January 30, 2017

By email to *PoliticalPartyRules@fec.gov*

Mr. Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: REG 2016-03—Comments on Notice 2016-11: "Rulemaking Petition: Political Party Rules"

Dear Mr. Stipanovic,

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's "Notice of Availability" of a petition for rulemaking submitted by the Minnesota Democratic-Farmer-Labor Party, Notice 2016-11, 81 Fed. Reg. 69721 (Oct. 7, 2016). We urge the Commission to deny the petition to initiate a rulemaking.

With their request, petitioners seek to undermine regulations governing how State, district, and local parties can use "soft money"—that is, large (and often unlimited) contributions that are not subject to the source and amount limits of the Federal Election Campaign Act (FECA). Loopholes similar to those petitioners seek to create led to the breakdown of the campaign finance system and the passage of the Bipartisan Campaign Reform Act (BCRA), whose relevant statutory provisions were upheld against facial constitutional challenges in *McConnell v. FEC*[1] and upheld against as-applied challenges in *Republican National Committee v. FEC*,[2] and whose implementing regulations have been developed over the course of several years of regulatory proceedings and litigation.[3]

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[1] 540 U.S. 93, 161–73 (2003).

[2] 561 U.S. 1040 (2010), *aff'g* 698 F. Supp. 2d 150 (D.D.C. 2010).

[3] *See e.g.* Definition of Federal Election Activity, 75 Fed. Reg. 55257 (Sep. 10, 2010); *see also Shays v. Fed. Election Comm'n*, 528 F.3d 914, 916–17 (D.C. Cir. 2008).

Specifically, petitioners ask the Commission to (i) narrow the scope of the "federal election activities" that trigger BCRA hard money rules for spending by state parties, (ii) allow state and local parties to use soft money to fund a wider range of staff activities than is permissible under current rules, and (iii) implement an array of deregulatory proposals, previously suggested by Commissioner Goodman, to exempt certain categories of party spending from the definition of a "party coordinated communication," to exempt certain activities from triggering the "conduct" prong of the party coordinated spending rules, and to liberalize rules related to party volunteer activities.

For the reasons outlined below, the Commission should reject this petition.

A. *BCRA's Legislative History, Purpose and Structure Make Clear That a Robust Interpretation of the "Federal Election Activity" Restrictions are Critical to Preventing Circumvention of the Soft Money Ban*

From the late 1970s through the 1990s, a series of Commission regulations and advisory opinions opened the door for State, district, and local party committees to use soft money, in many cases raised by federal candidates, to fund a range of activities that assisted federal candidates.[4] Soft money spending by the two major parties skyrocketed from 5 percent ($21.6 million) in 1984 to 42 percent ($498 million) in 2000—and a Senate investigation found that both parties were selling access to candidates in exchange for large soft money contributions.[5]

BCRA, enacted in 2002, amended FECA to prohibit federal candidates and national party committees from soliciting, receiving, or directing soft money. 52 U.S.C. § 30125. Similarly, FECA provides: "[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act." 52 U.S.C. § 30125(b)(1). The Act contains a limited exception for certain "Federal election activities" that a state party committee may finance in part with so-called Levin funds. 52 U.S.C. § 30125(b)(2).

The Act defines "Federal election activity" to include, *inter alia*, "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]" 52 U.S.C. § 30101(20)(A)(ii).

Congress's overriding purpose in enacting the state party soft money restrictions was to avoid further circumvention of the Federal campaign finance laws. One of BCRA's principal sponsors said that in closing the soft money loophole, Congress took "a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties,"[6] and indeed, the record in *McConnell* unquestionably demonstrated that large contributions raised by the parties presented ample opportunities for the

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4 540 U.S. 122-129.

5 *Id*. at 129-132.

6 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)

reality or appearance of corrupt bargains between contributors and candidates. *See* 540 U.S. at 145–56, 161–62.

The Supreme Court in *McConnell* upheld BCRA's prohibitions on state and local party committees using soft money to fund Federal election activity, as a permissible means of preventing "wholesale evasion" of the national party soft money ban "by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections." *Id.* at 161. The Court noted:

> [I]n addressing the problem of soft-money contributions to state committees, Congress both drew a conclusion and made a prediction. Its conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. *Rather, state committees function as an alternative avenue for precisely the same corrupting forces.*

Id. at 164 (emphasis added). The Court continued:

> Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the national party soft money ban] by scrambling to find another way to purchase influence. It was "neither novel nor implausible" for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees . . .

Id. at 166 (internal citation omitted).

The *McConnell* Court concluded that "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *McConnell,* 540 U.S. at 165–66.

The Court went on to explicitly discuss BCRA's definition of "Federal election activity," explaining that BCRA's ban on state party use of soft money for "Federal election activity" "is narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those contributions to state and local parties *that can be used to benefit federal candidates directly*." *Id*. at 167 (emphasis added). The Court continued:

> Common sense dictates, and it was "undisputed" below, that a party's *efforts to register voters sympathetic to that party* directly assist the party's candidates for federal office. It is equally clear that federal candidates reap substantial rewards from *any efforts that increase the number of like minded registered voters who actually go to the polls*.

Id. at 167–68 (internal citations omitted) (emphasis added).

According to the Court: "Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption," and BCRA's limits governing the funding of such activities are "a reasonable response to that risk." *Id*. at 168.

The legislative history, unmistakable congressional purpose and statutory structure of BCRA all make clear that inclusive regulatory definitions of "Federal election activity," "voter registration," "voter identification," and "GOTV" are critical to preventing circumvention of the soft money ban and should not be further narrowed by the Commission's administrative interpretations.

B. *The Definitions of "Federal Election Activity" that Apply to State, District, and Local Parties Were Developed to Address Actual or Apparent Corruption*

Importantly, most of the BCRA provisions and implementing regulations at issue here do not limit how much State, district, and local parties can spend on federal election activity (as long as the spending is not coordinated with federal candidates). Instead, BCRA and Commission rules provide that the funds used for such spending must be raised in limited amounts, and only from sources permissible under FECA.

As a result, these are *contribution* limits, which the Supreme Court has repeatedly upheld, not spending limits subject to strict First Amendment scrutiny. [7] And given the close relationship between political parties and their candidates, contributions to party committees pose much the same threat of corruption as contributions to the candidates those party committees support and with whom they are intimately connected. Thus, as the Supreme Court has put it, parties, "whether they like it or not, … act as agents for spending on behalf of those who seek to produce obligated officeholders."[8] There is nothing in the Court's recent jurisprudence that should lead the Commission to reconsider these rules.[9]

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[7] In *McConnell*, the Supreme Court addressed the contention that the state-party soft money provisions should be treated as spending limits subject to strict scrutiny, and concluded that although BCRA's state-party soft money provision "prohibits state party committees from spending nonfederal money on federal election activities," it does not "in any way limit[] the total amount of money parties can spend. … Rather, [it] simply limit[s] the source and individual amount of donations. That [it] do[es] so by prohibiting the spending of soft money does not render [it an] expenditure limitation[]." 540 U.S. at 139.

[8] *FEC v. Colo. Repub. Fed. Campaign Comm*., 533 U.S. 431, 452 (2001).

[9] *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014) expressly declined to "revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review," 134 S. Ct. at 1445. Contrary to petitioner's assertions, the Court in *McCutcheon* didn't express "it's skepticism of circumvention rationales." Pet. at 3. Indeed, after expressing concern about a "prophylaxis-upon-prophylaxis approach," the Court actually offered specific proposals to prevent circumvention of base limits. *Id*. at 1458.

Petitioners' primary complaint appears to be the degree to which BCRA itself regulates state parties, as opposed to how the Commission has interpreted BCRA. To the extent that petitioners contest the Commission's interpretation of BCRA's statutory provisions, their concern principally lies with the underlying regulatory definitions of activities that constitute "federal election activity,"[10] such as "voter registration activity"[11] and "get out the vote activity."[12] *See* Pet. at 4. And petitioners take issue with the regulatory requirement that staff who spend more than 25% of their time in a particular month on "federal election activities"—which includes voter identification, voter registration, and get-out-the-vote activity—must be paid with hard money.[13] Instead, petitioners ask that BCRA's hard money requirement only be triggered if staff spend more than 25% of their time "in connection with a federal election"—a more ambiguous (and, potentially, more easily abused) phrase.

In *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), the D.C. Circuit struck down an earlier Commission rule relating to the state party staff allocation issue, calling the rule "particularly irrational," and one that "makes no sense."[14] Presumably, petitioners now want to use soft money to pay staff for voter registration, voter identification, and get-out-the-vote activities that they claim are not "in connection with a federal election." *See* Pet. at 4-5. Yet the reason that parties must use hard money to pay staff engaged in such activities is because these activities are indisputably connected to federal elections, regardless of whether a party claims the activities are "locally directed." As the Supreme Court observed in upholding the state party soft money rules in *McConnell*, "voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates," and therefore "the funding of such activities creates a significant risk of actual and apparent corruption." 540 U.S. at 168.

The underlying definitions of those activities that constitute "Federal election activity," like "voter registration activity"[15] and "get-out-the-vote activity," were developed over the course of several years of regulatory proceedings and litigation.[16] And indeed, prior efforts by the Commission to write under-inclusive, loophole-ridden soft money rules were rejected by the D.C. Circuit, in a later iteration of the *Shays* case, as contrary to BCRA's purpose.[17] In that second *Shays* decision, the D.C. Circuit said that "[t]he FEC's restrictive definitions of GOTV activity and voter registration activity run directly counter to BCRA's purpose, and the

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10 11 C.F.R. § 100.24.

11 *Id*. § 100.24(a)(2).

12 *Id*. § 100.24(a)(3).

13 11 C.F.R. § 106.7(d)(1)(i)-(iii).

14 414 F.3d at 112.

15 *Id*. § 100.24(a)(2).

16 *See e.g.* Definition of Federal Election Activity, 75 Fed. Reg. 55257 (Sep. 10, 2010).

17 *Shays v. Fed. Election Comm'n*, 528 F.3d 914, 916–17 (D.C. Cir. 2008).

Commission has provided no persuasive justification for them."[18] The current definitions are necessarily inclusive, because as the Supreme Court observed in *McConnell*, "[c]ommon sense dictates" that "any efforts [by state or local parties] that increase the number of like-minded registered voters who actually go to the polls" will "directly assist the party's candidates for federal office."[19] The Commission need not and should not revisit these rules.

C. *Coordinated Spending Should Not Be Limited to Express Advocacy*

Finally, petitioners ask the Commission to undertake a rulemaking based on a proposal initiated by Commissioner Goodman. As we previously wrote in letters to the Commission regarding these recommendations:

> The most alarming suggestion in this proposal is to exempt from the definition of "coordinated" spending any public communication that refers to a candidate unless the communication contains express advocacy or republished campaign materials . . . While this proposal is made in the limited context of spending that would tally against the party coordinated spending limits, it is an approach to the concept of "coordination" that is invalid and discredited. *See, e.g., Shays v. FEC*, 414 F.3d 76, 97-102 (D.C. Cir. 2005); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 88 (D.D.C. 1999). As the Supreme Court has said, "the line between express advocacy and other types of election-influencing expression is, for Congress' purposes, functionally meaningless." *McConnell v. FEC*, 540 U.S. 93, 217 (2003).

The proposed approach is particularly problematic since it involves communications from party committees. The Supreme Court in *Buckley v. Valeo* established the express advocacy test for spending made *independently* of a candidate as a means of narrowing the broadly-worded statutory phrase "for the purpose of influencing" an election that could potentially "encompass both issue discussion and advocacy of a political result." 424 U.S. 1, 79 (1976). But communications from party committees, developed in coordination with candidates, and that reference a federal candidate or incorporate parts of candidate's campaign materials, cannot possibly be regarded as issue discussion and are undoubtedly intended to advocate a political result.

And, BCRA's treatment of "coordinated expenditures" already extends beyond express advocacy. For example, disbursements for "electioneering communications"—a category of non-express advocacy—that are coordinated with a candidate or party are treated as "coordinated expenditures," and thus as contributions to that candidate or party. 52 U.S.C. § 30116(a)(7)(c). The Supreme Court specifically upheld these provisions in *McConnell*, noting that "*Buckley*'s narrow interpretation of the term 'expenditure' was not a constitutional limitation on Congress' power to regulate federal elections," and consequently concluded that "there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." 540 U.S. at 202-03.

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[18] *Shays*, 528 F.3d at 932.

[19] 540 U.S. at 167-68.

By using what the Supreme Court has described as a "functionally meaningless" standard to draw the line between coordinated spending and independent spending (even if, in the first instance, just for parties), the Commission would be opening the door to the general evisceration of the coordination standard of the law.

Indeed, in *Shays v. FEC*, the D.C. Circuit examined the use of "express advocacy" as a standard for applying the coordination rules (there, outside of 90/120 day pre-election windows). The court said:

> [T]he FEC's rule not only makes it eminently possible for soft money to be used in connection with federal elections, but also provides a clear roadmap for doing so, directly frustrating BCRA's purpose. Moreover, by allowing soft money a continuing role in the form of coordinated expenditures, the FEC's proposed rule would lead to the exact perception and possibility of corruption Congress sought to stamp out in BCRA. . . .[20]

Finally, state parties—like most Americans—may have legitimate concerns about the growing role of independent expenditure-only organizations like super PACs that are working closely with the candidates they support. The proper way to address this issue is not by creating new campaign finance loopholes for party committees in the name of "rebalancing" the system—which would open the door to the corruption that BCRA was enacted to prevent—but instead for the Commission to enforce its own coordination rules against candidate-specific super PACs and to undertake a rulemaking on strengthening those regulations.

For the reasons set forth above, we urge the Commission to reject this petition for rulemaking.

Sincerely,

/s/ Brendan Fischer
Brendan Fischer
Director of Federal Programs
Campaign Legal Center

/s/ Donald J. Simon
Donald J. Simon
Counsel to Democracy 21

[20] *Shays*, 528 F.3d at 925 (internal quotes and citations omitted).