FEDERAL ELECTION COMMISSION

NOTICE OF PROPOSED RULEMAKING

ON THE DEFINITION OF FEDERAL ELECTION ACTIVITY

Wednesday, December 16, 2009

999 E Street, N.W.
9th Floor Meeting Room
Washington, D.C.
COMMISSION MEMBERS:

STEVEN T. WALTHER, Chairman
MATTHEW S. PETERSEN, Vice Chairman
CYNTHIA L. BAUERLY, Commissioner
CAROLINE C. HUNTER, Commissioner
ELLEN L. WEINTRAUB, Commissioner
DONALD F. McGAHN II, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel
DAVID ADKINS, Office of General Counsel
ROSEMARY SMITH, Office of General Counsel
JOHN GIBSON, Deputy Chief and Compliance Officer
WITNESSES:

KARL SANDSTROM, on behalf of the Association of State Democratic Chairs

PAUL S. RYAN, on behalf of the Campaign Legal Center

BRIAN SVOBODA, on behalf of the DLCC

NEIL P. REIFF, Sandler Reiff & Young, P.C.

JOSEPH E. SANDLER, Sandler Reiff & Young, P.C.

RON NEHRING, on behalf of the Republican State Chairmen's Committee of the RNC and the California Republican Party

JOHN PHILLIPPE, on behalf of the Republican State Chairmen's Committee of the RNC and the California Republican Party
CHAIRMAN WALTHER: Good morning, everyone. This will convene the special section of the Federal Election Commission for Wednesday, December 16, 2009. I'd like to welcome everyone here for today's hearing.

This morning we will be taking testimony on the Notice of Proposed Rulemaking on the definition of federal election activity, which was published in the Federal Register on October 20, 2009. The NPR will explore possible modifications to the definitions of voter registration activity and get-out-the-vote activity in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Shays III.

I'd like to thank all the people who took the time and effort to comment on the proposed rules and in particular those who will appear as witnesses at the hearing to give us the benefit of your practical experience and expertise on the issues raised by the proposed rules.

I'd like to describe briefly the format we will be following today. We expect to have a total of seven
witnesses who have been divided into two panels. Each panel will last for roughly one and a half hours. We'll probably take a short break between the two panels. Each witness will have five minutes to make an opening statement.

We have a light system at the witness table to help you keep track of your time. The green light will start to flash when you have one minute left. The yellow light will go on when you have 30 seconds left and the red light means it's time to wrap up your remarks. The balance of the time is reserved for questioning by the Commission.

For each panel we will have one round of questions from the commissioners, the General Counsel and the Staff Director, for the second round, only if time permits. I would like to remind my colleagues that we're not required to use our entire questioning time. We have a busy morning ahead of us and we appreciate everyone's cooperation in helping me to stay on schedule.

Our first panel consists of Karl Sandstrom on behalf of the Association of State Democratic Chairs; Paul Ryan, on behalf of the Legal -- Campaign Legal Center; and Brian Svoboda, on behalf of the Democratic Legislative
We will follow the alphabet, which means unless you've arranged otherwise, Mr. Ryan will go first, following Mr. Sandstrom and Mr. Svoboda. You have an opening comment, Commissioner Weintraub, and then we'll begin.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I'll be very brief. I just wanted to thank the witnesses and ask them that as they tell us what their concerns are, if you could give us a sense of your priorities. If there is one take-away message that you want us to walk out of the room with, if you could let us know that, that would be helpful to us as we are sorting through afterwards and trying to figure out -- you know, we may have to balance various perspectives and various concerns and so it would be helpful to know if one thing is more important to you than another and if you can tell us that, that would be useful.

Thanks.

CHAIRMAN WALTHER: Thank you. Mr. Ryan?

MR. RYAN: Good morning, Commission. Thank you, Chairman, Walther. Thank you, the rest of you for inviting us to testify today. I am here on behalf of the Campaign
Legal Center. The sole purpose of this rulemaking, in my view, is to address the concerns and remedy the problems identified by the D.C. Circuit Court in the Shays III decision.

The circuit court identified two distinct loopholes that the court wants to see closed, first being loopholes with respect to the current regulations defining GOTV activity and voter registration activity. The current rules require assistance, and thus, exclude encouragement of these activities which the court deems should be included within the definition of these rules.

The second issue is that the current rules require contact by individualized means, thus excluding mass communications, which the circuit court deemed should be included within these regulations.

The proposed rules fixed these two problems by first defining GOTV and voter registration activity to include encouraging or assisting people to register to vote and to vote, and secondly, by eliminating the individualized means requirement. The Campaign Legal Center supports both of these proposed fixes to the concerns identified by the
circuit court.

    The Legal Center, however, opposes a couple of things put forth in the NPRM. First, the Campaign Legal Center opposes any expansion of the exhortations exemption to communications other than spontaneous statements at live events. The Campaign Legal Center also opposes any exemption for a public communication that refers solely to one or more clearly identified candidates for state or local office and notes the date of the election.

    Any such communication that meets one of the provisions within the definition of federal election activity should be covered by the rules, in our view. These two -- I'm going to mention one more proposal that we opposed, but speaking directly to Commissioner Weintraub's request that we identify our priorities, these two I would identify as our most significant or highest priorities in terms of opposing some things that were put forth in the rules.

    But third, making permanent the now expired interim rule exempting certain federal election activities that take place in close proximity to federal and non-
federal elections occurring on separate dates. We would
like to see that rule not made permanent, but we've been
through this before and we've lost this battle a couple of
times and it's the third time that we filed comments,
perhaps the fourth time we've filed comments on this
particular issue.

So realistically speaking, if I had to choose the
battles to lose, I would continue with my loss in that one
and fight hard to prevent any expansion of the exhortation
exemption and likewise to oppose the exemption for public
communications that only identify state or local candidates
and the date of the election.

I'll leave it at that. I will look forward to
answering any questions you might have to my best -- best of
my abilities and again, I appreciate the opportunity to be
here.

CHAIRMAN WALTHER: Thank you very much. Mr.
Sandstrom?

MR. SANDSTROM: Mr. Chairman, Mr. Vice Chairman,
Commissioners, distinguished General Counsel, and John.

[Laughter.]
MR. SANDSTROM: I’m not suggesting John isn’t
distinguished. John distinguished himself as the finest
shortstop the Federal Election Commission ever produced.
Unfortunately, I was playing on another team regularly.

I am -- I’m pleased to be here to celebrate with
you on Groundhog’s Day. I think I’ve been here before on
this very issue. In what is quite remarkable, the
discussion, I don’t think, has advanced very far. We’re
still struggling with the very same issues that the
Commission was struggling with seven years ago.

Unlike Bill Murray in the movie, you don’t have a
script to follow. You’ve just been given instructions to do
it right, go back and get it right this time. Now of
course, the legislation doesn’t provide you with the
definition and the court didn’t provide you with a
definition of get-out-the-vote or voter registration.

They said you needed to get it right. You needed
to do what Congress intended for you to do and the court was
quite confident in their judgment that you hadn’t done that.
Well let’s look at what Congress intended you to do in
trying to craft what you should do on a going forward basis.
Let’s first identify that the purpose of BCRA clearly was not to depress voter registration activity. The purpose was not to depress get-out-the-vote activity.

If that were the purpose, the Court would have found in McConnell the Act to be unconstitutional. In fact, a number of -- the purpose is not even to prevent non-federal or soft money from being used to get-out-the-vote and voter registration activity. State political committees can use non-federal funds. I'm not referring to party committees, just other non-connected state committees.

State candidates, as long as they don't get together, can use non-federal funds, and non-profits, in fact, Paul's organization, can take unlimited soft money to do voter registration and get-out-the-vote.

So the purpose clearly was not to prevent these funds from being used. The purpose was prophylactic. What motivated Congress was that maybe the ban on federal candidates raising soft money might -- excuse me, be secretly circumvented by not having to the back door money pouring in to these committees maybe late at night through the back door with a wink and a nod by federal candidates.
who would then be corrupted by the fact this money is now going into get-out-the-vote and voter registration activity that may benefit them.

The Commission is not regulating without experience. This harm, this injury to the Act has never occurred. There is no evidence after two presidential elections that the nightmare scenario that motivated this lawsuit has come to fruition. What we have is the system is working precisely as designed. You do not find federal candidates and their agents raising unlimited soft money to engage in these activities.

There are literally tens of thousands of potential conduits out there. You have evidence of not a single one being used by any federal candidate to get around the ban on their receipt and solicitation of non-federal funds.

When we talked about those tens of thousands of committees -- I'm here representing the Association of State Democratic Chairs. The association comprises the chairs, the vice chairs of all the state party committees and represents the interests of state and local committees throughout the country. Most of those committees consist of
volunteers. You -- most of those committees you would find it very difficult to go about and locate their headquarters because they're just volunteers.

Their headquarters may be the family room in a volunteer chair's home. We're now going to say when will they be subject to federal regulation? When will -- their activities may have to be monthly reported to this Commission? When will their activities hold a sufficient threat to the integrity of this law that you need to take further measures to ensure that that does not happen? That you have to cut off their mere -- their organizational activities, their activities intended to encourage people to get out and vote because in the materials we submitted with our testimony, I think it's clear what these committees do on a daily basis.

They organize. They bring people together. Why? To make sure, as the advertisement on the web page of the Texas Party indicates, we want precinct chairs and we want county chairs and what do we want them to do? Organize people, because come Election Day we were going to employ them to get people out to vote. Does that mean all the
organizational activity of every county, every city, and every state committee is going to be brought into these regulations?

No, I think that – get-out-the-vote and voter registration for people who practice politics is a term of art. You would never put in your budget get out a voter registration and cover -- think that covers having voter registration forms on the desks in the party headquarters. Nobody would ever budget for that.

Nobody would think that answering a few questions about voter registration by volunteers in the office is voter registration activity. Nobody would think that telling people to vote on November 2 next year alone is get-out-the-vote. You would fire a campaign manager, who said, oh that was our get-out-the-vote activity. The people who passed this law had a very good idea what it was and it is facilitated --

CHAIRMAN WALTHER: Mr. Sandstrom, your time is getting close. Actually, it's expired, but go ahead. Just a reminder here.

MR. SANDSTROM: Yeah, I ran over a lot of times,
even when I took five minutes to answer your question. So in fact, much of what I'm discussing today, I am happy to expand upon it with questions. But get-out-the-vote and voter registration to the people who practice in this field have a meaning and it isn't an open-ended meaning which would include any exhortation to do one or the other.

CHAIRMAN WALTHER: Thank you very much. Mr. Svoboda?

MR. SVOBODA: Thank you, Mr. Chairman. Thank you to members of the Commission for having me here today and to the staff for helping make this possible. I am always pleased to yield time to Mr. Sandstrom, so I'll try to be brief.

Commissioner Weintraub asked for the take-away message and I guess my take-away message is this. You're here regulating two very different types of entities and that needs to be upfront in your mind as you write and finalize these rules. The first, which you're going to talk about at length today, are principally state party committees. They were talked about at length in McConnell.

They have the availability to spend Levin funds to
pay for a portion of their federal election activity that
doesn't refer to federal candidates. That's going to be
what's driving the bulk of your discussion. But also, these
rules are equally going to impact what the statute calls
associations or similar groups of candidates or state or
local office or of individuals holding state or local
office. Rolls off the tip of the tongue.

But that's who I'm here on behalf of today, on
behalf of the Democratic Legislative Campaign Committee, the
non-party legislative caucuses across the country whom they
support in their activities. And there's many other types
of entities besides who could fall into this category that
as yet the courts and the Commission haven't had much
occasion to think about.

So for example, New Jersey law permits the
creation of joint candidate committees. If you're running
for freeholder and you're running for assembly, you can pool
your money together into one bank account. You could have
the Svoboda-Ryan Committee putting up yard signs all over
Newark. You could have --

CHAIRMAN WALThER: Let's see if that happens.
MR. SVOBODA: You never know. Excellent.

Notionally it could apply to a governor or lieutenant governor running as a ticket out of the unified committee. It's not a subject you've had occasion to discuss yet, but if you look at a literal reading of the statute, it could apply to that.

It could apply to candidates who have formed slate committees to run for school board or to run for other non-federal office. So you have a statute that applies equally to state parties and to an entire group of actors that the courts haven't thought much about and the Commission hasn't thought too much about, that are engaged entirely in non-federal activities.

And one of the problems you bring to this process, not of your own making, but imposed on you by the Shays I court, is you have a court opinion saying that you basically have to write one-size-fits-all rules to cover these sorts of actors. You tried, or more accurately Commissioner Sandstrom and his colleagues tried in 2002 to create an exemption for GOTV and voter I.D. activities paid for by associations that refer solely to state and local candidates.
and the Shays I court, at the behest of Mr. Ryan, told you, you couldn't do that, that, you know, voter -- get-out-the-vote is what get-out-the-vote is, whether it's the city councilman in Laguna Beach that's doing it or whether it’s the Iowa Democratic Party that’s doing it. So that's one of the pieces of the puzzle that you’re going to have to address as you write these rules. And there are, moreover, burdens that the Commission has yet to confront, and that the courts have yet to confront in the imposition of these rules on these actors.

Let me give you just a couple of examples. The first is, the Supreme Court upheld the imposition of the federal election activity restrictions on state parties in McConnell. But it said “state committees can take advantage of the Levin amendment's higher contribution limits to fund any activities that do not specifically mention a federal candidate. The prohibition on the use of soft money in connection with these activities is therefore closely drawn to meet the sufficiently important governmental interest of avoiding corruption and its appearance.”

Well the people I represent, the people my clients
are interested in, we don't have access to Levin funds. Clearly whether you have that sort of tailoring that would be sufficient to support these sorts of descriptions, again, it's a subject that hasn't come up in the courts so far. And it's important for you because you have to draft rules here, or presumably you want to draft rules that are going to survive across the board, is the challenge.

CHAIRMAN WALTHER: We'd like that.

MR. SVOBODA: -- whether by Mr. Ryan and his clients, or whether by the slate of city council candidates that find themselves as respondents in a MUR and find themselves in litigation against you. So these are important. What it means is as you draft these terms, particularly voter registration and GOTV, which at bottom, everybody does, they have to be defined with precision so on the one hand you're capturing what you want to capture with respect to the state party committees, and yet on the other hand, you're allowing sufficient freedom for that genuinely non-federal activity by clients like mine.

And so that brings me to an example -- I brought reading materials here today, The Selling of the President
in 1968 by Joe McGinnis. Read it when I was in college. Had a happy ending, I guess, for some people. But there was in the book a newspaper ad that was prepared by one or another of the consultants working for Richard Nixon in 1968. It was going to appear in newspapers across the country.

I'll read you just an excerpt of the ad, because I'm short of time. But the ad read -- the headline of the ad was going to be Tuesday and the ad read:

It will be quiet on Tuesday. No speeches. No motorcades. No paid political announcements. It's a very special day just for grownups. America votes on Tuesday. We'll vote for one of three middle-aged men, all ordinary enough looking, each with a set of mannerisms and beliefs and strengths and weaknesses.

And we're not doing anybody any favors when we choose them. It's a terrible job. Our choice isn't difficult. There is no choice. We're going to vote for Richard Nixon. His years of high office, his moments of defeat, and his vital, almost forgotten rests from the pace of public life have blended into the mature judgment that
this nation desperately needs.

We choose Mr. Nixon with the full knowledge that America will not live happily after November 5. The next four years will test this nation's belief in itself more than any other period in history. On Tuesday, the shouting and the begging and the threatening and the heckling will be silenced. It's very quiet in the voting booth. Now it's your turn.

So this is a newspaper ad, presumably ran in 1968. Let's replace America with Maryland. Let's replace Nixon with O'Malley or Ehrlich and let's say that the ad was run by the Republican Governors Association. Is that ad federal election activity? Is that GOTV activity?

Under the proposed rule, I think it is. It encourages to vote and it informs the reader by local means of the date of the election, Tuesday, November 5. Would it be federal election activity under what Mr. Ryan's presented today? It would be. I understood his testimony to expose the expansion of the exclusion for state or local candidates for exhortations to other media like newspaper ads, and also expansions to include informing the date of the election.
So that in — that is an example of the sort of communication you may capture with this rule. How do you avoid -- first off, do you want to avoid capturing it? I think you do for the vitality of the statute and the regulation once it obtains judicial review -- how do you do it?

I think you have to look perhaps less formally at the languages that were used by the court in Shays III and I think you have to use your expertise as those familiar with how people do GOTV, with how they do voter registration to capture those spheres of activity that genuinely are intended to mobilize, not simply to persuade people to vote for a state or local candidate, because at bottom, this whole business is about getting people to vote on Election Day, everything they do from beginning to end, but looking at that special subset of activity that's actually directed toward voter mobilization. That, I think, is the way you can capture what Congress intended when they passed the statute while protecting the interests of these local committees that have neither the purpose or effect of influencing federal elections and yet nonetheless, would be
equally subject to whatever you decide to do here.

And I appreciate your indulgence on me running late and I'll be happy, as the others, to answer questions.

CHAIRMAN WALTHER: Thank you very much. At this point, we will turn to questions from the commissioners. I'll start with Mr. Vice Chairman.

VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman. Thank you for your testimony. It's not an easy task that we've been asked to undertake here. We are having to thread the needle. We have the court decision in Shays III which did -- which basically said go back and try again and as Mr. Sandstrom pointed out, it didn't give us extensive direction as to how we're supposed to do it. But we know that we have to have a broader definition than the one that we had earlier.

At the same time, we have to figure out how to do that in such a way that we're not going beyond what the statute permits us to do and enter into -- and federalize state and local party activities that we're not authorized to regulate under the statute.

So I guess my question to start off, and I -- at
least I know what the one-word answer is, but I hope each of
you could flesh out your answers. Under the -- under the
Shays decision, does the Commission have any choice other
than to go the route of defining voter registration
activities and GOTV by incorporating the words “encourage”
or something similar? And if we don't have to go that broad
under the Shays III decision, what are some alternative
narrow definitions that would comport with the decision, but
that don't go maybe as far as encourage and create the sorts
of issues that I know that Mr. Svoboda and Mr. Sandstrom
brought up?

So that's my first question, it's can we go
narrower than encourage and if so, what would be some of the
narrowing constructs that we can place on that language so
that we wouldn't create the issues that you raised? I guess
we could start with Mr. Ryan and go down the table.

MR. RYAN: No, you can't do anything short of
including encourage and still satisfy the concerns of the
circuit court and that's my simple answer, but also complete
answer, I think. I don't really think there's any need or
grounds to elaborate on how I would do it differently if you
were to decide to do it differently. I like the rule as proposed.

MR. SANDSTROM: I think it’s important to pay close attention to what the court did and why it did it. Yes, I think you can go narrower. I don't think, as you go -- try to discover how to do that, you do not have to limit yourself to hearing testimony from witnesses. You can go out and discover how these terms are actually used in practice.

The people who passed this law had something in mind, we would have been -- we would have been better off if they had actually defined the terms. But in every campaign people know what is meant by voter registration. People know what was meant by get-out-the-vote. And part of your job, I think, is to go out and discover that. And you can do that by making inquiries, doing your own independent investigation. You do not have to rely upon witnesses to tell you precisely what those mean.

What the court -- no, unfortunately, federal judges don't run for office. It's not a line item in their budget. And so when they're faced with terms which they --
there is no legislative history on, in which scenarios are thrown out, that this would be an opportunity for -- to influence federal elections. Of course it's an opportunity when there's a successful governor get-out-the-vote campaign in the same year of a presidential election in that state it will likely influence the outcome.

But that was not what was sought to be regulated. What was sought to be regulated is to look at these terms and as they're used in politics. So like I said, I would encourage the Commission to identify how these terms are used in politics. We've offered how we believe they're used. They're used with respect to facilitation and assistance. But others in practice -- and overwhelmingly I think you'll discover that those people will tell you the same thing, what is meant by voter registration, get-out-the-vote when they budget for it.

MR. SVOBODA: I think the word “encourage” in the Shays opinion was actually a flashpoint for the broader concern that the court had, which was that the Commission in the court's view, had not tailored the rules sufficiently to capture the range of activities that Congress intended when
it sought to regulate voter registration or get-out-the-vote activities.

So I think less significant perhaps than the term "encourage" was the actual examples that Shays presented to the court in litigation, and also, the example in the Long Beach advisory opinion that the court seized onto as it considered its opinion. From that I think you have data points and the sorts of activity that the court felt fairly ought to be -- ought to fall within the definition of federal election activity.

I think though the court signaled some openness, I mean, not a huge amount of openness. It's plain that the court was -- it had difficulties with what the Commission had done, but signaled some openness to the exercise of agency expertise to try to flesh out these terms and create a more narrowly tailored proxy.

So for example, we know from the first two Shays opinions that it's going to be difficult to support the definition of GOTV that's strictly time limited, I mean, certainly to the 72 hours. We know that. But the fact of the matter is, I mean from my clients' experience, and I
assume Mr. Sandstrom’s clients’ experience, I mean, most of what is — most of what operatives would budget as a GOTV expense, most of what they would do is what they would discuss as a GOTV program. Most of what members would have been familiar with as GOTV when they’re writing the regulation is something that happens in a fairly short window of time before the election.

The bulk of it happens in the days or weeks before the election. Very, very little of it happens a year out. So I think that’s a factor that you’re able to consider as you flesh out these rules. And also I think the court may be open to a distinction between fleshing out encouragement, if you will, to capture what Mr. Sandstrom talked about as mobilization. I mean, not simply telling someone, gee we want you to vote Bob Ehrlich. We really hope you do it on Tuesday, but those more affirmative means that are actually going to result in increasing turnout at the polls.

And paid advertising, paid communications is kind of a — it’s an example of perhaps — it’s the clearest example of where the rule may be most over inclusive. And it’s a special concern for state and local candidates
because you have a statutory exclusion that's designed to allow associations to do that for them so long as it doesn't take up other -- so long as it doesn't otherwise qualify as federal election activity. So that's one of the real dilemmas that the Shays II court didn't think about at all and unfortunately you have to think about now.

CHAIRMAN WALTHER: Thank you.

VICE CHAIRMAN PETERSEN: Just one follow-up question. When does -- I guess we're all struggling with the definition, is when does something fall from being a persuasive communication? You draw the distinction in your comments about differences between persuasive communications and GOTV -- GOTV communications.

At what point do we trip the threshold and enter from the one realm into the other? Is it once where you mention the date of an election, once we mention the date and polling place? Does it have to be date, polling place and hours of operation at the polling place? At what point -- and again, I know that these are difficult distinctions to make, but from the agency's perspective, as we're grappling with how to write rules, what are your thoughts on
when does a communication translate into a GOTV communication other than you just kind of know it when you see it?

MR. SVOBODA: I think it's not simply just the date, because there's many circumstances where the date's included in a candidate's, for example, own general media track or just in kind of general creative work in political communications. So I could imagine a number of circumstances where they communicate the date the week before the election, but it's not for the purpose of mobilizing. It's for the purpose of promoting the candidate in that particular contest in which the candidates run.

I think the line is when you go beyond persuasion, simply trying to encourage popular support for the candidate, but you're trying to do it at any point in the cycle and you're actually taking steps beyond that to mobilize. So, for example, you're putting together an office that's designed to help pick up people on Election Day and get them to the polls. You're doing calls on Election Day to ask people if they voted and to remind them to go vote and to tell them the polling places. Those are
just some examples and it may be difficult to codify an
exhaustive list, but it points a basic distinction, which is
between encouraging popular support and mobilizing.

MR. SANDSTROM: Communications cost money. When
I'm getting out the vote, I'm getting -- trying to get out
my vote, not the other person's vote. And so your message
is on a get-out-the-vote campaign and your activities are
designed to, as my colleague said, to mobilize a particular
segment of the public to action, that is, voting, not to
persuade them which way to vote, but to mobilize them to
action.

And that's why most of it occurs when that action
is about to occur, before Election Day. Sometime it may
have even been on an absentee ballot campaign. But you're
not wasting your money a month out saying don't -- vote on
November 2 so that it -- to actually mobilize that person to
do anything other than to be fairly disposed to your
candidate. And so I know it's -- you know, where --
persuasion, which turns into action, is not an easy line to
draw. You have to look at how in politics people draw that
line, because I'm not sure what other experience you look
CHAIRMAN WALThER: Commissioner Bauerly?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman.

I'd just like to follow-up a little bit on what the Vice Chair was discussing, what you're discussing. And while there may be communications that easily fall into one of these categories, are -- it seems to me there are also -- it might also be possible for communications to fall into both categories of persuasion and have the information necessary that you would -- that I think “mobilizes” is the word that you are using.

So while there may be time frames at which it's clearly one thing or the other, as we get closer to an election, would it be possible for those communications to do both? And in that instance, what's your view on where the -- where they shall fall on the line?

MR. SVOBODA: I think it is possible for communications to do both. I mean clearly the statute is constructed to recognize that they can. In the case of associations, for example, they say you may spend soft money to promote or support a candidate for state or local office.
as long as it does not otherwise qualify as FEA, but that means you have to be -- if that exception is going to mean something to state and local candidates, it means you have to be sparing in some degree in defining the other aspects of FEA.

It tends not to be a problem so much for state parties because if they're going to -- typically if they're going to do a voter registration or get-out-the-vote and they can mention the federal candidate whom they are wishing to support, they will mention the federal candidate whom they are wishing to support. The law gives them avenues to do that, for example, volunteer exempt activities. But that's captured through another section of FEA, right? I mean, public communications that promote, support, attack, and oppose the candidate for federal office are going to be caught there.

So associations face kind of a unique situation. We've got more desire to talk about federal candidates. We don't worry about that first prong of FEA. So the question is, well we're trying to encourage popular support for our own candidates. Are we finding ourselves tripped up under
FEA restrictions in a way that ironically a state or local party typically wouldn't do? And so I think that counsels for, in this context, being careful and sparing in defining what GOTV and voter registration mean.

And one last point, to follow-up on what Karl said a moment ago. He raised a point which I hadn't thought of before which I think is interesting, which is the targeting of activities could be a significant proxy for distinguishing GOTV and mobilization from encouraging popular support.

Nobody's going to run a GOTV program by taking out million dollar ads in the New York Times and saying please vote on Tuesday. You're as likely to get my father-in-law to vote as you are to me and that's not going to do anybody any good. If you're running a GOTV program, you're going to know who your voters are. You're going to have modeled them and have a sense of what their political attitudes are and their propensity to vote. You're going to know something about the voter history.

You're going to know – you're probably going to have I.D.'d them under separate financing descriptions, the
I.D. restrictions, and you’re going to know how they’re going to vote and you’re going to have a communication that’s basically going to make sure that those people and only those people go out and vote. So that actually is something that the Commission hasn't done before that may be worth considering in these rules, which is targeting as a proxy for distinguishing mobilization from encouraging popular support.

MR. SANDSTROM: I'll add a loop to that. Take an example that Brian used, Governor O'Malley. When does the Commission think he can stop and start limiting the persuasive messages that Governor O'Malley and his lieutenant governor on the ticket used to get -- to persuade their people to vote for them? When does the Commission think they can step into that election when there may not be any truly contested federal elections and limit the message they used to try to win an election?

So I think Congress could have attempted, whether it would be constitutionally successful or not, to limit the sorts of money that Governor O'Malley can raise so you won't have to live by federal contribution limits. You have to
abide by all the federal limits and prohibitions on corporate and labor funds. Over in Virginia, the same thing. They didn’t do that. They said the danger was a particular type of activity and that’s all we were seeking to regulate.

And so if they wanted to take the bigger step, they could have. For you to take the bigger step without clear direction from them I think would be a mistake.

MR. RYAN: My understanding of the law is that we’re not here to talk about what Governor O'Malley can do, what kind of money he can raise and spend through his campaign committee. We’re talking about party committees here and state party committees, local party committees in particular. I do believe that it is in fact possible and even likely that a particular communication will fall into both categories of persuasive and get-out-the-vote type of activity.

But Congress was clear that those types of communications, if they constitute get-out-the-vote activity, they’re covered by these provisions of BCRA. The Supreme Court was equally clear that they would be covered...
and the Supreme Court, I think, in its decision in McConnell, gave this Commission the guideposts and the explanation for why Congress could and did constitutionally cover these types of activities.

On pages 167 and 168 of the Supreme Court's decision in McConnell, the Court wrote: Common sense dictates, and it was undisputed below, that a party's efforts to register voters sympathetic to that party directly assists 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. Any efforts that increase the number of like-minded registered voters who actually go to the polls.

The types of arguments that you've received in written form that Mr. Sandstrom had made today that Congress didn't want to or didn't intend to regulate state party activities dealing with state and local candidates, I think it's just not the case. These arguments were made before Congress in the years leading up to the passage of the McCain-Feingold law.
Congress addressed these concerns with two very specific provisions in the McCain-Feingold law. Congress doubled the limit on contributions, hard money contributions to state parties from $5,000 and $10,000. And Congress included the Levin amendment that allows parties to -- state parties to raise another $10,000, up to another $10,000, to engage in precisely these kinds of activities, recognizing again that any efforts to turn out voters will benefit federal candidates and present this potential for circumvention of the federal hard money limits applicable to the national parties.

So -- and then the Court -- so we had Congress address this issue. These arguments were made to Congress. They addressed. And the arguments were made to the Supreme Court in McConnell. The Supreme Court rejected them in McConnell and explained why the limits were permissible as applied to GOTV and voter registration activities. And these arguments were made to the D.C. District Court and the D.C. Circuit Court in Shays I and in Shays III. And in Shays III, we're here to discuss today, the circuit court decision, the court again rejected these arguments that
Congress didn't mean to or Congress could not have touched or regulated these state and local party get-out-the-vote activities.

They're covered. I think the law is clear. It's established. We've been having this argument now for seven years and I think it's time for you to adopt the regulation that you proposed because it makes sense and it complies both with congressional intent with the Supreme Court's decision in McConnell and with the circuit court's decision in Shays III.

MR. SANDSTROM: Chairman, a remark on that, because my colleague, Brian, doesn't have to be here, I guess, because we were just instructed that this only applies to state parties, that this doesn't apply to candidates running together as a group, as an association.

So I think you -- since we now know clearly that this law was to -- not to cover them and was to cover state committees -- my colleague can exit the room. And what he quoted from the quote was totally unremarkable. I'm not sure what -- yes, when you have an election simultaneously occurring for state and federal office, voter registration
and get-out-the-vote activity is done on behalf of state candidates, by state candidates, by organizations, by state committees, will influence the outcome.

And if he -- if Mr. Ryan is suggesting that everything a state party does that actually will help -- you know, get the favorable outcomes on Election Day, is voter registration or get-out-the-vote activity, then you have now federalized tens of thousands of local party committees who are not now currently registered with you and you best tell them that.

MR. RYAN: I'd just like to -- one minute to make clear that --

CHAIRMAN WALTHER: Okay, I want to be able to make sure all the commissioners get the opportunity to answer -- ask some questions, so we need to keep moving through the commissioners and then come back, I think, with a little more free ranging conversation.

MR. RYAN: If I may just --

CHAIRMAN WALTHER: Sure, go ahead.

MR. RYAN: I just want to make clear; the Campaign Legal Center understands that the statute covers
associations of state and local candidates. We believe that rules should cover those candidates. I understood Mr. Sandstrom's earlier comments to be with reference to a single gubernatorial candidate, not associations of candidates.

CHAIRMAN WALther: Commissioner Bauerly, do you --

COMMISSIONER BAUERLY: Yes, if I might. I hope it will fully -- briefly, if we can, so my colleagues will have some time.

Mr. Svoboda, you -- I liked your characterization that maybe we should think about these less formally and I think you were using the word "mobilize." And that leads me to think that heaven forbid we need another definition in these regulations. But I'm trying to -- I was thinking through what the difference between encourage and mobilize is, because I'm assuming you're not suggesting physical force to move voters to the polls.

I assume it's something slightly less than that, although I recognize rides to the polls and things like that are obviously included. So I'm curious as to if you can perhaps help me understand a little bit about what you mean
by mobilize that is different from encourage.

MR. SVOBODA: Well maybe the best way to go at the question is to talk about what in my experience -- how political committees think about this. They will have --

COMMISSIONER BAUERLY: I'm going to interrupt you because I want to be -- perhaps I wasn't clear. I'm not -- I think we understand what the activities are. I'm wondering what the -- what the words on the page need to look like so that people aren't sitting in living rooms and wondering, and yet we're still being responsive to the court.

So is that defining encourage in a way that perhaps is more limited? And again, I'm loathe to suggest another definition, but what is shortcoming -- what, in your view, is the shortcoming of encourage and what's the specific language that would need to be in this regulation, unless it's a laundry list and perhaps that's your proposal?

MR. SVOBODA: Perhaps one way to go about it is to frame it almost as like a specific intent standard. So in other words, if you have a committee that has undertaken funds for the specific intent of ensuring that people whom
they have identified as potential supporters and here I lapse a little into the colloquial -- with the acts taken with the specific intent of ensuring that those people go to the polls and vote whether on Election Day or through early voting or through absentee ballot.

And then I would distinguish that between communications that are primarily intended simply to encourage popular support for a candidate. I toss this out without a moment of reflection beforehand, so please take this with a shaker of salt. But it takes you in a direction I think that's perhaps safer ground, a more precise ground then the encouragement standard, because the problem with encouragement is that -- if I'm running in 2010, November 2010, I'm encouraging people to vote for me today.

The question is, is that GOTV? I don't think that is GOTV. What you're trying to do is to capture those activities that are actually specifically taken to get identified voters to go and vote. And you can adopt perhaps a similar standard with respect to voter registration. Voter registration is a little more of an easy call because unlike GOTV, it's not as -- I mean, it's easy to tell when
an activity -- or it’s easier to tell perhaps when an activity applies to voter registration.

But GOTV is the most troublesome concern because there's a line between, again, that encouragement of general popular support and mobilization. And that's just one thought I think we're getting toward that, but I do wonder whether it ought to be more of a specific intent standard.

CHAIRMAN WALTHER: Thank you. Commissioner Hunter?

COMMISSIONER HUNTER: Thank you. I think your comments have all been very helpful and it is very difficult to draw the line here. I think what we -- the NPRM, was trying to do is, -- well, I appreciate the arguments that it is quite broad in the definition of encouragement. I think that the examples are probably narrower than the word “encourage.”

I was wondering if maybe there’s a possibility to submit additional comments, if the record could be open for a few days, to take a look at the examples in particular and maybe they -- hopefully they do a better job of covering the kind of mobilization activity that we were talking about.
That was, at least, I think the intent there.

And also, I understand sort of your distinction between the mobilization and the persuasion efforts and I think that the idea that Mr. Sandstrom talked about, the targeted -- who's being targeted by the activities is a very good way of looking at it. And what I think some of us were trying to get at in the get-out-the-vote activity exemption for public communications referring only to one identified state candidate, was that was sort of meant to cover a sort of broad category of persuasion communications.

So instead of exempting the kinds of get-out-the-vote voter registration activities that we've been talking about, it was meant to exempt this sort of other side of the coin. And structurally, it’s probably not the best way of doing it. I think it probably is better to say that should never be included in any kind of definition of voter registration activity or get-out-the-vote activity.

I think that's harder to do, but I think we should take a look at attempting to do that based on some of the comments that we've heard today. And I think if people can take that either now or at a later point, look at the
examples, and maybe there is a way of sort of putting into paper, as my colleague Commissioner Bauerly is suggesting, coming up with something that better tracks the line between the two.

Because I think it's true that encouraging is quite broad and I'm not -- I'm not sure I'm convinced that the court required us to pick that word. The court suggested it, but there's nothing in the court's opinion, in my view, that requires us to pick that word. So I think if anybody wants to comment on the examples now that would be helpful.

MR. SANDSTROM: I wouldn't know with respect to the example that was used, the advisory opinion, the, Long Beach. They were not robocalling the other person's supporters. They were robocalling because they had identified with phone numbers their supporters, and that's why you could argue that that was get-out-the-vote.

General political messages that are aimed at the entire electorate generally are persuasive. They are intended much like the New York Times ad that Brian quoted, to persuade people, and they're given to the people who
haven't made up their minds yet. When you get down to get-
out-the-vote, it's aimed at those who have made up their
mind.

MR. SVOBODA: Commissioner, I think part of the
reason you haven't heard many comments perhaps on the list
of examples is because of the broad standard that's created
at the beginning of the section and the fact that they are –
it's included, but not limited to those examples.

I mean, the examples that are listed I think are –
- I think fairly reflect GOTV activities. In the case of
GOTV, the problem for someone like my client is, well what
else out there is going to qualify as GOTV because there's
an infinite number of possibilities based on the wording of
the regulation that could qualify.

COMMISSIONER HUNTER: Do you think it's possible
that we could come up with an exhaustive list? I think this
list -- you know, I have to think about it a little bit
further. But do you think that that's possible and that's
something that people would know the universe?

MR. SANDSTROM: Provided you don't use the word
“but not limited to.”
COMMISSIONER HUNTER: Right.

MR. SANDSTROM: That just -- then your examples become fairly useless. It suggests that these are start cases, but there are others that may be undertaken or fall into the same category.

COMMISSIONER HUNTER: Right. My question was meant to -- it just -- it would be an exclusive list. It wouldn't be anything else besides the list.

MR. RYAN: My view is that it would not be possible to craft a truly exhaustive list that would be acceptable to the Campaign Legal Center. We strongly support the inclusion of the prefacing phrase, “but is not limited to,” before the list of examples that are given in these two proposed rules for both -- defining both terms.

The examples make sense to us, but again, with the caveat being we want to see retained the inclusion of the phrase, “including, but not limited to.”

COMMISSIONER HUNTER: Mr. Ryan, are you able to give me or provide at a later date another example of something that's not covered that you're envisioning should be covered in the examples?
MR. RYAN: I certainly have to give it some thought.

COMMISSIONER HUNTER: Okay, that would be very helpful. Thank you.

CHAIRMAN WALThER: Any further questions? Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thanks, Mr. Chairman. I guess I'm a little frustrated by some of this because I feel like some of the comments and some of the discussion, people are trying to reargue this case, which we lost. I mean, I know -- I know that you two don't agree with him, but his side won in court and we've got a decision to comply with.

Honestly, the court decision I think is pretty clear in saying that we created a loophole when we used the word “assist” and not “encourage.” I don't -- if we don't use the word “encourage,” I really don't know what to do, what to say when we go back to court if we get sued again and try and say well gee, we didn't think you meant it, Your Honor, when you said it opened up a loophole not to use the word “encourage.”

I just -- I don't know how to frame that. I don't
know what to tell my litigators to say to defend a rule that
doesn't use the word “encourage.” Part of my concern about
what you've been suggesting as alternatives is that they
both, you, Brian and Karl, both of you seem to be drawing on
intent-based standards. Brian, you specifically said go by
the specific intent and Karl's comments talk about
communications that are not primarily aimed at facilitating
the act of voting.

That doesn't seem to be an administrable standard
to me where we would have to get into the intent behind the
communication. I just -- I'm not sure how we would -- what
kind of guidance does that provide your clients?

MR. SANDSTROM: Intent often is objective. You
can look at activities and determine that a reasonable
person would conclude that the intent of that is actually to
mobilize the voters to get up off their duffs and go out and
vote, okay, that a reasonable person can make that
conclusion.

So I don't think intent is always subjective.
It's what a reasonable person who engaged in politics
considers to be get-out-the-vote, and that is intended to
move people to mobilize and activate and to vote. With respect to what the court -- yes, it's rather troubling what the court in fact said in many places in that decision. The court essentially said, we don't know what this means, but the Commission should be free to determine what it means in enforcement.

I don't think that's what you want to do in a First Amendment area, saying that we want to determine whether this is get-out-the-vote by enforcing the law against somebody that we conclude violated it because the --

COMMISSIONER WEINTRAUB: That's not -- that's not the section I'm talking about. That's not the section that I asked about. The court said, the FEC's definitions create two distinct loopholes. First, both definitions require that the party contacting potential voters actually “assist” them in voting or registering to vote, thus excluding efforts that actively encourage people to vote or register to vote, and dramatically narrowing which activities are covered. You have to deal with that language.

MR. SANDSTROM: If you deal with that language then, if you think the court was sufficiently, no, gave you
almost no leeway, okay then you need to cover everything that encourages people to vote from -- and if you encourage everything that gets covered, you've completely federalized the system.

The court did not, frankly, think this through as deeply and it is not reflected --

COMMISSIONER WEINTRAUB: I'm sorry, Your Honor, I don't think you thought this through?

MR. SANDSTROM: No, I'm not saying that's your response. It's that for the Commission instead to think it through, to go out and gather sufficient -- you know, evidence to support its regulation and support it with okay, what would a reasonable person in politics consider to be get-out-the-vote, not what the judge did, because he said that's not his job. The panel, that's not their job to do this.

But you didn't do your job adequately. Go back and do your job and discover what people in the field consider to be get-out-the-vote.

MR. SVOBODA: Commissioner, let me take a whack at it of my own. If I'm the Maryland Democratic Party and I
send direct mail to my voter file, say in August of the
election year, and it says you really ought to vote for
Martin O'Malley, am I committing FEA under the draft rules?
Am I required to pay for it with federal money?

I think I am. I am encouraging potential voters
to vote. I'm saying, you ought to vote for Martin O'Malley.
So what that means is the Commission, if it's going to go
with an encourage standard, has got to decide what encourage
means and how to flesh out that term so you're
distinguishing the encouragement that's going to qualify as
GOTV and the encouragement that's not.

I think -- the way I read the Shays case, the
court, I think, was frustrated that the Commission -- or
that the Commission --

COMMISSIONER WEINTRAUB: We all are.

MR. SVOBODA: -- a series of activities that it
thought fairly were characterizable as GOTV and voter
registration and yet the regulations didn't cover them. I
think it was – it's choosing the word “encourage” in this
context. I think it's expressing its frustration that
there's a range of activity that in its view seemed fairly
captured by these terms that should have been there.

I don't think that the Shays III court would have taken the example I just did, the direct mail on Mr. O'Malley, or the example I gave in the beginning of my testimony. I don't think the Shays III court would have found either of those to be GOTV.

One other point. Karl's talked frequently about federalizing the process. I want to come at that from a different angle. It's really a statutory problem for you all because you have a statute on the one hand that says that state parties, local parties and associations are free to sponsor public communications that promote, support, attack or oppose solely local candidates so long as they don't otherwise qualify as FEA.

So Congress actually had a statute where it tried to protect even the rights of state parties to be active solely in non-federal contexts. It conditioned that, however, by saying that they can't otherwise qualify as FEA. So the question is, do you define these terms in a way so that they swallow the exception and basically take it away? And that's a very acute problem for associations because we
don't have Levin funds. We don't mention federal candidates or promote or support them.

And if the definition of GOTV is so vast as to vitiate that exemption, then we really are violating congressional intent. I mean, it's -- I don't want to put the -- I don't want to talk about it in terms of federalizing the system because I'm not here to second guess what Congress did eight years ago. But it's a question of statutory interpretation for the Commission that as yet has not been teed up, or at least squarely in the Shays opinions, and is something that we nonetheless need to be mindful of here.

CHAIRMAN WALTHER: Thank you.

COMMISSIONER WEINTRAUB: And I just wanted to --

CHAIRMAN WALTHER: Yes.

COMMISSIONER WEINTRAUB: -- for Mr. Ryan. I know you said this wasn't your top priority, but I'm still interested in this concept of the elections that don't take place, the non-federal elections that don't take place on the Election Day, on the federal Election Day.

I'm wondering if you see a distinction between
voter I.D. and GOTV because it seems -- whereas it seems to me that getting people out, activities that are designed to, for example, drive people to the polls on a date when no federal officeholders or candidates are on the ballot, I'm not seeing how that has any impact on the federal election that takes place two months later as opposed to maybe voter I.D. does.

So I'm wondering if you see any distinction between those two activities and whether there is some period of time, some cooling off period that would dissipate the effect, is it worse, if it's -- I mean, we've actually seen some elections that are a week before the election, the federal election, as opposed to three months before the federal election or six months before the federal election. Is there some period of time over which this effect dissipates?

MR. RYAN: You mentioned voter I.D. versus GOTV. You didn't comment specifically with respect to voter I.D. My view is that the problem is most acute with respect to voter I.D. because the products, the results of voter I.D. efforts have more lasting effect perhaps. Getting directly
to your question about GOTV, I think it depends entirely on the specifics of the GOTV effort, as well as whether or not you're operating in a state that allows early voting, or whatever the state calls it.

If you can -- if it's a vote by mail state like Oregon, if it's an early voting state, if they call it vote by mail but you don't need any excuse to do it, or even if you do need an excuse to do it, if the window for voting is open and you're permitted to engage, use soft money to engage in get-out-the-vote efforts, I think it's a problem. I think it should not be permitted.

I think it's less of a problem if you're operating in a universe where there is no early voting, there's no possibility that getting out the vote efforts by a state or local party will actually encourage. If you cannot be voting for federal candidates at the time when those efforts are made, then the problem is less -- or it's less of a problem, I should say.

So there are variables beyond simply voter I.D. versus GOTV and GOTV obviously encompasses activities far broader than driving people to the polls. If we're talking
about driving people to the polls on a day when there's no federal election going on, I'm not concerned about that context. But we're talking about much, much more than that in terms of how the Commission regulates get-out-the-vote activities generally.

COMMISSIONER WEINTRAUB: And you think that we should just switch a little bit -- gears a little bit? You think that we should regulate differently the communication that goes out and says all sorts of wonderful things solely about state and local candidates, same communication. One mentions the date of the election. One doesn't mention the date of the election. You think that's a distinction that we should formalize in our regulations as one needs to be done with federal funds and one doesn't?

Presumably the one that doesn't even mention the name of the election and only talks about federal -- non-federal candidates. There's no reason to pay for that with non-federal -- with federal funds, sorry. I'm getting my terms all backward.

MR. RYAN: I think it -- if it were to say -- mention a bunch of state and local candidates, not mention
the specific date of the election, but say vote in November and both elections are in November, I think that is close enough to have it qualify as federal election activity. If the state party’s spending a bunch of money to say vote in November, it falls within the realm of the Supreme Court’s concerns that any efforts to get like-minded voters to the polls, if that -- I think that should be your guide star. And if you hold that up as your --

COMMISSIONER WEINTRAUB: Pages on non-federal candidates and then one line on the bottom that says don’t forget to vote, don’t forget to vote November, don’t forget to vote on November 2.

MR. RYAN: If it’s a printed communication, I think it should be covered, yeah.

CHAIRMAN WALTHER: Thank you. Commissioner McGahn?

COMMISSIONER MCGAHN: Thank you, Mr. Chairman. I want to thank the commenters for their efforts. It takes a lot of time to put this together and coming here is for some a repeat performance, others a repeat performance and others, I was there when you were up here. So it’s déjà vu
all over again in a different way, I suppose. But I appreciate the effort.

I'd like to explore two areas that others have already touched on, but maybe drill down a little bit farther into the details and pick up on something Mr. Ryan sort of concluded with that the any efforts language in McConnell should be our guide star. Are you saying that that should guide us, not the statute?

MR. RYAN: No, I’m saying you look at the statute and the statute should obviously be the baseline. But to the extent that questions arise about the statute, the Supreme Court's interpretation of the statute I think should be taken very seriously by this Commission.

COMMISSIONER MCGAHN: So a facial challenge is actually a construction of the statute in McConnell, that actually construes the statute and that tells us what the statute means and when it's applied to specific facts?

MR. RYAN: I think it's very instructive about what the statute means when applied to specific facts.

COMMISSIONER MCGAHN: I'll take that as a no, it's not -- that's not what McConnell does. What I want to get
at in the statute is there are certain things covered using terms like “voter registration,” “voter identification,” “get-out-the-vote,” “generic campaign activity,” but there are certain things that are excluded. So any effort to help federal candidates -- any effort that may help a federal candidate is not the standard. It's the statute, and there are exclusions.

And what I'd like to try to explore is the difference between those, which as Mr. Svoboda has called it, the difference between persuasion materials and the FEA materials. And let's take -- let's take the example that Mr. Svoboda offered in his opening, the newspaper article, or the newspaper ad. Let's assume that you do change the name of Nixon to O'Malley and let's say it's Maryland. Now is that -- is that FEA?

Let me ask Mr. Svoboda first.

MR. SVOBODA: No, I don't think it is.

COMMISSIONER MCGAHN: Mr. Sandstrom? State party -- let's assume -- let's assume it's a local party. Let's flesh out a hypothetical. Let's assume the local party pays for a newspaper ad that has that kind of language for a
gubernatorial candidate.

MR. SANDSTROM: It certainly should be FEA. I'm afraid -- Mr. Ryan suggests it should be. Maybe it needs one of those kinds of disclaimers, this is not intended to encourage you to vote. And so anything that state candidates put out together, they put on a disclaimer, this is not intended to encourage you to vote. It just --

COMMISSIONER MCGAHN: Like the Canter AO soft money language?

MR. SANDSTROM: It becomes a little -- absurd because of course you just leave it as encouraging someone to vote -- everything parties do are directed at that activity, all their organization is directed at encouraging people to vote.

COMMISSIONER MCGAHN: Mr. Ryan?

MR. RYAN: I don't remember the specifics of the ad that Mr. Svoboda gave.

COMMISSIONER MCGAHN: Let's pull it out. Can we, Brian?

MR. SVOBODA: Sure.

COMMISSIONER MCGAHN: Let's actually talk about a
specific example because when we talk about this generic
lawyer language and all this theory, that doesn't help. I
need to see examples.

MR. SVOBODA: Let the record reflect Mr. Ryan's
reading 104 -- pages 147 and 148 of The Selling of the
President 1968, the paperback edition of --

COMMISSIONER MCGAHN: The record will so reflect.
I'm sure he'll cite it in his --

MR. RYAN: Just having skimmed it, I believe that
yes, it does qualify as federal election activity, GOTV
activity and if I'm not mistaken, I want to be clear about
whether the answers that have been given by my colleagues
here on the panel are theoretical or under the proposed
rule. And if I'm remembering correctly, Mr. Svoboda, did
you not say or conclude your opening remarks by saying that
this --

COMMISSIONER MCGAHN: Hang on. I appreciate that.
Let's let the Commissioners ask the questions. I don't want
to step on the chairman's toes when we're in the meeting.
But let's not ask each other questions on my time.

MR. RYAN: Okay.
COMMISSIONER MCGAHN: But for the sake of argument, we know where his question's going, Mr. Svoboda, but let's clarify it.

MR. SVOBODA: My view is that it would not qualify as FEA under a fair reading of the statute, but that it would qualify as FEA under the proposed rule.

COMMISSIONER MCGAHN: Let me ask this then. Sticking with that hypothetical, Mr. Ryan, what could the state party do if they wanted to do something like that and not have it be FEA?

MR. RYAN: I think an ad that simply said vote for X for governor, I think that type of direct express advocacy without a more generalized encouragement or a suggestion to get out to vote generally would not be federal election activity under the proposed rules or under the statute.

COMMISSIONER MCGAHN: So that would come within the exclusion in the statute, (B)(i) -- because it refers solely to a clearly identified state candidate. Would that come -- or just not be subject to the FEA definition in the first part.

MR. RYAN: Just not be subject to the FEA
definition of the first part. I think there's a drafting problem with the exemption in (B), sub (B), in that it appears to me to be quite circular. It seems to me to say in short it's not FEA unless it's FEA.

COMMISSIONER MCGAHN: That's my concern. That's - - I actually -- the only document I have in front of me other than the comments is the statute itself. I thought that would be simpler than to go through years of regs and Shays III and all that. So I'm not wrong to say that the exclusion in (B) could easily be swallowed by (A), but we would have to give life to the exclusion of (B), right? We couldn't just go into that circle? We'd have to give that life.

MR. RYAN: I think that the problem with the drafting is that either the exemption swallows the larger rule or the rule swallows the exemption because of the poor drafting. In other words, if you -- you know, if you read that section of the statute to say that if it -- it's not federal election activity unless it's federal election activity, I don't see any other way out of it other than to have the rule swallow the exception and the exception
swallow the rule.

COMMISSIONER MCGAHN: So what do we do in that instance where we agree, for the sake of argument, the statute's poorly drafted; we just cross (B) out?

MR. RYAN: Well I certainly don't think Congress - - I would speculate that Congress didn't intend to have the entirety of the rule be swallowed by an exception that takes up one small subsection of it.

COMMISSIONER MCGAHN: They certainly didn't intend for the FEA rule to swallow the exception either, right? There has to be some limit on what's FEA structurally in the statute; it seems to be what Congress is doing, right?

MR. RYAN: Well the limits are given in the definition. It's limited to, for example, voter registration, get-out-the-vote activity, voter I.D., PASO communications. Once you're moving outside of those defined categories of what constitutes FEA, you're no longer talking about FEA. I think that's -- they are the limits to what constitutes FEA in the statute.

COMMISSIONER MCGAHN: Let me follow up on that. The comments of Mr. Sandstrom and Mr. Svoboda rang -- rang
true with me insofar as we're dealing with terms in the statute that have a meaning, or at least a meaning to political operatives and presumably those who voted in favor of this law. Voter registration, voter I.D. get-out-the-vote, these are terms that existed before BCRA. They existed after BCRA. These are not hieroglyphics on the Egyptian pyramids. These are words that people know what they mean.

Something I don't think the Commission's done before is just ask a very simple question and the question in a way answers Mr. Sandstrom's question to us, that we need to figure out what these words mean. That's what we're here to do today, I think.

So whether we can assume that let's say you're teaching a class of soon-to-be campaign managers or just giving a public talk, if someone were to ask you the question, what is voter registration, what would a layman's definition of that term be? How is that term understood by those who deal in this world?

I'm trying to help make the record on what these terms mean and whether there's agreement among folks as to
what they mean or not.

MR. SANDSTROM: I think it’s generally targeted communications, whether directed in person or through some other -- through a form of mass communication that is intended to, I would say mobilize or activate your supporters to vote.

COMMISSIONER MCGAHN: You say your supporters. You’re talking to a certain universe of people?

MR. SANDSTROM: Yeah, the people you have identified. That’s where it kind of fits into voter I.D. and that’s what they’re trying to capture. There are people you have identified as more likely than not, your supporters. It isn’t perfect art. You rank them in your get-out-the-vote efforts. You know whether they’re a five or four or three to determine whether you’re going to -- it depends on what the polling shows you, which of these groups are you actually going to try to get to the polls.

It’s activities that is targeted to a segment of the population that you’re trying to get to the polls at a time in which it makes sense to get them to the polls. And if you have early voting, then maybe earlier than Election
Day. Generally it's around Election Day.

    MR. SVOBODA: If I could --


    MR. SVOBODA: What you'll typically see is a campaign with an identified universe of the people who they think are likely to vote for them, either based on identification data that they've collected, a state party voter file, other lists that they've acquired, or perhaps modeling scores or other data about likely voter preferences.

    And then it's you – (a) take steps to make sure people are aware, that those people, the identified people, are aware of when the election is and the steps that they need to take in order to vote. You provide them with the information or resources that they need that you can provide them under state law -- and it varies from state to state -- that will allow them to cast their votes.

    And then you go through the process, whether for an early vote process, or an absentee chase process or on Election Day, to verify that they have in fact voted. So
for example, in the case of -- in the case of absentee voters, you develop a list of people who you've identified as likely to support your candidate. You send them applications for absentee ballots. You assist them in submitting the applications if state law will let you do that. You verify that the applications have been received and that they've received their ballot. You might call the voter to see if they've received their ballot.

You then pester the voter to turn in their ballots. If state law lets you come and collect the ballot and bring the ballot back to the polling place you do that. If state law lets you drive them to the polling place -- and turn in their ballot, you do that as well. And then you take steps otherwise to verify that they've cast their ballots.

So it's a series of sequential steps. It's basically a process to ensure that people know what they have to do in order to vote, that you're helping them to the extent that you can then take the steps that they need to take in order to vote and then you verify that they in fact voted, and you're doing that with a targeted universe of
people.

CHAIRMAN WALTHER: I want to say, we got about nine minutes left. I think Commissioner McGahn, you want to follow up quickly? I know that eventually the General Counsel, Ms. Duncan, is here to ask some questions.

COMMISSIONER MCGAHN: I'd like to hear Mr. Ryan's answer to the same question.

MR. RYAN: I'd be happy to answer the second question. On page seven of our written comments -- I'll be brief here, but we -- in six to seven in our written comments we explained that the Commission has for years had on its books definitions of get-out-the-vote activity, voter registration activity.

It's specifically now been moved, but it's section 100.133 of the Commission's regulations and it defines voter -- it defines get-out-the-vote activity as voter registration – get-out-the-vote activities as actions designed to encourage individuals to register to vote or to vote. I think that's a common sense explanation or definition of what the terms means. I think it's good that it's been in the Commission's regulations for years and I'm
not sure why the Commission ever departed from that understanding of what those terms mean.

COMMISSIONER MCGAHN: Thank you. If I could follow-up on that. You have a hypo in your comments, page 20-21. It wasn't in your briefs in Shays III and I wanted to -- I know, Mr. Ryan, your views because it's in your comments, but the hypo says -- it's trying to illustrate that the proposed rule may not go far enough. And I read the hypo and I thought gee, kind of looks like get-out-the-vote to me.

And it says imagine a mass mailing of more than 500 pieces that says, we urge all Democrats to get out to vote on November 4 between the hours of 6 a.m. and 6 p.m. at your polling station at, address of polling station, so you can support candidates like Mayor Smith. If you need a ride to the polls, call us at, phone number.

Is that get-out-the-vote?

MR. SVOBODA: I think if it's targeted it is, yeah.

COMMISSIONER MCGAHN: Assuming it's going to people they want it to go to?
MR. SVOBODA: Yeah.

COMMISSIONER MCGAHN: Okay.

MR. SANDSTROM: The one thing that you might take from your question is you have one person on the panel, my colleague, who is a political operative and that's the sort of -- his description of what get-out-the-vote is a -- is sort of a description you should seek to confirm and build into your definition.

CHAIRMAN WALTHER: We have to move on.

Commissioner, let's see, are you -- do you have anything more?

COMMISSIONER MCGAHN: I'm not done, but if you want to move on, we can move on.

CHAIRMAN WALTHER: Let me continue so we can get everybody, including myself and Mr. Gibson, just to make sure we're touching bases before the time is up. Ms. Duncan, do you have any questions?

MS. DUNCAN: I just have one brief question.

Thank you, Mr. Chairman.

Mr. Svoboda, in your comments, you propose that the Commission ought to limit the definitions to cover only
those activities that are primarily aimed at voter registration or turnout. And during the conversation during the hearing, I think you've put a finer point on that and articulated it as activities that are intended to mobilize, and then more specifically, as things that have -- you've articulated as specific intent standard.

I think, Mr. Sandstrom, you have indicated your agreement with that. I want to just follow-up a bit on Commissioner Weintraub's questions about the administrability of such a standard and ask it more specifically in the context of enforcement, because once rules are adopted, obviously we have the unfortunate responsibility also in some instances of having to enforce them.

How would you suggest that the Commission would actually go about determining whether these activities are specifically intended to mobilize or whether they are primarily aimed at registration and turnout and wouldn't that put potential respondents in some instances in a detrimental position where they may have to prove the negative that something was not in fact intended to mobilize
Can you give us more specific comments on that question?

MR. SVOBODA: Sure. In both my written comments and my colloquy with Commissioner Weintraub, I was trying to get at basically the same point, which was trying to flesh out the universe of activities. And when I laid -- when I argued, for example, for a specific intent standard, it was way -- it was not a way of inviting you to look at the subjectivity of the respondent, but to look at what they did and see what you can infer from what they did about what the purpose of the activity is.

And so how do you evaluate that as a general matter? I think you would look to the sorts of things that I discussed with Commissioner McGahn a moment ago. You know, were these sorts of things done as part of this process in order mobilize voters?

I mean one significant element at the outset being were the communications targeted. I do fear issues with administrability through enforcement. I think your rule obviously needs to provide sufficient guidance. I think one
of the difficulties with the proposed rule is that you have
the same problems of administrability. We have three people
on the panel, for example, and we've got disagreement about
whether this newspaper ad, for example, would qualify as
federal election activity.

So I think that's an uncertainty we're going to
buy in any event. I think your best solution is to craft a
definition, whatever the standard is, that is narrowly kept
tailored to capture what parties and associations actually
do to mobilize voters and is as clear as possible in that
regard.

MS. DUNCAN: I'd welcome the comments of the other
panelists on that question as well.

MR. SANDSTROM: I think if you look at a
reasonable person who is engaged in campaign management,
what they would consider to be get-out-the-vote and you
identify what factors are to be considered, whether it was
targeted, whether it was done at a time where it was
possible to – that voting was taking place or was eminent,
you could sketch out how that test would be applied, and
give respondents a whole lot more comfort than a test that
relies on the word “encourage.”

MR. RYAN: I think the proposed rule would be much more easily administered. I think you should stick with it rather than getting into an intent-based test.

CHAIRMAN WALTHER: Mr. Gibson, do you have any questions? Okay, for me, I would say just briefly because we don't have much time, I want to -- there's two minds here that we need to satisfy, our collective mind on how we're going to administer this matter, and, you know, we have diverse views here and the less there is for us to quibble over the nuance of a meaning, the better off it's going to be for us to administer and for our staff.

So it's on my mind that I not only want to be clear to the people that have to abide by it, but one that we will find, one that we can move forward to enforce. And then secondly, we can come up stuck or whatever, different points of view on the upcoming decision, but we're stuck with some fairly specific words here, and to go beyond those I think would be fairly daring.

I'm not too inclined to get us back in court because we didn't follow some of the language of the court
fairly closely and I would say, Mr. Sandstrom you mentioned that maybe we should go out into the sea of information that's there and try and shore up our reasons why we can use -- maybe vary from the word “encouragement,” for example. Correct me if I'm wrong, but I'm not sure procedurally how we could do that and then pass APA Standards. I was curious to know how you would suggest that we do that.

MR. SANDSTROM: The General Counsel can correct me if I'm wrong. The Commission can essentially seek independent information on its own outside to bolster what - - questions that are raised during the course of hearings. Your independent investigation trying to -- I think other agencies do this fairly regularly -- to try to determine what the facts are, what is -- and what -- so I think in going out and seeking additional information, objective -- in an objective fashion that's open and made part of the record, would not violate the APA.

CHAIRMAN WALTHER: I need to commission somebody because we are having these public hearings, we had public comment, to go back and then try and - - get particular individuals to give us input given the way we do our process
here. I was wondering -- I work here, so I'm just wondering
in this particular case.

MR. SANDSTROM: I think agencies rely upon expert
judgment gathered outside the hearing context.

MR. SVOBODA: Commissioner, if you start with the
premise that you're stuck with the word "encourage," you do
have under the APA the discretion to decide what encourage
means through a rationale process. I think you know from
the Shays III opinion some of the things that they thought
to be encouraging. They discuss them at length from the
example presented by Mr. Shays in the Long Beach advisory
opinion. I don't think that we know from the opinion
necessarily all of the things that they would find to be or
to -- not to be encourage.

So I think your task is to take -- you know, if
you're going to start with that word, I think your task is
to flesh it out and see, first off, in the exercise of our
expert judgment as an agency, what we think that means, and
second, evaluate it up against what the court said in Shays
III, and make predictive judgments as to whether we think
the court would agree with that, you know, realizing that
there is also a peril in the opposite direction.

    I mean, every two or three years, the Commission considers federal election activity rules knowing that Mr. Shays, rest his soul, may challenge them. But the possibility exists that you may face challenge from another avenue as well and that's a particular vulnerability with associations and groups of state or local candidates where the McConnell language is thin at best on that.

    So the Commission faces the dilemma it's faced in other contexts, which is, you can regulate to the Nth degree, but if you pull that rubber band as far back as it can go, you know that there's some risk it may come back and snap you and undo the whole exercise.

    CHAIRMAN WALThER: Well, we're here because of a Supreme Court -- because of a court decision. We're looking to the Supreme Court to make the decision to try and move forward in a way that won't find us back in court and we'll substantially comply with the intent of that decision. So that is a balancing act and I just wanted to -- really for Mr. Sandstrom to take a look at what he would suggest we would do to meet the APA requirements at this point.
The question can be, can we ignore the word “encourage” only if we go out and get more supportive language than in our opinion? What would be the reason for it? We’ve heard a lot of testimony back in forth, varying degrees of how it might be interpreted or defined, redefined.

MR. SANDSTROM: The court did not put the word “encourage” into the statute. It identified activities that it was concerned about that might not be covered. It used, for example, the Long Beach example, where robocalls were made to encourage people to get out and vote.

I can encourage -- this is a very flexible word. I can encourage the Commission to do a good job. I can also encourage it to go out and gather additional information. There's very different ways that I'm using that word. One is just a general use -- to tell you to do what the job requires and in others I'm encouraging to actually taking particular action. So that word, one, is not in the statute. The court is not in a position to put it in the statute. It's not in the position to put it in the regulations.
It can tell you that there is certain activity that it identified that it believed was covered by the statute, such as the activity in the Long Beach advisory opinion -- and I think you can cover that because that was -- what they sought there was robocalls being made on Election Day to motivate people to vote. They were sent to a targeted audience.

CHAIRMAN WALThER: Thank you. Commissioner McGahn, would you like to finish up, a brief question?

COMMISSIONER MCGAHN: Actually, I want to follow-up with Mr. Ryan on our hypothetical, on the newspaper article where I think we agreed that there is a way for them to do it if they only do advocacy for O'Malley.

I think that's where we left off. I don't want to put words in your mouth. Is that -- is my recollection correct, that we came up with a way that a state party could do that kind of ad, but it's a stripped down version that would not be FEA?

MR. RYAN: Yes, as long as it isn't encouraging people generally to get out to vote, instead simply advocating that people vote for a specific candidate.
COMMISSIONER MCGAHN: What if it includes the date of the election, would that change your answer?

MR. RYAN: No, again provided that it's not a get-out-to-vote general exhortation.

COMMISSIONER MCGAHN: Wait a second, the "provided" threw me. Would it or wouldn't it be? Assume you're -- assume you're a lawyer for a state party and they prepared this piece and it has go vote for O'Malley on Election Day, November -- well it's not going to be -- whatever the election date would be in our hypothetical, November whatever, whatever year, would that be FEA?

MR. RYAN: The addition of the go vote for I think would bring it within the realm of getting -- you know, get-out-the-vote encouragement of getting out to vote versus vote for O'Malley.

COMMISSIONER MCGAHN: Well it says go vote for O'Malley. You're telling me that there's a difference between go vote for O'Malley and vote for O'Malley?

MR. RYAN: I think under the statute, yes, particularly a difference between get out to vote for O'Malley and vote for O'Malley.
COMMISSIONER MCGAHN: Why?

MR. RYAN: Congress decided to cover get-out-to-vote type communications and Congress did not decide to cover pure straightforward express advocacy for a single candidate.

COMMISSIONER MCGAHN: But when you say vote for O'Malley, isn't that encouraging you to go vote?

MR. RYAN: It may be, but I think the line exists somewhere and in my view that's where the line exists.

COMMISSIONER MCGAHN: But they could include the date of the election so long as it simply said vote for O'Malley? But if you say go vote for O'Malley, as a lawyer you'd have to cross out go and then it wouldn't be FEA. You could use state money to pay. But if it had go, you'd have to use all hard money?

MR. RYAN: I think that would be compliant with the statute, yes.

COMMISSIONER MCGAHN: That's at least a line, okay.

CHAIRMAN WALTHER: This will have to be very quick, because we're running into the time for the other
MR. SVOBODA: One quick footnote on your exchange. The state party would be able to pay for that communication with a mix of hard and Levin funds. An association, like the DGA, would have to pay for it entirely with federally-eligible funds.

COMMISSIONER MCGAHN: And an outside group that's not a party could use all soft.

MR. SVOBODA: Correct.

COMMISSIONER MCGAHN: Right. One -- if I could, Mr. Chair, just one more follow-up. Let's change -- let's just put another fact in the hypothetical. Let's assume it's the local party doing this piece and there is no presidential election, there is no senatorial election. And for whatever reason this local Democratic Party was unable to field a nominee for Congress. So there is a Republican on the ballot, but no Democrat and they want to put out a piece that says go vote for O'Malley on November -- Election Day; does that change your answer?

MR. RYAN: I'd want to look more closely at the statute and the proposed regulation to give it a definitive
answer. I don’t know if there’s leeway within the statute to make a distinction about which party’s candidates are on the ballot. I believe the language is an election in which federal candidates are on the ballot, but I would need to review it.

My instinctual response, not having done that review, is it’s still covered under the statute.

COMMISSIONER MCGAHN: Common sense-wise, since we’ve invoked common sense per the Supreme Court, it would seem that the Democratic Party, if they say go vote for O’Malley, they’re not getting out the vote for a Republican Congressional campaign. They can’t possibly be really urging that. So there’s got to be some kind of line. And if you could, I’d like you to reflect upon it in answering my question perhaps.

CHAIRMAN WAL ThER: Perhaps we could have a written answer, if you want to give five days to have people provide further comment. But we have to have a hearing.

MR. RYAN: Is that the same deadline for the response to Commissioner Hunter’s --

CHAIRMAN WAL ThER: I was just thinking of the same
thing. We'll see what the commissioners think --

    COMMISSIONER MCGAHN: Thank you, Mr. Chairman, for your indulgence.

    CHAIRMAN WALTHER: Two weeks. Is there a calendar handy with the date? Commissioner Weintraub?

    COMMISSIONER WEINTRAUB: If we're giving people two weeks, I'd like to hear if people have any other verbs they want to offer. They don't like encourage, they want to try another verb, I'd be happy to hear it. Or if you have actual wording suggestions for how you think we could cabin in the word “encourage” so that it would not raise the problems that you are currently concerned about, I'd be happy to hear that too.

    CHAIRMAN WALTHER: Let me see if I can pick a date.

    MR. SVOBODA: I didn't realize I'd be getting homework. This will teach me to raise my hand in class.

    CHAIRMAN WALTHER: Really, that's what you get. If we pick two weeks, we're looking at the 30th, so why don't we pick the 4th of January? That's a Monday. Any objections? If not, it will be the 4th of January for
COMMISSIONER WEINTRAUB: Do you want to give them until the sixth so that they don't necessarily have to work over New Year's weekend?

CHAIRMAN WALTHER: Well New Year's is a Friday, so -- but sure. Wednesday the 6th it is.

Thank you very much for appearing. We appreciate it very much. We look forward to your comments and it's been very edifying for all of us. Thanks.

(A brief recess was taken.)

CHAIRMAN WALTHER: We are now convening the second panel for the public hearing on the definition of federal election activity. Thank you very much for being here. I apologize because we're late in getting started, but it's kind of the nature of the beast sometimes when we get started on matters.

I want to thank Neil Reiff and Joseph Sandler, Ron Nehring and John Phillippe for being here. I've talked to them both -- all of you before this and as I understand it, you're only looking at one statement for the two of you, so we will do it that way. But let's figure just five to 10
minutes on each and we'll flexible about that.

So we'll just begin with that. So, Mr. Reiff and Mr. Sandler?

MR. REIFF: We'll be brief.

CHAIRMAN WALTHER: All right. Thank you.

MR. REIFF: Mr. Chairman, Commissioners, thank you for the opportunity to appear today to provide oral testimony in connection with this rulemaking regarding the Commission's definition of voter registration and get-out-the-vote. I'll be making a short opening statement on behalf of both Joe Sandler and myself.

We appear here today on behalf -- on our own behalf. Our views are based on our experience as counsel to over 35 Democratic state party committees and several associations of state and local candidate organizations, but we are not speaking for any specific client today.

This rulemaking is required due to the D.C. Court of Appeals decision in Shays v. FEC. In that decision, the court instructed the FEC to amend its regulations regarding the definition of voter registration and get-out-the-vote due to the court's concerns that the Commission's current
rules created two distinct loopholes. Without much elaboration, the court was concerned that the Commission's current rules regarding individualized contacts and the requirement of such activities assist a voter in order to be subject to the regulations.

We believe that both of these concerns can be addressed without a vast federalization of non-federal campaign activity. We believe that virtually all campaign activity that benefits federal candidates are already required to be paid for with federal funds, such as the rule that requires any public communication that promotes or supports or attacks or opposes a federal candidate be paid for exclusively with federal dollars, as well as the fact that most generic campaign activity is already covered under the current FEC rules.

So as a practical matter, what we are essentially considering here today is how much non-federal campaign activity will be subject to federal regulation. We believe the Commission can satisfy the court’s concerns with modest changes to its regulations and providing clear guidance on what constitutes voter registration and get-out-the-vote.
To that end, we have provided specific proposed regulatory language in our written comments. Our proposed language addresses the court's concerns first by eliminating the concept of individualized contacts and replacing it with specific types of communications that are commonly used to directly communicate with the voters, such as mail, phones, in-person contact, as well as e-mail and text messaging.

Our proposal would also include calls made right before an election that are designed solely to remind voters to get out the vote.

Second, we suggest that the Commission replace the assist standard with what we refer to as a facilitation standard. This would make it clear that the Commission's regulations do not cover those communications that are merely designed to encourage registration in voting and include those activities that help bring the desired activity about.

This clearer standard can be fleshed out with the proposed examples in our written comments. During this rulemaking process, the Commission should be mindful that the Shays court undertook its task in what appears to be a
political vacuum, devoid of empirical evidence and a realistic understanding of how the challenged regulations operated in the larger regulatory scheme.

Thus, it is imperative that the Commission adopt a standard short of mere encouragement. To do so would essentially federalize all campaign communications and activities undertaken by party committees and non-federal associations. This is clearly not what Congress had intended, and we predict that it would lead to considerable confusion and uncertainty in the regulated community and thus undermine rather than further the interests of consistent compliance with the law.

Thank you for your consideration of our oral and written testimony. We would be happy to take any questions for you.

CHAIRMAN WALTHER: Thank you very much. Appreciate it. Ready for Mr. Nehring?

MR. NEHRING: Mr. Chairman, Mr. Vice Chairman, members of the Commission and staff, I'd like to thank you for the opportunity to testify before you today. I'm here in my capacity as chairman of the Republican State
Chairman's Committee of the Republic National Committee. To my right is Mr. John Phillippe, chief counsel of the RNC, who will be asked to -- available to answer questions as well.

It's a privilege to be part of this bipartisan panel. In reviewing the other comments submitted for this rulemaking, I was really struck by a few things. First, almost all of the commenters who weighed on the merits of the proposed rules expressed a strong belief that the Commission's proposals would go too far. Second, several of the commenters are from my home state of California, where I'm chairman of the state Republican Party. And third, most of the commenters are Democrats.

So these are the same people whose candidates and causes I'm often working against as I've worked to elect Republicans across California in my role as -- and in my role as chairman of the state chairman's committee for the state party, or for the national party across the country.

But today I'm pleased to join with my Democratic colleagues in urging the Commission to protect state and local political activity and speech, put another way, to
protect the rights of Americans to participate in voter registration and get-out-the-vote activity through political parties.

State and local parties are primarily concerned with electing state and local officials. I say this based upon my experience not only as state party chairman in California, where I have served in that role for three years, but also for 5.5 years as the county Republican chairman in San Diego, California.

The national party committees, such as the RNC, the National Republican Senatorial Committee, and the National Republican Congressional Committee, and their Democratic counterparts, take the lead on electing federal candidates. In internal discussions at our state party, I always refer to the NRCC as the lead agency on congressional races and the NRSC is the lead agency on the U.S. Senate race in California.

Our state and local parties are focused on electing state and local candidates primarily through grassroots activities and in states such as California. We're also greatly interested in state ballot measures,
propositions, initiative, referendum.

Voter registration and turnout programs make up a substantial part of our operations both at the state party level as well as our county committees throughout California. Should the Commission adopt the proposed regulations, a large portion of our grassroots activities supporting state candidates, local candidates, and ballot measures would suddenly be federalized and restricted.

I’m deeply concerned about the effect the proposed regulations will have on our grassroots non-federal activity primarily for two reasons. First, the proposed regulations sweep in large amounts of purely non-federal activity. While I understand the Commission must adopt broader definitions than the existing ones, the proposed regulations capture basically all voter registration and GOTV activity during the FEA time frames regardless of the type of candidate they were intended to support.

There are only two exceptions to the proposed rules for mere exhortations during political speeches or events and for public communications directed solely in referencing the non-federal candidates. Both of these
exceptions appropriately exclude purely non-federal activity, but the exception is very limited.

I ask the Commission to consider creating a formal safe harbor that extends the mere exhortation exception to all grassroots activity and speech. The Commission could easily create a clear, safe harbor by adopting a time and space ratio as it has with other regulations. Extending this exception would allow a greater amount of purely non-federal activity to remain non-federal while accomplishing BCRA's stated purpose of preventing soft money from influencing federal elections.

Second, the proposed regulations will deter grassroots activities. BCRA's restrictions have already dramatically curtailed grassroots activities that I've seen firsthand. For example, the California Republican Party, along with its local county committees, registered on average 300,000 new Republican voters each year for the 15 years preceding BCRA's enactment through times that were both good for our party and bad, but on average 300,000 new Republicans a year regardless of 15 straight years.

Since BCRA, our state party and our county
committees together have registered fewer than 300,000 of Republican voters each of the years since its enactment. I fear that the proposed regulations will make it even more difficult for state and particular local parties to engage in grassroots activity such as voter registration and voter turnout activity.

In some small states that are not competitive at the federal level for our party, but are competitive at the state level, requiring more of their grassroots activity to be funded with federal dollars will suffocate those state parties. And unregistered local parties with robust voter registration and GOTV programs will now have to worry about complying with more extensive federal laws.

State and local parties often have only a few full-time staff members. Many local party committees have no full-time staff members at all and are primarily volunteer driven. We need clear and simple regulations to follow, such as a clear time and space ratio.

But even if you're not convinced that ours is the best approach, I do think there's a great deal of merit to some of the other approaches recommended by the -- to the
Commission by the other commenters and I look forward to discussing those with you today as well.

CHAIRMAN WALThER: Thank you very much. We'll begin, Mr. Vice Chairman?

VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman.

I'd like to pick up a point that Mr. Nehring brought up in his remarks and that Mr. Sandler brought up in your written remarks about this mere exhortation and whether or not we could expand this beyond a speech at an event or at a rally.

The language that's used in the Shays court is that a definition could surely be crafted that would exempt such routine or spontaneous speech and any exhortations without opening a gaping loophole permitting state parties to use soft money to saturate voters with unlimited direct mail and robocalls that unquestionably benefit federal candidates.

So I guess a couple of questions to ask is do -- under the court's direction, do we -- do we have the latitude in which to craft a rule that would allow for exhortations, mere exhortations to other types of communications? And is there anything that the court
identifies here? Is there anything unique about a speech at
a rally or at an event where an exhortation would be okay,
but are there qualities in other types of speech where it
would create the sorts of problems that the court was
seeking to -- well the court identified that -- the
legislation was trying to stamp out.

Is there any reason why we would want to just
limit it just to speeches or events or do you think that we
have the latitude to apply it across the board to all sorts
of communications?

MR. SANDLER: Commissioner, we do believe that the
Commission does have the latitude to do that and that the
reference to routine exhortation was not intended to be
limited to one particular -- the medium of a rally as
opposed to some other means of communication. But you would
interpret that precisely to mean, at least as the court did
-- and they were quoting the brief of the plaintiffs there --
to mean that kind of expressions we were talking about
before, get out and vote for Smith for governor today, get
out and vote today, without more, is a routine exhortation
and can and, we would submit, should be excluded from the
scope of the definition of federal election activity and
that we don't believe the court -- Shays court intended that
to be conditioned on a particular means of communicating
that routine exhortation.

MR. PHILLIPPE: Yes, we would agree with that,
Commissioner. The -- I think the court was really just
addressing that because that was the Commission's stated
rationale. There is something in between just having that
one exemption and allowing a gaping loophole that allows
saturation of voters. So, I think that's the challenge for
the Commission, is to find out where that line should be
drawn. But it's certainly -- certainly somewhere beyond
just that speech exemption.

VICE CHAIRMAN PETERSEN: If I could just ask
another question. Through the first panel, we've all been
talking about the difficulty in drawing lines, when does --
when does speech go from being just a mere exhortation under
the policy that you're advocating, that you would like to
have that applied across the board, when does a mere
exhortation cross the threshold and become get-out-the-vote
communications?
Where — what sort of criteria should the Commission consider when attempting to draw the line between what is a mere exhortation that should be permitted without triggering federal funding requirements and when it would cross the line where federal funding requirements would then be in place?

MR. REIFF: I think our view is that using the concept that exhortation is really not the way to go generally speaking, that you're just going to get caught in too many kind of logical traps if you just limit it to when does an exhortation draw the line?

So what you really need to do for this to kind of stand the test of time is to make this a functional definition. So what we have proposed in our written comments is a functional definition. We used the concept of what we like to call facilitation. Facilitation is obviously more than just mere exhortation. It is exhortation plus something that will bring the act of voting. I guess, going back to the word “assist” again here for a second, but I don't want to fall into that trap per se, but it's more than just saying how to vote, more than
saying vote for someone or go vote for someone.

What our written comments presents is a definition that's realistic, that accounts for the things that we believe really do kind of facilitate a vote and I think you really need to have a functional definition.

MR. PHILLIPPE: Yeah, we -- I absolutely agree with that and as Mr. Nehring said at the outset, we've put forth a specific proposal that would involve a time/space ratio to determine what actually constitutes get-out-the-vote activity beyond -- certainly beyond mere exhortation. I agree, the exhortation framework, it's fairly unworkable.

And I would say that beyond just the ratio, there needs to be some content requirement. Even the one commenter, or the one witness who spoke in favor of including mere encouragement as get-out-the-vote activity admitted there needs to be a line -- a line drawn somewhere.

So I think again it's about finding where that line is drawn. I think it's well beyond mere exhortation and given that, I would suggest jettisoning that exhortation framework and having a separate -- coming up with a rule under a different framework and whether it's ours with the
time/space ratio, whether it's theirs, as well as the other
commenters who suggested some kind of facilitation standard,
I think those are both very workable and appropriate
standards.

So I would suggest moving in that direction.

MR. NEHRING: If I may add to that, as I reviewed
this issue, I found there to be a great irony in that as
someone who is a state Republican chairman now and served as
a county Republican chairman for 5.5 years, I drew up a lot
of budgets and we never spent -- in 5.5 years as county
chairman of San Diego, we never spent one dollar on
broadcast media whatsoever for get-out-the-vote purposes.

But the irony is that the proposed regulations
would classify all types of broadcast messages as get-out-the-vote activity when in fact we would never choose to
engage in broadcast media for that purpose because it
doesn't work.

What we have found to be the most effective means
of turning voters out is individualized contacts, such as
visiting someone in person at their door. We built a large
precinct organization in San Diego specifically for that
purpose. When we sought to maximize turnout among our members, we did not turn to any broadcast means. We turned to a large in-person voter contact organization.

And so the irony is that all types of messaging that really in effect have nothing to do with turnout and is not intended to have anything to do as turnout, would be federalized and treated as such under these proposed rules, which I think justifies expanding that mere exhortation, that safe harbor in one of the manners that have been proposed.

CHAIRMAN WALther: Commissioner?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman. I'd like to return to a big topic from this morning and I think something you may have just described, Mr. Nehring, and Mr. Phillippe, is the content part of your standard about you use the word, I believe, “active encouragement,” which sounds different than encourage, but could also have the similar elements.

So I would like you to -- and I appreciate that both sets of our commenters have come up with proposals and I'd like to explore each of those. So if you could provide
us with a little more context of what that means, particularly in terms of GOTV sorts of efforts. Obviously if you're standing at someone's door, that might be an active activity, but there might be other types of contacts that are less active.

So I'd like to get your thoughts on that and then I'll turn it over to Mr. Sandler and Mr. Reiff to talk a little bit more about why facilitate isn't assist.

MR. NEHRING: If I may, what struck me here is that we may engage in all types of broadcast communications, for example, concerning state ballot measures, for instance, or particularly in our upcoming June primary. Our June primary in California, for example, by rule we are not permitted to take sides in any of those primary elections that will take place. We do not pre-primary endorse at the California Republican Party.

But we are intensely interested in some of the ballot measures which will be on that ballot. So we may engage in broadcast advertising or other means of communication which would be swept in under the current definitions, the current rules as they are proposed as
somehow federal activity in some way and therefore would have to be funded with -- out of our federal account as opposed to state accounts when clearly, those ballot measures are only -- they are clearly state business and not federal activity by any conventional definition, but yet the unintended consequences would sweep that in.

So I think a different definition is required to -- as we classify that, because otherwise we're going to get into the position where we can't engage in speech on purely state matters under the proposed definitions because they get swept up in all this. I think that that's unfair and not practical in any sense.

COMMISSIONER BAUERLY: And I appreciate that. I think that's the line we're trying to draw. But I'm trying to understand how adding “actively” in front of “encourage” narrows that in a way that prevents you from being able to participate in ballot measures. What makes it different than encourages, is what I'm trying to understand.

MR. PHILLIPPE: And we're not even necessarily suggesting that the language in the regs should say simply actively encourage, unless you do want to define that. The
broader point is that some kind of encouragement, whether it includes a specific facilitation element or not, some kind of encouragement the court was concerned about that we're not capturing it. We're excluding encouragement. That doesn't mean we need to include all kinds of encouragement.

And even the earlier witness who said encouragement should be included said don't include all kinds of encouragement. So what we suggest is the line should be drawn closer. There should be a nexus between where the line is and what the Shays III appeals court actually said. And that was, it needs to be something more than assist.

So given where that standard is, we would suggest a standard for encouragement that is certainly one that facilitates or provides specific information with the encouragement. If we're going to apply the standards to direct mail, it would be something certainly that doesn't say just go vote November 6. But it would say, go vote here, the polling location, here are the polling hours, that sort of thing. If you need a ride to the polls, call us at this number.
It would be the same thing with the phone banks, calling up people and making an active specific reference and encouragement to going and voting. Because — and I think you hit on this earlier today, and we'll probably get into this discussion a little bit, somewhere there needs to be a line between persuasion and get-out-the-vote. And frankly, every campaign communication is in one sense a get-out-the-vote communication. You could construe it that broadly under some of the theories being advanced.

Nobody's -- you're not persuading voters. You're not attempting to persuade voters to like or dislike a candidate. You're trying to persuade them to go out and vote for or against a candidate. So there just needs to be some kind of active, specific element that's added so state parties and local parties know where that clear line is.

COMMISSIONER BAUERLY: Thank you. And if just to follow-up on sort of the -- perhaps the more concrete examples that go with encouragement, but I did want to understand how you were proposing the idea of facilitate to be something -- obviously, whatever vacuum the court decided the last -- the most recent decision we're referring to, it
is the decision that we must deal with and I appreciate your sympathy towards that, but -- and yet we have -- it's a reality we have to deal with.

So whether it's a vacuum -- it was done in a vacuum and whether we think that the judges knew everything they needed to know, this is what we're left with, these particular words in this particular decision.

MR. SANDLER: We agree with that and we're respectful and mindful of the concerns that were expressed by the Campaign Legal Center and Commissioner Weintraub. It is not the occasion to re-litigate the case and the Commission's job is to come up with something that won't be challenged again in court ideally, and if so, it will be sustained.

There's no magic I think in the word "facilitation." The concept we're trying to get at here I think was actually articulated by the court in the Shays III appeal decision and it's quotation in turn from the McConnell decision. They're saying the -- they're trying to ban the use of soft money for efforts by state and local parties that increase the number of like-minded registered
voters who actually go to the polls.

So there's got to be something beyond the mere sort of persuasion value in a candidate's specific message and in a non-candidate specific message that actually accomplishes -- you know, by some objective measure, will increase the number of like-minded voters. So for example, to take the obvious one, a T.V. ad that just says go vote next Tuesday, it's broadcast to the whole media market. It's not -- it's GOTV. It's not going to increase the number of like minds because it's not targeted in any way.

The -- actually the concept we're trying to get at here and any kind of information or activity that's actually helpful to the voter in terms of encouraging the act of voting beyond the mere -- the mere exhortation, which the court indicated could be excluded, is what we're trying to get at and I think the examples given in the language we proposed draw the line where the court would think it appropriate to do so.

CHAIRMAN WALTHER: Thank you very much.

Commissioner Hunter?

COMMISSIONER HUNTER: Thank you and thank you
again, as Commissioner Bauerly said, for both your
constructive ideas on how to deal with this.

I wanted to ask a question of Mr. Sandler and Mr.
Reiff, about your proposal. And in the first one about
voter registration activity, I think you took out one of the
examples that was in there, preparing and distributing
information about registration and voting.

MR. SANDLER: That's probably unintentional,
right?

COMMISSIONER HUNTER: I think it was an example of
--

MR. REIFF: I think that example probably is
subsumed within our examples that we have, so we may have
done that just because it was duplicative. I don't think it
was -- that it's intentional in anyway.

COMMISSIONER HUNTER: Okay, I just wanted to see
if there was something in that example in particular or you
just thought it was --

MR. REIFF: No, we try to streamline and have our
proposed regulation as being self-sustaining. To the extent
it might have been duplicative to some language we included
on our own, that would be the reason we would have deleted it. I don't think you should read anything more in to that.

COMMISSIONER HUNTER: Okay. And then on the other definition, get-out-the-vote activity, you changed around the example A just a little bit, just sort of nothing substantive, but added in examples D and E, which I think gets to a little bit more of what you've been all talking about, facilitating or encouraging specific people to do something, to vote.

I was wondering if you could -- if you could comment on whether those two last examples, what if -- what if the campaign, it was a state campaign and they were contacting people to vote for either a state candidate or a state ballot initiative and they mentioned -- they mention the state candidate and they mention the date of election and they're calling specific voters who they think will vote for their state candidate and they're reminding them to vote on Election Day?

MR. REIFF: An association with state candidates I suppose would be a good example since they are covered by these rules. Again, in presenting our functional
definition, as Joe kind of laid out the standard for McConnell, we were trying to adhere to that standard. And we would concede that that reminder call right before an election, within two or three days -- and again, the four panelists here, we have years of campaign experience, so I think we could call ourselves experts in the types of techniques that are used to do those activities that the McConnell Court was talking about.

That reminder call, three days, two days, one day before the election without any persuasion element to the call, I think we would concede, and our definition concedes is the kind of activity that the Commission could consider GOTV, even if it only mentioned a non-federal candidate. And I would compare that to perhaps -- again, you're correct. That would be the kind of call that would be targeted towards someone you have already identified as a likely voter for either your party or your candidate.

And I would contrast that with perhaps you need a few more votes and you're on the margins of getting 50 percent to win the election and you need to reach out to some undecided or persuadable voters. And you have script
three days before the election and you're not sure how that person's going to vote, but you spend two minutes, three minutes on persuasion script where you're trying to convince the voter why this candidate should be elected or why you should vote for that candidate.

It could even be someone who might be identified as a ticket splitting voter and you just -- they might vote Democratic in certain elections and Republican in others and you're trying to bring them over. So that's another possibility. I would not consider that type of call a GOTV call.

So again, we're trying to get at those activities we believe are facilitating that -- what the court's addressing.

CHAIRMAN WALTHER: Thank you. Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman, and also thank the witnesses for their concrete suggestions. That's always appreciated. And I particularly want to welcome Mr. Nehring and Mr. Phillippe. I don't think we have seen you here as witnesses before, so it's nice to see
new faces, not that it isn’t also nice to see you.

Joe and Neil, I’m having a hard time figuring out what the difference is between assist, facilitate, and encourage and why you think facilitate is a far superior word to encourage and what you think it encompasses that assist doesn’t? And I’m assuming and hoping that you didn’t pick that out by going to a thesaurus and looking up assist and trying to come up with another word that maybe the court wouldn’t be so offended by. And --

MR. REIFF: In our defense, we actually use the word “facilitate” when we filed comments in the 2005 rulemaking after Shays I. We actually introduced the concept of facilitation in those comments. It’s not a new concept for us.

COMMISSIONER WEINTRAUB: Oh, okay, that’s encouraging in and of itself, if I may use the word “encourage.” And it’s interesting to listen to you guys struggle to not use words like “assist” and “encourage” as you’re talking about this. I’ll just fess up, my prejudice upfront. I hate the word “facilitate.” I just don’t like the word, because I like plain, Anglo-Saxon type words that
people understand more easily.

But tell me what you think the differences are?

MR. REIFF: Well let’s start with the problem of the court’s decision, because I think that’s where the real problem lies. There’s just very little guidance in the decision.

COMMISSIONER WEINTRAUB: We’re stuck with it.

MR. REIFF: Yes, you’re stuck with it, but you shouldn’t be so reactionary that you just go all the way to the other side and say okay, everything that encourages is -- - we believe the court says everything that encourages is now covered under the definitions, so you’ve got to find something functional and something that is realistic and something that works with the regulated community that’s not overbroad.

So we went back to the drawing board and we -- again, we did not -- I don’t believe we -- although we did put a footnote where we did define the words, we believe the word “facilitation” is a much more active word than “assist.” Assist -- and the court again did not really elaborate on this so we really don’t know necessarily what
they were thinking.

But we kind of started from -- we started over.

We wiped the slate clean, as the Commission is trying to do here, and we've tried to think of a word that really captured what we believe was a realistic approach to this. And we thought facilitate, just as we did in 2005, we still believe that that word encapsulates the proper characterization of what the Commission should capture in the rules.

COMMISSIONER WEINTRAUB: But you're not helping me out here in trying to find the difference between facilitate, assist, and encourage.

MR. REIFF: Well, I am not an English major, but maybe someone else on the panel can do that.

COMMISSIONER WEINTRAUB: Joe, you want to try? It's your word.

MR. REIFF: Want to take a shot at it?

MR. SANDLER: Again, we don't think there's necessarily any magic to the word “facilitation” and I'm not sure that the court was trying to say don't use the term “assist” at all costs. They were trying to get at the
concept that something that actually again, beyond the
persuasion message. The whole idea of GOTV is you're trying
to turn out people to vote other than by just saying go out
and vote for our candidate, just get them to the polls,
either vote for the ticket or without mentioning the name of
the candidate, even though that comes into play when you go
to define it.

And that's the -- that's the concept. So the mere
-- merely say -- when you say get out and vote for Smith for
Governor or vote for Smith for Governor, that doesn't rise
to the standard that the court has in mind here. It's got
to be something more.

And you can say, what's the difference? But I
think the court is prepared to accept the definition, which
involves some information or activity that will actually
increase the likelihood that somebody goes to vote beyond
again, just a candidate specifically, persuasion message,
something that tells them something about -- that will
actually increase the likelihood that they go to vote for
some reason other than that they like the candidate.

Because you've told them what day it is, the time of it, and
make it easier in some way for them to do it. And the idea, well that sounds like assistance, we don't think that's the touchstone of the court's -- court's opinion was.

COMMISSIONER WEINTRAUB: And you've talked about this notion of targeting, which the earlier panel also talked about, targeting your likely voters and getting them out to vote, which makes sense to me. But I'm not sure where I see that in your proposed rule.

MR. SANDLER: The proposed definition -- again, we think that a rule should be as clear and detailed and comprehensive as possible to avoid further confusion and litigation. The idea is that you had -- the means of communication we talk about in here are inherently targeted. It's something other than a medium that hits everybody in a certain area, like broadcast or newspaper.

COMMISSIONER WEINTRAUB: Let me ask the folks on the other side of the table so that they don't feel left out. What would we base -- a time/space? I hesitate to use the word "allocation." We haven't done so well on allocation regs recently, but what would we -- what would we base the time/space -- I can't use another word --
allocation on? I mean, do we just pick a percentage that
sounds good to us, I don't know, 10 percent, 5 percent, 2
percent, 25 percent?

How do we -- how do we figure out what would be an
appropriate time/space ratio?

MR. PHILLIPPE: I'll say I'm here largely in a
supporting role for Mr. Nehring, but I'm happy to weigh in
on some of these -- some of these legal issues and
particularly the standard we presented.

The Commission has a lot of experience in dealing
-- one of the reasons we proposed this was because this is
something that you've used in other contexts. You know,
there's a couple ways -- there's a couple ways to slice it,
I think. The first is what -- really thinking in terms of
what the campaigns, and specifically in this context, what
do parties actually do? So starting from a get-out-the-
vote, say a postcard that's nothing except go out and vote.
It drops three days before the election. Go out and vote.
Here's your polling place. Here are the polling hours. One
hundred percent facilitation we'll call it.

I'm happy to weigh in on the facilitation aspect
too, because in my mind that's encouragement plus specific information, making it more likely and easy for the person to go vote. It's something other than individualized assistance. But it's an encouragement, plus -- and I think that you can frame it in that language. That will certainly address your concern about using encouragement in terms of going back to court and having an encouragement element there.

But on the other hand, certainly a pure persuasion piece that says nothing about going out and voting would surely be -- would surely be not included. So I mean I would suggest the Commission could actually -- and perhaps we could submit more comments -- but the Commission could also look at some examples of these. What kind of mailers are sent -- sent out? To what -- when does that GOTV element of a communication or a call cross that threshold?

I don't know what the specific threshold is. And if I had a clear idea of that, we probably would have suggested that. But as Mr. Reiff pointed out before, a call, for instance, to voters the day before the election in a close race that's primarily aimed at persuasion and then
say you're successful in persuading that person at the end, and you tell them where the polling place is, that's still probably a persuasion call because it's only -- it might be 10 percent get-out-the-vote at the end.

Clearly that's not enough, but a call to identified supporters that might even have a small persuasion piece as sort of that extra motivation to go -- to go vote. Go vote on Tuesday or your taxes are going to go up and your poll is located at this location, that probably would count.

So I don't know where exactly that line is, but given that the Commission does have experience in time/space ratios, I would suggest that you could find a proper one.

MR. NEHRING: If I may add?

COMMISSIONER WEINTRAUB: I appreciate your confidence.

MR. NEHRING: If I may add to that. I think that Democrats and Republicans can agree that there is a clear need for a bright line definition that folks can take a look at and clearly identify. Absent that, we're left with this gray area which will no doubt have a chilling effect on
state and local campaign activity.

Just one example that I would cite is that in city or county -- Republicans in my county make -- have a big emphasis on voter turnout. It's the biggest, most expensive program that we engage in, zero broadcast ads and no radio ads, no T.V. It's all aimed at in-person contact supplemented to some degree by mail.

But if I have a local school board candidate who's engaged in a precinct walk and he also wants to walk the county party door hanger, which lists a variety of different candidates on that, and it may or may not have a label that indicates the polling place, if there's any question as to whether or not that is legal for him to distribute or not, then he's going to default to not distributing at all and not getting that information out.

When you take that type of decision and multiply that across hundreds of thousands of races, it does create a chilling effect for candidates who are not intended to be addressed by BCRA.

CHAIRMAN WALTHER: Thank you. Commissioner McGahn?
COMMISSIONER MCGAHN: Thank you, Mr. Chairman. I want to thank the commenters like I did the first panel, for your time, particularly Chairman Nehring for coming because it's rare for someone who is not a practitioner in the area, but instead a political operative to come and testify. And given the opportunity that that presents, I'd like to ask you a few questions that are similar to what I asked the previous panel.

There's words in the statute, one word in particular, get-out-the-vote, that we are trying to put legal terms on. But I think it might help to have a political operative definition to the extent you could describe what you think is get-out-the-vote, maybe contrasting what is not get-out-the-vote. That would help at least some of our thinking as to how -- produce a rule that actually allows for folks to know what is and what is not permissible.

MR. NEHRING: I think that's an excellent question, because what I see is a tremendous gap between what is considered get-out-the-vote activity in hearing rooms in Washington versus what get-out-the-vote activity is
out in the field.

   And as we were discussing this internally leading up to the hearing, and there were discussions of ads and such, we're not going to run ads in order to drive turnout up. That's not going to fall under my get-out-the-vote definition whatsoever, because it won't work. I would recommend to you the book Get Out the Vote by Harvard University's Donald Green and Alan Gerber, which lists every means of -- that campaigns and political parties may engage in in order to maximize turnout and the two methods that are repeatedly -- that are mentioned most often in rooms like this, which are broadcast ads and robocalls, are completely ineffective in terms of driving turnout.

   When I became county leader in San Diego in 2001, we sought to maximize Republican turnout. We immediately started building a Republican precinct organization where we would recruit volunteers and ask them to visit their Republican neighbors with a piece of campaign literature, a door hanger that the county party would provide listing all of our candidates from the top of the ticket to the bottom and knocking on doors, not just doing the lit drop, but
knocking on doors, ringing the doorbell and handing the door
hanger to someone, because that demonstrably has the
greatest impact on turnout.

So when I think about turnout, I think about
programs that have a practical impact on turnout, not those
that are simply when you're sitting in a conference room and
watching an ad on T.V., yep that's a turnout ad. It's not,
because it doesn't work to that effect.

My concern is when questions are raised such as
well if the door hanger includes the polling place or it
doesn't include the polling place, that's the FEA or not
FEA. This just -- and it drives people out in the field
crazy because while we may have a situation in California
where my state party is going to provide all the door
hangers for the entire GOTV operation throughout the state,
but my county party may come along and put a label on it
indicating that the polling place for the household where
this door hanger's going to be delivered is at this place.

Well is the total door hanger now federal
activity? Is only the label -- does the Avery label that
comes out the laser printer, does that have to be paid for
with federal dollars or does the state party now have to re-
report all that as federal activity? You're dealing with
volunteers out in the field who are just trying to get their
Republican neighbors out to vote and it goes into all of
these various other questions that when we were federalizing
all of this -- all of this activity.

So my answer is, it's programs that we engage in
that have a practical impact on increasing turnout when
executed, and that is overwhelmingly in-person contact that
is highly personalized.

COMMISSIONER MCGAHN: Let's follow-up to that.
When a party, and I think both parties do this and they call
it different things, but when a party puts together whether
it's its victory plan or its coordinating campaign plan,
whatever it may be called on the other side of the aisle,
you have various line items budgeted in and you have maybe
state candidate advocacy and you have GOTV and voter I.D.

I want to try to explore from your perspective as
someone who is an operative, not a practitioner of the law,
but a practitioner of the ground game. Flesh out, if you
could, a little bit more the distinction between what Mr.
Svoboda characterized as persuasive mail on the first panel and get-out-the-vote and things that could be federal election activities. It’s the same theme we’ve all hit, but as an operative, what’s the difference between the two?

MR. NEHRING: I think there's a difference in terms of what means is used to deliver what message. First, I would define persuasive communications to be communications that are intended to influence how someone would vote if they choose to turn out to vote. So that's persuasion.

Get-out-the-vote activity is to effect the decision of whether or not that individual chooses to vote at all, recognizing that the world is run by those who show up and not those who are merely registered to show up. And so what we have found is that from an efficacy standpoint, persuasive messages are best delivered through broadcast media and mail and perhaps some telephone advocacy, although not as a primary measure, while the methods used to maximize turnout have -- are those which are individualized in-person contacts.

And I can't tell you how many times we've had to
have -- we don't have discussions internally in terms of what's the best type of T.V. ad in order to maximize turnout? The practical issues that we have to walk through are how do we visit people in gated communities? How do we recruit someone from inside a particular neighborhood? Is it more effective for me to recruit a pool of precinct walkers and disburse them into targeted districts or recruit volunteers out of targeted districts to make sure that's covered, because there's a difference when you visit -- when you're visited by your neighbor versus when you're visited by some random person or someone who's paid to do that.

We find that recruiting members of the party to visit their -- their neighbors of that party is the most effective means of doing that. So there's a distinction in terms of intent, persuade if they're going -- how they would act if they choose to turn out and vote. But there's also a difference in terms of methodology that's used to carry that message.

So the notion of classifying broadcast television ads or radio ads as turnout activity to me represents a total disconnect from what's happening in the field.
COMMISSIONER MCGAHN: I’d like to ask you a question about voter identification. I’ve heard it argued that voter I.D. done in an off-year election or non-federal election somehow is still in connection with a federal election because that voter I.D. data is still going to exist.

You being from California, first at the county level, now statewide as chair, I think of ballot initiatives and how you I.D. for ballot initiatives or how you would I.D. for state candidates. Could you explain to us what correlation, if any, there is between voter I.D. in an off-year for a ballot initiative and a federal candidate? Because I could think of 10 examples off the top of my head that demonstrate there’s no correlation, but there is this argument that somehow voter I.D. carries over to all elections.

MR. NEHRING: The notion that voter I.D. data is going to carry some lasting benefit beyond a couple of months or a year is simply impractical. Politics is dynamic. Just look at -- look at how different the political environment is today compared to how it was 12
months ago. I guarantee you that the voter I.D. data that was conducted in last year's presidential election is meaningless today among those voters who would be most interested in, which is independent voters and those who are generally not strongly aligned with a political party.

COMMISSIONER MCGAHN: Can I ask you why? Maybe a specific example, maybe an issue that you would have tested last cycle that is no import to this cycle and vice versa?

MR. NEHRING: Well I would say that certainly given the current economic climate, that we see a rise in prevalence of issues related to job creation and taxation and the like and those issues that are more on the regulatory side drop.

We've seen in California a lot of talk about the need for job creation in our state. We have an unemployment rate that's 2 percent above the national average right now and we have a tremendous number of people who are fleeing our state for jobs in other states. So simply voter I.D. in terms of -- let's go one step level. Voter I.D. might indicate placing calls to someone to determine what's the most important issue to them?
Well if you’ve lost your job since that voter I.D. question was asked, chances are the issues that are most important to you have changed and you may be more interested in something that’s going to generate jobs as opposed to well, passing that tax increase because it’s for some good cause, or something to that effect.

The issues matrix is very dynamic and therefore, when you key your voter I.D. questions off of some of those issues, then the data becomes old very, very quickly. I would never rely upon, for example, issue questions that were 12 months old in order to determine my persuasion — persuasion or GOTV messages because it’s not going to be accurate. It’s not going to be a good investment of my time or money.

COMMISSIONER MCGAHN: So timing matters.
Proximity to that election in your experience is a critical distinction?

MR. NEHRING: It’s absolutely critical.

COMMISSIONER MCGAHN: That would also be true of get-out-the-vote, right? You don’t do get-out-the-vote in September. You do it around the election, which kind of
echoes Mr. Sandler’s, Mr. Reiff’s proposed rule. They have one prong, 72 hours within the election.

    MR. NEHRING: Right. Well in our state, voting takes place during the final 30 days. You can vote by mail and it’s very easy, unlike New York, for example, which would be the extreme opposite example where it’s very, very difficult to vote by mail, in California it’s very easy. In fact, you can register as a permanent absentee voter. We’ll just mail your ballot to you regardless of whether you have a local polling place or not.

    We do not engage in get-out-the-vote activity until the last possible moment. For example, we will engage in one round of get-out-the-vote activity just before absentee ballots are dropped into the mail so that the contact is in the closest proximity to when the decision will be made, that the pen goes onto the ballot and decisions are made and that another round of GOTV in the window just before Election Day itself, which by the way, underscores the fact that when you create a national standard that will apply, that may or may not be rational in some states.
For example, having a 30-day get-out-the-vote window in New York wouldn't make sense where 95 percent of voters are going to casts their ballot on Election Day as opposed to California, where half of our ballots are going to be cast before Election Day.

COMMISSIONER MCGAHN: One final question, Mr. Chairman.

CHAIRMAN WALTHER: We do have some time here.

COMMISSIONER MCGAHN: The -- I think you were both here for the first panel and I asked about a hypothetical, a newspaper ad that references a state candidate for governor and says vote for, let's say Schwarzenegger just as a hypothetical. Right. Mr. Reiff, we don't want you to get too excited, just a hypothetical.

MR. RIEFF: He's termed out.

COMMISSIONER MCGAHN: My sense is that there's consensus that that's not get-out-the-vote. If you add the date of the election, that's not get-out-the-vote, but if you say go vote for Schwarzenegger, there's a distinction in some minds between go and just voting. It seems to me if one goes to lunch versus lunch, it's kind of the same thing.
But as an operative, do you see a distinction between the two?

MR. NEHRING: First, no. But let me also add to that that -- and this underscores the point. You provided a perfect example, even a better example than mine. In my view, you --

COMMISSIONER MCGAHN: Thanks.

MR. NEHRING: You can write a newspaper ad that advocates -- express advocacy for a clearly identified candidate. You can list the election day, when the polls will be open and provide a map to the polling place and in a practical sense, that newspaper ad is not get-out-the-vote activity because it will have no impact on turnout whatsoever. Zippo.

COMMISSIONER MCGAHN: Why do you say that? Do you have a basis, whether it’s your expert experience or background or any kind of something we could have for the record? Because a lot of times we get caught up. People make those statements, but we don’t really flesh out --

MR. NEHRING: Sure. And I believe that if you’re engaged in regulating get-out-the-vote activity, which is
clearly what's taken place here, then you're in a similar position to where I was when I became county leader in San Diego in 2001, and that we had not run a voter turnout operation in a decade in my county before I became chairman. So I was not wedded to a particular approach when we -- we knew that we wanted to maximize turnout. We didn't know how we wanted to do that, so we went out and looked and tried to find some empirical data to show us what's the best way to do it. Should we take out newspaper ads? Should we knock on people's doors? Should we do phone banks?

Phone banks would be the normal -- the path of least resistance to do that. But we opted not to do that because it's ineffective based upon the research of Mr. -- Professors Green and Gerber at Harvard. They had not published their book at that point. They have since published a book. It's now in its second edition, which I would recommend to everyone.

In fact there is summary data for each voter turnout methodology and even broken down by how many dollars per additional vote based upon the studies that they've compiled. And so I don't believe any rational political
organization would engage in GOTV activities through newspaper ads.

Now when you're in the business of making rules, perhaps someone's going to be in a conference room and look at something and say, well this says get out the vote, this says the date of the election, it has a map to the polling place, where you can call for information, it even has the phone number for the county registrar of voters. That's not rational get-out-the-vote activity.

COMMISSIONER MCGAHN: In your world, that's just not get-out-the-vote?

MR. NEHRING: It's not because it won't work.

COMMISSIONER MCGAHN: How about Mr. Sandler and Mr. Reiff, you want to agree or disagree with that or elaborate?

MR. SANDLER: There's two issues involved in the definition. One is the medium of communication, one is the content of communication. We didn't see the whole hypothetical from the last panel, but if you're talking about a newspaper ad, that clearly makes it an easy hypothetical because the medium of communication doesn't
meet the test of the Shays court that encourages like-minded voters and makes it more likely for like-minded voters to get out and vote, because it's addressed to everybody. That's just not sufficiently individualized.

So in that hypothetical, I don't think you even reach the issue of content. It's not GOTV.

MR. REIFF: Plus you couldn't do a newspaper ad giving instructions on where to vote because presumably that advertisement would be seen by people voting in multiple precincts, so it's almost impossible to craft a newspaper ad that could be so informational to assist in that vote.

MR. NEHRING: We've got some pretty small newspapers in some of our rural outreaches.

MR. REIFF: It probably costs about $1 to put it out.

COMMISSIONER MCGAHN: Thank you.

CHAIRMAN WALTHER: Ms. Duncan, any questions?

MS. DUNCAN: No, Mr. Chairman, we don't. Thank you.

CHAIRMAN WALTHER: Mr. Gibson? I'd like to go back to Commissioner Weintraub's question and see if we could flesh it out a little bit, the difference between your
proposal where we move between assist and encourage, in between we find something like facilitate.

What is -- what is in encourage that's so broad that facilitate would narrow? In other words, there's an aspect of encourage that we were told in the previous panel that you can either bifurcate it or sliver off aspects of it that should not be included in the definition you end up with.

I understand your use of the word “facilitate” to try and help us get there. What example -- what examples could you give us in your opinion that would be left off of the word, that constitutes encouragement in the general definition, but would be excluded if we were just to say facilitate?

MR. REIFF: I think the primary example that we talked extensively about in our comments are vote for Senator -- well Governor Smith in this example -- on November 7. Clearly, in our view, and I think we've seen this in a lot of the other written comments, merely giving the date of an election would be clearly an example. And I think the Commission acknowledged that themselves in their
examples, that we actually omitted from our proposed
regulations because it's subsumed already within our
proposed definition.

    But something might -- merely giving the date of
the election is something that we would not see as something
that would facilitate a vote. And I'm sure Chairman Nehring
could probably talk extensively about how little GOTV
effect, merely getting the date of the election, provides.
That would be definitely one example.

    So in terms of -- there are types and modes of
communications that are more likely to easily be seen as
GOTV than others. The in-person contact, you may have a
form with you where you're trying to collect a ballot or
give a ballot or give an absentee ballot or collect a mail
ballot. These things are so evidently and obviously GOTV
that -- the reminder phone call.

    So there are types of communications that are more
obvious that would be GOTV. Then there are ones that are
obviously not GOTV that we've discussed here. And that's
why we kind of went away from -- and I think this is where
the Commission got caught up with the court, is this concept
of individualized contact is really where you fell into a problem. And the advisory opinion that they had before them, there was some logical leaps, I would admit, in that opinion that I could see why the court would have some concerns.

That's why we believe you should redirect back to the modes of communication. The obvious modes of communication that shouldn't be GOTV, T.V., radio, newspapers, mass communications, then there is the one that probably falls in the middle that's the most difficult to do with is mail because with mail you have the opportunity to do a lot of things. You can merely provide a persuasive communication and there's really no time element.

We talked about the phone call where you could spend three minutes trying to persuade a voter or you could spend 15 seconds reminding them to vote. So even within phone you can draw a line. So the one -- the one type of communication I think you will possibly struggle with is mail because mail gives you the opportunity to merely provide persuasive information, plus adding the date of the election, plus an absentee ballot or a phone number. That's
the one I think that you will probably have to spend the
most time dealing with when you craft your final regulation.

So in our proposal, again we try to give you
examples of things we believe wouldn't cross that line, and
again, being mindful of the court's directive. So if you
have a mailing that gives the date of the election, plus the
time when the polls are open, the location of a polling
place and a mailing, because again, a mailing can be highly
targeted. We create a functional definition and we think
that's the way to go and those are the types of examples and
that's how you should draw the line.

CHAIRMAN WALTHER: In the modern world, especially
our kids who are living by texting and it came up in
conversations, but of course you I can see a situation where
you get a texting, “Just a reminder about the election,” and
then press here and then all of a sudden you have a way to
get from where you are on your GPS to the polling place.

MR. REIFF: Absolutely.

CHAIRMAN WALTHER: I can see --

MR. REIFF: This was not addressed in the Shays
decision and I believe we're the only commenters who even
addressed the issue. We even included our proposed definition, text messaging as an example of mode of communication, and as well as e-mail.

CHAIRMAN WALTHER: Facebook, YouTube, kind of analyze the ways of communicating. We're going to be looking at how to -- some of these areas, I suppose.

Any further comments from any other commissioners?

Anything further any of you would like to add to your comments?

MR. PHILLIPPE: Could I just -- you know, because the timing element I think is important and it was hit on a couple of times and I just want to give another specific example of why timing is important and why we've always thought it was -- you know, from the RNC perspective in working with state parties, 2000 -- in the 2000 election, our presidential candidate lead all the polls quite convincingly in the days leading up to the elections and lost the popular vote by two million votes.

In the state elections of Virginia and New Jersey next year, we undertook something called the 72-hour Task Force. We didn't undertake the 60-day Task Force or the 90-
day Task Force. We undertook the 72-hour Task Force to figure out why was it that we couldn’t get our voters to the polls in the numbers that we thought they’d show up and the numbers that the polling reflected based on persuasive communications leading up to that.

And out of that came state level get-out-the-vote programs called the 72-hour Project, again, the days leading up to the election. It just underscores the point that facilitating a vote and turning out the vote is a time bracketed activity and content bracketed. We didn’t look at -- nothing came out of that that lead us to change how we advertise or run different kinds of newspaper ads. It was the grassroots phone and precinct walking activities that came out of that.

And so I just want -- I want to emphasize that timing element because I think it’s something that wasn’t addressed much in the NPRM and was addressed by our colleagues here in their comments. But I do encourage -- I do encourage you to consider -- consider that element more fully.

CHAIRMAN WALTHER: Commissioner Weintraub?
COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Just one follow-up, because -- I mean, you talk about the timing element and your 72-hour program, which makes perfect sense to me. But as you probably know, we tried a 72-hour limit and that got tossed out in court. And you said robocalls are not an effective way of getting out the vote. But that was exactly what they were using in that L.A. advisory opinion that we issued and we were hammered for not covering that.

So I mean, it's not that -- I think what you're saying makes a certain amount of sense. It's just that I think we've tried some of these things before and they haven't worked out very well for us.

MR. REIFF: I'll just make one quick comment about that 72-hour requirement and the past attempts. In our proposal, again bringing you back to that -- we do include robocalls, again, going back to just the mode of the communication, not worrying about targeting, keeping it to the simple methodology.

And I would note that that's the only -- although we did reintroduce the 72-hour element, we were being very
limited in this application. I think the Commission's problem was the implication of their original regulations in 2002, was that the 72-hour element was across the board applicable, which I think is troubling. And of course, we don't adhere to that and it's only in that one limited aspect do we introduce the 72-hour requirement.

MR. SANDLER: Four days out you give some information about the polling place, clearly that's GOTV and the court in Shays I, that's what they were focusing on.

MR. NEHRING: My concern here is in the chasm that exists between the -- what has to take place in terms of rulemaking process here in Washington and what happens out there in the field. It is enormous. In the -- I would just stress, in the upcoming June primary election, I'm intensely interested in one particular ballot measure that will appear on that June ballot.

I don't care about any federal candidate who will appear on that ballot whatsoever, yet I have to deal with the federal election activity window leading up to that date and under the proposed rule, my mail, persuasion mail, on that ballot measure, if it mentions an election day and
related information, it is going to be considered federal
election activity under this proposed rule. I don't care
about any federal candidate on that ballot.

Commisssioneer Weintraub: I hear you, but it
certainly is not unknown for individual groups to introduce
a very controversial ballot measure in order to drive
turnout of voters who will care about that ballot measure
because they think that this will also help their federal
candidates. I mean, we have seen this happen. This is a
real -- this is not a hypothetical. We've seen it happen in
a number of elections and I've seen it happen in a number of
different states.

So are we supposed to -- how are we supposed to
write a rule that says well okay, I get you, that one, you
don't care about any federal race; you are only focused on
the ballot measure? But what about the one where they
actually do care about the federal race and they think wow,
what a great idea? We are going to get all of our pro-life
voters out by putting this measure on the ballot or all of
our gun people out by doing that measure. I mean, these
things do happen.
MR. NEHRING: I think the principle to recognize is that BCRA was not intended to federalize the state and local activity, but yet that is the effect. That is what you will be doing if you adopt the rule as it is proposed. I'll give you an example. I'll come back to my example about June.

The measure that I care about was put on the ballot by the legislature and the governor, who was not put on the ballot by any type of political group and so on, and is one that I care about because it is the Washington State's top two primary measures that will be on the ballot in California.

I'm intensely interested in defeating that ballot measure. And so this wasn't intended to drive some turnout or anything like that, but yet my ability to communicate on that purely state issue is going to be inhibited by the proposed rule here and that's why a narrowly -- more narrow construction is necessary. And I don't often agree with the Los Angeles County Democratic Central Committee, but I am happy to do in this particular case, as well as the California Democratic Party, which provided comments.
A narrower construction is necessary because the long list of state and local activity that you will be restricting through the rule as proposed to me is inappropriate and inconsistent with the intent of BCRA to leave such activity alone.

CHAIRMAN WALTHER: Are there any further questions? If not, I want to thank all of you, both groups. You really had a lot to offer, I think. We really appreciate the specific information you offered for us and as well as on the grassroots, here's how it really gets done, type of approach.

So thank you very much.

MR. SANDLER: Thank you, Mr. Chairman

CHAIRMAN WALTHER: We'll adjourn this meeting.

(Whereupon, at 12:40 p.m., the hearing was adjourned.)
CERTIFICATE OF REPORTER

I, JENNIFER O’CONNOR, the officer before whom the foregoing testimony was taken, do hereby testify that the testimony of witnesses was taken by me and thereafter reduced to a transcript under my direction; that said record is a true record of the testimony given by the witness; that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this testimony was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

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JENNIFER O’CONNOR