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.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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

1. This action challenges regulations promulgated by the Federal Election Commission ("FEC") to implement the provisions of Title I of the Bipartisan Campaign Reform Act of 2002 ("BCRA").

2. Congress enacted the BCRA in March 2002, after years of consideration. A central purpose of the legislation 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 BCRA reflects Congress' 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. Title I of the BCRA contains the statutory ban on soft money, and Congress directed the FEC to promulgate rules to implement the provisions of Title I. (Section 403(c) of the BCRA). The FEC published its Title I regulations in the Federal Register on July 29, 2002. *See* 67 Fed. Reg. 49064. These regulations, in multiple and interrelated ways, thwart and undermine the language and congressional purpose of Title I. Numerous provisions of the regulations contravene the language of the statute, and the regulations, as a whole, will frustrate the purpose and intent of the BCRA by allowing soft money to continue to flow into federal elections and into the federal political process.

4. As described below, the Court should invalidate the Title I regulations because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of [the FEC's] statutory jurisdiction, authority or limitations," and were adopted "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(a), (c), (d).

Jurisdiction and Venue

5. 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.

6. 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

7. 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 next faces re-election in November 2002 and, if re-elected, intends to seek re-election in November 2004 when Title I of the BCRA will be effective. Representative Shays was a principal House sponsor of the Bipartisan Campaign Reform Act.

8. 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 next faces re-election in November 2002 and, if re-elected, intends to seek re-election in November 2004 when Title I of the BCRA will be effective. Representative Meehan was also a principal House sponsor of the Bipartisan Campaign Reform Act.

9. Plaintiffs are United States citizens, elected Members of Congress, 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 Title I regulations are

allowed to stand and thereby to undermine the letter and spirit of the ban on soft money enacted by Congress.

10. In particular, as federal officeholders and as actual or potential future candidates for federal office, plaintiffs and their campaign opponents are and will be regulated by the FECA and by the BCRA. Plaintiffs are among those whom the BCRA seeks to insulate from the actual or apparent corrupting influence of special interest soft money. If the challenged Title I rules are allowed to stand and to undermine the reforms embodied in the BCRA, the plaintiffs will once again be forced to discharge their public responsibilities, raise money, and campaign in a system that Congress has determined is, and appears to be, corrupted by the influence of soft money. Further, by thwarting and undermining the soft-money ban, 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.

11. 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.

12. Likewise, the requirement in Title I of the BCRA that state parties not spend unregulated soft money on state and local activities that affect federal elections, as defined in the 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 even if soft money is spent by political parties in their states on generic campaign activities that affect federal elections, 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.

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

Background

14. 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 the 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. Soft money has been raised by the political parties, working with their federal officeholders and candidates, in disregard of these laws, on the theory that the money is spent for so-called "party building" activities, and not spent to affect federal elections. In practice, and as Congress determined in enacting the 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 a total of almost one-half billion dollars of soft money.

15. 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, 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.

16. The BCRA ends the soft money system by requiring the national parties to raise, spend, direct or transfer only "hard money," *i.e*., funds that are subject to 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, the BCRA also prohibits state, district and local parties from using unregulated soft money to pay for "federal election activities," as defined in the BCRA.. (*See, e.g. id.* at Section 323(b)). Further, the BCRA prohibits

federal candidates and officeholders, as well as national party officials, 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 nexus between federal officeholders and candidates, and soft money contributions that corrupt and create the appearance of corruption.

17. The 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 rule-making 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 the BCRA. In a number of these cases the amendments not only rejected the recommendations made by the General Counsel but also, without explanation, were in direct conflict with longstanding interpretations of the 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 and that 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.

18. The Title I rules promulgated by the FEC fail, in multiple and interrelated ways, properly to implement the language and intent of the BCRA to ban soft money from the federal electoral and political processes. Changes made to the regulations during the rulemaking process, usually against the recommendation 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 the BCRA, who have publicly declared the law to be 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."

19. The regulations issued by the FEC undermine the soft money ban by contravening the language and purpose of the BCRA in each of the three areas 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 will operate synergistically, so that the overall effect of the regulations will be to allow the soft money system to continue in significant ways, contrary to the language of the BCRA and the intent of Congress.

The Challenged FEC Soft Money Regulations

A. Sham Party Entities

20. The 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 the FECA, as added by Section 101(a) of BCRA). In order to prevent circumvention of the law, the 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 the FECA, as added by Section 101(a) of BCRA).

21. 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.

22. This "grandfather" exception will allow the national parties to establish entities for the raising and spending of soft money prior to the effective date of the 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 the BCRA, those entities will be able to raise and spend soft money after

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

23. For example, this regulation would allow a national party prior to November 6, 2002 to establish a new nonprofit entity, to send the party's executive director to direct the new entity, to provide the new entity with information about which 2004 campaigns should be targeted for the spending of soft money, and to provide fundraising lists and other assistance for the raising and spending of soft money for the 2004 elections. Yet, under the FEC's new regulation, none of these facts could be considered by the FEC in determining whether national party had "directly or indirectly established, financed, maintained or controlled" the entity. As an "independent" nonprofit organization, furthermore, the new entity after November 6, 2002 could raise and spend soft money in unlimited amounts from any source, including foreign sources, and would not have to publicly disclose any of its activities.

24. Further, because of the FEC's improper definition of the terms "solicit" and "direct" in its new regulations under the BCRA, *see* paragraphs 28 through 33, *infra*, national party officials, as well as federal officeholders and candidates, will be able to raise soft money for, and direct soft money to, this new entity after November 6, 2002, contrary to the BCRA. The entity will then be able to spend soft money for advertisements supporting and attacking federal candidates, and for other activities that benefit the party's federal candidates.

25. Parties and party operatives already are actively exploring evading the BCRA through this loophole created by the FEC. According to *The Washington Post,* "Both the

Democratic and Republican senatorial campaign committees are exploring the creation of separate soft-money funds." T. Edsall, "New Ways to Harness Soft Money in Works," *The Washington Post* (Aug. 25, 2002). According to the *National Journal,* "[E]ven some national party committees are looking at setting up, before November 5, new groups that they say could legally raise soft money next year so long as they do not coordinate their activities with the national committees." P. Stone, "New Channels for Soft Money," *National Journal* (September 7, 2002). The report quotes the executive director of the National Republican Senatorial Committee as saying, "There clearly is a window now, legally and functionally, to review our options and set something up in advance of the elections." The report says that the Democratic Senatorial Campaign Committee "is looking at similar ideas, according to several party fundraisers."

26. The 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 principal. (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, the BCRA may be circumvented if a state party, or federal officeholder or candidate, is allowed to establish and/or control an entity prior to November 6, 2002, and 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.

27. Under the FEC's regulation, the Commission will be 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 the BCRA restrictions after November 6, 2002. This will allow state parties and federal officeholders and candidates to establish such entities prior to November 6, 2002, and have the entities treated as "independent" after that date, leaving such entities free to raise and spend soft money, in contravention of the BCRA.

B. The definitions of "solicit" and "direct."

28. A central goal of the 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 the 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 the FECA.

29. 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 the 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 the FECA. Nor did the FEC explain why the definition of "solicit" should be

narrower as used for BCRA than for other sections of the 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.

30. 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."

31. This definition of the statutory term solicit will allow parties, candidates and officeholders to continue to solicit soft money, contrary to the 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 the BCRA. This new definition of "solicit" creates the potential for massive circumvention of the BCRA ban on soft money solicitations by federal candidates and officeholders.

32. The 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 the FECA, as added by Section 101(a) of BCRA). Despite Congress' 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 the BCRA.

33. These definitions of the terms "solicit" and "direct" will permit federal candidates and officeholders, as well as the national party officials, to continue to solicit and direct soft money, in contravention of the BCRA, so long as they do not explicitly "ask" for soft money contributions. This would include soliciting and directing soft money funds for sham affiliates established under the "grandfather" provision described above in paragraphs 20 through 27, *supra*, in contravention of the BCRA.

C. State party fundraisers

34. The 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 the BCRA). The 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 the FECA, as added by Section 101(a) of BCRA.) Candidates and officeholders, however, are not permitted under the BCRA to solicit or direct soft money contributions at such fundraisers.

35. In contravention of the BCRA, the FEC's regulations allow federal candidates and officeholders to explicitly 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 the 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."

36. 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 define the term "agent" to include those who have either "actual" or "apparent" authority. 11 C.F.R. 109(a)(5). This longstanding FEC definition is consistent with common law.

37. Yet, for purposes of the 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 contravention of the longstanding definition of "agent" that the FEC has applied to other provisions of the FECA. In defining "agent" to exclude those with apparent authority, the FEC has created the opportunity for circumvention of the BCRA by allowing national party agents with apparent authority to engage in activities on behalf of the party that the party is prohibited from doing under BCRA.

38. The same problem exists for provisions of the 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 the BCRA, in contravention of the statute.

E. Leadership PACs

39. The 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 the FECA, as added by Section 101(a) of BCRA). This provision is intended to prohibit "Leadership PACs" — political action committees established and controlled by federal officeholders — from raising and spending soft money.

40. Under pre-BCRA law, the FEC interpreted a narrower statutory standard to allow federal officeholders to establish and control "Leadership PACs," without treating such PACs as *per se* affiliated with the officeholder. The FEC, however, 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.

41. In the 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.

42. 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).

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

F. The definition of "federal election activity."

44. The 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 activities," 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 the FECA as added by section 101(a) of the BCRA).

45. 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.

46. 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 of unregulated soft money to influence federal elections, in

contravention of the 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 the BCRA, as described in paragraphs 47 through 65.

47. Get-out-the-vote activity. The 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 the FECA, as added by 101(b) of the 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."

48. 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-to-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.

49. 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 would permit state, district and local parties to continue 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 the BCRA.

50. Voter identification. The 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 the FECA, as added by Section 101(b) of the 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.

51. 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.

52. 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 the BCRA.

53. Generic campaign activity. The 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 the FECA, as added by Section 101(b) of the BCRA.) The 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 the FECA, as added by Section 101(b) of the 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.

54. 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 the 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 100.27).

55. Voter registration. The 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 the FECA, as added by section 101(b) of the 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."

56. 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 the 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.

57. 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 the BCRA.

58. Time restriction on "federal election activities". The 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 the FECA, as added by section 101(b) of the BCRA). Unlike the definition of "voter registration," which is explicitly limited by the 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.

59. 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 the 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 the BCRA.

60. Internet activities . The 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 the FECA as added by section 101(b) of the BCRA). Under the BCRA, such communications must be funded exclusively with hard money. The 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 the FECA, as added by 101(b) of the 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.

61. In previous interpretations of the 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 federal election activities that are conducted over the Internet, in contravention of the BCRA.

62. Associations of state and local candidates. For anti-circumvention purposes, the 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 certain "federal election activities," including get-out-the-vote and voter identification activity in connection with federal elections. (Section 323(b)(1) of the FECA, as added by Section 101(a)). Congress included this provision in order to ensure that the 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.

63. 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 activities" does not appear in the 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 activities." 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 the BCRA has defined as "federal election activities," in contravention of the statute.

64. State party salaries. The BCRA defines the term "federal election activities" 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 the FECA, as added by Section 101(b)). But the 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).

65. Contrary to the 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, 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 Regulations.

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

a. Hard money allocation exception. The 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." The BCRA provides no exception to this requirement. Yet the FEC Regulations at Section 300.32(c)(4) (unlike the regulation proposed by the FEC's General Counsel) change 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 unregulated soft money to finance "federal election activities" than BCRA permits.

b. "Levin" fundraising costs. The 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 activities." (Section 323(c) of the FECA, as added by Section 101(a) of the BCRA). Contrary to this statutory requirement, the regulation at section 300.32(a)(4) 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. The BCRA imposes detailed restrictions on the conditions under which state, district and local committees can raise and spend funds, including "Levin" funds, for "federal election activities." 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 the 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 the BCRA.

d. State party building fund. Prior to the BCRA, the 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. The 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 the BCRA.

e. Definition of state party committees. The BCRA requires state, district and local committees to spend hard money or "Levin" funds on "federal election activity." (Section 323(b)(1) of the FECA, as added by Section 101(a) of BCRA.) The FEC regulations improperly define "state," "district" or "local" party committees by requiring 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 the 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 potentially allows "informal" or "unofficial" committees to be established by state party entities that would be able to spend unregulated soft money, in contravention of the BCRA.

Legal Basis for Challenging the FEC Soft Money Regulations

67. This Court should not afford deference to the FEC in reviewing the soft money 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).

68. The FEC's soft money regulations described above are contrary to the plain text of BCRA and the clear intent of Congress. 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).

69. The FEC failed to give adequate notice of the rules it adopted, and failed to articulate a rational basis for its decision to adopt the soft money 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

70. Plaintiffs request the following relief:

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

B. That the Court enjoin the FEC from enforcing unlawful soft money regulations until such time as they are corrected to comply with Congress' 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.

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Respectfully submitted,

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