INSTITUTE FOR
FREE SPEECH

September 30, 2024

Ms. Amy L. Rothstein
Assistant General Counsel for Policy
Federal Election Commission
1050 First Street NE,
Washington, DC 20463

RE: Comment on REG 2024-07, Political Party Rules II

Dear Ms. Rothstein;

On behalf of the Institute for Free Speech,[1] we write to express our support for the Commission commencing a rulemaking to lessen the burden on state and local political parties.

The impact of the Commission's political party rules, reflected in the *Shay's III* rulemaking, has been the effective federalization of state and local political parties. This raises serious federalism concerns. After all, *states*—not the federal government—should determine how money is raised or spent to elect *state* officials. While many of these burdens stem from statutory language, particularly requirements adopted as part of the Bipartisan Campaign Reform Act, there are still opportunities to make a difference through regulatory reform.

Over ten years ago, the Commission held a public hearing on the challenges faced by political parties seeking to engage in federal elections.[2] The Institute for Free Speech—then known as the Center for Competitive Politics—highlighted some of these and other opportunities to adjust the Commission's regulatory approach in response to Petitioner's 2016 petition for rulemaking.[3] We attach and incorporate these comments by reference to this document.

Unfortunately, as the Petition for Rulemaking highlights, little regulatory progress has been made over the past decade to alleviate the burdens on state and local parties.

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[1] The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government.

[2] *FEC Chairman Goodman and Vice Chair Ravel Host Political Party Forum*, Federal Election Commission (June 4, 2024), https://www.fec.gov/updates/fec-chairman-goodman-and-vice-chair-ravel-host-political-party-forum/.

[3] *See* Comment of Center for Competitive Politics on Notice 2016-11: Rulemaking Petition: Political Party Rules (Jan. 30, 2017), https://sers.fec.gov/fosers/showpdf.htm?docid=355039.

Subsequent judicial opinions underscore the need for review today. Since the adoption of the Commission's current rules, the Court has repeatedly emphasized that it "has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance."[4] It also has emphasized that there must be solid evidence of problems to justify a regulation: "We have 'never accepted mere conjecture as adequate to carry a First Amendment burden.'"[5]

Moreover, the Court has clarified how courts will approach agency interpretations of statutes. *Loper Bright Enterprises v. Raimondo* ruled that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires…. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[6]

The Petition provides an opportunity for the Commission to revisit both practical and legal concerns about its current regulatory approach, including whether the Commission's current approach is properly tailored to the statute or whether it sweeps up too much core First Amendment activity.

For example, the Commission should reexamine the presumption that state and local/district committees are "affiliated" for purposes of federal contribution limits. This presumption has the necessary effect of filtering contributions up to the state party and away from more locally focused organizations. Moreover, it neglects that in many states, local and district parties act with a significant degree of autonomy and often select their own leaders in localized elections.

The Commission should also reexamine the allocation of expenses for staff salaries, wages, and benefits. As the Petition for Rulemaking observes, the inclusion of "federal election activity" goes beyond what is required in the statute and federalizes the vast majority of state party employees, particularly in states that do not have off-year state or local elections.

Other areas for particular attention include revisiting the Commission's definition of exempt volunteer activities, particularly considering the changing nature of campaigning, and reexamining the Commission's definition of federal election activity, which, as currently written, sweeps up far too much basic party activity that is at best tangentially connected to federal elections.

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[4] *FEC v. Cruz*, 596 U.S. 289, 305 (2022).

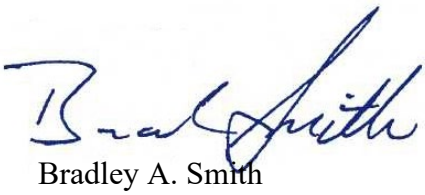
[5] *Cruz*, 596 U.S. at 307 (quoting *McCutcheon v. FEC*, 572 U.S. 184, 210 (2014)).

[6] 144 S.Ct. 2244, 2273 (2024)

The Commission has heard concerns with its approach to political parties for over a decade. Supreme Court rulings since the adoption of the party regulations heighten these concerns by raising serious constitutional doubts about many of the regulations. Thus, the matter is ripe for consideration and action. Therefore, we strongly encourage the Commission to initiate a rulemaking addressing regulations on political parties as soon as possible.

Thank you very much for your time and consideration of our views.

Respectfully submitted,



Bradley A. Smith
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CENTER for COMPETITIVE POLITICS

Congress shall make no law...

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January 30, 2017

VIA ELECTRONIC SUBMISSION SYSTEM

Federal Election Commission
Attn.: Mr. Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Notice 2016-11: Rulemaking Petition: Political Party Rules

Dear Mr. Stipanovic:

The Center for Competitive Politics (the "Center" or "CCP"),[1] respectfully submits these comments in response to Notice 2016-11.[2] That notice concerns a petition for rulemaking ("the Petition" or "Pet."),[3] asking the Commission to amend "Title 11 of the Code of Federal Regulations in order to strengthen political parties."[4]

The Center disagrees with Petitioners' assertion that citizens pose a threat to the existence "of political parties at the state and local level"[5] when they associate with and donate to non-party organizations. Such groups often give voice to issues that the major political parties do not.

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[1] The Center is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

[2] 81 Fed. Reg. 69721, 69721 (Oct. 7, 2016).

[3] Ken Martin and Minnesota Democratic Farmer-Labor Party, Petition for Rulemaking to Strengthen Political Parties (June 14, 2016), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=351550.

[4] Pet. at 1.

[5] Pet. at 2 (internal quotation marks omitted).

Nevertheless, the regulation of political parties implicates the same associational liberties and free speech interests as limitations upon other civil society groups. And, as explained below, the Center believes that state and local parties perform services for which they are uniquely suited. Consequently, CCP supports the Petition to the extent permissible under current law.

A. Definition of "Federal election activity"

The Petition asks that the Commission "reconsider the sheer overbreadth of its BCRA regulations" by revising the definition of "Federal election activity" in light of Supreme Court decisions restricting the scope of the anti-corruption interest.[6]

In *Shays*, the district court scolded the FEC for balancing First Amendment rights against statutory objectives in its rulemaking.[7] Overruling that view, the D.C. Circuit recognized that the Commission has an "obligation to attempt to avoid unnecessarily infringing on First Amendment interests" while establishing rules that fulfill statutory goals and comport with the APA.[8] Thus, to protect First Amendment rights and avoid unnecessary litigation, the FEC must take First Amendment concerns into account as it revises the definitions of the activities comprising "Federal election activity."

For example, the D.C. Circuit noted that the Commission "could surely [craft a definition] that would exempt . . . routine or spontaneous speech-ending exhortations."[9] A first step in protecting such activity would be to include it among the examples of speech that are not voter registration.[10]

B. Employee activities

The Petition asks that the Commission amend 11 C.F.R. § 106.7 to make it conform to statutory language regarding employee services.[11] The Commission's departure from the statutory definition of employee services has resulted in both confusing circularity and the regulation of statutorily excluded activity.

Under the statute, "Federal election activity" includes "services provided during any month by an employee of a State, district, or local committee of a political party *who spends more than 25 percent* of that individual's compensated time during that month *on activities in*

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[6] Pet. at 3.

[7] *Shays v. FEC*, 508 F. Supp. 2d 10, 55 (2007).

[8] *Shays v. FEC*, 528 F.3d 914, 925 (2008) ("*Shays IV*"); *see also id*. at 926.

[9] *Id*. at 932 (internal quotation marks omitted).

[10] *See* 11 C.F.R. § 100.24(a)(2)(ii).

[11] Pet. at 4.

connection with a Federal election."[12] The rule changes the statutory language in two ways: first, it explicitly changes the trigger by initiating regulation at 25% or less of employees' compensated time, rather than "more than 25 percent"; second, it adds the phrase "Federal election activity" as a qualification in addition to "activities in connection with a Federal election."[13] Like the first change, the second leads to regulation beyond that sanctioned by the statute, while also making the definition confusingly circular.

Turning to the first difference from the statutory language, the employee services regulations should be amended to match the statutory percentages. The statute explicitly includes as Federal election activity only services that reach more than 25% of compensated time in connection with a Federal election. That is, services below that 25% threshold are not Federal election activity. Accordingly, they should not be regulated as such, including any requirement that they be paid for in part with Federal funds. The Commission's "rewriting of the statutory thresholds [is] impermissible," as "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[14] As the Supreme Court has stated, "It is hard to imagine a statutory term less ambiguous than . . . precise numerical thresholds," and when the Commission "replace[s] those numbers with others of its own choosing, it [goes] well beyond the 'bounds of its statutory authority.'"[15]

Furthermore, constitutional avoidance requires that this provision be amended. The statute was implicitly a compromise between controlling the soft money that Congress feared being routed into Federal elections through donations to state parties, and the need to respect the dual sovereignty established by the Constitution, which left to the state governments the control of their own elections.[16] Thus working at the limits of its Constitutional authority, Congress struck a balance between regulating state activity and attempting to control soft money by defining as Federal election activity only services that reach more than 25% of an employee's time.

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[12] 52 U.S.C. § 30101(20)(A)(iv) (emphasis added).

[13] *See* 11 C.F.R. §§ 106.7(c)(1); (d)(1)(i); 300.33(d)(1).

[14] *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014). This and the following citation are from the opinion of the court, as Section II-A was the opinion of five justices.

[15] *Id.*; *see also Union Pac. R.R. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 900–01 (8th Cir. 2013) (noting that an agency's actions are *ultra vires* where it "lack[s] statutory authority to penalize" particular action but attempts to do so anyway).

[16] *See Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005) (noting "[p]rinciples of federalism" (internal quotation marks omitted)); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (noting "broad power" to control elections (internal quotation marks omitted)); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (same); *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) (same); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (noting that "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections," and that this power "inheres in the State" (internal quotation marks omitted)).

Even if the Commission could successfully argue that some ambiguity in the statute allowed it to regulate services *less than* the statutory 25% threshold, "[c]onstitutional avoidance trumps . . . *Chevron* deference."[17] The FEC's rule extends beyond the statute in violating the dual sovereignty established by the U.S. Constitution, subsuming the entirety of state and local campaigns and elections under federal control and regulation. The FEC may not interpret a statute in a way that pushes the limit of congressional authority. In such situations, courts will independently inquire whether there is another interpretation that would not raise serious constitutional concerns,[18] invalidating the regulation.

Second, adding the phrase "Federal election activity" as a qualifier on the employee services regulation contravenes the statute, creates confusion, and implicitly lowers the regulatory threshold. Including the phrase contravenes the explicit statutory requirements, which regulate employee services only when they involve "activities in connection with a Federal election."[19] As just discussed with regard to the 25% threshold, the Commission has "no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[20]

Moreover, the phrase "Federal election activity" has specific statutory definitions, and each of those definitions is incorporated into the employee services regulation by including the phrase "Federal election activity" as a qualifier. That is, the current rule regulates when "employees . . . spend 25% or less of their time in a given month on *Federal election activity* or activity in connection with a Federal election."[21] "Federal election activity," however, is defined as "voter registration activity," "voter identification [or] get-out-the-vote activity," or "services provided . . . by an employee . . . who spends more than 25 percent of that individual's compensated time . . . on activities in connection with a Federal election."[22] Incorporating the first two of these definitions, the employee services regulation becomes as follows:

> State, district, and local party committees must either pay salaries, wages, and fringe benefits for employees who spend 25% or less of their time in a given month on [voter registration activity, voter identification, or get-out-the-vote activity] or activity in connection with a Federal election with funds from their Federal account.[23]

But voter registration, voter identification, and get-out-the-vote activity are regulated by other provisions, subject to different requirements. By incorporating voter registration, voter

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[17] *See Union Pac. R.R.*, 738 F.3d at 893.

[18] *Id*.

[19] *See* 52 U.S.C. § 30101(20)(A)(iv).

[20] *Util. Air Regulatory Group*, 134 S. Ct. at 2445.

[21] 11 C.F.R. § 106.7(c)(1) (emphasis added); *see also id*. at (d)(1)(i).

[22] 52 U.S.C. § 30101(20)(A).

[23] 11 C.F.R. § 106.7(c)(1).

identification, and get-out-the-vote activity into the employee services regulation, the rule is bound to cause confusion as to party obligations with regard to all those activities.[24]

Furthermore, inserting the "Federal election activity" qualifier creates even greater confusion with regard to employee services, because it effectively results in the double inclusion of the employee services term, as follows:

> State, district, and local party committees must either pay salaries, wages, and fringe benefits for employees who spend 25% or less of their time in a given month on [services provided during any month by an employee of . . . a committee of a political party who spends more than 25 percent of that individual's compensated time . . . in connection with a Federal election] or activity in connection with a Federal election with funds from their Federal account.[25]

By thus including parts of the employee services requirements twice, as a result of incorporating the "Federal election activity" qualifier, the rule becomes unintelligible. To the extent it would drop the regulatory threshold to 6.25% (25% of 25%), however, the regulation would explicitly contravene the statute. While doubtless unintended, this is one potential interpretation of this poorly-drafted regulation.

C. Memorandum and Resolution on Regulatory Relief

The Petition also "present[s]"[26] Commissioner Lee Goodman's Memorandum on Regulatory Relief and attached Resolution on Strengthening Political Parties ("Resolution"),[27] stating that the "proposed resolution is an excellent starting point for . . . provid[ing] relief to state and local party committees."[28] Commissioner Goodman organized these proposed amendments according to three general categories: party coordinated communications, volunteer activities, and voter registration and get-out-the-vote activities. To the extent the Commission

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[24] *See* Pet., Ex. A at 2 (noting complications with Levin amendment and "disincentive[s] for state and local candidates to appear" with federal candidates).

[25] *See* 11 C.F.R. § 106.7(c)(1).

[26] Pet. at 6.

[27] Commissioner Lee Goodman, Memorandum on Regulatory Relief for Political Parties and attached Resolution of the Federal Election Commission Commencing Work on a Notice of Proposed Rulemaking Focused on Strengthening Political Parties (Oct. 29, 2015), Pet., Ex. B.

[28] Pet. at 6.

considers the Resolution's proposed amendments as part of this rulemaking, the Center has the following comments.[29]

1. Party coordinated communications

1. The Resolution states that the Commission should delete 11 C.F.R. § 109.37(a)(2)(iii), leaving only the republication and express advocacy elements of the content standard for party coordinated communications at § 109.37(a)(2)(i)–(ii).[30] The FEC has not revised § 109.27(a)(2) in response to *Shays IV*, where the court stated that the Commission had to develop a standard that "rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition."[31]

This amendment would address the constitutionally overbroad nature of the candidate reference provisions at 11 C.F.R. § 109.37(a)(2)(iii), which treat merely mentioning a candidate in a public communication as conduct that triggers the coordinated communication regulation. Nevertheless, in deleting 11 C.F.R. § 109.37(a)(2)(iii), other provisions in the party coordinated communications content standard must also be addressed.

In particular, the *Shays IV* court held that the content standards of the coordinated communications standard at § 109.37(a)(2) failed under the APA because it did not "rationally separate[] election-related advocacy from other activity falling outside FECA's expenditure definition,"[32] such that it did not fulfill "BCRA's fundamental purpose [of] prohibiting soft money from being used in connection with federal elections."[33] In particular, the candidate reference provision, which this amendment would delete, only operates in a 90/120-day window before an election, leaving only the express advocacy provision at § 109.37(a)(2)(ii) and the republication of campaign materials provision at § 109.37(a)(2)(i) to operate outside that window.[34] Regardless of the merits of its decision, the *Shays IV* court held that the express advocacy provision was "functionally meaningless," and thus inadequate to effect BCRA's purposes when the candidate reference provision was not in effect.[35] The Resolution's amendment would eliminate that provision entirely.

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[29] The Commission's notice of rulemaking states, "Finally, the petitioners ask the Commission to consider additional regulatory modifications listed in Commission Agenda Document No. 15-54-A, a proposed resolution that recommended amending several rules . . . ." 81 Fed. Reg. at 69721.

[30] Pet., Ex. B., Resolution at 1.

[31] *Shays IV*, 528 F.3d at 925 (internal quotation marks omitted).

[32] *Id*. at 926.

[33] *Id*. at 925 (internal quotation marks omitted).

[34] *Id*. at 922.

[35] *Id*. at 924 (quoting *McConnell v. FEC*, 540 U.S. 93, 193 (2003)).

Thus, to effect the requested amendment, the Commission should also amend § 109.37(a)(2)(ii) to read as follows: "A public communication that advocates, either expressly or by means of words functionally equivalent to express advocacy, the election or defeat of a clearly identified candidate for Federal office." The Supreme Court has held that the test for express advocacy or its functional equivalent properly balances the government's interests against First Amendment rights,[36] and it addresses the sham issue ads that led the *McConnell* Court and the *Shays IV* court to call the express advocacy test "functionally meaningless."[37] Thus, the test would "rationally separate[] election-related advocacy from other activity falling outside FECA's expenditure definition."[38]

Although the Supreme Court blessed the express advocacy or its functional equivalent test in both *McConnell* and *WRTL II*, the Commission could also use the PASO standard to revise § 109.37(a)(2)(ii). The Supreme Court has held that "[t]he words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act."[39] That is, they "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"[40] They would thus also meet the requirements of the *Shays IV* court.

As the D.C. Circuit noted, the Commission may be "properly motivated by First Amendment concerns" in formulating rules that "rationally separate[] election-related advocacy from other activity,"[41] thus protecting the rules from constitutional challenge and preserving court and agency resources. Eliminating the candidate reference provision and amending the express advocacy provision under either of these approaches, but particularly the first, will properly address First Amendment rights, effect BCRA's purposes, and clearly separate protected activity.

2. The Resolution proposes that the Commission amend the redistribution of campaign materials content standard at 11 C.F.R. § 109.37(a)(2)(i) by adding an express advocacy qualifier. As amended, a public communication would meet the content standard for a party coordinated communication when it

> disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under

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[36] *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) ("*WRTL II*").

[37] *McConnell*, 540 U.S. at 193; *Shays IV*, 528 F.3d at 924.

[38] *Shays IV*, 528 F.3d at 925 (internal quotation marks omitted).

[39] *McConnell*, 540 U.S. at 170 n.64.

[40] *Id*. (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972)); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66 (1st Cir. 2011).

[41] *Shays IV*, 528 F.3d at 926 (internal quotation marks omitted).

> 11 CFR 109.23(b)[,] *or the campaign materials do not expressly advocate the election of the candidate and are incorporated as a subordinate part of the political party communication.*[42]

The Commission should amend the redistribution of campaign materials to meet its First Amendment obligation of avoiding the regulation of incidental activity. Nevertheless, to meet the *Shays IV* requirements regarding coordinated communications, the amendment should be phrased as follows: "or the campaign materials are not express advocacy, and do not contain its functional equivalent, on behalf of the candidate and are incorporated as a subordinate part of the political party communication." Alternatively, the Commission could meet the D.C. Circuit's concerns by incorporating a PASO test into its content standard.

3. The Resolution proposes that the FEC amend the conduct standard at 11 C.F.R. § 109.37(a)(3) by adding an additional exemption. The conduct standard currently exempts from coordinated activity "[a] candidate's response to an inquiry about that candidate's positions on legislative or policy issues." The Resolution would additionally exempt candidate biographical information.

The FEC should adopt the amendment for biographical information. The current rule already exempts responses from candidates for information that is more likely to be important and persuasive to voters—responses on legislative or policy issues. Moreover, the biographical information covered by this amendment is already available publicly, from a candidate's own website or websites like LinkedIn, such that there is little harm in candidates providing it in response to a request. Furthermore, there is little to no monetary value in biographical information, such that there will be no inducement to circumvent contribution rules.[43] Meanwhile, allowing candidates to provide biographical information upon request will assure accuracy and a better-informed electorate.

4. The Resolution proposes that the Commission amend the conduct standard at 11 C.F.R. § 109.37(a)(3) by additionally exempting polling data. In particular, the amendment would allow "candidates to provide political parties '*opinion poll results purchased by the candidate or candidate's authorized political committee*' without triggering the conduct prong, provided the provision . . . is treated as a contribution . . . to the political party."[44]

The Commission should grant this request. Inasmuch as the poll results are treated as a contribution, and thus subject to the Commission's existing regulations, the concerns regarding illegal coordination are inapplicable.

5. The Resolution proposes that the Commission add a provision to 11 C.F.R. § 109.37 that would allow political parties to "use all information obtained from any publicly

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[42] 11 C.F.R. § 109.37(a)(2)(i) (emphasis added for amendment).

[43] *Cf. FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 460 (2001).

[44] Pet., Ex. B, Resolution at 2 (emphasis in original).

available source, even if such information is material to the creation, production, or distribution of a party communication, without the use of such information constituting coordination."[45]

The FEC should create this blanket exemption across all the prongs of the conduct standard for materials from a publicly available source. The six prongs of the conduct standard are incorporated into 11 C.F.R. § 109.37(a)(3) from § 109.21(d). Section 109.37(a)(3) indicates that the first three prongs, at § 109.21(d)(1)–(3), are the core of the conduct standard.[46] And of these three core prongs, two already have exceptions for material from publicly available sources.[47] Furthermore, two of the other three prongs have exceptions for material from publicly available sources.[48]

Thus, under the current rules, a candidate can have material involvement in a communication, a candidate can have substantial discussions about the communication, a candidate can use a common vendor with a party, or a former employee of the candidate now working for a party can create the communication, and the communication is not coordinated so long as "the information material to the creation, production, or distribution . . . was obtained from a publicly available source." But, if a candidate suggests the communication or if campaign material is republished, the communication is coordinated, even if the information material to the communication came from a publicly available source.

There is no basis for such a distinction, and the arbitrary lack of exemption for only two of the six categories can only cause confusion as to what parties can and cannot do.

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[45] Pet., Ex. B, Resolution at 2.

[46] *See* 11 C.F.R. § 109.37(a)(3) (noting that there is no reporting requirement for certain conduct under § 109.21(d)(4) and (d)(5) unless the candidate also engages in conduct under (d)(1)–(3)).

[47] *See* 11 C.F.R. § 109.21(d)(2) (stating that a candidate's material involvement in a communication does not meet the coordination conduct standard "if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source"); § 109.21(d)(3) (stating that a communication "created, produced, or distributed after" substantial discussion with a candidate does not meet the coordination conduct standard "if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source").

[48] *See* 11 C.F.R. § 109.21(d)(4) (stating that the common vendor prong is "not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source"); 11 C.F.R. § 109.21(d)(5) (stating that the prong for communications created by a former employee of a candidate is "not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source").

6. The Resolution proposes that the Commission add provisions regarding grassroots campaign materials and Internet communications to the sections explaining coordinated communications and party coordinated communications at 11 C.F.R. §§ 109.21 and 109.37.

The definition of Federal election activity already states that "[t]he costs of grassroots campaign materials, including buttons, bumper stickers, handbills, brochures, posters, and yard signs, that name or depict only candidates for State or local office," are exempt from Federal election activity.[49] For clarification, the Resolution would repeat this exemption in the coordinated party communication rule, and it would then add a comparable exemption for Internet communications.

Thus, under the Resolution, new provisions would be added to §§ 109.21 and 109.37, stipulating that "the costs of grassroots campaign materials, including buttons, bumper stickers, handbills, brochures, posters, and yard signs, that name or depict only candidates for State or local office, as well as Internet communications, which are not public communications under 11 C.F.R. § 100.26, are exempt from the" definitions of coordinated and party coordinated communications.[50]

Given that grassroots campaign materials are not Federal election activity, and are thus already exempt from regulation,[51] the Commission should add the provision regarding grassroots campaign materials to §§ 109.21 and 109.37, so that party obligations are clear.

Furthermore, the Commission should include the Internet communications provision with the amendment. The current rules already exclude communications over the Internet from regulation unless they are placed for a fee on another person's Web site,[52] such that the proposed amendment would merely make §§ 109.21 and 109.37 consistent with other, existing rules.

2. Volunteer activities

1. The Resolution proposes that the FEC amend 11 C.F.R. §§ 100.87, 100.88(a), 100.147, and 100.148 to clarify that volunteer phone banks—similar to newsletters, brochures, handbills, and yard signs used in connection with volunteer activities—are exempt from the definition of contribution.

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[49] 11 C.F.R. § 100.24(c)(4).

[50] Pet., Ex. B, Resolution at 2.

[51] *See* 11 C.F.R. § 100.24(c)(4).

[52] *See* 11 C.F.R. § 100.26.

The Commission should make these amendments. The list of activity exempted from regulation as contributions is broad, particularly for volunteer activity.[53] Moreover, the individual, one-on-one calls at issue with volunteer phone banks bear no resemblance to general public communications like broadcasting, newspapers, and billboards, which must be considered a contribution.[54] Furthermore, exempting the costs of phone banks would meet the same purposes as the other exemptions at 52 U.S.C. § 30101(8)(B)(ix): encouraging civic participation in the political process by exempting the costs related to volunteer activities.

2. The Resolution proposes that the Commission amend 11 C.F.R. §§ 100.87, 100.147(a), 100.88(b), 100.148, 100.89(a), and 100.149(a) to clarify that volunteer mail is not a contribution, by specifying that the "direct mail" limitation to the exemption applies only to commercial vendors—not to volunteer mail.

The current rules include direct mail among the public communications that must be treated as contributions—that is, as activity that may not be included in the exemption for volunteer activity. Sections 100.87, 100.147(a), 100.89(a), and 100.149(a) define direct mail as "any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists." Sections 100.88(b) and 100.148 use a similar but slightly different definition. Section 100.88(b), for example, states, "For purposes of this section, the term direct mail means any mailing(s) by commercial vendors or mailing(s) made from lists that were not developed by the candidate."[55] The Resolution would amend each of these rules, restricting the exemption exclusion to mailings from commercial vendors. The exemption exclusion would thus state: "*For purposes of this paragraph, the term direct mail means any mailing(s) performed wholly by a commercial vendor.*"[56]

The coordinated communication regulations function as contribution limits. As such, the Commission's only applicable interest is fighting quid pro quo corruption or its appearance.[57] Here, there is no well-founded concern that volunteer activity will implicate quid pro quo corruption. Accordingly, these regulations should be amended to exclude from the definition of contribution as much volunteer activity as possible. At the minimum, the FEC should ensure that

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[53] *See* 52 U.S.C. § 30101(8)(B)(i) ("The term 'contribution' does not include . . . the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee . . . .").

[54] 52 U.S.C. § 30101(8)(B)(ix)(1).

[55] Section 100.148 has slightly different wording for the same requirements: "For purposes of this section, the term direct mail means mailings by commercial vendors or mailings made from lists that were not developed by the candidate."

[56] Pet., Ex. B., Resolution at 2 (emphasis in original).

[57] *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (noting that the Supreme "Court has identified only one legitimate governmental interest for restricting campaign finances: preventing [quid pro quo] corruption or [its] appearance").

these definitions are consistent by including in §§ 100.88(b) and 100.148 the language used in the other provisions, which is more attentive to First Amendment rights.

3. The Resolution proposes that the Commission amend 11 C.F.R. § 100.87(c) "to clarify that a candidate may transfer funds to a political party to engage in volunteer activity benefitting that candidate."[58] It would make similar changes to 11 C.F.R. §§ 100.89(c) and 100.149(c).

The regulation currently states that a payment by a party committee of the costs of materials related to volunteer activity is not a contribution to a candidate if

> [s]uch payment is not made from contributions designated by the donor to be spent on behalf of a particular candidate or candidates for Federal office. For purposes of this paragraph, a contribution shall not be considered a designated contribution if the party committee disbursing the funds makes the final decision regarding which candidate(s) shall receive the benefit of such disbursement.[59]

The Resolution would amend the regulation by adding the following language to the final sentence: "*or if the funds originate from an authorized committee*."[60]

To the extent a candidate's authorized committee cannot make a contribution to itself, the Commission should grant this request.

4. The Resolution proposes that the Commission amend 11 C.F.R. § 100.87 to clarify that all volunteer activities are exempt from the definition of contribution. It would revise the first paragraph so that it states:

> The payment by a state or local committee of a political party of the costs *of any volunteer activity or* of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids or newsletters, and yard signs) used by such committee in connection with volunteer activities on behalf of any nominee(s) of such party is not a contribution.[61]

It would revise the title of subparagraph (d) so that it states: "Distribution of materials *and other activities* by volunteers."[62] Finally, it would revise subparagraph (d) so that it states:

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[58] Pet., Ex. B, Resolution at 2.

[59] 11 C.F.R. § 100.87(c).

[60] Pet., Ex. B, Resolution at 2 (emphasis in original).

[61] 11 C.F.R. § 100.87 (emphasis added for amendment).

[62] *Id*. (emphasis added for amendment).

> Such materials are distributed *or such activities are conducted* by volunteers and not by commercial or for-profit operations. For the purposes of this paragraph, payments by the party organization for travel and subsistence or customary token payments to volunteers do not remove such individuals from the volunteer category.[63]

The FEC should adopt these changes. Two statutory provisions combine here to give the FEC broad discretion in granting the amendment. First, 52 U.S.C. § 30101(20)(B)(iv) excludes from regulation as Federal election activity "the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office." Second, 52 U.S.C. § 30101(8)(B)(i) specifically excludes "the value of services provided without compensation by any individual who volunteers on behalf of a candidate" as a contribution.

The proposed amendment would give better effect to the statutory requirement concerning volunteer services. Furthermore, in thus protecting volunteer activity, the Commission would meet its "obligation to attempt to avoid unnecessarily infringing on First Amendment interests" while establishing rules that fulfill the statutory goals and comport with the APA.[64] Finally, given that § 100.87 already has a provision limiting the scope of the exemption—by rendering it inapplicable to general public communications or political advertising—the proposed amendment will not create any of the loopholes that concerned the *Shays IV* court. Accordingly, the FEC should grant the amendment.

To more accurately reflect the content of the amended subsection, the title of 11 C.F.R. § 100.87(d) should be amended to read "Volunteer activities, including distribution of campaign materials," rather than amending it to read "Distribution of materials and other activities by volunteers."

3. Voter registration and get-out-the-vote activity

1. The Resolution proposes amendments to two provisions that currently exempt exhortations to vote incidental to other communications. That is, the provisions narrow the circumstances under which incidental activity is regulated as Federal election activity. Specifically, it would amend the provision on voter registration activity at 11 C.F.R. § 100.24(a)(2)(ii) as follows:

> "Activity is not voter registration activity ~~solely because~~ <u>if</u> it ~~includes a brief exhortation to register to vote, so long as the exhortation~~ is incidental to a communication, activity, or event."[65]

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[63] *Id*. (emphasis added for amendment).

[64] *Shays IV*, 528 F.3d at 925 (internal quotation marks omitted); *see also id*. at 926.

[65] Pet., Ex. B, Resolution at 3.

Similarly, it would amend the provision on get-out-the-vote activity at 11 C.F.R. § 100.24(a)(3)(ii) as follows:

> "Activity is not get-out-the-vote activity ~~solely because~~ if it ~~includes a brief exhortation to vote, so long as the exhortation~~ is incidental to a communication, activity, or event."[66]

The Commission should grant these amendments. The *Shays IV* court stated that the Commission should be able to craft definitions that exempt routine, incidental exhortations to vote.[67]

2. The Resolution proposes that the Commission amend the voter registration and get-out-the-vote provisions by creating a subsection (C) at both 11 C.F.R. § 100.24(a)(2)(ii) and (3)(ii), adding a third example of activity that is neither voter registration nor get-out-the-vote activity. The new subsection (C) would state:

> A mailer or phone call urges the election of one or more state or local candidates and discusses the merits of the state or local candidacy, does not mention a federal candidate, and in connection with the state or local candidate message informs the recipient "You should vote on November 4 at the Washington Middle School between the hours of 8 am and 6 pm."[68]

The FEC should add this example to both 11 C.F.R. § 100.24(a)(2)(ii) and (3)(ii). This example is precisely the type of routine, incidental activity that the *Shays IV* court said should be exempted.[69]

3. The Resolution proposes that the Commission remove the phrase "Federal election activity" wherever it has been added to the statutory qualifier— "in connection with a Federal election"—in employee payment regulations, including 11 C.F.R. §§ 106.7(c)(1), 106.7(d)(i) and (ii), and 300.33(d)(1) and (2). The Resolution notes that this amendment is necessary to make the regulations conform with 52 U.S.C. § 30101(20)(A)(iv) and 11 C.F.R. §§ 106.7(e)(2) and l00.24(b)(4).

In accordance with the discussion above, the Commission should make these amendments.

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[66] *Id*.

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

[68] Pet., Ex. B, Resolution at 3 (emphasis omitted).

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

Thank you for considering these comments. The Center looks forward to working with the Commission to ensure the continued viability of state and local parties, consistent with the Constitution and governing statutes. Should the Commission choose to hold a public meeting, the Center requests the opportunity to provide testimony through a representative.

Respectfully Submitted,

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