for state or local office, the nonfederal funds are used "solely in connection with such election for State or local office," the funds comply with state legal requirements, and there are no references other than to candidates for the state or local office at issue.
- Section 441i(e)(4)(A)—which appears under the heading "**Permitting certain solicitations**"—expressly authorizes a federal officeholder or candidate to "make a general solicitation of funds" on behalf of certain nonprofit groups "where such solicitation does not specify how the funds will or should be spent," subject to certain restrictions. 2 U.S.C. 441i(e)(4)(A).

- Section 441i(e)(4)(B)—which bears the subheading "**Certain specific solicitations**"—expressly authorizes a federal officeholder or candidate to "make a solicitation explicitly to obtain funds for carrying out" certain specified voter registration and get-out-the-vote activities, "or for an entity whose principal purpose is to conduct such activities," so long as "the solicitation is made only to individuals" and "the amount solicited from any individual during any calendar year does not exceed $20,000."

These are the only three instances in which Congress has authorized federal officeholders and candidates to engage in the "solicitation" or "direction" of soft money.

Nothing in BCRA's state party fundraising provision suggests that Congress intended *sub silentio* to create a fourth category of authorized "solicitations." Unlike other provisions that are titled as "**Permitting certain solicitations**," the state party fundraising provision is simply entitled "**Fundraising events**." And unlike the three provisions that *expressly authorize* the solicitation and direction of soft money in certain limited instances, the fundraising provision does not even use these key terms. Instead, it merely provides that, "[n]otwithstanding" the soft-money solicitation ban, "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." As the District Court initially acknowledged, this provision is most naturally read as allowing federal candidates and officeholders to attend and speak at such fundraisers without *per se* violating BCRA, so long as they do not themselves engage in the "solicitation" or "direction" of soft money. 337 F. Supp. 2d at 88. The state party fundraising provision does not provide that a federal officeholder or candidate may "*solicit*" — a word Congress knew how to use, as is evident throughout Section 441i (which uses "solicit" or "solicitation" 17 times). The provision

states that federal candidates and officeholders may "attend, speak, or be a featured guest" at state party fundraisers, not that they may engage in unlimited, no-holds-barred solicitation and direction of soft money "without restriction or regulation." 11 C.F.R. 300.64(b).

Language matters. The Commission's reading violates BCRA's plain language. Congress enacted a sweeping ban providing that federal officeholders and candidates "shall not" solicit or direct soft money, subject to three specific exceptions that authorize such "solicitations" in limited, carefully regulated circumstances. This language leaves the Commission without authority to create a *fourth* exception to the solicitation ban. *Expressio unius est exclusio alterius* ("the mention of one thing implies the exclusion of another thing"). Where Congress lists certain exceptions to a general provision, neither courts nor agencies may "read other unmentioned, open-ended, 'equitable' exceptions into the statute." *United States v. Brockamp*, 519 U.S. 347, 352 (1997); *see TRW, Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001); *NRDC v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007) (invalidating regulation under *Chevron* step one because where "Congress enumerated specific exceptions" to a general rule, "Congress has spoken on the question and has not provided" the agency with "authority" to create other exceptions); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007) (invalidating regulation under *Chevron* step one because where "the terms of the [statute] establish the precise conditions under which [regulated parties] are exempt," an agency may not change or add to those conditions).[1]

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[1] *See also Indep. Ins. Agents*, 211 F.3d at 643-44 (applying *expressio unius* canon under *Chevron* step one to reject an agency's construction of statute); *Halverson*, 129 F.3d at 185 (same); *see generally Shays I*, 414 F.3d at 107-09 (holding that Commission's definition of "electioneering communication" failed *Chevron* step one because "the Commission has taken the three parts of BCRA's standard" as set forth in the statute "and added a fourth .... Nothing in the statute suggests that Congress contemplated such an element.").

Nor do the verbs "attend," "speak," or "be" equate with the verb "solicit." When Congress intended to create an exception to the solicitation ban, it did so by using the verb "solicit," *e.g.*, federal officeholders and candidates "may make a solicitation" in certain circumstances. 2 U.S.C. 441i(e)(4)(B). Congress's "choice of different verbs ... is a choice which we properly take as evidence of an intentional differentiation." *Nat'l Insulation Transp. Comm. v. ICC,* 683 F.2d 533, 537 (D.C. Cir. 1982) ("we presume that the use of different terminology within a statute indicates that Congress intended to establish a different meaning") (internal quotation marks and citation omitted); *see also Florida Pub. Telecomms. Ass'n v. FCC,* 54 F.3d 857, 860 (D.C. Cir. 1995) ("when Congress uses different language in different sections of a statute, it does so intentionally").

This reading is reinforced by Section 441i(e)'s structure, which provides in one subsection that a federal candidate may "speak" at a state party fundraising event but establishes in other subsections 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 juxtaposition of these subsections, and the difference in the verbs they use, indicates that, although Section 441i(e)(2) and (4) are exceptions to the soft-money solicitation ban, Section 441i(e)(3) — the state party fundraiser provision — is not. The statute plainly "[p]ermit[s] certain solicitations" of soft money, but not at state party fundraisers.

The Commission argues that the statute is "ambiguous" and might really have been intended to allow additional exceptions to the soft-money solicitation ban. The Commission claims that its "complete carve-out" is the only construction that "harmonize[s]" and "reconciles" Section 441i(e)(3) with Section 441i(e)(1)(B), and that any other reading would

render Section 441i(e)(3) "largely superfluous." Resp. 39. That is simply not so. Section 441i(e)(1)(B) broadly provides that federal candidates and officeholders "shall not ... solicit, receive, direct, transfer, or spend funds in connection with" state or local elections unless those funds comply with federal source prohibitions and contribution limits. There is no conflict between these two provisions. One is a broad, unqualified ban on solicitation of funds that do not meet FECA's requirements. The other is a clarification that, "[n]otwithstanding" the ban, a federal officeholder or candidate may still "attend, speak, or be a featured guest" at a state or local party fundraising event. The clarification makes clear that these acts will not, by themselves, be construed to constitute "solicitation." Thus, a federal officeholder or candidate may attend and speak at a state party fundraiser even if soft money is being raised, provided that he restricts his own solicitation activities to funds that comply with FECA's source prohibitions and contribution limits.

The Commission argues, however, that the interplay of 441i(e)(1)(B) and (e)(3) is ambiguous because Congress failed to specify that its permission to "attend" and "speak" did *not* include the right to engage in solicitation as well. Resp. 40; *see also* JA 287. This turns the rules of statutory construction on their head. As this Court emphasized in *Shays I*, Congress is not required to "rul[e] out every possible limitation on statutory language" in order for that language to be "clear"; a statute is not "ambiguous" simply because it "'does not expressly *negate*'" the agency's preferred reading. 414 F.3d at 108 (citation omitted, emphasis in original). Congress created three express "solicitation" exceptions to the ban against soft-money solicitation. Under elementary canons of statutory construction, that leaves the Commission with no authority to create additional soft-money "solicitation" exceptions that Congress did not include.

The Commission contends that, since it has now interpreted 2 U.S.C. 441i(e)(1)(B) to allow federal officeholders and candidates to attend state *candidate* soft-money fundraisers (subject to certain restrictions and required disclaimers), Section 441i(e)(3) must be construed as authorizing unbridled soft-money solicitations at state *party* fundraisers in order to avoid being rendered "'*largely* superfluous.'" Resp. 39-40 (emphasis added). But an agency cannot render part of a statute "superfluous." At the time of BCRA's enactment, Congress could not foresee how the Commission would regulate participation in state candidate fundraisers and similar events, but wanted to codify that federal officeholders and candidates could at the very least attend and speak at state party fundraisers without being deemed to be engaged in forbidden "solicitation." Any apparent surplusage is occasioned only by the Commission's *post hoc* interpretation of Section 441i(e)(1)(B), not by Congressional action. And even if Congress had been redundant, the "preference for avoiding surplusage constructions is not absolute" and can be offset by other canons of construction, including the avoidance of a result that is inconsistent with the statute's overall structure and purposes. *Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004); *see also Sabre, Inc. v. DOT*, 429 F.3d 1113, 1122 (D.C. Cir. 2005) ("[l]egislative drafters often use apparently redundant language").[2]

The Commission also argues that the "[n]otwithstanding" clause in Section 441i(e)(3) creates ambiguity, because the term "notwithstanding" operates to "supersede" the underlying soft-money solicitation ban that the "notwithstanding" clause qualifies. Resp. 40. That too is

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[2] The Commission appears to argue that Section 441i(e)(3) would be "largely superfluous" under plaintiff's reading because Section 441i(e)(1)(B) *already* allows federal officeholders and candidates to solicit funds for state and local parties "in amounts permitted by FECA and not from prohibited sources." JA 287; Resp. 39 & n.22. This hardly suggests that *unrestricted* solicitations of soft money—including from corporations, unions, and wealthy individuals and groups—should be allowed at state party fundraisers. Such a result goes far beyond what Section 441i(e)(1)(B) "already" authorizes. Resp. 39.

incorrect. As emphasized in the case cited by the Commission, a "notwithstanding" clause simply "override[s] *conflicting* provisions" of the underlying prohibition, not the entire prohibition. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added); *see also United States v. Hyde*, 497 F.3d 103, 108 (1st Cir. 2007) ("notwithstanding" clauses "supersede *conflicting* federal statutes") (emphasis added). As applied to Section 441i(e), that rule of construction dictates that the state party fundraiser provision override the flat ban on solicitation only to the extent there is a conflict between the two. Accordingly, as suggested by its most natural and straightforward reading, the state party fundraiser provision indicates only that any of the listed activities — attending, speaking at, or being a featured guest at a designated event — will be permitted even if they might otherwise be construed as violating the ban on solicitation and direction of soft money. But with respect to any activity that goes *beyond* those specifically listed — including and especially "solicitation" and "direction" of soft money — the general prohibition controls. Plainly, this limited clarification neither indicates that Congress intended a wholesale exemption from the general soft-money solicitation ban nor authorized the FEC to create one.

B. The Commission's "Complete Carve Out" Flouts the Legislative History and Congress's Core Underlying Purposes.

BCRA's legislative history and Congress's evident purposes similarly confirm that Congress neither intended nor authorized the Commission's "complete carve-out." As the sponsors repeatedly emphasized, BCRA was intended to eliminate the corruption and appearance of corruption resulting from federal officeholders and candidates raising money for themselves or organizations helpful to their election prospects. *See McConnell v. FEC*, 540 U.S. 93, 182-83 (2003) ("Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or

officeholder."). To this end, BCRA established a rule that is both clear and "simple: Federal candidates and officeholders cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee — national, State or local." JA 259 (statement of Sen. McCain); JA 258-59 (statement of Sen. Feingold) (section-by-section analysis of BCRA describing explicitly 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 state party fundraiser). The Commission's initial proposed rule relied on this legislative history and purpose, cautioning 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.

More generally, as the Supreme Court and this Court have emphasized, BCRA was designed to "plug the soft-money loophole," through which contributors were able to "bu[y] influence and access with Federal officeholders and candidates." *McConnell*, 540 U.S. at 134; JA 259 (statement of Sen. McCain). It defies logic and "common sense" to conclude that in a law designed to close loopholes, Congress intended *sub silentio* to authorize the opening of another by allowing federal candidates and officeholders to solicit and direct soft money "without restriction or regulation" at any designated state or local party fundraising event. *See FDA v. Brown & Williamson Tobacco*, 529 U.S. at 133. Had Congress intended that result, it surely would have said so expressly — as it very easily could have done by adding "solicit" and "direct" to the permitted activities listed in the state party fundraiser provision, as it did in other sections of the statute.[3]

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[3] The opportunity for abuse of this loophole is exacerbated by the lack of any definition of what constitutes a "fundraising event for a State, district, or local committee of a political

(Footnote continued)

This Court's rejection of other soft-money regulations in *Shays I* is closely on point. At issue were regulations that narrowly defined the verbs "solicit" and "direct." The Commission argued that these terms were "ambiguous" because they have various dictionary meanings, and that its chosen definitions were therefore entitled to *Chevron* deference. This Court rejected the Commission's arguments and held that, even though "solicit" and "direct" might be ambiguous in other situations, they clearly require a broad definition in this situation given the statutory "context" and Congress's underlying intent. This Court described the broader context and goals of the soft-money solicitation ban:

> Reflecting "Congress's effort to plug the soft-money loophole," *McConnell*, 540 U.S. at 133, . . . BCRA marshals "solicit" and "direct" as reinforcements for other, more straightforward prohibitions. Candidates may not "receive" or "spend" soft money, nor may they "solicit ..., direct, [or] transfer" it—for themselves or anyone else. *See* 2 U.S.C. § 441i(e)(1). The same restrictions—spending, receiving, transferring, soliciting, directing—likewise apply to national parties. *See id.* § 441i(a). Further, BCRA surrounds these restrictions with yet more stopgaps, providing, for example, that even indirectly controlled entities count as "parties" for purposes of these restrictions, 2 U.S.C. § 441i(a)(2), and then "reinforc[ing]," *McConnell*, 540 U.S. at 133, the soft-money rules by requiring that certain state-party activities receive federal (i.e., non-soft-money) funding, 2 U.S.C. § 441i(b). Given this context, and considering Congress's intent to shut down the soft-money system, we think it obvious that "solicit" and "direct" serve to reinforce BCRA's more direct prohibitions. Barred from spending and receiving unregulated funds, candidates and parties might switch to raising such money for friendly outsiders. So BCRA bans "soliciting" and "directing" as well.

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party." 2 U.S.C. 441i(e)(3). Thus, nothing prevents a federal candidate or officeholder from calling together a group of wealthy donors, labeling the gathering a "fundraising event for a State, district, or local committee of a political party," and conducting unrestricted solicitation of soft money for state parties. The District Court in *Shays I* expressed "concern" that the absence of a definition for this term "could lead to widespread abuse." 337 F. Supp. 2d at 91 n.60.

414 F.3d at 105-06 (parallel citation omitted). This Court held that, given Congress's overriding purpose to "shut down the soft-money system," the Commission's narrow definitions of "solicit" and "direct" did not make it past *Chevron* step one because, even though these terms "'can, of course, mean a variety of things,' ... in the context of *this* case we find the FEC's narrow interpretation ... implausible." *Id.* at 105 (emphasis added). This Court explained, in words precisely on point with respect to the Commission's "complete carve-out" in dispute here:

> The FEC's definitions fly in the face of [Congress's] purpose because they reopen the very loophole the terms were designed to close. Under the Commission's interpretation, candidates and parties may not spend or receive soft money, but apart from that restriction, they need only avoid explicit direct requests. Instead, they must rely on winks, nods, and circumlocutions to channel money in favored directions—anything that makes their intention clear without overtly "asking" for money. Simply stating these possibilities demonstrates the absurdity of the FEC's reading. Whereas BCRA aims to shut down the soft money system, the Commission's rules allow parties and politicians to perpetuate it, provided they avoid the most explicit forms of solicitation and direction.

Id. at 106. The state party fundraiser regulation suffers from these identical flaws. Whereas BCRA "aims to shut down the soft money system" and forbids federal officeholders and candidates from making *any* soft money solicitations with three narrow specified exceptions, the regulation allows unfettered solicitations of soft money "without restriction or regulation," so long as these occur within the context of state or local party fundraisers. Because this construction flouts BCRA's underlying purposes, it fails *Chevron* step one.

II. The Commission's Construction of the State Party Fundraiser Provision Also Fails *Chevron* Step Two Because It Is An Impermissible Interpretation That Unduly Compromises BCRA's Purposes and Creates the Potential for Gross Abuse.

Even if Section 441i(e) were deemed ambiguous, the state party fundraising regulation nevertheless fails under *Chevron* step two because—for all of the reasons discussed above—it is an "unreasonable" and "impermissible" interpretation of the statute. *Shays I*, 414 F.3d at 96-97.

It is "inconsistent with the statutory mandate," "frustrate[s] the policy that Congress sought to implement," "unduly compromises the Act's purposes," and "create[s] the potential for gross abuse." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 32; *Orloski,* 795 F.2d at 164-65.

The Commission argues, however, that its regulation cannot be deemed "unreasonable" because there is no evidence that it has *actually* undermined the soft-money solicitation ban since it was first promulgated. Resp. 43 n.24. That is not the issue. The issue is whether the "complete carve-out" from the soft-money solicitation ban "create[s] the *potential* for gross abuse"; there is no requirement of proof that abuses have actually occurred. *Orloski*, 795 F.2d at 165; *see also Shays I*, 414 F.3d at 90 (BCRA regulations may be challenged "notwithstanding Shays's and Meehan's failure to show specific adverse use of challenged safe harbors"); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (agency action may be challenged when it "lift[s] regulatory restrictions on [a plaintiff's] competitors or otherwise allow[s] increased competition," without having "to wait until increased competition actually occurs"); *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (plaintiffs may challenge agency action that "*authorizes* allegedly illegal transactions that have the clear and immediate *potential* to compete" with them; there is no need to wait for third parties to commit "specific, allegedly illegal transactions [that] hurt [plaintiffs] competitively" before bringing suit) (emphasis added).[4]

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[4] *McConnell* emphasizes the "hard lesson of circumvention" that is "taught" by "the entire history of campaign finance regulation": regulatory loopholes will be exploited by those "scrambling to find another way to purchase influence." *McConnell*, 540 U.S. at 166. "Money, like water, will always find an outlet." *Id.* at 224. Lest there be any uncertainty about the injuries that can flow from improper FEC regulations, it bears note that the courts in *McConnell* found that prior FEC regulations had "subverted," "eroded," and "circumvent[ed]" FECA; left the Nation's campaign finance system in "utter disarray," "an elaborate fiction," and "so riddled

(Footnote continued)

III. The Commission's Construction of the State Party Fundraiser Provision Also Violates the Standards of "Reasoned Analysis" Required Under the APA.

The regulation also fails the APA's standards of reasoned decisionmaking. Much of the Commission's revised E&J is devoted to statutory construction arguments that already have been addressed and refuted above. The Commission also persists in its revised E&J and brief in arguing that "regulating federal officeholders' and candidates' speech at state and local fundraising events raises *particularly vexing constitutional concerns*," that regulating speech in this one context "is more difficult than in other contexts," and that it would therefore "be *especially* intrusive for the Commission" to prohibit direct soft-money solicitations at such events. Resp. 40 (emphasis added); JA 288 (emphasis added). The Commission argues that federal officeholders have a "unique," "ongoing," and "special" relationship with their state and local parties. Resp. 41-42; JA 287-88.

Much of what the Commission says about the "special" relationship between federal candidates and state parties is true, which probably explains why Congress singled out attendance at state and local party fundraisers for special protection in Section 441i(e)(3). But this close relationship does not suggest that enforcing the ban against soft-money solicitation is "particularly vexing" at state and local party fundraisers, unlike any other kind of fundraising events. To begin, the Commission concedes that the soft-money solicitation ban applies to anything said by a federal officeholder or candidate outside of the fundraiser itself—to all "fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event." JA 289; *see* Resp. 43 n.24. Why is it any less "vexing" to apply the soft-

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with loopholes as to be rendered ineffective"; and thereby helped trigger a crisis in public confidence that ultimately required the intervention of Congress, the President, and the federal judiciary. 540 U.S. at 126, 142 & n.44, 167, 674; 251 F. Supp. 2d at 651-53, 655 (Kollar-Kotelly, J.); *see also* 540 U.S. at 123-32; 251 F. Supp. 2d at 195-201 (per curiam).

money solicitation ban to these types of communications than to what is said by the same people at the fundraiser itself? How are the "practical enforcement concerns" (JA 287) any greater in the fundraiser context than in other contexts such as meetings in a Senator's office or at dinner with lobbyists? The Commission offers no plausible explanation as to why that might be so.

Moreover, many of the precedents and comments to which the Commission cites speak of the difficulty *in general* of distinguishing solicitations from other speech, thereby undermining the Commission's conclusion that there is something "particularly vexing" about making that distinction in the state party fundraiser context. For instance, the Commission asserts that "whether a particular message is a solicitation may depend on the person hearing the message—what one person interprets as polite words of acknowledgment may be construed as a solicitation by another person." JA 288. But this possibility (and any purported constitutional concerns arising from it) can exist in *any* context where a solicitation might be made.[5] The Commission's further observation that the "likelihood of [such] misinterpretation occurring increases at a State party fundraising event because of the Federal officeholders' and candidates' unique relationship to, and special identification with, their State parties" adds nothing. *Id.* Simply positing the existence of a "unique relationship" between federal candidates and state parties does not explain why distinguishing solicitous from non-solicitous speech is "especially intrusive" in this one particular context but not any others. *Id.*

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[5] Thus, the Commission's reliance on several Supreme Court cases recognizing the possibility that different listeners may take away varied interpretations of the same speech, JA 288, is misplaced. At most it rehashes the Commission's argument in the original E&J that regulation of candidate solicitations in general raises constitutional concerns. It does not explain why solicitations at a state party fundraiser raise unique concerns and additionally ignores the Supreme Court's decision in *McConnell* upholding the candidate solicitation ban in its entirety as a "valid anticircumvention measure[]" in the face of a First Amendment challenge. 540 U.S. at 181-84.

Many of the supposedly "unique" aspects about state and local *party* fundraisers also apply to state and local *candidate* fundraisers and other types of fundraising events. Thus, participation in *any* kind of fundraiser is for the purpose of "aid[ing] in the successful raising of money"; federal officeholders and candidates often have "close" relationships with state officeholders and candidates; contributions at *many* kinds of fundraisers are often received before the event itself; and many kinds of fundraisers receive "low-dollar" contributions. JA 287-89; Resp. 41-43. Nevertheless, the Commission has not hesitated in the context of state *candidate* fundraisers to provide guidance about how a federal candidate can be a featured guest at, attend, speak at, and help publicize such events *without* engaging in forbidden soft money fundraising.

Specifically, the Commission has concluded that a federal officeholder or candidate may attend, speak at, and participate in other ways at state *candidate* fundraisers and similar events at which soft money is being raised, "provided that by his own speech and conduct" he avoids soliciting any funds beyond those authorized by FECA. *See* AO 2003-3. In these contexts, the "covered person" must, if he makes *any* solicitation, "clearly and conspicuously" advise attendees that he "is only soliciting federally permissible funds." *Id.* The Commission has provided detailed guidance about what covered persons may or may not say at such events, including suggested written and oral disclaimers. *Id.* ("I am only asking for up to $2,000 from individuals and I am not asking for corporate, labor or minors' funds.").[6] The Commission has

[6] *See especially* AO 2003-3's answer to the question whether, at state *candidate* fundraisers, it is permissible for a "covered person" to make "'general solicitations' of funds that do not request specific amounts." The Commission responded: "Yes, provided that written notices are clearly and conspicuously displayed at state candidate fundraising events at which Federally impermissible funds are raised indicating that the covered person is only soliciting federally permissible funds. If written notices are provided the covered person may legally make general requests for financial support at state candidate fundraising events without any oral

(Footnote continued)

extended this disclaimer approach 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).

The Commission nowhere attempts to explain why this disclaimer approach for state *candidate* fundraising events could not just as readily be followed in the context of state *party* fundraising events. The approach would respond to the Commission's professed concerns about federal officeholders and candidates being "reluctant to appear at State party fundraising events" due to fears of "complaints, intrusive investigations, and possible violations based on general words of support for the party." JA 289. A Commission-approved disclaimer would eliminate that fear while also avoiding opening a gaping loophole that authorizes "unabashed solicitation" of unlimited sums of soft money. *Shays I*, 337 F. Supp. 2d at 89. The Commission has failed to demonstrate, and cannot demonstrate, that the First Amendment concerns are any more "vexing" in the context of state *party* fundraisers than they are in the context of state *candidate* fundraisers or other events. *Id.*

Equally flawed is the Commission's reliance on a series of hypotheticals it posed to commenters at its May 17, 2005 hearing on the revised E&J. The Commission contends that these examples show that there is "uncertainty" whether a statement such as "'thank you for your continuing support of the party' constitute[s] solicitation" when "spoken at a fundraising event." JA 288. But whether this particular remark, or others like it, is addressed to a gathering at a state

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disclaimer that only Federal permissible funds are being requested. Alternatively, if written notices are not provided at the event, the covered official may make the following public oral disclaimer: 'I am only asking for up to $2,000 from individuals and I am not asking for corporate, labor or minors' funds.' If such a public oral disclaimer is made at the event it only need be made once, and is not required to be made during a covered person's one-on-one discussions with donors or other people at the event. This should not, however, be construed to permit a covered person to inoculate a solicitation of non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to disregard the limitation."

party fundraiser, to a group of lobbyists prior to the fundraiser, or to a generous party contributor visiting a Senator's office after the fundraiser, there is always the possibility that different listeners may interpret the same statement differently and that the candidate or officeholder will need to take this into account. The Commission raises "practical enforcement concerns" and objects to the fact that "an analysis of the particular facts and circumstances surrounding the speech would be required in order to determine whether a speech [delivered at a state party fundraiser] would be solicitation," but here again, no explanation is supplied as to why this is not true of speech in any number of circumstances that might require the Commission to engage in line drawing. JA 287-88. The Commission's hypotheticals do not prove that line drawing is "particularly vexing" at a state party fundraiser, let alone supply a "rational justification" for a rule that undeniably allows a federal officeholder to shake people down for unlimited amounts of soft money in the face of Congress's "evident purpose" and "intent to shut down the soft-money system." *Shays I*, 414 F.3d at 105.[7]

In its revised E&J the Commission also endeavors to distinguish the Hatch Act, which permits a federal employee to "give a speech or keynote address at a political fundraiser ... as

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[7] Other hypothetical examples offered by the Commission to justify its rule are simply farfetched. The E&J states that "[s]ome commenters noted [at the May 17, 2005 hearing] that even a 'pure policy' speech, otherwise permissible at a non-fundraising event, could constitute an impermissible solicitation in the context of a State party fundraising event." JA 288. This is little more than an argument that *anything* said at a fundraiser might reasonably be regarded as a solicitation, a position that is implausible, contrary to the statutory exemption that expressly permits candidates to "speak" at fundraisers, and was not endorsed by commenters favoring the alternative rule rejected by the Commission that would allow candidates to speak but to not solicit soft money donations at state party fundraisers. *See, e.g.*, FEC Public Hearing Tr. at 59 (May 17, 2005), *available at* http://www.fec.gov/law/RulemakingArchive.shtml#cand_solicit_party (noting that a candidate who "talk[s] about foreign policy and homeland security" at a state party fundraiser is "not involved in a solicitation") (remarks of Mr. Noble of the Center for Responsive Politics); *id.* at 56 (same) (remarks of Mr. Ryan of the Campaign Legal Center).

long as the employee does not solicit political contributions," *see* 5 U.S.C. 7323; 5 C.F.R. 734.208(b), but it fails to explain why Section 300.64(b) could not similarly "provide[] clear guidance to speakers to distinguish permissible speech" from prohibited solicitations as the Hatch Act does. JA 289. The Commission notes that the Hatch Act employs a "narrow definition of 'solicit' meaning 'to request expressly' that another person contribute something" and that the statute contains a scienter requirement so that one cannot violate the act without "knowingly" soliciting contributions. *Id.* (citing 5 C.F.R. 734.101); *see also* 5 U.S.C. 7323(a)(2). These arguments, however, only serve to undermine the Commission's conclusion that as a practical matter BCRA's authorization for candidates and officeholders to "attend, speak or be a featured guest" at a state party fundraiser should be implemented through a "complete carve-out" from the soft money solicitation prohibition. The E&J never explains why the Commission's rule governing state party fundraisers could not be tailored in a fashion similar to those implementing the Hatch Act so as to avoid what the District Court described as an "interpretation [that] likely contravenes what Congress intended when it enacted" Section 441i(e)(3) and that undoubtedly "creates the potential for gross abuse." *Shays I*, 337 F. Supp. 2d at 91.

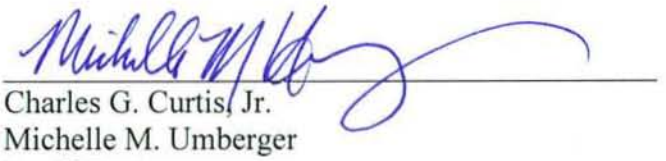
The Commission argues that allowing federal officeholders and candidates to solicit unlimited amounts of soft money "'without restriction or regulation'" is consistent with other exceptions in BCRA that "already" permit these individuals to raise nonfederal funds under certain circumstances; these express provisions "establish that Congress did not intend to eliminate all solicitation of nonfederal funds by federal officeholders and candidates." Resp. 39 n.21 (citing 2 U.S.C. 441i(e)(1)(B), 441i(e)(4)(A), and 441i(e)(4)(B)). As discussed in Part I above, the correct conclusion is just the opposite: Congress created an unqualified ban with only

three exceptions in which "solicitations" would be allowed, which forecloses any argument that Congress intended to allow the Commission to create additional exceptions from the soft-money solicitation ban. *See* Part I above. In addition, as the Supreme Court emphasized, the exceptions to the soft-money solicitation ban "tightly constrain[]" the exempted solicitations. *McConnell*, 540 U.S. at 181 n.70 (discussing Section 431i(e)(1)(B)). The Commission's state party fundraiser exception, on the other hand, provides for no constraints at all and authorizes unlimited soft-money shakedowns "without restriction or regulation" *in this one context alone*. The Commission has failed to explain why such a complete carve-out is either necessary, desirable, or consistent with BCRA's underlying purposes.

Conclusion

For the reasons set forth above and in the Principal and Response Brief for Christopher Shays, this Court should reverse the judgment below with respect to 11 C.F.R. 300.64(b). The 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).

Respectfully submitted,



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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)(C) and D.C. Cir. R. 32(a). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 6,655 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2008, I caused to be served by hand two copies of the foregoing "Reply Brief for Christopher Shays" upon the following counsel:

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