IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Christopher Shays and Martin Meehan, for their First Amended Complaint, state as follows:

1. This action challenges regulations promulgated by the Federal Election Commission ("FEC") to implement the provisions of Titles I and II of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81.

2. Congress enacted BCRA in March 2002, after years of consideration. The legislation has three central purposes. The first is comprehensively and effectively to ban "soft money" – funds not subject to the contribution limits and source prohibitions of federal law – from federal elections and the federal political process. The passage of Title I of BCRA reflects Congress's determination that the explosive growth of soft money over two decades had caused corruption and the appearance of corruption in

federal elections and in the federal political process, and had undermined the confidence of the American people in their government and their political system.

3. The second central purpose of BCRA is to ensure that campaign advertisements are subject to disclosure and to the ban on the use of corporate and union treasury money to fund campaign advertising, even if they are run in the guise of so-called "issue ads." The passage of the so-called “Snowe-Jeffords” provisions of Subtitle A of Title II of BCRA reflects Congress’s determination that the growth of sham “issue advocacy” over the last decade has significantly eroded the disclosure provisions in the federal campaign finance laws and the longstanding ban on the funding of campaign advertisements with corporate and union treasury funds.

4. The third central purpose of BCRA is to ensure that meaningful rules governing “coordination” between an outside spender and a candidate are in place to prevent evasion of the contribution limits, disclosure requirements and source prohibitions of federal law. The passage of Subtitle B of Title II of BCRA reflects Congress’s determination that the FEC's coordination regulations were unrealistic, ineffective, and contrary to existing law, and that new rules were necessary to ensure effective regulation of coordinated communications so as to preserve the integrity of the federal contribution limits, disclosure requirements and source prohibitions.

5. Title I of BCRA contains the statutory ban on soft money and related implementing provisions. Title II contains the statutory provisions governing sham “issue ads” (referred to in the statute as “electioneering communications”) and additional statutory provisions requiring the promulgation of new regulations on “coordination.”

Congress directed the FEC to promulgate rules to implement the provisions of Titles I and II. (Sections 214(c) and 403(c) of BCRA.) The FEC published its final Title I regulations in the Federal Register on July 29, 2002. *See* 67 Fed. Reg. 49064. It published its final Title IIA regulations governing "electioneering communications" on October 23, 2002. *See* 67 Fed. Reg. 65190. It published its final Title IIB regulations governing "coordination" on January 3, 2003. *See* 68 Fed. Reg. 421.

6. The FEC's new regulations, in multiple and interrelated ways, thwart and undermine the language and congressional purposes of Titles I and II of BCRA. Numerous provisions of the regulations contravene the language of the statute, and the regulations, as a whole, frustrate the purpose and intent of BCRA. The Title I regulations will allow the political parties to continue to raise and spend soft money to influence federal elections. The Title IIA regulations will allow corporate and union funds to continue to be used to pay for sham "issue ads" in contravention of the contribution limits and source prohibitions in the law. They will also allow individuals and groups to pay for sham "issue ads" in contravention of the disclosure requirements in the law. The Title IIB regulations will allow candidates and outside spenders to coordinate their electioneering activities, in contravention of the contribution limits, source prohibitions, and disclosure requirements in the law.

7. As described below, this Court should invalidate the specified Title I and II regulations because they are arbitrary, capricious, an abuse of discretion, or otherwise are not in accordance with law; they are also in excess of the FEC's statutory jurisdiction,

authority or limitations; and they were adopted without observance of procedure required by law. 5 U.S.C. §§ 706(2)(a), (c), (d).

Jurisdiction and Venue

8. This action arises under the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.,* as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706; and the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

9. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e) because the defendant is a United States agency and because a substantial part of the events or omissions giving rise to the claim occurred in this District.

Parties

10. Plaintiff Christopher Shays is a Member of the United States House of Representatives from the 4th Congressional District of the State of Connecticut. Representative Shays was elected in 1987 and re-elected in 1988, and every two years thereafter. He intends to seek re-election in November 2004. Representative Shays was a principal House sponsor of the Bipartisan Campaign Reform Act.

11. Plaintiff Martin Meehan is a Member of the House of Representatives from the 5th Congressional District of the Commonwealth of Massachusetts. Representative Meehan was elected in 1992 and has been re-elected every two years thereafter. He intends to seek re-election in November 2004. Representative Meehan was also a principal House sponsor of the Bipartisan Campaign Reform Act.

12. Plaintiffs are United States citizens, elected Members of Congress, intended candidates for re-election to Congress, voters, recipients of campaign contributions, fundraisers, and members of national and state political parties. Each plaintiff faces personal, particularized, and concrete injury in the event that the challenged regulations implementing Titles I and II are allowed to stand and thereby to undermine the letter and spirit of BCRA reforms enacted by Congress.

13. In particular, as federal officeholders and as intended candidates for re-election to Congress, plaintiffs and their campaign opponents are and will be regulated by FECA and by BCRA. Plaintiffs are among those whom BCRA seeks to insulate from the actual or apparent corrupting influence of special interest soft money, sham "issue advertisements," and unregulated coordinated spending. If the challenged Title I and Title II rules are allowed to stand and to undermine the reforms embodied in BCRA, the plaintiffs will be forced to undertake their public responsibilities, raise money, and campaign in a system that Congress has determined is, and appears to be, corrupted by these improper influences. Further, by thwarting and undermining the protections Congress intended from BCRA, the challenged rules will also adversely affect the public's perception of plaintiffs and their fellow office-holders as candidates, public officials and party members.

14. The BCRA Title I bans on the raising and spending of soft money by the national political parties and on the solicitation of soft money by federal officeholders and candidates directly affect the plaintiffs. If these Title I bans are not faithfully implemented by the FEC's regulations, plaintiffs face the risk that unregulated soft

money will be used in an attempt to influence federal elections in which they are candidates.

15. Likewise, the requirement in Title I of BCRA that state and local parties not spend unregulated soft money on their activities that affect federal elections, as defined in BCRA, directly affects the plaintiffs. If this requirement is not faithfully implemented by the FEC's regulations, plaintiffs face the risk that unregulated soft money will be used by state and local parties to pay for activities that affect plaintiffs' federal elections. Plaintiffs face this risk whether or not such spending is directly targeted to their particular elections. Plaintiffs will also be adversely affected in their capacities as officeholders and party members who might be expected by their parties to raise soft money directly or indirectly for use at the state and local party levels, and who could be rejected for official and party leadership positions if they fail or decline to raise such funds.

16. The BCRA Title IIA provisions on "electioneering communications" directly affect the plaintiffs. If these Title IIA provisions are not implemented faithfully by the FEC's regulations, plaintiffs face the risk that unlimited and unregulated sums of corporate and union treasury funds will be used to influence federal elections in which plaintiffs are candidates through the funding of sham "issue ads" that are campaign ads in reality. Some of this spending is likely to be made by corporations organized under section 501(c) of the Internal Revenue Code.

17. The BCRA Title IIB provisions on "coordination" directly affect the plaintiffs. If these Title IIB provisions are not faithfully implemented by the FEC's regulations, plaintiffs face the risk that their electoral opponents and opposing political parties will

engage in unregulated coordination of campaign activities with outside spenders, thereby allowing the outside spenders to evade their contribution limits and reporting requirements, or to avoid the ban on the spending of corporate or union treasury funds, thus influencing federal elections in which the plaintiffs are candidates.

18. Defendant United States Federal Election Commission is a federal agency created pursuant to FECA, 2 U.S.C. § 437c. BCRA requires the FEC to promulgate regulations to implement Titles I and II of the statute.

Background on Title I Soft Money Regulations

19. For almost a century, since 1907, federal law has prohibited corporations from making contributions to influence federal elections. Since 1947, the same prohibition has applied to labor unions. And since FECA was first amended in 1974, contributions from individuals for the purpose of influencing federal elections have been limited to $1,000 per election to candidates, and $20,000 per year to national political party committees. (BCRA increased these limits to $2,000 and $25,000, respectively.) Soft money -- money that is not subject to these limits or source prohibitions -- has been raised by the political parties, working with their federal officeholders and candidates, in disregard of these laws, on the claim that the money is spent for so-called "party building" activities and not spent to affect federal elections. In reality, and as Congress determined in enacting BCRA, the national parties have raised and spent soft money in order to influence federal elections. In the 2000 election cycle alone, the two major national political parties raised and spent a total of almost one-half billion dollars of soft money.

20. Much of the soft money system operates at the state party level as well. Tens of millions of soft money dollars are raised each election cycle by the national parties, and then transferred to the state parties to be spent to influence federal elections. The state parties also directly raise additional amounts of soft money to be spent for the same purpose. The state parties spend soft money on ads which promote, support, attack or oppose federal candidates. Spending by the state parties on such ads has become a major avenue for the flow of soft money into federal elections. The state parties also spend soft money on activities such as get-out-the-vote drives, voter identification activities, generic campaign activities and voter registration drives, all of which affect both federal and non-federal elections. Much of the soft money spent by state parties is controlled by, or coordinated with, national party officials and federal candidates.

21. BCRA ends the soft money system by requiring the national parties and officials acting on their behalf to raise, spend, direct or transfer only "hard money," *i.e.*, funds that are subject to the contribution limits, source prohibitions and reporting requirements of federal law. (*See, e.g.,* Section 323(a) of FECA, as added by Section 101(a) of BCRA.) Because Congress determined that much of the soft money system operates through expenditures made by state parties and their subordinate entities, BCRA also prohibits state, district and local parties from using unregulated soft money to pay for "Federal election activity," as defined in BCRA. (*See, e.g., id.* at Sections 323(b) and 301(20).) Further, BCRA prohibits federal candidates and officeholders from raising, spending or directing unregulated soft money in connection with state or federal elections. (*See, e.g., id.* at Section 323(e).) The purpose of this provision is to break the

link between federal officeholders and candidates, and contributors of soft money that corrupts and creates the appearance of corruption.

22. BCRA requires the FEC to promulgate regulations to implement these statutory provisions consistently with the purpose and direction of Congress to end the soft money system. On May 20, 2002, as part of a rulemaking proceeding, the Commission published for comment proposed regulations based on draft regulations recommended by the Office of the General Counsel of the FEC. The agency received public comment and testimony on those proposed rules. After the close of the comment period, the General Counsel presented new draft regulations to the Commission and recommended their adoption. At the Commission meeting to consider and act on these regulations, however, four of the six Commissioners voted to adopt a number of amendments to the proposed regulations which undermined the letter and purpose of BCRA. In a number of these cases the amendments not only rejected the recommendations made by the General Counsel but also, without explanation, directly conflicted with longstanding interpretations of FECA made by the FEC, interpretations that were left in place and not changed by these amendments. There was no prior notice of, or opportunity for public comment on, the amendments that were incorporated into the final rules even though the amendments materially altered those rules. The final regulations that the FEC transmitted to Congress on July 16, 2002, and published in the Federal Register on July 29, 2002, were substantially different in key ways from the regulations proposed for public comment and from past positions taken by the FEC.

23. The Title I rules promulgated by the FEC fail, in multiple and interrelated ways, properly to implement the language and intent of BCRA to ban soft money from the federal electoral and political processes. Changes made to the regulations during the rulemaking process, often contrary to the proposals and recommendations of the General Counsel, were typically adopted by a split vote of 4-2 by the Commissioners. This control group of four Commissioners includes members who have long expressed hostility to BCRA, who have publicly expressed their belief that BCRA is unconstitutional, who actively assisted some Members of Congress in their efforts to kill the legislation, and who have publicly spoken and published in opposition to the ban on soft money. One of the Commissioners said in an interview that "soft money is one of the good things in the system."

24. The regulations issued by the FEC undermine the soft money ban by contravening the language and purpose of BCRA in each of the three areas in which Congress legislated to address the problem: (a) the activities of the national parties; (b) the activities of the state parties; and (c) the activities of federal candidates and officeholders. Furthermore, the regulations create multiple opportunities for evasion of the soft money ban that together have the overall effect of allowing the soft money system to continue. This result directly contradicts the language of BCRA and the intent of Congress.

The Challenged FEC Soft Money Regulations

A. Sham Party Entities

25. BCRA prohibits national party committees from raising or spending soft money after the effective date of the law, November 6, 2002, subject to limited transition exceptions. (Section 323(a)(1) of FECA, as added by Section 101(a) of BCRA.) In order to prevent circumvention of the law, BCRA also imposes this same restriction on any entity "directly or indirectly established, financed, maintained or controlled" by a national party committee. (Section 323(a)(2) of FECA, as added by Section 101(a) of BCRA.)

26. Yet without any basis in the statute, the Commission created a "grandfather" provision in section 300.2(c)(3) of its regulations that provides that the Commission must disregard any facts about the involvement by a national party committee prior to November 6, 2002 in establishing, maintaining or controlling an entity that continues to raise and spend soft money after that date. Instead, the Commission will be allowed to take into account "solely" the relationship between the party committee and the entity after November 6, 2002.

27. This "grandfather" exception allowed the national parties to establish entities for the raising and spending of soft money prior to the effective date of BCRA, and have those supposedly "independent" entities function after the effective date as if they had not been established by the parties. Because of this regulation and in contravention of BCRA, such entities will be able to raise and spend soft money after the effective date of

BCRA, notwithstanding their establishment by, and affiliation with, the national party prior to that date.

28. Further, because of the FEC's improper definition of the terms "solicit" and "direct" in its new regulations under BCRA, *see* paragraphs 32 through 37, *infra*, national party officials, as well as federal officeholders and candidates, are able to raise soft money for, and direct soft money to, any such new entity after November 6, 2002, contrary to BCRA. The entity is thus able to spend soft money for advertisements supporting and attacking federal candidates, and for other activities that benefit the party's federal candidates.

29. The national parties, and party operatives, have taken advantage of this loophole created by the Commission. Republican Party operatives, for instance, established a new group called the "Leadership Forum" right before November 6, 2002. The Leadership Forum is headed by several individuals with close ties to House Republican leaders. The president of the Leadership Forum had been the chief of staff to House Majority Leader Tom DeLay until August 2002. A former chairman of the National Republican Congressional Committee (NRCC) is the vice chair of the Leadership Forum. According to a recent article in the *National Journal,* "[W]hat's interesting about the Leadership Forum is that it was created right before the recent election with the blessing of the NRCC – and with the transfer of $1 million from NRCC's soft money account to the forum's coffers." P. Stone, "Hard Questions About Soft-Money Groups," *The National Journal* (December 21, 2002). (*Roll Call* has reported that the Leadership Forum later returned the funds to the NRCC. J. Bresnahan,

"Leadership Forum Returns $1 Million," *Roll Call* (January 8, 2003).) According to press reports, the Leadership Forum is "a new GOP committee to channel soft money to House campaigns ...." T. Edsall, "Campaign Money Finds New Conduits As Law Takes Effect," *The Washington Post* (November 5, 2002).

30. BCRA also provides that entities "directly or indirectly established . . . maintained, or controlled" by state, district and local parties, or by federal candidates and officeholders, are subject to the same soft money prohibitions as imposed on their principals. (Sections 323(b)(1) and (e)(1) of FECA, as added by Sections 101(b)(1) and (e)(1) of BCRA.) In these cases as well, BCRA has been circumvented because a state party, or federal officeholder or candidate, has been allowed to establish or control an entity prior to November 6, 2002, and to have that entity raise and spend soft money after that date under the guise of being an "independent" organization, without the FEC taking into consideration any facts about the relationship between the entity and the party, officeholder or candidate prior to November 6, 2002.

31. Under the FEC's regulation, the Commission is required to ignore all facts about how such entities have been "established," "maintained" or "controlled" prior to November 6, 2002, in determining whether the entities are subject to BCRA restrictions after November 6, 2002. Like the national parties, the state parties and their operatives, working with national party officials, have already taken advantage of this loophole as well. In August 2002, the state committees of the Democratic Party incorporated a new entity, the Democratic State Parties Organization (DSPO), which has, according to a document distributed by the group, "the same legal status as a state party ..." D. VanNatta, "Parties Create Ways to Avoid Soft Money Ban," *The New York Times* (November 2, 2002). According to published reports, Democratic Party chair Terry McAuliffe told a group of party fundraisers that he expected the DSPO to raise approximately $40 million in soft money before the 2004 elections. *Id.* The president of the DSPO said the entity "intended to spend the large checks it receives on get-out-the-vote and party registration programs in states where such spending is legal." *Id.*

B. <u>The definitions of "solicit" and "direct"</u>

32. A central goal of BCRA is to prevent federal candidates and officeholders (as well as national political parties) from soliciting, receiving or directing soft money. (*See, e.g.,* Sections 323(a), (e) of FECA, as added by Section 101(a) of BCRA.) The final draft regulations recommended by the General Counsel defined the term "solicit" to mean to "request, suggest or recommend" that a soft money contribution be made. This definition was based on longstanding Commission interpretation of that term in other sections of FECA.

33. Instead, the Commissioners adopted a regulation (Section 300.2(m)) that narrowly defines "solicit" to mean only to "ask," contrary to the General Counsel's recommendation, to the plain and commonly understood meaning of "solicit," and to the interpretation of this same term that the Commission has long used for other sections of FECA. The new definition was adopted for BCRA purposes only, and without changing the interpretation of the term "solicit" that the Commission has used for other parts of FECA. Nor did the FEC explain why the definition of "solicit" should be narrower as used for BCRA than for other sections of FECA. The Commissioner who proposed the new definition said that the regulation, in effect, would allow "a wink and a nod" request for soft money to be made by federal officeholders and candidates.

34. In commenting on this regulation, the General Counsel said, "It doesn't seem to me to take a great deal of cleverness to make a solicitation that is clearly intended to encourage – to persuade a person to make a contribution, without coming out and asking. And I think this definition has the potential for great mischief . . . And I'm concerned that this language creates a definition so narrow that it would, frankly, be very easy to avoid."

35. This definition of the statutory term "solicit" will allow parties, candidates and officeholders to continue to solicit soft money, contrary to BCRA, as long as they do not explicitly "ask" for a soft money contribution. For example, the regulation will allow candidates or officeholders to "recommend" that a donor make a soft money contribution to a named recipient, and that will not be treated as a solicitation of soft money prohibited by BCRA. This new definition of "solicit" will lead to massive circumvention of the BCRA ban on soft money solicitations by federal candidates and officeholders.

36. BCRA also provides that a federal candidate or officeholder, or a national political party, may not "direct" soft money funds. (Section 323(a)(1) of FECA, as added by Section 101(a) of BCRA.) Despite Congress's explicit prohibition on both soliciting *and* directing soft money, the FEC defined "direct" to mean the same thing as "solicit," *i.e.,* "to ask." Under this definition, a candidate or party official could direct or otherwise tell a potential donor that a soft money contribution should be sent to a particular recipient to be useful in a federal campaign, and this would not be considered to be "directing" a contribution within the meaning of BCRA.

37. These definitions of the terms "solicit" and "direct" permit federal candidates and officeholders, as well as national party officials, to continue to solicit and direct soft money, in contravention of BCRA, so long as they do not explicitly "ask" for soft money contributions. This includes soliciting and directing soft money funds for sham affiliates established under the "grandfather" provision described above in paragraphs 25 through 31, *supra*, in contravention of BCRA.

C. State party fundraisers

38. BCRA provides that federal candidates and officeholders shall not "solicit, receive, direct, transfer or spend" soft money. (Section 323(e)(1) of FECA, as added by Section 101(a) of BCRA.) BCRA makes clear that candidates and officeholders may "attend, speak or be a featured guest" at state party fundraising events without violating this ban on solicitation. (Section 323(e)(3) of FECA, as added by Section 101(a) of BCRA.) Candidates and officeholders, however, are not permitted under BCRA to solicit or direct soft money contributions at such fundraisers.

39. In contravention of BCRA, the FEC's regulations allow federal candidates and officeholders explicitly to solicit and direct soft money at state fundraising events "without regulation or restriction." Section 300.64. The Commissioner who proposed this regulation described it as "a total carve out" from the ban in the statute on soliciting soft money. This regulation is contrary to the language and purpose of BCRA, which prohibits federal officeholders and candidates from soliciting and directing soft money. The regulation authorizes federal candidates and officeholders to make solicitations of soft money and to direct soft money, without restriction, at any event that is deemed to be a "state party fundraiser," in contravention of the statute.

D. Definition of "agent"

40. The BCRA prohibition against national parties soliciting, receiving, directing or spending soft money is also imposed on any "agent acting on behalf of" a national party. (Section 323(a)(2) of FECA, as added by Section 101(a) of BCRA.) Longstanding FEC regulations had defined the term "agent" to include those who have either "actual" or "apparent" authority. 11 C.F.R. § 109(a)(5) (Jan. 1, 2002). This longstanding FEC definition was consistent with the common law.

41. Yet, for purposes of BCRA, the new FEC regulation defines "agent" to include those who have "actual" authority and excludes those who have "apparent" authority. Section 300.2(b). This new regulation does so in direct contravention of the longstanding definition of "agent" that the FEC had applied to other provisions of FECA. In defining "agent" to exclude those with apparent authority, the FEC has created the opportunity for circumvention of BCRA by allowing national party agents with apparent

authority to engage in activities on behalf of the party that the party is prohibited from engaging in under BCRA.

42. The same problem exists for provisions of BCRA that govern the activities of state parties and their "agent[s]," Section 323(b)(1), and of federal candidates and officeholders and their "agent[s]," Section 323(e)(1). In these instances as well, agents with apparent authority will be permitted, under the FEC regulation defining "agent," to engage in activities prohibited by BCRA, in contravention of the statute.

E. Leadership PACs

43. BCRA provides that an entity "directly or indirectly" controlled by a federal candidate or officeholder cannot raise or spend soft money. (Section 323(a)(2) of FECA, as added by Section 101(a) of BCRA.) This provision is intended to prohibit "Leadership PACs" — political action committees established, financed, maintained or controlled by federal officeholders — from raising and spending soft money.

44. Under pre-BCRA law, the FEC interpreted a narrower statutory standard to allow federal officeholders to establish or control "Leadership PACs," without treating such PACs as *per se* affiliated with the officeholder. The FEC has never found a "Leadership PAC" to be affiliated with a federal officeholder, despite the common knowledge that Leadership PACs are in fact established and controlled by these officeholders.

45. In BCRA, Congress specifically adopted a broader statutory standard to make clear that Leadership PACs could not raise and spend soft money. To that end, Congress provided that an entity "directly or indirectly established, financed, maintained or

controlled" by a federal officeholder is subject to the same soft money prohibitions as are imposed on the officeholder.

46. Notwithstanding this broader statutory language, and the clear intent of Congress to prevent officeholders and candidates controlling and benefiting from soft money through their "Leadership PACs," the FEC adopted a regulation in Section 300.2(c)(2) that is the same as the FEC's existing regulation for "Leadership PACs." *Compare* 11 C.F.R. § 100.5(g)(4).

47. This regulation allows Leadership PACs established or controlled by federal officeholders to continue raising and spending soft money, in contravention of the language and purpose of BCRA.

F. <u>The definition of "Federal election activity"</u>

48. BCRA prohibits state parties from using unregulated soft money to influence federal elections by defining certain campaign activities by state, district and local parties as "Federal election activity," and by requiring that such activities be funded with hard money, or with an allocated mixture of hard money and limited non-federal funds, termed "Levin" funds (after the name of the provision's principal Senate sponsor). (Section 323(b) of FECA, as added by Section 101(a) of BCRA.)

49. Congress defined the activities by state parties that influence federal elections and cannot be financed with unregulated soft money, in order to end the widespread practice of soft money being channeled through state parties to influence federal elections. Congress acted with the knowledge that much of the soft money raised by national parties and by federal officeholders and candidates was being sent to state parties

to be spent to influence federal elections, and that state parties were also spending soft money they raised themselves for such activities.

50. The FEC regulations, however, work in multiple ways impermissibly to constrict the definition of "Federal election activity" adopted by Congress and thereby to allow the continued spending by state parties of unregulated soft money to influence federal elections, in contravention of BCRA. In so doing, the regulations permit state, district and local parties to continue to spend unregulated soft money on various campaign activities which Congress determined influence federal elections, and which Congress directed to be funded with hard money or Levin funds. In redefining and constricting the definition of "Federal election activity," the FEC regulations are contrary to the language and intent of BCRA, as described in paragraphs 2 through 6 of this First Amended Complaint.

51. Get-out-the-vote activity. BCRA defines the term "Federal election activity" to include "get-out-the-vote activity" in connection with an election in which a federal candidate is on the ballot. (Section 301(20)(A)(ii) of FECA, as added by Section 101(b) of BCRA.) The regulations proposed by the General Counsel defined "get-out-the-vote activity" to include both "encouraging" and "assisting" registered voters in the act of voting. This definition was consistent with past FEC interpretations of the term "get-out-the-vote activity."

54. The regulation at Section 101.24(a)(3) adopted by the FEC Commissioners defines the phrase "get-out-the-vote activity" to mean only providing "assistance" to an individual in voting, such as offering to transport a voter to the polls. The definition fails

to include "encouraging" individuals to vote, a commonly understood core get-out-the-vote activity. This definition is contrary to the position taken by the General Counsel in this rulemaking and by the FEC in the past, and the FEC offered no explanation for this departure from its past practice. Because the FEC's new definition of "get-out-the-vote activity" for BCRA purposes fails to include activities that "encourage" individuals to vote, the regulations will permit state, district and local parties to spend unregulated soft money on any get-out-the-vote activity that does not directly provide individual "assistance" for voting. For example, the FEC's new definition will permit state, district and local parties to continue to spend unregulated soft money on activities to encourage potential voters to vote in elections where federal candidates are on the ballot, such as a phone bank or mass mailing, in contravention of BCRA.

55. Voter identification. BCRA defines the term "Federal election activity" to include "voter identification" in connection with an election in which a federal candidate is on the ballot. (Section 301(20)(A)(ii) of FECA, as added by Section 101(b) of BCRA.) The regulations proposed by the General Counsel defined "voter identification" to include obtaining or acquiring voter lists. The General Counsel told the Commissioners that list acquisition "is a key means of identifying voters, and therefore, seemed to us to be voter ID." He also said that list acquisition is a "significant part of" campaign spending. The General Counsel's definition was consistent with how the FEC has defined and applied the term in the past.

56. The regulation at Section 100.24(a)(4) adopted by the FEC Commissioners defines the phrase "voter identification" to include only "creating or enhancing voter lists

by verifying or adding information" regarding a specific voter. The definition fails to include the purchase of voter lists, although this is a core voter identification activity. This definition is contrary to the position taken by the General Counsel in this rulemaking and by the FEC in the past, and the FEC offered no explanation for this departure from its past practice.

57. Because the FEC's new definition for BCRA purposes fails to include all voter identification activity, the regulation will permit state, district and local parties to continue to spend unregulated soft money on voter identification activity directly applicable to identifying potential voters, such as list acquisition, in contravention of BCRA.

58. Generic campaign activity. BCRA defines the term "Federal election activity" to include "generic campaign activity" in connection with an election in which a federal candidate is on the ballot. (Section 301(20)(A)(ii) of FECA, as added by Section 101(b) of BCRA.) BCRA defines the term "generic campaign activity" to mean "a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." (Section 301(21) of FECA, as added by Section 101(b) of BCRA.) The General Counsel recommended that "generic campaign activity" be defined to encompass any "campaign activity" (not limited to "public communications") that otherwise met the statutory definition. This definition was consistent with how the FEC defined and applied the term in the past.

59. The regulation at Section 100.25 adopted by the Commissioners restricts this definition to include only a "public communication" that promotes or opposes a political

party. By limiting the scope of "generic campaign activity" to include only public communications, and not other types of campaign activity (and without explaining the departure from past practice), the FEC regulation permits state, district and local parties to spend unregulated soft money on any other campaign activity promoting a party that does not involve "public communications," in contravention of BCRA. For example, state, district and local parties will be able to promote parties by spending unregulated soft money to send mailings and conduct phone banks directed to fewer than 500 people (*see* Section 100.26), or to send an unlimited amount of electronic mail and other communications across the Internet (*see* Section 100.26).

60. Voter registration. BCRA defines the term "Federal election activity" to include, among other things, "voter registration activity" within 120 days of a regularly scheduled federal election. (Section 301(20)(A)(i) of FECA, as added by Section 101(b) of BCRA.) The regulations proposed by the General Counsel defined the term to include "contacting individuals ... to encourage or assist them in registering to vote." This definition was consistent with positions taken by the FEC in the past to define and apply the term "voter registration."

61. The regulation at Section 100.24(a)(2) adopted by the FEC Commissioners, however, constricts the phrase "voter registration activity" to mean only providing "assistance" to an individual with the mechanics of registering to vote, in contravention of BCRA and without any explanation for the departure from past practice. The regulation fails to include "encouraging" voters to register, despite the position taken both by the General Counsel in this rulemaking and by the FEC in the past.

62. Because the FEC's new definition for BCRA purposes fails to include activities that directly encourage individuals to register to vote, the regulations will permit state, district and local parties to continue to spend unregulated soft money on such voter registration activity. For example, the regulation's definition would permit the continued use of unregulated soft money to pay for activities, such as a phone bank or mass mailing, that encourage unregistered voters to register, in contravention of BCRA.

63. Time restriction on "Federal election activity." BCRA defines the term "Federal election activity" to include get-out-the-vote drives, or voter identification or generic activities "conducted in connection with an election in which a candidate for Federal office appears on the ballot . . . ." (Section 301(20)(A)(ii) of FECA, as added by Section 101(b) of BCRA.) Unlike the definition of "voter registration," which is explicitly limited by BCRA to a period 120 days before an election, there is no time limit in the statute for these voter activities "in connection with" a federal election. But the regulation at Section 100.24(a)(1) adopted by the Commissioners arbitrarily defines this term to mean "[t]he period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law . . . " and continuing until the date of the election.

64. This arbitrary time limit for the application of the soft money ban to get-out-the-vote and other voter activities has no statutory basis. It will permit state party activities that influence federal elections to be excluded from the definition of "Federal election activity," in contravention of BCRA. In some states, for instance, the filing deadline for the primary ballot is not until mid-summer of the election year. Under this

regulation, state party voter activities prior to this point can continue to be funded with unregulated soft money, in contravention of BCRA.

65. Internet activities. BCRA defines the term "Federal election activity" to include "public communications" that promote, support, attack or oppose federal candidates. (Section 301(20)(A)(iii) of FECA, as added by Section 101(b) of BCRA.) Under BCRA, such communications must be funded exclusively with hard money. BCRA further defines the term "public communication" to mean "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." (Emphasis added) (Section 301(22) of FECA, as added by Section 101(b) of BCRA.) The FEC's regulation at Section 100.26 repeats the statutory definition but adds a new exclusion – not found in the statute – that the "term public communication shall not include communications over the Internet," and therefore such communications can be funded with unregulated soft money.

66. In previous interpretations of FECA, the FEC has treated the Internet as a form of "general public political advertising." The General Counsel told the Commissioners that "nothing in the BCRA or the legislative history suggests that Congress considered exempting activities conducted on the Internet . . . ." By excluding Internet communications from the definition of "public communications," the regulation allows state, district and local parties to continue to spend unregulated soft money on certain federal election activity that is conducted over the Internet, in contravention of BCRA.

67. <u>Associations of state and local candidates.</u> For anti-circumvention purposes, BCRA provides that an "association or similar group of candidates for state or local office or of individuals holding state or local office" shall be required to use hard money funds to pay for "Federal election activity," including get-out-the-vote and voter identification activity in connection with federal elections. (Section 323(b)(1) of FECA, as added by Section 101(a) of BCRA.) Congress included this provision in order to ensure that BCRA restrictions on the use of soft money in federal campaigns cannot be evaded by conducting these activities through associations of state or local candidates, such as the National Governors Association.

68. The regulations, however, exclude from the definition of "Federal election activity" any such activity by an association of state or local candidates or officeholders "if such communication refers only to one or more State or local candidates." (Section 100.24(a)(3) and (4).) This exclusion from the definition of "Federal election activity" does not appear in BCRA and was not contained in the regulations proposed by the General Counsel. It is directly contrary to the language of BCRA, which explicitly treats associations of state and local candidates in the same manner as state, district and local parties for purposes of determining which activities are "Federal election activity." By taking certain activities by associations of state and local candidates out of this definition, the regulation permits such associations to spend unregulated soft money, rather than hard money, on activities that BCRA has defined as "Federal election activity," in contravention of the statute.

69. State party salaries. BCRA defines the term "Federal election activity" to include the salaries of any state, district or local party employee who spends more than 25 percent of his or her time on federal election activities. (Section 301(20)(A)(iv) of FECA, as added by Section 101(b) of BCRA.) But BCRA did not change the existing requirement that the salaries of those employees who spend less than 25 percent of their time on federal election activities must be paid with an allocated mixture of hard and soft money. *See* 11 C.F.R. §106.5(c)(2).

70. Contrary to BCRA, FEC regulation § 300.33(c)(2) provides that the salaries and wages of such employees who spend less than 25 percent of their time on federal activities "shall be paid from funds that comply with State law" -- in other words, may be paid entirely from soft money -- rather than allocated between soft and hard money as required under current law. Thus this regulation rolls back current law and creates an incentive for state parties to direct their employees to spend up to 25 percent of their time each month to conduct federal election activities because – unlike under existing law – those salaries can be funded under the new regulation entirely with unregulated soft money.

G. Additional Illegal Title I Regulations

71. There are multiple additional instances in which the FEC Title I regulations contravene the language of BCRA and undermine the intent of Congress:

a. Hard money allocation exception. BCRA requires state, district and local parties to use an allocated mixture of hard money funds and "Levin" funds to pay for certain "Federal election activity." BCRA provides no exception to this requirement.

Yet FEC regulation § 300.32(c)(4) (unlike the regulation proposed by the FEC's General Counsel) changes this statutory provision by allowing state, district or local committees to pay for the first $5,000 of such activity in a calendar year entirely with Levin funds. This regulation simply re-writes the statute to allow state, district and local parties to use more soft money to finance "Federal election activity" than BCRA permits.

b. "Levin" fundraising costs. BCRA explicitly requires that state, district and local parties use only hard money to pay the costs of raising funds (including "Levin" funds) that are used to pay for "Federal election activity." (Section 323(c) of FECA, as added by Section 101(a) of BCRA.) Contrary to this statutory requirement, regulation § 300.32(a)(4) as adopted by the FEC Commissioners permits state, district and local parties to use "Levin" funds to pay for the costs of raising "Levin" funds. The General Counsel's office told the Commissioners that "it seemed pretty clear" that Congress "did not want Levin funds to be raised with anything other than Federal funds." The new regulation is contrary to the statute and allows "Levin" funds to be used for an impermissible purpose.

c. Accounting for "Levin" funds. BCRA imposes specific restrictions on the conditions under which state, district and local committees can raise and spend funds, including "Levin" funds, for "Federal election activity." The Commission's regulations, however, fail to establish effective safeguards and procedures for the handling of funds by state, district and local committees in order to ensure that these party committees comply with BCRA requirements. The regulations adopted by the FEC Commissioners, contrary to the regulations proposed by the General Counsel, permit state, district and

local party organizations to commingle unregulated soft money funds with Levin funds in a single account. *See* Section 300.30(c)(3). The FEC regulations compound the problem of commingling funds by failing to require state parties to use accounting procedures in accord with standard industry practices. *Id.* These regulations fail to establish effective safeguards and protections to ensure the proper enforcement of BCRA.

d. State party building fund. Prior to BCRA, FECA permitted national state, district, or local committees to spend unlimited donations to purchase or construct an office "facility." 2 U.S.C. § 431(8)(b)(viii). The Commission interpreted this term under FECA to mean not just a building or office, but also such items as office equipment and furniture. *See, e.g.,* FEC Advisory Opinion 2001-12. BCRA repealed this statutory provision and enacted a new provision applicable only to state parties that allows state parties to use exclusively soft money, if permissible under state law, to pay for the purchase or construction of an office "building." In so doing, Congress intentionally used the term "building" instead of "facility" to make clear that the provision applies only to a building and does not apply to such items as office equipment and furniture. Yet the Commission adopted Section 300.35, which, as explained by the Commissioners who favored it, will continue to allow state parties to spend unregulated soft money for state party "facilities" and therefore for such items as office equipment and furniture, in contravention of BCRA.

e. Definition of state party committees. BCRA requires state, district and local committees to spend hard money or "Levin" funds on "Federal election activity." (Section 323(b)(1) of FECA, as added by Section 101(a) of BCRA.) The FEC

regulations improperly define "state," "district" and "local" party committees by requiring that such committees be a "part of the official party structure," a limitation not found in the statute. *See* Section 100.14. This limitation is also not found in the FEC's longstanding definition of "state committee" for purposes of FECA, 11 C.F.R. § 100.14, and the FEC did not explain why the definitions should be different for BCRA purposes. The new definition for BCRA purposes allows "informal" or "unofficial" committees to be established by state party entities that would be able to spend unregulated soft money, in contravention of BCRA.

Background on the FEC's Title II, Subtitle A Regulations On "Electioneering Communications"

72. Federal law has long prohibited corporations and labor unions from using their treasury funds to make expenditures in connection with federal elections. 2 U.S.C. § 441b(a). Over the past decade, this longstanding law has been evaded and undermined by the practice of running ads which praise or criticize named federal candidates, but which avoid using particular phrases of "express advocacy" such as "vote for" or "vote against." Corporations and labor unions have used their treasury funds to pay for such ads on the basis of claiming that the ads were discussions of "issues" rather than an effort to influence federal campaigns. This "sham issue ad" loophole has grown into a vehicle for corporations and labor unions to spend tens of millions of undisclosed dollars of their treasury funds to influence federal elections, thus undermining the integrity of the longstanding ban on corporate and union spending in federal elections.

73. Congress acted in BCRA to close this loophole by passage of the so-called "Snowe-Jeffords" provisions of Title IIA. These provisions address the core of the "sham issue ad" problem by defining "electioneering communications" to include ads that refer to a clearly identified federal candidate and that are broadcast to the electorate of the candidate within 60 days of the general election, or 30 days of the primary. (*See* Section 304(f)(3) of FECA, as added by Section 201 of BCRA.) All "electioneering communications" are subject to disclosure, and corporations and labor unions cannot "directly or indirectly" use their treasury funds to pay for "electioneering communications." (*See* Section 316(b)(2)(c) of FECA, as added by Section 203 of BCRA.)

74. BCRA requires the FEC to promulgate regulations to implement these statutory provisions consistently with the purpose and direction of Congress to close the "sham issue ad" loophole. The Commission approved draft rules on "electioneering communications" on August 1, 2002 based on recommendations from the Office of General Counsel, and published those proposed rules for comment on August 7, 2002. The Commission received public comment and testimony on those proposed rules. After the close of the comment period, the General Counsel presented new draft regulations to the Commission and recommended their adoption. At the Commission meeting to consider and act on these regulations, however, four of the six Commissioners voted to adopt amendments to the proposed regulations, a key one of which created an exemption for section 501(c)(3) corporations. This amendment was contrary to the advice of the General Counsel and undermined the letter and purpose of BCRA.

75. The Title IIA electioneering communications regulations fail properly to implement the language and intent of BCRA to close the "sham issue ad" loophole. The regulations promulgated by the FEC undermine the Title IIA provisions of BCRA in significant ways, so that the provisions will not serve effectively to prevent corporate and union treasury funds from flowing into federal elections in the guise of "sham issue ads."

The Challenged Title IIA Regulations

A. Section 501(c)(3) corporations

76. In Title IIA, Congress expressly exempted certain communications from the definition of "electioneering communication" and additionally granted the FEC limited discretion to exempt "any other communication" through such regulations as the Commission may promulgate "consistent with the requirements of" the statutory definition. However, Congress imposed two limitations on the Commission's authority to create such exemptions. (*See* Section 304(f)(3)(B)(iv) of FECA, as added by Section 201(a) of BCRA.) First, any such regulatory exemption must "ensure the appropriate implementation" of the definition of "electioneering communication." Second, a regulation may not exempt a communication "if it ... is described in section 301(20)(A)" – that is, a "public communication that refers to a clearly identified candidate for Federal office ... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."

77. In discussing on the House floor this statutory authority to promulgate a regulatory exemption, Rep. Shays said that "we do not intend that Section 201(3)(B)(iv)

be used by the FEC to create any *per se* exemption from the definition of 'electioneering communications' for speech by Section 501(c)(3) charities." 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002) (remarks of Rep. Shays).

78. Notwithstanding this explicit interpretation of its regulatory exemption authority to preclude the promulgation of a *per se* exclusion for all communications by section 501(c)(3) corporations, the Commission adopted a regulation that provides for a *per se* exclusion from the definition of "electioneering communication" for any communication that "is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986." 11 C.F.R. § 100.29(c)(6).

79. The regulation exempting all communications by section 501(c)(3) corporations from the definition of "electioneering communications" was adopted against the advice of the FEC's General Counsel. The draft regulations proposed by the General Counsel to the Commission on September 24, 2002, did *not* include a regulatory exemption for section 501(c)(3) corporations. The General Counsel explained in commentary to his proposed final regulations that "[s]uch a blanket exemption is too broad for the limited exemption authority BCRA provides to the Commission." FEC Agenda Document 02-68 (Sept. 24, 2002) at 49. Nonetheless, the same four Commissioners that supported the adoption of the various provisions undermining the Title I soft money regulations also voted to override the advice of the General Counsel and adopt a regulatory exemption for all communications by section 501(c)(3) corporations.

80. This regulation will permit a section 501(c)(3) corporation to run an "electioneering communication" ad – *i.e.*, an ad that mentions a federal candidate and is broadcast to the electorate of that candidate immediately before an election in which that candidate is running – even if the ad promotes or opposes that candidate. This regulation will allow section 501(c)(3) corporations to spend an unlimited amount of their corporate treasury funds on "electioneering communications," and to spend such funds without disclosure, notwithstanding the purpose of the Title IIA provisions of BCRA to close the "sham issue ad" loophole which allows corporate treasury funds to be spent on such ads. There is a record of abuse where section 501(c)(3) corporations have run the same kinds of "sham issue ads" that Title IIA of BCRA was intended to regulate. As Rep. Shays explained during the floor debate on Title IIA, "some [section 501(c)(3)] charities have run ads in the guise of so-called 'issue advocacy' that clearly have had the effect of promoting or opposing federal candidates." 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002) (remarks of Rep. Shays). By creating a *per se* exemption for all ads by section 501(c)(3) corporations, this regulation is in direct contravention of the language and purpose of Title IIA of BCRA.

B. <u>Public Service Announcements and Other "Unpaid" Ads</u>

81. The Commission's regulation provides that a broadcast communication must be "publicly distributed" to be deemed an "electioneering communication." 11 C.F.R. § 100.29(a)(2). The regulation further defines "publicly distributed" to mean aired, broadcast or disseminated "for a fee" through a broadcast, cable or satellite system. *Id.* at § 100.29(b)(3)(i).

82. This regulatory definition of "electioneering communication" thus excludes from its scope any broadcast ad which is not a paid advertisement. Thus, all "public service advertisements," or "PSAs," are by definition excluded from the scope of "electioneering communications."

83. There is no basis in BCRA for this exclusion. The statutory definition of "electioneering communication" does not distinguish between paid and unpaid advertisements, but rather encompasses both. Nor did the Commission here purport to exercise its limited discretionary authority to create an exemption from the definition of "electioneering communication" under section 304(f)(3)(B)(iv). Rather, it simply re-wrote the statutory definition to exclude by regulation a class of communications that are clearly included in the scope of the statutory definition.

84. The Commission's exclusion of unpaid advertisements – including PSAs – from the definition of "electioneering communications" opens a loophole that will undermine the language and intent of the Title IIA provisions. PSA advertisements have in the past featured federal candidates, have portrayed those candidates in a favorable light that would have the effect of promoting or supporting their candidacy, and have been broadcast within 60 days of a general election or within 30 days of a primary. Thus, such PSA's have all of the elements of an "electioneering communication," and the congressional purposes in Title IIA in regulating "electioneering communications" apply as well to such unpaid advertisements, including PSAs. However, the Commission's regulation allows corporations and labor unions to use their treasury funds to subsidize the production costs and related expenses of these ads if they are then broadcast without

paying for airtime. This will allow corporate and union funds to be used to pay for ads which Congress deemed to be "electioneering" and which can serve to promote or support favored candidates right before an election. Moreover, the Commission's regulation, as a practical matter, grants unchecked discretion to broadcasters to exempt an "electioneering communication" from statutory coverage by airing the ad for free. For all these reasons, the Commission's regulation excluding such unpaid advertisements from the definition of "electioneering communication" is contrary to the language of Title IIA and undermines the purposes and intent of BCRA.

Background on the FEC's Title II, Subtitle B Regulations On "Coordination"

85. Congress, the Commission, and the Supreme Court have long recognized that, to be effective, any restrictions on campaign contributions to a candidate must also govern expenditures by an outside spender made in coordination with the candidate or a political party. An expenditure coordinated with a candidate or political party is the functional equivalent of a contribution to that candidate or political party.

86. The 1976 amendments to FECA, codifying the Supreme Court's treatment of coordinated expenditures in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*), require that an outside expenditure made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added); *see also id.* § 431(17) (converse definition of "independent expenditure"). This standard was reiterated in BCRA and expressly

extended to coordination with political parties as well as candidates, thereby codifying the FEC's interpretation of FECA with regard to coordination with political parties.

87. Allowing coordinated expenditures to go unregulated would completely undermine the integrity of contribution limits and pose the same threats of corruption and the appearance of corruption as unrestricted direct contributions. Under FECA, BCRA, the Commission's traditional approach, and the governing judicial precedents, there is no functional difference between a coordinated expenditure and a direct contribution.

88. Moreover, Congress, the courts, and until recent years the Commission have all recognized that "coordination" must be defined in a realistic manner to reflect the real world of politics, campaigns, and advertising. The definition must be sufficiently broad to capture coordinated campaign activities that take place even pursuant to a "general understanding" or a "wink or nod" (in the Supreme Court's words). *See Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604, 614 (1996) ("general or particular understanding"); *FEC v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 442 (2001) ("wink or nod").

89. In December 2000, a divided FEC repealed its coordination regulations that had governed for the past generation and promulgated new regulations that redefined "coordination" much more narrowly in the context of "coordinated communications," which were defined as "general public political communications . . . made for the purpose of influencing federal elections." *See* 65 Fed. Reg. 76138, 76142-43 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23 (2001). The new rules were extensively criticized both on and off the Commission. The

most recurrent complaint was that the new rules were far too narrowly drafted, failed to recognize and regulate many instances of real-world coordination, seriously undermined the contribution limits, and threatened to make evasion of FECA commonplace. The new regulations led the Commission to drop its investigations into several alleged instances of coordination growing out of the 1996 and 2000 presidential campaigns; the dissenting Commissioners charged that the "new coordination regulations create[d] a large loophole" that would "simply provide cover for those not interested in enforcement of the Act as Congress intended." Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air,* MUR 4982, at 5 (FEC Apr. 23, 2002); *see* Statement of Reasons of Commissioner Thomas and Chairman McDonald in *In re The Coalition, et al.,* MUR 4624 (FEC Sept. 7, 2001); *see also* Statement for the Record of Commissioner Thomas in *In re AFL-CIO, et al.,* MURs 4291 *et al.* (FEC Sept. 25, 2000).

90. Section 214 in Title IIB of BCRA followed directly from these criticisms. It (a) repealed the Commission's newly adopted coordination rules, effective December 22, 2002; (b) provided that the Commission "shall promulgate new regulations on coordinated communications" addressing various issues; and (c) directed that the new rules "shall not require agreement or formal collaboration to establish coordination." As Senator McCain explained, "Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill." 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002). As Senator

Feingold similarly observed, "[t]hese rules need to make more sense in light of real life campaign practices than do the current regulations." *Id.*

The Challenged Title IIB Regulations

91. The Commission adopted its new coordination rules on December 6 and transmitted those rules to Congress on December 18. The new coordination rules were published in the *Federal Register* on January 3, 2003 and are scheduled to take effect on February 3 of this year. *See* 68 Fed. Reg. 421 (Jan. 3, 2003).

92. The Commission's new coordination regulations fail to implement properly the language, purposes, and intent of Section 214 of Title IIB of BCRA. The regulations undermine FECA and BCRA in numerous ways, and in fact represent a substantial step backward in the effective control of coordinated general public political communications.

A. "Content Standards"

93. For the first time ever, the new regulations use a "time frame" test to carve large areas of coordinated political advertising out from regulatory control, in the name of a "bright-line" content standard. Until now, the Commission has always recognized that any general public political communication made for the purpose of influencing a federal election must be subject to the governing coordination regulations without reference to any so-called "bright-line" content restrictions. The Commission has recognized that political advertising may attempt to influence federal elections in a variety of ways throughout an election cycle, and that communications that in fact attempt to influence the outcome of a federal election must be subject to the coordination regulations irrespective of any bright-line rules.

94. The new regulations provide that political advertising and other public communications that seek to influence the outcome of an election are subject to the coordination provisions only if one or more of the following "content standards" is met:

i. The communication qualifies as an "electioneering communication" under new 11 C.F.R. § 100.29.

ii. The communication disseminates "campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing," with certain exceptions not material here.

iii. The communication "expressly advocates the election or defeat of a clearly identified candidate for Federal office."

iv. The communication is (a) a public communication; that (b) "refers to a political party or to a clearly identified candidate for Federal office"; (c) "is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate"; and (d) "is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot."

11 C.F.R. § 109.21(c)(1)-(4).

95. These "content standards" create huge loopholes that never existed before. To begin, outside political advertisements that are run more than 120 days before a general election, primary, or convention may now be closely coordinated with a candidate or political party so long as the advertisements do not simply "republish" the candidate's own campaign materials or engage in outright "express advocacy." Thus, a candidate will now be able to write a proposed advertisement touting his virtues or attacking his opponents and then persuade a corporation or union to saturate the airwaves with the advertisement using its corporate or union treasury funds, so long as the advertisement is run more than 120 days before any primary, convention, or general election, and so long as it avoids any "express advocacy." Under the FEC's regulation, this does not constitute coordinated spending. For example, in a State that holds an April primary for nominations to federal office, federal candidates will be able to engage in blatant and unregulated coordination of advertising up until December of the year before the primary (*i.e.,* 120 days before the primary), and again between the April primary and the following July (*i.e.,* 120 days before the November general election). The early campaign season and the immediate nomination aftermath are crucial periods when candidates frequently seek to communicate with the electorate. The Commission's new loopholes permit a candidate to engage in massive, unregulated coordination with corporations, unions, wealthy individuals, and interest groups during these periods -- free from any contribution limitations, source restrictions, or even disclosure requirements.

96. Similarly, under the new rules, a candidate or party will be able to engage in massive, open, and unregulated coordination with corporate and union spenders at any

time -- even on the eve of a primary, convention, or general election -- so long as the coordinated advertising and other communications do not "refer[] to a political party or to a clearly identified candidate for Federal office." Such advertisements and communications, by emphasizing issues and playing upon themes of concern to a candidate, may influence the outcome of an election even without mentioning a candidate or party by name. Under the new rules, even if there were evidence that a candidate was writing such "issue ads," scheduling their air times to run adjacent to the candidate's own campaign advertisements on the same themes, and soliciting corporations and unions to run the ads using their general treasury funds for the purpose of helping his campaign, such activities will now entirely escape regulation or restriction because they do not qualify under the Commission's "content standards."

97. There is no justification for these new loopholes. Congress intended for the Commission to capture more instances of coordinated campaign communications though the new rules, not to use those rules to exempt whole categories of coordinated communications. Congress also intended for the new rules to reflect the real world of campaigns and politics; the new rules do not. The new rules are contrary to the statutory requirement that an outside expenditure made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). The Commission's new approach marks an unjustified and impermissible departure from the longstanding approach to coordination followed by Congress, the Commission, and the courts for the past generation.

B. "Conduct Standards" And Additional Provisions

98. The Commission's new regulations impose not only "content standards," but also "conduct standards" that must be met in order for a communication to be deemed "coordinated," and thus subject to the contribution limits, source prohibitions, and disclosure requirements of FECA and BCRA. *See* 11 C.F.R. § 109.21(d)(1)-(6) (enumerating "conduct standards"). Portions of these conduct standards are drawn in an unreasonably and unrealistically narrow manner that will result in certain types of coordinated communications going entirely unregulated, contrary to the letter and intent of federal law.

99. For example, all of the conduct standards apply to coordination activities undertaken not only by the candidate, an authorized committee, or a political party committee, but also by "an agent of any of the foregoing." Like the narrow definition of "agent" used in the soft-money regulations, however, "agent" is narrowly defined for coordination purposes and is restricted to those with "actual authority, either express or implied, to engage in" the specific coordinated activities in issue. 11 C.F.R. § 109.3. The Commission used the same narrow approach to agency in this context as it adopted with respect to the soft-money rules and, for all of the reasons set forth in paragraphs 40 through 42 of this First Amended Complaint, *supra,* the Commission's narrow approach to agency is equally objectionable here. In particular, by defining "agent" to exclude those with apparent authority, the FEC has created the opportunity for circumvention of FECA and BCRA by allowing agents with apparent authority to engage in a variety of

coordinated activities with outside parties on behalf of a candidate or committee and to escape all regulation under the coordination rules.

100. The new coordination regulations fail to reflect the real world of campaigns and politics in other ways as well. For example, the new rules reach only "public communications," defined by the Commission to exclude any communications using the Internet and electronic mail. *See* 11 C.F.R. § 100.26; *see also* 68 Fed. Reg. at 430. For all of the reasons set forth in paragraphs 65 through 66 of this First Amended Complaint, *supra,* defining "public communications" so as to exclude the Internet lacks any statutory basis, violates Congress's intent, and is contrary to previous Commission interpretations and practices. As the General Counsel advised the Commissioners, "nothing in the BCRA or the legislative history suggests that Congress considered exempting activities conducted on the Internet . . . ." The Commission's unjustified exclusion will allow candidates, committees, and outside spenders to engage in massive coordination with respect to Internet communications, thereby creating yet another loophole in the regulation of coordinated communications. In these and other ways, the Commission's approach to coordination flouts the letter and intent of BCRA.

Legal Basis for Challenging the FEC's BCRA Regulations

101. This Court should not afford deference to the FEC in reviewing the Title I or Title II regulations. The regulations described above are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. As such, they are invalid pursuant to 5 U.S.C. § 706(2)(a).

102. The FEC's regulations described above are contrary to the plain text of FECA and BCRA, to the clear intent of Congress, to the agency's own historic practices and interpretations, and to governing judicial precedents. They are in excess of the FEC's statutory jurisdiction, authority and right. As such, they are invalid pursuant to 5 U.S.C. § 706(2)(c).

103. The FEC failed to give adequate notice of many of the rules it adopted, and failed to articulate a rational basis for its decision to adopt these regulations which, in many cases, are inconsistent with past positions and interpretations taken by the Commission. Moreover, the FEC failed to offer any rational explanation for its rejection of alternative approaches to the regulations, including those proposed by the FEC's own General Counsel and by members of the public who commented on the proposed regulations. For these and other reasons, the FEC's regulations described above are invalid pursuant to 5 U.S.C. § 706(2)(d).

Requested Relief

104. Plaintiffs request the following relief:

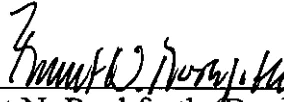
A. That the Court declare that the Title I and Title II regulations described above are contrary to law, arbitrary and capricious, and otherwise unlawful;

B. That the Court enjoin the FEC from enforcing the unlawful Title I and Title II regulations until such time as they are corrected to comply with Congress's intent in passing BCRA and to otherwise comply with law; and

C. That the Court grant such other and further relief as it deems proper.

DATED: January 21, 2003.

Respectfully submitted,



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