

**Testimony of James Bopp, Jr.**  
**Before the House Administration Committee Regarding**  
**Constitutional Issues Raised by Recent Campaign Finance Legislation**  
**June 14, 2001<sup>1</sup>**

Thank you for the opportunity to testify regarding constitutional issues raised by recent campaign finance legislation. My testimony today will focus on the effect on citizen groups if current campaign finance “reform” bills – such as McCain-Feingold (S. 27) and Shays-Meehan (H.R. 380) – were enacted into law.

On June 12, I also testified on constitutional problems posed by these bills before the Subcommittee on the Constitution of the House Committee on the Judiciary, and that testimony focused on the effect of such legislation on political parties. Members of this Subcommittee are respectfully referred to my June 14 testimony for that analysis.

I have appended (as *Appendix B*) to this testimony my 37-page analysis of McCain-Feingold, entitled “*McCain-Feingold*”: *Analysis of S. 27 as Passed by the Senate* (hereinafter “*McCain-Feingold Analysis*”; available online at <[www.jamesmadisoncenter.org](http://www.jamesmadisoncenter.org)>, where the present analysis will also be posted). It raises numerous constitutional and practical issues that are directly transferable to Shays-Meehan that will not be repeated herein. The *McCain-Feingold Analysis* has several appendices listing court opinions recognizing the constitutional rights relevant to the present testimony. The analysis makes the point that such forms of campaign finance “reform” would have the effect of denying the average person an effective voice in the public forum because in order for average individuals to be heard on vital issues they must associate in issue advocacy groups and pool resources to amplify their voices.

I am a practicing attorney with the law firm of Bopp, Coleson & Bostrom in Terre Haute, Indiana. Since 1980, a significant portion of my law practice has involved the representation of non-profit corporations – including the National Right to Life Committee and the Christian Coalition – and political action committees regarding compliance with the Federal Election Campaign Act (FECA). I have also represented several state political party committees, including the Vermont and Michigan Republican Parties, in both state and federal courts, including successfully challenging unconstitutional state election laws on their behalf.

I am also the General Counsel for the James Madison Center for Free Speech (a corporation recognized by the Internal Revenue Service under 501(c)(3) of the Internal Revenue Code), which advocates and promotes free speech and association rights in the election law context through litigation, legislative analysis and testimony, comments on proposed rulemaking by the Federal Election Commission, and publishing scholarly and popular articles.

In these capacities, I have represented parties in numerous FEC investigations and enforcement actions, as well as in pre-enforcement suits against the FEC that resulted in the

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<sup>1</sup>The witness states, in compliance with the House rule requiring disclosure of grants or contracts relevant to a witness’ testimony received in the current or two preceding fiscal years by the witness or any entity represented by the witness, that no such grants or contracts exist.

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striking down of five separate FEC regulations and section 441b of the FECA for violating the First Amendment. I have won eight cases against the FEC, without sustaining any losses. In addition, I have represented numerous plaintiffs in successful law suits challenging state election statutes and regulations.<sup>2</sup>

Because of my developed expertise in federal election law, I have provided testimony on numerous occasions before federal and state legislative committees on proposed election legislation and before the FEC on proposed regulations. Since 1996, I have served as the Chairman of the Election Law Subcommittee, Free Speech & Election Law Practice Group, The Federalist Society for Law & Public Policy Studies.

A summary of my resume is attached as *Appendix A*, and a full version is in my June 12 testimony before the Subcommittee on the Constitution of the House Committee on the Judiciary on these same issues and on the James Madison Center website at <[www.jamesmadisoncenter.org](http://www.jamesmadisoncenter.org)>.

### Introduction

In general, Shays-Meehan would severely restrict the ability of citizen groups to communicate with the public regarding the positions and voting records of public office candidates and incumbents – or even upcoming votes in Congress.

Shays-Meehan would impose a year-round prohibition on unions and corporations (including citizen groups) from paying for public communications that an FEC regulator might consider “for the purpose of influencing a Federal election,” if that communication is pursuant to

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<sup>2</sup>In addition to dozens of successful federal district court decisions, I have been privileged to represent numerous plaintiffs in their successful efforts to vindicate their constitutional rights to free speech in the election context, which resulted in reported appellate decisions by the United States Courts of Appeals for the 1st, 2nd, 4th, 7th, 8th, 9th, 10th and 11th circuits. See *Florida Right to Life Committee v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963 (8th Cir. 1999); *North Carolina Right To Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *California ProLife Council v. Scully*, 164 F.3d 1184 (9th Cir. 1999); *Brownsburg Area Patrons Against Change v. Baldwin*, 137 F.3d 503 (1997); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *Minnesota Concerned Citizens for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997); *Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D. Me. 1995, *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *New Hampshire Right to Life v. Gardner*, 99 F.3d 8 (1st Cir. 1996); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991).

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any “general or particular understanding with a candidate,”<sup>3</sup> or if the citizen group has any of several broad categories of direct, indirect, presumed, or actual links to a candidate.<sup>4</sup> These prohibitions apply “regardless of whether the . . . communication . . . is express advocacy.” (§§ 201(c), 206.)

Even if a group seeks to avoid “coordination” by avoiding virtually all two-way conversation with their congressmen (or other candidates), the organization must avoid issuing communications that comment favorably or critically on a candidate year round because to the broad definition of “express advocacy.” (§ 201.)

Avoiding such “coordination” or “express advocacy” is even insufficient in the 60-day blackout period before elections, during which even mentioning a candidate’s name would be deemed express advocacy of the election or defeat of a clearly identified candidate and therefore forbidden to corporations and labor unions. (§ 201.)

Shays-Meehan would only permit such forms of speech to PACs, which would seriously restrict the rights of citizen groups wanting to engage in issue advocacy.

Shays-Meehan purports to make an exception for voting records and voter guides, but the exception would deprive citizen groups of their current ability to express a viewpoint on the issues being discussed, e.g., by making “correct” answers all pluses and “incorrect” answers all minuses. The sort of voter guides typically done by citizen groups would be banned under this alleged “exception.” (§ 201.)

The restrictions of Shays-Meehan would apply even to communications from citizen groups to the public about coming critical votes in Congress.

These general observations are developed more fully below, as is the constitutional standard against which they are measured and found wanting.

### I. The Constitutional Standard<sup>5</sup>

The First Amendment to the U.S. Constitution protects the right of nonprofit, corporate citizen groups to engage in issue advocacy. The United States Supreme Court has repeatedly refused to allow campaign finance regulations to be applied beyond the narrow scope of “communications that expressly advocate the election or defeat of a clearly identified candidate.”

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<sup>3</sup>An example would be an understanding that an organization would publicize which candidates sign a “pledge” form on a certain bill.

<sup>4</sup>“Candidate” includes all federal incumbents (unless they have announced retirement) from the day after election (i.e., for six years for senators).

<sup>5</sup>A fuller discussion of the constitutional standard is found in the attached *McCain-Feingold Analysis*.

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*Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *FEC v. Massachusetts Citizens For Life*, 479 U.S.238, 259 (1986). Such a bright line is necessary in order to prevent vague or overbroad restrictions of core political speech. *Buckley*, 424 U.S. at 43, 80. This bright line distinction between express advocacy, which may be regulated, and issue advocacy, which may not, has been followed by a host of lower court decisions which have struck down numerous attempts by federal or state governments to regulate issue advocacy. See *Citizens For Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Lamar v. Florida Right to Life, Inc.*, 238 F.3d 1288 (11th Cir. 2001); *Vermont Right To Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *North Carolina Right To Life, Inc. v. Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 (7th Cir. 1998); *Virginia Soc'y For Human Life, Inc. v. Caldwell*, 152 F. 3d 268, 270 (4th Cir. 1998); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*).<sup>6</sup>

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<sup>6</sup>See also *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996); *Richey v. Tyson*, 120 F. Supp.2d 1298, 1309 (S.D. Ala. 2000); *North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp.2d 498 (E.D. N.C. 2000); *Virginia Society for Human Life v. Federal Election Commission*, 83 F. Supp.2d 668 (E.D. Va. 2000); *Federal Election Commission v. The Christian Coalition*, 52 F. Supp.2d 45, 62 (D.D.C. 1999); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928 (D. Kan. 1999); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp.2d 740 (E.D. Mich. 1998) (same); *Right To Life of Dutchess County, Inc. v. FEC*, 6 F. Supp.2d 248 (S.D. N.Y. 1998); *Clifton v. FEC*, 927 F. Supp. 493, 496 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Survival Educ. Fund, Inc.*, 1994 WL 9658, at \*3 (S.D. N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2309 (1996); *West Virginians For Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D. W.Va. 1996); *FEC v. NOW*, 713 F. Supp. 428 (1989); *FEC v. AFSCME*, 471 F. Supp. 315, 317 (D. D.C. 1979); *The League of Women Voters of Colorado v. Davidson*, 2001 Colo. App. LEXIS 656 (2001); *Osterberg v. Peca*, 12 S.W.3d 31, 51-65 (Tex. 2000); *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808, 814-829 (Wash. 2000); *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 614 (Alaska 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999); *Elections Bd. v. Wisconsin Mfr. & Commerce*, 597 N.W.2d 721, 737 (Wisc. 1999); *Doe v. Mortham*, 708 So.2d 929, 932 (Fla. 1998); *Virginia Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814 (Va. 1998);

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The constitutional protection for advocating issues extends to advising the public about the positions of candidates on the issues and the merits of those positions. Issue advocacy involving discussion of candidate positions on issues at election time is not some deceptive “loophole” that citizen groups are exploiting and needs to be closed. Rather, it is core First Amendment speech. It is our democratic Republic working as it is supposed to work, with the marketplace of ideas busy as always. To be for the right to free expression is to be for strong protection of robust issue advocacy right in the middle of election campaigns.

The Supreme Court in *Buckley* expressly stated that citizen groups could employ issue advocacy as much as desired to promote candidates:

So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want *to promote the candidate and his views*. [emphasis added]

To protect issue advocacy, the High Court in *Buckley* developed the bright-line “express advocacy” test, which held that a citizen group could safely discuss candidate’s positions on issues and the merits of those issues so long as the nonprofit corporation avoided “explicit words” “expressly advocating the election or defeat of a clearly identified candidate for public office.” Express advocacy is based on the actual words used in the communication, not on the basis of third party judgment regarding motivation or intent, e.g., by the FEC after the fact, or how the communication might be understood by recipients. The Court insisted that a bright-line test is essential to provide “security for free discussion” so that a speaker need not “hedge and trim.”

## II. Shays-Meehan Provisions Affecting Citizen Groups

### A. Year-Round Restrictions & 60-Day Blackouts

Current FECA law prohibits corporations and unions from spending funds for express advocacy (with exceptions not discussed here). As noted, the Supreme Court has defined express advocacy in terms of explicit words expressly advocating the election or defeat of a clearly identified federal candidate. This was dictated, the Court said, by the First Amendment and is, therefore, not open to redefinition. The express advocacy bright line was drawn precisely at the border between issue advocacy, which may not be regulated, and express advocacy, which is subject to some governmental regulation.

Nonetheless, Shays-Meehan attempts to move that constitutionally-dictated border line by expanding the reach of “express advocacy.” Section 201 expands “express advocacy” to include “words that in context can have no reasonable meaning other than to advocate the

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<sup>6</sup>(...continued)

*State v. Proto*, 526 A.2d 1297, 1310-11 (Conn. 1987); *Klepper v. Christian Coalition*, 259 A.D.2d 926 (N.Y. App. Div. 1999).

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election or defeat of one or more clearly identified candidates” or “expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election.”

These incursions into protected issue advocacy territory would sweep in virtually any sort of commentary on the voting records or positions on issues of politicians. Disgruntled candidates would complain to the FEC if they think commentary is negative, and if it is positive their opponents would file the complaint. On contentious social issues, value judgments on a candidate’s view would be difficult to state without triggering a possible complaint under Shays-Meehan’s standard of “unmistakable and unambiguous support for or opposition to” a candidate.

These year-round restrictions are supplemented by a 60-day period before primary and general elections when corporations and unions are banned from even “referring to one or more clearly identified candidates in a paid advertisement that is transmitted through radio or television.” (§ 201.)

Measuring these proposed restrictions against the constitutional standard reveals their constitutional shortcomings.

It cannot be imagined that the First Amendment that requires the express advocacy bright line to protect issue advocacy will countenance a law that proscribes the mere mention of a politician’s name in a broadcast advertisement 60 days before an election. Against the powerful First Amendment free expression right, supporters of Shays-Meehan would need to counterbalance a powerful, “compelling” state interest for the restriction to stand. A federal court will expend little ink before writing the words “unconstitutional” and “enjoined” as the epitaph for a provision that would even proscribe a communication that says: “The Senate will vote next week on bill X. Please call Senator Y and urge him to support the bill.”

While slightly less blatant, the definition of express advocacy that speaks of “unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited references to external events, such as proximity to an election” clearly goes beyond the Supreme Courts definition that required examination of the words of the communication itself, without outside references, to see if there are explicit words that expressly advocate the election or defeat of a clearly identified candidate. The key terms of Shays-Meehan, such as “unmistakable and unambiguous support,” “anything of value,” etc. are terms of subjective judgment, and therefore beyond the scope of the objective criteria that the Supreme Court authorized in this crucial First Amendment area. With the new mandatory prison sentences that Shays-Meehan would authorize, the language is too ambiguous and too far into the protected territory of issue advocacy for the Supreme Court to sustain.

Similar name-or-likeness blackout periods have already been found unconstitutional in the federal courts. For example, in Michigan, the Secretary of State promulgated a rule that banned corporate and labor union communications made within 45 days of an election that merely contained the “name or likeness of a candidate.” Two traditional adversaries, Right To

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Life of Michigan and Planned Parenthood, challenged the rule in separate federal courts and had the rule declared unconstitutional.<sup>7</sup> In *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2d Cir. 2000), the Second Circuit struck down a “notice of expenditure” statute that defined “mass media activities” as “includ[ing] the name or likeness of a candidate for office” and required reporting if such occurred “within 30 days of a primary or general election.” *Id.* at 380. In *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), the Fourth Circuit also struck down a statute requiring reporting of expenditures for communications “if the printed material or advertisement names a candidate. *Id.* at 159.

### B. The Voter Guide “Exception”

Shays-Meehan provides an “exception” to the year-round ban on commentary on politicians by corporations or unions for publication of voter guides and voting records. However, such score cards typically reflect a point of view on the issues scored – through the way they are characterized as positive or negative and through explicit commentary.

All this would now be forbidden by Shays-Meehan. Under the bill, such a scorecard would be an illegal corporate campaign contribution year-round unless it meets all the following conditions, i.e., it:

- [1.] presents information solely about the voting record or position on a campaign issue of one or more candidates (including any statement by the sponsor of the voting record or voting guide of its agreement or disagreement with the record or position of a candidate), so long the voting record or voting guide when taken as a whole does not express unmistakable and unambiguous support for or opposition to one or more clearly identified candidates;
- [2.] is not coordinated activity . . . [and questions to candidates may only be in writing]; and
- [3.] does not contain [express advocacy] or words that in context have no reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates.

Measuring these restrictions on issue advocacy against the constitutional standard, it again becomes clear that Shays-Meehan has gone astray. The words regulated are not explicit words that expressly advocate the election or defeat of a clearly identified candidate. And they would be subject to rulemaking by the FEC, which has often demonstrated that it believes that it can sense such an “urge,” even when it is not expressed in explicit words. The presumption of coordination that is obvious in the second point, is based on an unconstitutional concept of

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<sup>7</sup>*Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998).

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coordination that is more fully discussed *infra*. Therefore, the restriction is unconstitutional and the “exception” is a meaningless gesture, pretending to offer what it withholds.

However, even if a communication meets all of the above-stated government-imposed speech specifications, it would still be forbidden if it is deemed to be “coordinated” with a candidate or party, a term that is defined in the bill with broad expansiveness.

The specific conditions set forth in the definition of “express advocacy” and the voter guide “exception” track past attempts by the FEC to regulate commentary on politicians that have been repeatedly invalidated under the First Amendment.

For example, the “unambiguous support” definition of “express advocacy” is similar to a 1995 definition<sup>8</sup> declared unconstitutional by the First Circuit in *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997). It is also similar to the FEC’s “circumstances” definition emphatically rejected by the Fourth Circuit in *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). And its controls of speech content and tone in voter guides are similar to FEC regulations declared unconstitutional by the First Circuit in *FEC v. Clifton*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).<sup>9</sup>

### **B. Allowing Only PACs to Comment**

Shays-Meehan would ban expenditures by citizen groups to comment on incumbents or candidates except under a PAC, with all the attendant compliance burdens. This would silence many small citizen groups that lack the resources consult specialist lawyers and to hire accountants and compliance staff to meet the complex and burdensome compliance requirements.

In *FEC v. Massachusetts Citizens for Life*, 479 U.S.238, the Supreme Court held that it was unconstitutional to enforce the FECA to prohibit non-profit, issue-oriented corporations from making expenditures even for *express advocacy*, or to require that it be done through a PAC. The Court described the speech-suppressing effect of such a policy as “substantial” and enumerated the burdens of complex compliance requirements on small, simple citizen groups. The Court held that there was no justification for such burdens because such groups posed no danger of corruption, the only possible justification for such a law. If there is no justification for limiting the *express advocacy* of such citizen groups, there can be no justification to so limit their *issue advocacy* swept into express advocacy by a flawed, overreaching definition.

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<sup>8</sup>“[W]hen taken as a whole and with limited reference to external events, such as proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.”

<sup>9</sup>For a detailed discussion of these and other cases, see James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 University of West Los Angeles Law Review 1 (1997).

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Even those groups with the resources and sophistication to operate a PAC would yet be severely limited because of the restrictions on PACs, which Shays-Meehan would further tighten. For example, no individual may contribute more than \$5,000 per year to a particular PAC, and PACs connected to a parent citizen group may solicit PAC contributions only from group members. The name of all donors over \$200 must be reported (the bill would reduce this to \$50). Thus, Shays-Meehan would sharply reduce the amount of commentary about incumbent politicians and candidates, which is obviously the unconstitutional goal.

### C. “Coordinated Activity” Trap

Shays-Meehan also would suppress issue advocacy by trying to make much of it a forbidden corporate contribution. It does this by (1) ignoring the express advocacy line and (2) expanding “coordination with a candidate.”

#### 1. Ignoring the Express Advocacy Line

As described earlier in this testimony, *supra* at I, government may only regulate express advocacy, not issue advocacy. The bright-line boundary between the two is the express advocacy test, which the United States Supreme Court has established and reaffirmed as being mandated by the First Amendment to the U.S. Constitution. The express advocacy line is required, the Court said, to prevent unconstitutional vagueness and overbreadth in the super-protected zone of free speech about public issues.

The federal courts have recognized the threat posed by vague and overreaching efforts to classify political communications as “coordinated” expenditures subject to regulation as contributions, and have therefore allowed such regulation only in the presence of substantial coordination and prearrangement, even where the communication itself contained express advocacy.<sup>10</sup> The FEC’s efforts to regulate issue advocacy as coordinated expenditures have twice been struck down. *See Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1454-55; *Clifton*, 927 F. Supp. at 496-500. The District of Colorado rejected the FEC’s attempts to extend its coordination regulations into the realm of issue advocacy, finding that “the fact that [the coordination provision] implicates first amendment freedoms argues for adoption of the more

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<sup>10</sup>*See, e.g., Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617-18 (1996); *NCPAC*, 470 U.S. at 498; *Iowa Right To Life Comm., Inc. v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999); *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997); *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490-91 (D. Vt. 2000); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999); *FEC v. Public Citizen*, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999); *Republican Party of Minn. v. Pauly*, 63 F. Supp. 2d 1008, 1015 (D. Minn. 1999); *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff’d on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993), *rev’d on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 518 U.S. 604 (1996).

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narrowly defined “express advocacy” interpretation in order to minimize intrusions.” *Colorado Republican*, 839 F.Supp. at 1454. Therefore, the court concluded “that ‘express advocacy’ is required in order for a coordinated expenditure to be ‘in connection with’ the general election campaign.” *Id.* at 1455. The District of Maine has also blocked efforts to treat issue advocacy as coordinated, holding that, “as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate.” *Clifton*, 927 F. Supp. at 500.

Even the lone court to allow for some theoretical regulation of coordinated issue advocacy still allowed only a slight reach beyond the express advocacy test, theorizing that the FEC might be allowed to regulate payments for advertisements so close to the express advocacy threshold that they “would be every bit as beneficial to the candidate as a cash contribution of equal magnitude,” such as “gauzy candidate profiles prepared for television broadcast or use at a national political convention” or “coordinated attack advertisements, through which a candidate could spread a negative message about her opponent.” *Christian Coalition*, 52 F. Supp. 2d at 126. Such a standard would fall short of the advocacy of legislative action at issue here.

In contrast, the FEC was upheld in its earlier recognition that the express advocacy requirement was vital to its regulatory scheme, and that its regulatory power therefore did not reach corporate donations for a non-political picnic sponsored by a committee organized by a Congressman. *See Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). There, the FEC followed a clear and objective test “for distinguishing between political and non-political congressional events”:

An event is non-political if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event.

*Orloski*, 795 F.2d at 160. Although the District of Columbia Circuit stopped short of holding the FEC’s express advocacy test to be constitutionally required in the context of coordinated expenditures, it did uphold the test as “logical, reasonable, and consistent with the overall statutory framework.” *Id.* at 167. Such description cannot be applied to the far reaching and standardless approach which Shays-Meehan proposes.

- a. **The First Amendment demands that any regulation of political speech must be precisely drawn without ambiguity as to its scope.**

Where government seeks to regulate political speech “so closely touching our most precious freedoms,’ precision of regulation must be the touchstone.” *Iowa Right to Life*, 187 F.3d at 968 quoting *Buckley*, 424 U.S. at 41. A lack of specificity poses a severe threat to the exercise

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of First Amendment rights. As the Supreme Court explained, such vague laws threaten to “trap the innocent by not providing fair warning,” they give reign to “arbitrary and discriminatory application,” and they force citizens to “steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Buckley*, 424 U.S. at 41 n. 48 quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Hence, “[t]o avoid uncertainty, and therefore invalidation of a regulation of political speech, the Supreme Court in *Buckley*, established a bright line test.” *Iowa Right to Life*, 187 F.3d at 969. This test limits regulation to communications which “contain express language of advocacy with an exhortation to elect or defeat a candidate.” *Id.* at 969-70.

This necessity for a bright line is ignored by Shays-Meehan. Instead, the bill would reach “anything of value” “in connection with a Federal candidate’s election” “regardless of whether the value provided is in the form of a communication which expressly advocates a vote for or against a candidate.” (§ 206.) While this regulation by its own terms extends well beyond the realm of express advocacy, its outer boundaries cannot be discerned with any degree of certainty.

Such failure to limit the scope to express advocacy cannot be tolerated by the First Amendment. As the Eighth Circuit explained in striking an Iowa law that did provide some guidance, “absent the bright-line limitation in *Buckley*, ‘the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled.’” *Iowa Right to Life*, 187 F.3d at 970 quoting *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir 1997).

That this speech is “coordinated” with a candidate does nothing to alleviate its vagueness. A blurring of the lines between express advocacy and issue advocacy poses the identical threats of uncertain prohibitions and selective enforcement regardless of whether the communications are coordinated. As the Supreme Court has explained,

For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

*Buckley*, 424 U.S. at 42. Discussions of issues and candidates do not cease to overlap simply because the speaker coordinates its message with a politician. In fact, the same intimate link between candidates and issues that necessitates a bright regulatory line also makes coordination with candidates an invaluable aid to the effective promotion of issues.

Indeed, the uncertainty posed by vague regulation may actually pose a greater threat to free speech and association in this context than in the uncoordinated contexts analyzed in *Buckley* and *Massachusetts Citizens* because the burdens posed by investigation are likely to be

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substantially greater. To determine a violation under Shays-Meehan, the FEC would have to evaluate not merely the communication itself, but also whether it had been coordinated with the identified candidate. Exploring and establishing whether or not coordination actually occurred may necessitate an incredibly burdensome and intrusive investigation into the affairs of both the organization and the candidate. Such a burdensome investigation would, in and of itself, strip the organization of its First Amendment rights.

Unlike other regulatory agencies, the “subject matter which the FEC oversees . . . relates to the behavior of individuals and groups only insofar as they act, speak, and associate for political purposes.” *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981). Accordingly, the scope of the FEC’s investigatory powers is more limited than other agencies. *Id.* This is so since the investigative process itself “tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.” *Sweezy v. New Hampshire*, 345 U.S. 234, 245 (1957).

If an investigation targets a group’s lawful issue advocacy, “the First Amendment may be invoked against infringement of the protected freedoms.” *Watkins and United States*, 354 U.S. 178, 196 (1957). This is so, since “[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of government interference.” *Id.*; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Such disclosures “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley*, 424 U.S. at 64.

That an investigation into whether issue advocacy has been coordinated can impose a severe burden upon speakers engaging in constitutionally protected activity is demonstrated by the example of the FEC’s attempted enforcement of such provisions against the Christian Coalition. This attempt led to “lengthy” discovery and “voluminous” facts which were established by testimony and documents from numerous individuals including a former President of the United States. *Christian Coalition*, 52 F. Supp.2d at 14, 23, 94 n.56.

### **b. Issue advocacy is protected from laws that may permissibly govern express advocacy.**

Besides serving as a bulwark against vagueness, the express advocacy test is also necessary to prevent overbreadth. Because Shays-Meehan infringes on core First Amendment rights, it can be justified only to the extent necessitated by a compelling governmental interest. Where a law extends beyond the communications that give rise to the compelling interest, it is overbroad.

In order to prevent overbreadth, the Supreme Court has held that government only has an interest in regulating speech that “expressly advocate[] the election or defeat of a clearly identified candidate. *Massachusetts Citizens*, 479 U.S. at 248-49; *Buckley*, 424 U.S. at 80.

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The express advocacy test marks the effective boundary of these interests for coordinated expenditures just as it did for the uncoordinated expenditures at issue in *Buckley* and *Massachusetts Citizens*. With regards to the corporate ban of § 441b, the interest in banning corporate contributions is precisely the same as that in banning corporate expenditures. In either case the concern is that the corporation may skew the political process by advocating the election or defeat of candidates through the use of large quantities of funds obtained not from contributors interested in the corporation's political agenda, but from investors interested in making money through the corporate form. The scope of this interest is identical regardless of whether the money is used to advocate independently or in coordination with a candidate. In either case, an advertisement which expressly advocates the candidate's election (or his opponent's defeat) falls within the scope of permissible regulation, but one which advocates political issues does not.

With regard to the contribution limits of § 441a, the permissible breadth of regulation is actually narrower than for the disclosure provisions for which the express advocacy test was created. Requiring disclosure of express advocacy expenditures is permissible because it "lessens the risk that individuals will spend money to support a candidate as a quid pro quo for special treatment." *McIntyre*, 514 U.S. at 356. This is an offshoot of the anti-corruption justification for contribution limits, but the less intrusive nature of disclosure allows it to be applied more broadly. In contrast, the Supreme Court has held that monetary limits on independent expenditures violate the constitution, even after the limit was construed to encompass only express advocacy. *Buckley*, 424 U.S. at 43-48. Hence, the severity of the burden posed by contribution limits allows their application only to a subset of the broader category of express advocacy which can be subjected to disclosure provisions.

### **c. Expenditures are given greater constitutional protection than contributions.**

The Supreme Court has also emphasized that limits on expenditures impose a far greater burden on speech than do limits on contributions. As it explained, "[E]xpenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," whereas contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 19-20 (footnote omitted). This is because a "contribution serves as a general expression of support for the candidate" which "does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. In contrast, restrictions on what can be spent on communications "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. It is because of this distinction that contributions are subject to limits which cannot be imposed upon expenditures. *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 903-04 (2000).

Here, although Shays-Meehan seeks to treat the proposed communications as contributions, the impact of § 441a's limits would be that of a spending limit rather than a contribution

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limit. As the Supreme Court has noted, “coordinated expenditures do share some of the constitutionally relevant features of independent expenditures.” *Colorado Republican Federal Campaign Committee v. F.E.C.*, 518 U.S. 604, 624 (1996). Hence, the scope of permissible regulation cannot logically be any greater for such “coordinated expenditures” than they would be for true contributions of money or non-communicative donations such as food or office space.

In sum, only express advocacy may become a contribution by coordination. Shays-Meehan violates the constitution by attempting to make issue advocacy capable of becoming a coordinated contribution. There is also an extremely practical reason for avoiding what Shays-Meehan attempts – preventing every complaint to the FEC from becoming a burdensome investigation to determine whether coordination has occurred. If even issue advocacy may be a coordinated expenditure, then every citizen group may be investigated for everything. The investigation itself, as already noted *supra* at II.C.1.a, can become a punishing burden.

### 2. Expanding “Coordination With a Candidate”

Shays-Meehan also expands the concept of “coordination with a candidate.” Section 206 of the bill defines “coordinated activity” as

anything of value provided by a person in connection with a Federal candidate’s election who is (or at any time during the same election cycle has been) acting in coordination with that candidate (or an agent of that candidate) on any campaign activity in connection with a Federal election in which such candidate seeks nomination or election to Federal office (*regardless of whether the value provided is in the form of a communication which [sic] expressly advocates a vote for or against any candidate*), and includes any of the following . . . .” [emphasis added]

The list that follows includes (1) “[a] payment made in cooperation . . . with, at the request of suggestion of, or pursuant to a general or particular understanding with a candidate.”

Current law provides that “coordination” with a “candidate” requires that the citizen group have an actual prior communication about a specific expenditure for a specific project that results in the expenditure that results in the expenditure being under the control of a candidate or being based on information provided by the candidate about the candidates’s plans or needs.

The new definition above is vastly expansive and places citizen groups that lobby and incumbent politicians at risk. For example, the mere discussion with a member of congress about her “message” (e.g., a specific bill introduced by that member of congress) any time during his or her two year term of office would create coordination. Thereafter, the citizen group would be forbidden at any time in any manner to make any public communication that would be “of value” to the lawmaker because it would be an illegal corporate campaign contribution. For example, literature promoting a congressman’s bill in his home state could thus become a contribution.

Because judicial precedent is clearly to the contrary, these provision will not withstand judicial scrutiny.

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### D. Presumed Coordination from Shared “Professionals”

Section 206 of Shays-Meehan further creates a presumption of coordination (converting issue advocacy to forbidden contributions) where

the person making the payment retains the professional services [defined as “polling, media advice, fundraising, campaign research or direct mail”] of any person that has provided or is providing those services in the same election cycle to a candidate (including services provided through a political committee of the candidate’s political party) in connection with the candidate’s pursuit of nomination for election, or election, to Federal office, . . . and the person retained is retained to work on activities relating to that candidate’s campaign.

This provision amounts to an unconstitutional penalty on free speech. An incorporated citizen group cannot be forced to forfeit its right to associate freely with legitimate providers of professional services in order to exercise its freedom of speech. Moreover, a vendor at any point during an election cycle could unilaterally decide to sell election-related services to a candidate thereby cancelling the free speech rights of all his PAC clients regarding that candidate. In some areas, there may be only one or two vendors of a specific service that a PAC requires to make its independent expenditure, and this bill could consequently eliminate the ability to make PAC expenditures.

The First Amendment permits spending limits to be applied to an express advocacy expenditure only if that expenditure actually has been discussed between the candidate and the person or citizen group. Coordination may not be presumed on the basis of some relationship. In *Colorado Republican Federal Campaign Committee v. FEC* (1996), the Supreme Court emphatically rejected the FEC’s position that an political party expenditure may be presumed coordinated with the party’s federal candidate. The Court declared the proper test to be whether the specific expenditure was in fact the subject of communication between the those making the expenditure and the candidate. (“We therefore treat the expenditure, for constitutional purposes, as an ‘independent’ expenditure, not an indirect campaign contribution” because, the Court said, “the summary judgment record shows no actual coordination as a matter of fact.”)

If the constitution forbids applying such a coordination presumption between a party and its nominee, the same principle plainly applies in the present situation.

Appended as *Appendix C* is a chart entitled *Shays-Meehan Trip Wires*, showing the complexity that this bill would impose on citizen groups. It begins with issue-oriented speech that is then analyzed and sorted as to its content, the Shays-Meehan statutory test language and whether it is independent or coordinated. The result reveals whether the expenditure for the communication constitutes an independent expenditure, a contribution to a candidate, or non-political speech. Then, based on what entity has made the expenditure for the communication and whether it has complied with statutory and regulatory mandates, it may be determined whether the issue-oriented speech is allowed or prohibited.

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### **E. Congressional Member Endorsements**

Section 101 of Shays-Meehan would prohibit members of Congress from endorsing the fundraising efforts of citizen groups that use any part of the money for communications to the public by any medium at any time of the year that “promotes,” “supports,” “attacks,” or “opposes” any candidate. This would encompass many routine communications by a citizen group to promote pending legislation. Political party officials would also be prohibited from raising money for any 501(c)(3) (including charities), 501(c)(4), or 527 organizations.

### **F. Advance Notice Requirements**

Section 204 of Shays-Meehan requires that independent expenditures be reported as soon as any contract is signed for the communication, which could be weeks or months in advance of the dissemination of the communication to the public.

Common sense dictates rejection of a proposal that would make “expenditures” (when contracts or payments are made) into “independent expenditures” that require reporting.<sup>11</sup> Major public policy organizations routinely buy air time in advance of elections in key markets in order to have broadcast time available if the organization decides to make independent expenditures. Then the air time may not be used for strategy reasons (and contracts are no problem because broadcasters usually have ready markets for freed-up air time before elections). For example, the organization may decide that independent expenditures are needed more elsewhere in a different race that has just become more critical based on current polling data.

Another example is that of a planned independent expenditure on printed express advocacy pieces in support of U.S. Senate candidate John Ashcroft by the National Right to Life Committee’s. When Ashcroft’s opponent died, NRLC did not think it seemly to release the brochures and elected to spend its money on other races. In such situations, contracts and payments are made, but there is no communication, and it would be inaccurate and misleading to the public to have such “expenditures” reported as “independent expenditures.”

A further example, typical of major public policy organizations, is found in NRL PAC’s practice of arranging for telemarketing firms to make express advocacy phone calls into targeted areas at election time. The general agreement is made well in advance of the election, but the agreement is only for a set range of expenditures (low and high ends) and the rate per call. At this

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<sup>11</sup>Common sense has always told public policy organizations that a printed independent expenditure communication is reportable when it is posted and that broadcast express advocacy communications are reportable when put out on the air. That has been the uniform practice of all organizations in their reporting of independent expenditures to date under existing rules. The FEC is in the process of ill-advised rulemaking proposing to require independent expenditures to be reported when a contract is made for the communication. Notice 2001-6, “Independent Expenditure Reporting,” 66 Fed. Reg. 23628, May 9, 2001.

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point, the amount of money that will be available to spend is yet unknown, for it has not been raised yet. In what state or races the calls will be made is unknown; in fact it may be only decided on the day before the phone calling begins as last-minute polling indicates where there is a need. Thus, at the time of the agreement for telemarketing services, the total amount to be spent is yet unknown, as is the location of the calls. The idea of reporting when an agreement for services is made would simply be unworkable for telemarketing. These communications are properly “made” when the calling begins.

The same is true of print communications. Major organizations often purchase paper stock in large quantities long before elections. Some generally used materials, e.g., brochures, may also be printed in advance without any knowledge of where the materials will actually be mailed.

As may be seen, the proposal on when independent expenditures are “made” is simply unworkable in the real world of major public policy organizations. The present practice is in place because it is the only reasonable, workable one.

Incumbents, of course, would love the proposed legislation because it would provide advance opportunity to dissuade broadcasters and newspapers from carrying independent expenditure communications. Such things actually happen.

An example is the case of *National Right to Life PAC v. Friends for Bryan* (No. CV-S-88-865-PMP-(RJJ)), a 1988 case brought in state court by NRL PAC against Nevada Governor Richard Bryan’s U.S. Senatorial campaign committee for tortious interference with contractual relations. Lawyer Jeffrey Eskin had written intimidating letters on behalf of Friends for Bryan to radio and television stations that had contracted to carry independent expenditure communications for NRL PAC. As a result, stations refused to broadcast contracted advertisements, imposing the equivalent of a prior restraint on NRL PAC’s speech.

Some of the threatening correspondence that was admitted into evidence in that case is appended as *Appendix D* with items bearing their original exhibit numbers. Plaintiff’s Exhibit 5 is a fax letter sent to KOH News, accompanied by a copy of Eskin’s October 31, 1988, letter. Exhibit 6 is an identical letter (but for candidate name changes) of the same date from lawyer Robert Bauer (of the District of Columbia law firm Perkins Coie, counsel for the Senator Burdick Campaign Committee in North Dakota) targeted at broadcasters of NRL PAC express advocacy communications. Exhibit 7 is a letter that contains the same boilerplate language tailored to intimidate broadcasters from broadcasting NRL PAC ads in opposition to U.S. Senate-candidate Bob Kerrey, written by his campaign chairman in Nebraska. Exhibit 32 is the same letter as the Eskin letter sent with Exhibit 5 concerning NRL PAC ads, but on Bryan for U.S. Senate letterhead.

The source of this systematic campaign of intimidation is evident in Exhibit 33, an October 21, 1988, form letter prepared by Robert F. Bauer, Counsel to the Democratic Senatorial Campaign Committee, from which the other letters were obviously derived. This letter, obtained

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by legal discovery in this case, reveals a well-orchestrated intimidation effort of which the other letters were a part.

Governor Bryan's lawyer, Jeffrey L. Eskin, also sent threatening letters to stations concerning independent expenditure ads by other organizations. Exhibit 34 was an intimidation letter against broadcast independent expenditure ads by the American Medical Association PAC, and Exhibit 35 sought to prevent express advocacy communications by the Auto Dealers and Drivers for Free Trade PAC in the Bryan race.

This evidence demonstrates what is usually invisible to the public – a widespread practice of well-planned, systematic intimidation attempts against broadcasters to gain political advantage.

Shays-Meehan would provide increased time for such mischief, at the expense of First Amendment rights. If broadcasters are willing to cancel advertisements to which they have already committed and that are in process (as were NRL PACs) – even though it means they might suffer unwanted publicity for pulling ads in progress – how much easier will it be for intimidation to prevail with the extra time the bill would provide before broadcasting even begins. Candidates seeing reports of contracts would immediately demand to see copies of the ads for which the contract had been made, claiming the ads must be perused for libelous or inaccurate material (and, as noted above, the ad scripts might not even have been created yet). Even if there is only delay in ads being aired as a result of the opportunity for interference provided by the proposed rule, that would be a satisfactory result for the opposition.

As a result of the harassment that would likely arise from the advance reporting of contracts for independent expenditures, many broadcasters would likely be tempted simply not to accept express advocacy communications, thereby depriving advocacy organizations of their opportunity for free speech. The vital ability of Americans to participate in the political process would therefore be thwarted, to the detriment of the Republic.

### **G. Mandatory Prison**

Despite the added ambiguity imposed by Shays-Meehan and the coordination traps it creates, its creators have decided to impose a mandatory minimum one-year prison sentence for “knowing and willful” violations of any of the above restrictions that involve a “contribution” or “expenditure” of \$2,000 or more in a calendar year. This, coupled with the increasing complexity of the FECA, would cast an Alberta-clipper level of chill over constitutionally protected free speech about politicians, forcing many small citizen groups into silence and greatly encumbering the more sophisticated with the need to “hedge and trim,” as the United States Supreme Court described it in *Buckley*.

### **Conclusion**

Shays-Meehan would virtually destroy the ability of citizen groups to participate in our Republic, thereby trampling on freedom of speech and association with respect to the most vital

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issues of our day. Fortunately, the federal courts have shown greater solicitude for the Constitution and the workings of our Republic, along with less respect for the incumbent-protection urges of members of Congress, and may be relied upon to promptly bury such alleged “reform.” However, members of Congress have also taken an oath to uphold the Constitution. Passage of Shays-Meehan would be in derogation of that oath and duty.

**APPENDICES**

- A Summary of Resume of James Bopp, Jr.
- B *McCain-Feingold Analysis*
- C *Shays-Meehan Tripwires*
- D Intimidating Letters in Evidence in *National Right to Life PAC v. Friends for Bryan*
  - Plaintiff’s Exhibit 5
  - Plaintiff’s Exhibit 6
  - Plaintiff’s Exhibit 7
  - Plaintiff’s Exhibit 32
  - Plaintiff’s Exhibit 33
  - Plaintiff’s Exhibit 34
  - Plaintiff’s Exhibit 35