IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER SHAYS and MARTIN MEEHAN,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-CV-1984 (CKK)
FEDERAL ELECTION COMMISSION,	)	MOTION FOR SUMMARY JUDGMENT
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, the Federal Election Commission ("Commission") hereby moves this Court for summary judgment. A Memorandum of Points and Authorities, a Statement of Material Facts, and a proposed Order are filed herewith, pursuant to LCvR 7 and 56.1 (D.D.C.) and the Court's Scheduling Order dated January 7, 2004.

This motion is made on the grounds that plaintiffs lack standing and the Commission's regulations are not ripe for judicial review. Even if this suit were properly before the Court, plaintiffs cannot prevail on the merits because the Commission regulations at issue are not arbitrary or capricious.

Wherefore, the Commission respectfully moves that this Court grant this Motion for Summary Judgment, as outlined above and in the Memorandum that accompanies this Motion.

Respectfully submitted,

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February 27, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER SHAYS and MARTIN MEEHAN,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-1984 (CKK)
FEDERAL ELECTION COMMISSION,	)	
	)	FEC MEMORANDUM
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

This suit challenges regulations lawfully promulgated by the defendant Federal Election Commission ("Commission" or "FEC") pursuant to explicit Congressional direction to implement provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), which amended the Federal Election Campaign Act of 1971, 2 U.S.C. 431-55 (the "Act" or "FECA").

As demonstrated below, plaintiffs lack standing to bring their present claims because their speculation about the possible activities of unidentified third parties does not demonstrate an imminent harm to the plaintiffs from the Commission's regulations. Plaintiffs' abstract facial challenges to the regulations are not ripe for judicial review because plaintiffs do not claim that the regulations improperly restrict their own primary activity. In any event, the Commission regulations fall within the broad rulemaking discretion granted by Congress and easily satisfy the deferential standard of judicial review.

BACKGROUND

Plaintiffs Christopher Shays and Martin Meehan are Members of the United States House of Representatives who were the principal House sponsors of BCRA. First Amended Complaint ("FAC") ¶¶ 10-11. Both plaintiffs state that they intend to seek re-election to the House of Representatives in the 2004 elections. Id.

The defendant Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret and civilly enforce the Act. See 2 U.S.C. 437c(b)(1), 437d(a), (e) and 437g. BCRA, the most recent amendment to the Act, was adopted by Congress and signed into law in March 2002. The Act authorizes the Commission to "formulate policy with respect to" the Act, 2 U.S.C. 437c(b)(1), and to promulgate "such rules . . . as are necessary to carry out the provisions" of the Act. 2 U.S.C. 437d(a)(8). See also Buckley v. Valeo, 424 U.S. 1, 110-111 (1976). Moreover, BCRA sections 402 and 214 specifically direct the Commission to promulgate regulations to implement the new BCRA provisions under strict time limits. See also 2 U.S.C. 434(f)(3)(B)(iv).[1]

Following the March 2002 enactment of BCRA, the Commission issued notices of proposed rulemaking, solicited and received written comments, and heard oral testimony. Plaintiffs submitted comments jointly with the other principal congressional sponsors of BCRA during the rulemaking proceedings. The Commission issued final regulations implementing the soft money provisions of Title I of BCRA in June 2002 (67 Fed. Reg. 49064-132 (July 29, 2002), Attachment 1), the electioneering communications provisions of Title II of BCRA in October

[1] See BCRA § 402(c)(1) ("Commission shall promulgate regulations to carry out this Act and the amendments made by this Act that are under the Commission's jurisdiction not later than 270 days after the date of enactment of this Act"); BCRA § 402(c)(2) (requiring regulations to carry out Title I of BCRA within 90 days of enactment). See also BCRA § 214(b) and (c) (repealing prior regulations and requiring "new regulations on coordinated communications").

2002 (67 Fed. Reg. 65190-212 (Oct. 23, 2002), Attachment 2), and the coordination and independent expenditure provisions in December 2002 (68 Fed. Reg. 421-58 (Jan. 3, 2003), Attachment 3).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THEIR PRESENT CHALLENGES.

"Article III of the Constitution limits the 'judicial power' to the resolution of 'cases' and 'controversies.'" McConnell v. FEC, 124 S.Ct. 619, 707 (Dec. 10, 2003). "One element of the 'bedrock' case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." Id. To establish standing under Article III, the plaintiffs have the burden of demonstrating the "three requirements that constitute the 'irreducible constitutional minimum' of standing":

> First, a plaintiff must demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.' ... Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of -- the injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court." ... Third, a plaintiff must show the "'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

McConnell, 124 S.Ct. at 707 (citations omitted).

"[A]n 'injury in fact' [is an invasion of a legally protected interest that is] 'concrete,' 'distinct and palpable,' and [particularized as well as] 'actual or imminent.' McConnell, 124 S.Ct. at 707. Particularized means that "the injury must affect the plaintiff in a personal and individual way." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992). The injury cannot be merely a generalized grievance about the government that affects all citizens or derives from an interest in the proper enforcement of the law. FEC v. Akins, 524 U.S. 11, 23

(1998); Lujan, 504 U.S. at 573-74. Thus, courts "may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law." Freedom Republicans v. FEC, 13 F.3d 412, 415 (D.C. Cir. 1994), cert. denied, 513 U.S. 821 (1994).

"[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (citations omitted). Accord, Wertheimer v. FEC, 268 F.3d 1070, 1075 (D.C. Cir. 2001) ("[A]ppellants bear the burden of showing their standing"). A plaintiff "must allege in his pleading the facts essential to show jurisdiction," McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936), and "'the necessary factual predicate may not be gleaned from the briefs and arguments,'" FW/PBS, 493 U.S. at 235 (citation omitted). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" Steel Company v. Citizens for Better Environment, 523 U.S. 83, 94-95 (1998) (citation omitted).

In determining whether plaintiffs have satisfied their burden of presenting facts that demonstrate that they personally will suffer an "actual or imminent" injury from the Commission's regulations, the unusual nature of this lawsuit is pivotal. Although the plaintiffs, as federal officeholders and candidates, are regulated by some – though not all – of these rules, they do not ask the Court to find that any of the regulations at issue improperly restrict their own freedom of action. Rather, the flaw they allege in the regulations is the failure to regulate the activities of other people more strictly. When "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Lujan, 504 U.S. at 562 (citation omitted). Indeed,

when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed." Id. (emphasis in original).

Despite this heightened burden, plaintiffs have relied only upon general speculation to support their standing, and have not even tried to allege any facts to demonstrate how they will personally be injured by the existing regulations. For example, they assert that there is a "risk" that "their electoral opponents and opposing political parties" might use activities they believe the Commission's regulations should have prohibited to influence plaintiffs' own elections. FAC ¶ 17. But they do not identify anyone who ever has, or is now planning, to engage in such activities in their specific districts, and they make no attempt to explain how any such activity would be likely to harm their chances for reelection. Indeed, they offer no facts demonstrating whether they even face serious opposition for reelection. Plaintiffs assert that they "might be expected by their parties to raise soft money" for state party committees and "could be rejected for official and party leadership positions if they fail or decline to raise such funds." FAC ¶ 15. But they allege no plans to seek leadership positions and no facts demonstrating that their parties have requested that they raise soft money, that they were denied party leadership positions in the past for declining to raise soft money, or that the raising of soft money for state parties is a criterion for election to party leadership positions. They allege that the Commission's regulations "will also adversely affect the public's perception of plaintiffs and their fellow officeholders" if the campaign finance law is not administered in precisely the manner they prefer. FAC ¶ 13. But they allege no factual basis demonstrating how the public perception of Congress would be changed by the adjustments they seek in any of the Commission's regulations. While Congress undoubtedly concluded that the BCRA amendments in general were needed to help combat a public perception of corruption, FAC ¶ 13, plaintiffs have alleged

no facts demonstrating a Congressional determination that any of the discrete regulatory issues they raise in this case would cause a public perception of corruption.

Even if plaintiffs had presented facts rather than speculation to support their standing, their reliance upon general allegations of injury to litigate the validity of some two dozen separate regulations is insufficient. "[S]tanding is not dispensed in gross." Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996). "Article III standing requires an injury with a nexus to the substantive character of the . . . regulation at issue," Diamond v. Charles, 476 U.S. 54, 70 (1986). Thus, plaintiffs have the burden of producing facts demonstrating that they will suffer a personal injury in fact from each of the regulations they challenge here; demonstrating such an injury from one regulation would not suffice to establish their standing to contest any other regulations. See id. at 67 ("to the extent that Diamond's claim derives from … the parental notification section, he lacks standing to continue this litigation, for it does not address the validity of that provision"); International Primate Pro. League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77 (1991) (superseded by statute on other issues) ("Standing does not refer simply to a party's capacity to appear in court . . . [but] is gauged by the specific common-law, statutory or constitutional claims that a party presents"); Catholic Social Service v. Shalala, 12 F.3d 1123, 1125 (D.C. Cir. 1994) ("a plaintiff's standing must be analyzed with reference to the particular claim made"); Whitmore v. FEC, 68 F.3d 1212, 1215 (9th Cir. 1995) (whether candidate has standing to challenge campaign finance provisions "depends on what claim is made"). Plaintiffs have not even attempted to undertake this burden.

In any event, plaintiffs' theories of standing are erroneous as a matter of law. Plaintiffs' first theory is basically grounded upon competitive standing; they allege that there is a "risk" that someone might engage in activity they believe should not be permitted by the Commission's

regulations that might influence their own elections. FAC ¶¶ 14-17. First, the D.C. Circuit has not determined whether the economic competitor standing doctrine is even applicable to political competitors. Gottlieb v. FEC, 143 F.3d 618, 620 (D.C. Cir. 1998) ("we have never completely resolved this 'thorny issue'"). See also Winpisinger v. Watson 628 F.2d 133, 139 (D.C. Cir. 1980) ("The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event"), cert. denied, 446 U.S. 929 (1980). Second, even if it can be applied to political competitors, competitive standing can only apply to a plaintiff in direct competition with the person whose activities he alleges should be prohibited. "[T]he line of cases granting standing to economic competitors . . . require that the plaintiff 'show that he personally competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit' . . . [f]or '[o]nly then does the plaintiff satisfy the rule that he was personally disadvantaged.'" Gottlieb, 143 F.3d at 621. Thus, plaintiffs' claims of competitive injury from the possible activities of party committees, corporations, political committees and individuals — none of whom are candidates running against them in the upcoming election — cannot establish standing.

Third, and most importantly, the Commission's regulations apply in the same way to plaintiffs and their supporters as they do to plaintiffs' electoral opponents and their supporters. Thus, while plaintiffs are in competition with other candidates for the votes of their constituents, all candidates are subject to the same limits on their campaign finance activities, and the regulations cannot, therefore, be said to provide plaintiffs' opponents any competitive advantage. Indeed, if any of the activities to which plaintiffs object do occur in connection with the

plaintiffs' own elections, they are just as likely to be the work of people supporting their reelection as of people opposing it.

The McConnell Court rejected similar claims of competitive standing for candidates seeking to challenge the BCRA increase in the contribution limit. Like the plaintiffs here, those candidates did not allege that the new contribution limit treated them differently from other candidates, but asserted that they "'do not wish to solicit or accept large campaign contributions as permitted by BCRA' because '[t]hey believe such contributions create the appearance of unequal access and influence.'" McConnell, 124 S.Ct. at 709. The result, they alleged, was that BCRA made "it more difficult for them to compete in elections." Id. The Court found this sort of allegation insufficient to establish standing because it failed to state an injury to those candidates caused by the statute they sought to challenge. "Their alleged inability to compete stems not from the operation of § 307, but from their own personal 'wish' not to solicit or accept large contributions, *i.e.,* their personal choice." Id. Similarly, plaintiffs here have not alleged that the Commission's regulations permit their opponents to do anything they are precluded from doing. Rather, they allege that they do not wish to engage in such activities even if they are permitted, because they believe those actions contribute to the public appearance of corruption (or, as the unsuccessful McConnell plaintiffs put it, the "appearance of unequal access and influence," id.). The decision in McConnell forecloses this as a basis for plaintiffs to demonstrate standing.

Plaintiffs' second theory of injury is that the activities they think the Commission should have prohibited will "adversely affect the public's perception of plaintiffs and their fellow officeholders" because plaintiffs "will be forced to undertake their public responsibilities, raise money, and campaign in a system … corrupted by these improper influences." FAC ¶ 13. This

theory is foreclosed by McConnell as well. First, McConnell reaffirmed that "a plaintiff's alleged injury must be an invasion of a concrete and particularized legally protected interest." 124 S.Ct. at 708. The Court concluded that a group of voter plaintiffs' assertion that the increased contribution limit would "deprive them of an equal ability to participate in the election process based on their economic status" was not a legally protected interest because "[w]e have never recognized a legal right comparable to the broad and diffuse injury asserted by" these plaintiffs. Id. Similarly, the courts have never recognized a legal right comparable to the "broad and diffuse" injury asserted by the plaintiffs here: to participate in a political system free of anything they personally believe to be improper influences. Indeed, if this were a legally protectable personal right of anyone seeking to run for office, the power to regulate campaign finance activities would effectively be transferred from Congress to individual litigants in court.

Second, this claim is foreclosed by the same holding of McConnell applicable to their first theory: if plaintiffs find participation in the rough and tumble of politics to be morally repugnant, or fear that their public reputations will suffer from being members of Congress, they are free not to run. Nothing in the Commission's regulations "force[s]" these plaintiffs "to undertake … public responsibilities" at all (FAC ¶ 13); any diminution in their reputations resulting from their membership in Congress "stems not from the operation of [the Commission's regulations], but from their own personal 'wish'" to hold public office. McConnell, 124 S.Ct. at 709.

Plaintiffs' third theory of standing is that their own political parties might deny them leadership positions if they decline to raise soft money "for use at the state and local party levels." FAC ¶ 15. This theory is misdirected, for BCRA does not even purport to prohibit federal candidates from soliciting soft money for state parties from individuals; it merely limits

the amounts they can solicit from any one person. McConnell, 124 S.Ct. at 682 n.70. In any event, none of the Commission's regulations govern in any way a political party's constitutionally protected freedom to choose its own leaders, and no provision of the Commission's regulations requires any candidate or officeholder to raise soft money for state party committees if he or she would prefer not to do so. Accordingly, any injury to plaintiffs' prospects for leadership positions if they decline to solicit soft money derives not from the Commission's regulations, but from the actions of their party's members, representing "the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Lujan, 504 U.S. at 562 (citation omitted).

In sum, plaintiffs have utterly failed in their complaint to support their standing to litigate, both factually and legally. Moreover, we are now at the summary judgment stage, when allegations will no longer do, and standing must be proven with admissible evidence. Lujan, 504 U.S. at 561 ("Since [the three standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation"); id. at 566 ("Standing . . . requires, at the summary judgment stage, a factual showing of perceptible harm"); Sierra Club v. EPA, 929 F.3d 895, 899 (D.C. Cir. 2002) ("a plaintiff moving for summary judgment in the district court . . . must support each element of its claim to standing 'by affidavit or other evidence'" (quoting Lujan, 504 U.S. at 561)).

No one doubts the sincerity of plaintiffs' concern about campaign finance policy or their interest in having BCRA, which was a substantial legislative achievement for them, administered

in a manner congruent with their views. But "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 485 (1982). "[A]n asserted right to have the [g]overnment act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a [F]ederal court." Allen v. Wright, 468 U.S. 737, 754 (1984). "Vindicating the public interest (including the public interest in [g]overnment observance of the Constitution and laws) is the function of Congress and the Chief Executive," not private litigants. Lujan, 504 U.S. at 576. Thus, plaintiffs have no standing to obtain judicial review of the policies adopted by the Commission pursuant to the broad discretion granted by Congress to "formulate policy with respect to . . . this Act," 2 U.S.C. 437c(b)(1), unless they can demonstrate a particular injury caused by each of the regulations at issue that "affect[s] the plaintiff in a personal and individual way." Lujan, 504 U.S. at 560 n. 1. See also Whitmore, 68 F.3d at 1215 (that candidate "had a stake in the congressional campaign finance laws does not imply that the law caused her injury"). That is something they have failed to do.

II. THE ABSTRACT POLICY DISPUTES PRESENTED IN THIS CASE ARE NOT RIPE FOR JUDICIAL REVIEW.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" National Park Hospitality Ass'n v. Department of Interior, 123 S.Ct. 2026, 2030 (2003) ("NPHA") (emphasis added) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967) (footnote omitted), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977)). Accord Reno v. Catholic Social Services, Inc.,

509 U.S. 43, 57 n.18 (1993). The doctrine "reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – post-implementation litigation." Ohio Forestry Ass'n. v. Sierra Club, 523 U.S. 726, 735 (1998). The ripeness doctrine is "'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" NPHA, 123 S.Ct. at 2030. (citation omitted).

In this case, plaintiffs present an abstract facial challenge to a large number of the Commission's regulations implementing Title I and Title II of BCRA. Some statutes provide for immediate judicial review of agency regulations, but neither BCRA nor FECA contains such a provision. Indeed, BCRA did provide for immediate, pre-enforcement review of the constitutionality of the new statutory provisions, but Congress did not provide in BCRA for pre-enforcement review of the regulations it directed the Commission to promulgate. "Absent [such a provision for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." NPHA, 123 S.Ct. at 2030 (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990)). See Sprint Corp. v. FCC, 331 F.3d 952, 956 (D.C. Cir. 2003).[2]

[2] "'[I]njunctive and declaratory judgment remedies . . . are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless [they] arise in the context of a controversy "ripe" for judicial resolution' ... , that is to say, unless the effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties.'" Reno, 509 U.S. at 57 (quoting Abbott Laboratories, 387 U.S. at 148-49) (footnote omitted).

"The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once, whether or not explicit statutory review apart from the APA is provided." Lujan, 497 U.S. at 891 (citations omitted). This exception is not applicable here because, as discussed supra pp. 4-11, plaintiffs have not alleged that any of the features of the Commission's regulations they challenge would require them to change their own conduct. To the contrary, their entire case in based upon claims that the regulations do not adequately restrict the actions of others. When, as here, "there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 386 (1999) (emphasis added). See also Reno, 509 U.S. at 58; Lujan, 497 U.S. at 891.

In sum, plaintiffs' facial challenge to the regulations relies largely upon arguments at a high level of generality about how words in certain regulations might be construed and applied to the hypothetical activities of others in situations that may or may not arise. "Unlike the drug manufacturers in Abbott Laboratories, but like the cosmetics companies in Toilet Goods Ass'n v. Gardner, [387 U.S. 158, 164 (1967)], petitioners here need not change their behavior or risk costly sanctions." Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1205 (D.C. Cir. 1998), cert. denied, 527 U.S. 1021 (1999). As discussed supra, pp. 8-11, plaintiffs assert that the regulations as a whole create a risk of harm to their reputations or to their general interest in ensuring that the electoral process in which they wish to participate is free from influences they consider to be corrupting. But like the "threat to federalism" alleged in Texas v. United States, 523 U.S. 296, 302 (1998), each of those alleged risks is "an abstraction — and an abstraction no graver than the 'threat to personal freedom' that exists whenever an agency regulation is

promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected."

In such circumstances, plaintiffs have failed to carry their jurisdictional burden of demonstrating that this case falls within any exception to the rule that "a controversy concerning a regulation is not ordinarily ripe for review under the Administrative Procedure Act until the regulation has been applied to the claimant's situation by some concrete action." Reno, 509 U.S. at 58 (emphasis supplied) (agreeing with Lujan, 497 U.S. at 891).

III. THE COMMISSION'S REGULATIONS ARE NOT ARBITRARY OR CAPRICIOUS.

A court may set aside a regulation under the Administrative Procedure Act, only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This standard is "highly deferential" and "presumes the validity of agency action." Cellco Partnership v. FCC, 2004 WL 257041, *4, ___ F.3d ___, ___ (D.C. Cir. Feb. 13, 2004). Thus, "the party challenging an agency 's action as arbitrary and capricious bears the burden of proof." San Luis Obispo Mothers For Peace v. NRC, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc), cert. denied, 479 U.S. 923 (1986).

Under this standard, "[a] court cannot substitute its judgment for that of an agency . . . and must affirm if a rational basis for the agency's decision exists." Bolden v. Blue Cross & Blue Shield Ass'n, 848 F.2d 201, 205 (D.C. Cir. 1988). See also Sierra Club v. EPA, 353 F.3d 976, 978 (D.C. Cir. 2004) ("'The arbitrary and capricious standard deems the agency action presumptively valid, provided the action meets a minimum rationality standard.'" (citation omitted)). Where the empowering provision of a statute simply authorizes the agency to "make . . . such rules [. . .] as [are] necessary to carry out the provisions of this Act," as the Act does in

2 U.S.C. 437d(a)(8), the "validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973) (citation omitted). In order to prevail in this facial challenge to the Commission's new regulations, where the regulations have "not yet been applied in a particular instance" and thus there is "no record, concerning the [FEC's] interpretation of the regulation or the history of its enforcement," plaintiffs "'must establish that no set of circumstances exists under which the [regulation] would be valid.'" Reno v. Flores, 507 U.S. 292, 300-301 (1993) (citation omitted). Accord, Bldg. Construction Trades Dept. AFL-CIO v. Allbaugh, 295 F.3d 28, 33 (D.C. Cir. 2002), cert. denied, 537 U.S. 1171 (2003).

The Commission's construction of its own governing statute is entitled to substantial deference under Chevron U.S.A. v. NRDC, 467 U.S. 837, 842 (1984). "Under Chevron, the court examines whether the statute speaks 'directly … to the precise question at issue.'" United States v. Kanchanalak, 192 F.3d 1037, 1047 (D.C. Cir. 1999) (citation omitted). If it does, the court must give effect to the unambiguously expressed intent of Congress. Chevron, 467 U.S. at 842. However, "[i]f the statute 'has not directly addressed the precise question at issue,' then the agency's construction, if reasonable, should be honored." Kanchanalak, 192 F.3d at 1047. See also Central Sales Motor Freight Bureau v. ICC, 924 F.2d 1099, 1104 (D.C. Cir.) ("the term 'precise question at issue' [is] to be interpreted tightly"), cert. denied, 502 U.S. 823 (1991). Whether a competing interpretation of the statute might also be reasonable is irrelevant. "[U]nder Chevron, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." FEC v. National Rifle Ass'n, 254 F.3d 173, 187 (D.C. Cir. 2001) (quoting Serono Labs, Inc. v. Shalala,

158 F.3d 1313, 1321 (D.C. Cir. 1998)). See also Sociedad Anonima Vina Santa Reta v. U.S. Dept. of Treasury, 193 F.Supp.2d 6, 16 (D.D.C. 2001).

The Commission, which has broad discretionary authority over the administration, interpretation and civil enforcement of the Act, 2 U.S.C. 437c(b)(1), 437d(a) and 437g, "is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981). Accord, Kanchanalak, 192 F.3d at 1049 ("[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference.'" (citation omitted)).

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 866 (citation omitted).

Throughout their complaint, plaintiffs imply that deference should be denied despite this settled authority because the Commission's General Counsel supported a regulation that differed from what the Commission adopted. See e.g., FAC ¶¶ 22, 32, 56, 74, 79, 100, 103. It is well settled, however, that "[t]he Commissioners are appointed by the President to administer the agency, the agency's staff is not." San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1327 (D.C. Cir. 1984), affirmed en banc in relevant part, 789 F.2d at 33, 34. Thus, "Chevron deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to each

individual agency employee." Serono Laboratories, 158 F.3d at 1321. The D.C. Circuit recently rejected as a "rather silly suggestion" the argument than an NLRB decision should be found unreasonable because it conflicted with the General Counsel's advice. "It is of no moment . . . what was the General Counsel's understanding of the case law before the present decision issued, and the court will take no note of it." Chelsea Industries, Inc. v. NLRB, 285 F.3d 1073, 1077 (D.C. Cir. 2002). This Court should do the same.[3]

Plaintiffs' ad hominem attack upon several Commissioners for having expressed their views on some legal and policy questions relating to BCRA prior to the rulemakings, see FAC ¶ 23, is equally irrelevant. "An administrative official is presumed to be objective [and] mere proof that [he or] she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption." United Steelworkers v. Marshall, 647 F.2d 1189, 1208 (D.C. Cir. 1980). "[P]olicymakers" like the Commissioners are presumed to "approach their quasi-legislative task of rulemaking with an open mind – but not an empty one." PLMRS Narrowband Corp. v. FCC, 182 F.3d 995, 1002 (D.C. Cir. 1999). Thus, the D.C. Circuit has rejected the argument "that we should deny an agency Chevron deference because of our judicial assessment that it has been 'hostile' to certain

[3] In citing to pre-decisional discussions during public proceedings, plaintiffs ignore the fundamential difference between a rulemaking process, through which an agency develops and evaluates alternative proposals for making new law, and a judicial proceeding, through which a court considers whether those regulations are within the agency's broad authority. During the BCRA rulemaking proceedings, the General Counsel's views were expressed for the purpose of assisting the Commission with the evaluation of legal alternatives and with the factual record, which included testimony from numerous witnesses; it is improper to offer those statements as grounds for invalidating duly enacted law. Plaintiffs' reliance upon statements attributed to the General Counsel during FEC deliberative meetings, e.g., FAC ¶¶ 34, 55, 66, 71 & 109, is impermissible for the additional reason that these deliberations are not part of the administrative record. See PLMRS Narrowband Corp. v. FCC, 182 F.3d 995, 1001 (D.C. Cir. 1999); Common Cause v. FEC, 676 F.Supp. 286, 289 n.3 (D.D.C. 1986). The Commission's regulations provide

ideas." North Broward Hospital District v. Shalala, 172 F.3d 90, 94 (D.C. Cir.), cert. denied, 528 U.S. 1022 (1999).

Finally, deference should be enhanced in this case by the fact that plaintiffs' claims all rest on the proposition that the Commission's regulations do not construe or apply the statute as broadly as they would like. As the D.C. Circuit recently noted, the Commission is "[u]nique among federal administrative agencies" in that "its sole purpose [is] the regulation of core constitutionally protected activity – 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" AFL-CIO v. FEC, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 387 (D.C. Cir. 1981), cert. denied, 454 U.S. 897 (1981)). In this "delicate first amendment area, there is no imperative to stretch the statutory language or read into it oblique inferences of Congressional intent," Machinists, 655 F.2d at 394. See also Galliano v. United States Postal Service, 836 F.2d 1362, 1370 (D.C. Cir. 1988) (finding that "FECA's first-amendment-sensitive regime" preempts otherwise applicable provision of postal statutes). "The [Federal Election C]ommission has been vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." In re Carter-Mondale Reelection Committee, 642 F.2d 538, 545 (D.C. Cir. 1980).

Thus, construing the statute narrowly to avoid unnecessary interference with constitutionally protected political advocacy is a policy choice well within the Commission's discretion. AFL-CIO, 333 F.3d at 179 (in drafting regulations the "Commission must attempt to avoid unnecessarily infringing on First Amendment interests"). See also Weaver v. U.S. Information Agency, 87 F.3d 1429, 1436 (D.C. Cir. 1996); Blitz v. Donovan, 740 F.2d 1241,

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that "[s]tatement of views or expression of opinions made by Commissioners or FEC employees

1244-145 (D.C. Cir. 1984). Indeed, in McConnell the Supreme Court repeatedly construed the provisions of BCRA narrowly to avoid unnecessary intrusion on political activity, relying in several instances on some of the same Commission regulations under review in this case. See, e.g., 124 S.Ct. at 670 (relying on regulation defining "solicit" and "direct"); 678, 681-82 (narrowly construing BCRA's ban on donations to certain tax-exempt organizations); 675 (relying on Commission's construction of certain Federal election activity); 680 (relying on the Commission's construction of BCRA's ban on donations to section 527 organizations); 679 n.69 (relying on Commission's construction of BCRA Title II limit on solicitation as inapplicable to certain non-profit corporations). The substantial constitutional concerns inherent in the regulation of political advocacy provide an important additional reason for giving particular deference to the Commission's narrow construction of provisions of the Act that regulate political speech.

A. The Commission's Title I Regulations Are Not Arbitrary Or Capricious

Title I of BCRA, which became effective on November 6, 2002, prohibits national party committees from acquiring and spending funds that are not subject to the limitations, prohibitions and reporting requirements of the Act. To prevent evasion of this restriction, BCRA defined a new category of activity — "Federal election activity" — that state, district and local party committees must pay for entirely with Federal funds or, in some cases, an allocated ratio of Federal funds and a new category called Levin funds. 2 U.S.C. 441i(b).

Congress defined Federal election activity in 2 U.S.C. 431(20)(A) as:

> (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

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at meetings are not intended to represent final determination or beliefs." 11 CFR 2.3(c).

> (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);
> (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
> (iv) 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 connection with a Federal election.

Federal funds, which are also commonly called hard money, are contributions subject to the Act's general limitations, prohibitions and reporting requirements. Non-Federal funds, which are commonly called soft money, include donations from some sources generally prohibited by the Act, such as corporations and unions, 2 U.S.C. 441b, and donations from individuals that exceed the Act's contribution limitations, 2 U.S.C. 441a(a). See 11 CFR 300.2(g), (k). Levin funds are a special category of funds available only to state and local party committees, which may include non-Federal funds subject to certain source and amount limitations and reporting requirements in the Act. See 67 Fed. Reg. 49065.

BCRA permits each state, district and local party committee to finance some kinds of Federal election activity with a mix of hard money and Levin funds the committee itself has raised, 2 U.S.C. 441i(b)(2)(B)(iv), and requires such committees to disclose publicly their revenue and disbursements for such activities, 2 U.S.C. 434(e)(2). Federal officeholders and candidates, and national party committees, including their officers and agents, may not solicit Levin funds for state, district or local political parties, 2 U.S.C. 441i(b)(2)(C). National Party Committees and their agents may not make donations, or solicit or direct donations from sources prohibited under the Act or in amounts exceeding statutory limits, to groups organized under

section 501(c) or 527 of the Internal Revenue Code to pay for "Federal election activity." U.S.C. 441i(d). Federal candidates and officeholders and their agents are permitted to solicit soft money from individuals in limited amounts, subject to a variety of restrictions and exemptions. 2 U.S.C. 441i(e).

We address below plaintiffs' challenges to the regulations implementing these provisions in the order in which they appear in the Commission's Explanation and Justification ("E&J") of its BCRA Title I regulations. 67 Fed. Reg. 49064. Id.[4]

1. Regulation 11 CFR 100.14, Defining State, District and Local Party Committees As "Part Of The Official Party Structure," Is Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 431(15) defined the term "State committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission." The statute does not define "district" or "local" party. The Commission promulgated 11 CFR 100.14, which construes "State committee" to mean "the organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level, including an entity that is directly or indirectly established, financed, maintained, or controlled by that organization, as determined by the Commission" (emphasis added). The regulation's definition of "district or local committee" follows this formulation.

The Commission's discretion is especially broad here because 2 U.S.C. 431(15) explicitly provides that the precise parameters of its reach are to be "determined by the

[4] We were informed yesterday afternoon that plaintiffs intend to withdraw their claims addressed in two sections of this memorandum: Section I. 2 (pp. 23-26) and Section I. 16 (pp. 59-62). That notice came too late to revise this memorandum in response.

Commission." The language of the statute clearly implies, if not requires, the sort of official organizational nexus made explicit in the Commission's regulations. It is difficult to imagine how a committee could be "responsible for the day-to-day operation" of the party "by virtue of the [party's] bylaws," 2 U.S.C. 431(15), without being part of the "official party structure," 11 CFR 100.14. Moreover, it is plainly reasonable for the Commission to use similar criteria in defining "district" or "local" committee, as Congress used to define "State committee." As the Commission explained, "requiring a committee to be part of the official party structure before it satisfies the regulatory definition is an important safeguard, ensuring that BCRA's provisions sweep only as far as necessary to accomplish its ends." 67 Fed. Reg. 49065. This ensures that the party is not responsible for unofficial groups calling themselves "Democrats" or "Republicans," even though they are not an actual component of the party itself.

Plaintiffs anticipate that these provisions may allow "informal" or "unofficial" committees to be established by state parties that would enable them to circumvent the restrictions in BCRA on state party committees' use of soft money. FAC ¶ 71(e). However, the Commission addressed that concern directly in 11 CFR 100.14(c) by broadly subjecting to regulation as a "subordinate committee" "any organization that at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee, and is directly or indirectly established, financed, maintained, or controlled by the State, district, or local committee." Id.[5] This

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[5] Before BCRA, the definition of subordinate committee was: "any organization which is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee." 11 CFR 100.14(b) (2000).

provision includes language that the plaintiffs argued during the rulemaking proceedings should be in the final rules. 67 Fed. Reg. 49066.

2. Regulation 11 CFR 100.24(a)(1), Defining "In Connection With An Election In Which A Candidate For Federal Office Appears On The Ballot," Is Not Arbitrary Or Capricious.

Under BCRA, get-out-the-vote activities, voter identification, and generic campaign activities are "Federal election activity" only if they occur "in connection with an election in which a candidate for Federal office appears on the ballot regardless of whether a candidate for State or local office also appears on the ballot." 2 U.S.C. 431(20)(A)(ii). The Commission in 11 CFR 100.24(a)(1) applied this language to two types of elections. During even-numbered years, when regular Federal elections are held, activities are "in connection with an election in which a candidate for Federal office appears on the ballot" if they occur on or between the earliest filing deadline for the primary election (or in states that do not conduct primaries, January 1) through the date of the general election (or of any subsequent runoff election). 11 CFR 100.24(a)(1). During odd-numbered years, when only special federal elections are held, activities during the period between the setting of the date of a special election and the date of the special election are "in connection with" the Federal election. Id.

The phrase "in connection with an election in which a candidate for Federal office appears on the ballot" is not defined in the Act. The Commission concluded that "Congress clearly intended to establish certain periods of time in which no candidates for Federal office appear on the ballot," 67 Fed. Reg. 49066, reasoning that if those restrictions were applicable at all times, this statutory language of limitation would be meaningless. After considering proposals from commenters ranging from the entire two-year federal election cycle down to the period beginning on the date on which a federal candidate is actually certified for the ballot, the

Commission adopted the two-pronged definition set out above. The regulation "closely tracks the statutory language . . . by tying the definition to the actual date that Federal candidates appear on the ballot," 67 Fed. Reg. 49066, starting when they may first file for the primary and ending on the date of the general election or runoff. As is true for the 120 day time period during which BCRA regulates voter registration activities as Federal election activity, 2 U.S.C. 431(20)(A)(i), the regulatory time period for Federal regulation of these other activities as Federal election activity "focuse[s] on the subset of . . . activity that is most likely to affect the election prospects of federal candidates," 2 U.S.C. 431(20)(A)(i); McConnell, 124 S.Ct. at 675. The Commission's definition also makes the statutory requirements easier for state and local parties to follow: although there may be many different ballot filing deadlines among the states, a state or local party committee need only be concerned with the deadlines in its own state, which it already needs to monitor because some federal disclosure report deadlines are pegged to those dates. 67 Fed. Reg. 49066.

Plaintiffs claim that the Commission's construction of "in connection with an election in which a candidate for Federal office appears on the ballot" imposes an "arbitrary time limit" with "no statutory basis" that "will permit state party activities that influence federal elections to be excluded from the definition of 'Federal election activity' in contravention of BCRA." FAC ¶ 64. As the Commission noted, "a large number of State and local elections take place in odd-numbered years," such as mayoral elections in many large cities, statewide elections in at least five states, and local elections such as school board elections throughout the country, and concluded that "[a]ctivities in connection with [state and local] elections are presumably not 'conducted in connection with an election in which a candidate for Federal office appears on the ballot' even under the most expansive reading of the statute." 67 Fed. Reg. 49066. The Act

contains no language inconsistent with the Commission's policy choice, and the regulation gives reasonable and relevant substance to the statutory limitation that the activities subject to regulation be "in connection with" a Federal election.

In fact, the Commission's construction has already been declared "reasonable" by the McConnell Court and was a key factor in the Court's decision that BCRA's "federal election activity" provisions are not facially overbroad in their effect on state and local elections. In McConnell the Court explicitly recognized that the Commission "[a]ppropriately, in implementing this subsection ... categorically excluded all activity that takes place during the run-up to elections when no federal office is at stake," McConnell, 124 S.Ct. at 675, and concluded that "the statute provides" a "basis for the FEC to reasonably narrow" the scope of these provisions. Id. at 675 n.63 (citing 11 CFR 100.24(a)(1)). This court would have to reject the Supreme Court's conclusion to overturn this regulation.

In light of the concerns raised by the Commission, and because the Supreme Court has already found the Commission's construction to be "reasonabl[e]" and relied upon it in holding the statute constitutional, 11 CFR 100.24(a)(1) is not arbitrary or capricious.

3. Regulation 11 CFR 100.24(a)(2), Defining Voter Registration Activity, Is Not Arbitrary Or Capricious.

BCRA does not define the term "voter registration activity," which is one of the Federal election activities listed in 2 U.S.C. 431(20)(A). In 11 CFR 100.24(a)(2), the Commission defined "voter registration activity" to mean "contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote." The regulation provides examples of covered activity, including "printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms." Id. This definition, the Commission explained,

"encompass[es] individualized contact for the specific purpose of assisting individuals with the process of registering to vote [and] includes the costs of printing and distributing voter registration information, such as registration forms, and voting information, for example, pamphlets of similar materials explaining the voter-registration process." 67 Fed. Reg. 49067. The Commission's construction thus reasonably addresses the actual statutory language, "voter registration activity," by focusing on "individualized contact for the specific purpose of assisting individuals with the process of registering to vote," 67 Fed. Reg. 49067.

Plaintiffs' objection to this regulation is that it is too narrow because it does not include merely "encouraging" individuals to register to vote, which plaintiffs claim is "core" voter registration activity. FAC ¶¶ 48-50, 60-62. As a result, plaintiffs predict, "the regulations will permit state, district and local parties to continue to spend unregulated soft money on such voter registration activity" as "a phone bank or mass mailin[g] that encourage[s] unregistered voters to register, in contravention of BCRA." FAC ¶62.

BCRA, however, contains no reference to "core" voter registration activity, let alone any language demonstrating congressional intent to include merely "encouraging" voter registration as a Federal election activity. In fact, Congress has used specific language elsewhere in the Act when it intended to address mere encouragement of registration to vote. Thus, in 2 U.S.C. 431(9)(B)(ii) Congress excluded from the definition of "expenditure" certain "nonpartisan activity designed to encourage individuals to vote or register to vote." Id. (emphasis added). Congress' failure to include such language in BCRA undermines plaintiffs' claim that it was impermissible for the Commission to construe the more general language of BCRA as it did.

During the rulemaking the Commission "expressly rejected a [proposed] definition that would have included 'merely encouraging voter registration,'" 67 Fed. Reg. 49067, because such

activity was widespread among nonpartisan civic groups who were not otherwise regulated by federal campaign finance law, such as the League of Women Voters and the American Legion. As the Commission explained, "[this] more expansive definition would run the risk that thousands of political committees and grassroots organizations that merely encouraged voting as a civic duty, who have never been subject to Federal regulation for such conduct" would have their activities subject to the fundraising restrictions that apply to Federal election activity. Id. Finally, while the Commission has clearly required something more than "merely encouraging" registering to vote, 67 Fed. Reg. 49067, the Court cannot yet know how this general regulatory language will be applied to specific fact patterns. Thus, judicial review 'is likely to stand on a much surer footing in the context of a specific application of [the] regulation than could be the case in the framework of [a] generalized challenge." Sprint Corp., 331 F.3d at 956 (quoting Toilet Goods, 387 U.S. at 164).

In sum, plaintiffs' argument is nothing more than a disagreement about policy. Because the Act does not define voter registration activity and the Commission's policy choices are reasonable, 11 CFR 100.24(a)(2) is not arbitrary or capricious.

4. Regulation 11 CFR 100.24(a)(3) Defining Get-Out-the-Vote Activity Is Not Arbitrary Or Capricious.

As with "voter registration activity," BCRA does not define the phrase "get-out-the-vote activity" that is included in "Federal election activity" under 2 U.S.C. 431(20)(A)(ii). The Commission's definition of this term in 11 CFR 100.24(a)(3) takes an approach similar to the definition of voter registration activity. "Get-out-the-vote ('GOTV') activity" means "contacting registered voters by telephone, in person, or by other individualized means, to assist them in

engaging in the act of voting,"[6] but excludes "a communication by an association or similar group of candidates for State or local office or of individuals holding State or local office if such communication refers only to one or more State or local candidates." 11 CFR 100.24(a)(3). As the Commission noted, if "GOTV activity" were "defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity." 67 Fed. Reg. 49067. If every communication urging people to vote for a local candidate or ballot issue were treated as GOTV activity, there would be little if any state and local campaign speech that would not be subject to this provision. Thus, the Commission sought to define GOTV activity "in a manner that distinguishes it from ordinary or usual campaigning that a party committee may conduct on behalf of its candidate." As we explain below, the Commission's definition of GOTV is consistent with the language used in the statute, 2 U.S.C. 431(20)(A)(ii), and reasonably implements the statutory scheme by focusing on activities involved in actually getting registered voters to the polls, rather than on general campaign speech.

Plaintiffs have two separate complaints about the Commission's construction of GOTV activity: first, that it implicitly excludes merely "encouraging" individuals to vote, FAC ¶¶ 48-54, and second, that it explicitly excludes communications by groups of state and local candidates and officeholders that reference only state or local candidates, id. at ¶¶ 67-68. Since the statute neither defines "GOTV activity" nor indicates whether Congress intended to include mere "encouragement" to vote or activities by groups of state and local candidates that refer solely to non-federal candidates, the issue before this Court under Chevron is whether the Commission's regulation is reasonable.

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[6] This includes but is not limited to "[p]roviding to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and

The Commission's definition of GOTV activities is fully consistent with the statute in "focus[ing] on activity that is ultimately directed at registered voters" and that has the particular purpose of "assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee or other means provided by law," 67 Fed. Reg. 49067. The exclusion of mere speech generally encouraging the public to vote is supported by the same concern that prompted the Commission to exclude "mere encouragement" from the definition of "voter registration activity," for there are any number of nonpartisan civic and other groups that regularly urge citizens simply to exercise their right to vote, without supporting any candidate, party or issue, or otherwise suggesting how anyone should vote.[7] This is a reasonable policy choice that does not conflict with anything in the statute.

With respect to plaintiffs' second issue, the Commission had substantial policy reasons, reflected in provisions of BCRA, for excluding from federal regulation as GOTV activities communications paid for by associations of state and local candidates and officeholders that refer only to state or local candidates. Under the allocation rules in effect when Congress passed BCRA, a GOTV communication that featured only state and local candidates was treated as a wholly non-federal activity subject only to state campaign finance laws if it was paid for by a State or local party committee. As the Commission explained when it adopted the new regulation, "this exclusion keeps State and local candidates' grassroots and local political activity a question of State, not Federal law. Interpreting the statute to extend to purely State and

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the location of particular polling places" and "[o]ffering to transport or actually transporting voters to the polls." 11 CFR 100.24(a)(3).

[7] As with the voter registration regulation, the Commission has not yet had the opportunity to apply its GOTV regulation to any actual activity. The language of the regulation suggests, however, that it would not cover an incidental exhortation to go out and vote included in a speech given to a civic organization, or a stand-alone message such as a sign urging people to "Vote for the candidate of your choice."

local activity by State and local candidates would potentially bring into the Federal regulatory scheme thousands of State and local candidates that are currently outside the Federal system." 67 Fed. Reg. 49067. BCRA did not indicate any specific Congressional intent, in the general phrase "get-out-the vote activity," to mandate such an unprecedented intrusion into the conduct of local elections.

The Commission's decision to adopt an exclusion for this limited class of activity wholly focused on non-federal elections reflects a policy Congress itself applied to a similar provision of BCRA. In 2 U.S.C. 441i(f), Congress permitted state and local candidates and their agents to fund a "public communication" under 2 U.S.C. 431(20)(B)(iii) — another category of "federal election activity" — entirely with non-federal funds so long as the communication refers only to state and local candidates. The Commission's decision to include a similar limitation in its definition of the broad and ambiguous phrase "get-out-the-vote activities" to avoid a similarly unnecessary intrusion into activities directed at state and local elections is surely "reasonably related to the purposes of the enabling legislation." Mourning, 411 U.S. at 369 (citation omitted).[8]

Because GOTV activity is not defined in 2 U.S.C. 431(20)(A)(ii), and the Commission's policy choices are reasonable and consistent with the Act, 11 CFR 100.24(a)(3) is not arbitrary or capricious.

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[8] The Commission adopted a similar exclusion that applies to associations of state and local candidates that engage in voter identification activities. So long as such an activity refers only to one or more state or local candidates and is paid for by such an association, it is excluded from the definition of "voter identification." Since voter identification and GOTV activity in local election campaigns go hand-in-hand, the Commission's parallel exclusions in the definitions of both serve the same purpose. See infra pp. 31-33.

5. Regulation 11 CFR 100.24(a)(4), Defining Voter Identification, Is Not Arbitrary Or Capricious.

Voter identification is another category of Federal election activity that is not defined in BCRA. See 2 U.S.C. 431(20)(A)(ii). The Commission in 11 CFR 100.24(a)(4) defined this term as the costs of "creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates." As with GOTV, this regulation excludes activity conducted by "an association or similar group of candidates for State or local office or of individuals holding State or local office" that "refers only to one or more State or local candidates." Id.

The Commission decided that "the act of acquiring a voter list in and of itself does not constitute voter identification" and concluded, based on testimony and comments during the rulemaking, that "[c]ommittees have a number of reasons for acquiring voter lists, including fundraising and off-year party building activities." 67 Fed. Reg. 49069. When party committees acquire or use voter lists for these other purposes, rather than to engage in GOTV activity in a Federal election, "there lacks a nexus between the activity and the statutory language that contemplates activity 'in connection with an election in which a candidate appears on the ballot.'" Id. Accordingly, the Commission concluded that the costs of obtaining pre-existing voter lists do not constitute "voter identification" subject to regulation as Federal election activity, while activities focused on enhancing or amending the information in such a list to make it useful in a Federal election are subject to regulation.

The Commission's conclusion that voter lists are used for purposes other than voter identification is amply supported by the comments and testimony in the administrative record. Id. (citing comments by a state political party and several national party committees). Numerous commenters and witnesses explained that state and local party committees use voter

lists for fundraising and party-building programs in addition to identifying voters for federal election purposes, and expressed concern that a broad restriction on such purchases might result in state parties having to use their federal and Levin funds to buy voter lists that they intend to use, for example, only to raise funds to use in separate state and local elections. 67 Fed. Reg. 49069.

Plaintiffs raise two issues about this regulation. First, they complain that the definition omits the costs of acquisition of voter lists, which they view as "'core' voter identification activity," FAC ¶ 56. Second, they criticize the limited exclusion for associations of state candidates, predicting that such groups will be used as a means to evade BCRA's restrictions. Id. at ¶ 67. The Act, however, does not define "voter identification," 2 U.S.C. 431(20)(A)(ii) let alone "'core' voter identification activity" FAC ¶ 56, and it includes no language evincing congressional intent to regulate any particular activity as "voter identification." Moreover, as we have already explained, including the purchase of a pre-existing voter list within the definition of "voter identification" as plaintiffs demand would overreach, requiring the use of Federal funds for activity unrelated to Federal elections, such as fundraising in connection with local elections.

The exclusion of activities of associations of state and local candidates that refer only to state or local candidates in this regulation serves the same purposes as the similar exclusion from the definition of GOTV, discussed in the last section, and the Commission relied upon essentially the same reasoning for both provisions. See 67 Fed. Reg. 49069-70. Accordingly, this provision is valid for the same reasons.

In sum, because the Commission's construction of "voter identification" represents a considered response to policy concerns brought to its attention during the rulemaking,

11 CFR 100.24(a)(1) is not arbitrary or capricious, and should not be disturbed merely because plaintiffs would prefer a different construction.

6. Regulation 11 CFR 100.25, Defining "Generic Campaign Activity" To Include Only Public Communications, Is Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 431(20)(A)(ii) included in the definition of Federal election activity "generic campaign activity" that is "conducted in connection with an election in which a candidate for Federal office appears on the ballot." "Generic campaign activity" is defined in 2 U.S.C. 431(21) as "campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." Since nothing in the Act specifies which particular state political party activities should be considered "campaign activity" and which should not, the Commission adopted 11 CFR 100.25 to resolve that ambiguity.[9] The regulation specifies that a generic campaign activity is "a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate."

By limiting the definition of "generic campaign activity" to a "public communication," 11 CFR 100.25 "ensure[s] that the definition encompasses only the external activities of a political party" because "public communications" are, by definition, directed at the general public. 67 Fed. Reg. 49071. This construction closely tracks the statutory definition of "generic campaign activity" in 2 U.S.C. 431(21) by omitting internal communications of a party with its members that are not part of any "campaign activity" seeking votes from the public. The Commission's rule avoids regulation of small scale party activities that are not designed to

[9] During the Commission hearings, one state party chair testified in response to a request to define "generic campaign activity: "I don't believe there's any one accepted definition. We've seen a variety of definitions between the regulations and the political science studies and

garner support for, or opposition to, the party and focuses instead on the types of generic party activities that, in the Commission's experience, political parties typically use to influence elections. 67 Fed. Reg. 49071 (citing FEC Advisory Opinion 1998-9, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6264, 1998 WL 271038). The Commission specifically noted that "it is difficult to envision how a campaign activity could effectively promote or oppose a political party without it taking the form of a public communication," 67 Fed. Reg. 49071, and the definition it adopted avoids any constitutional concerns that might be raised regarding the regulation of internal party communications. See, e.g., Eu v. San Francisco Co. Democratic Central Comm., 489 U.S. 214 (1989).[10]

Plaintiffs nonetheless claim that 11 CFR 100.25 is too narrow because it is limited to "public communications," the definition of which, by operation of 2 U.S.C. 431(23) and (24), does not include mailings and phone banks directed to fewer than 500 people, and also does not include electronic mail and other Internet communications, 11 CFR 26.[11] FAC ¶ 59. However, plaintiffs do not point to any language in BCRA evincing congressional intent to include or exclude any particular activity as "generic campaign activity." In fleshing out the statute's

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everything else. I don't have a simple definition for you here this morning." Transcript of FEC Hearing on Soft Money, June 5, 2002, Attachment 4, at 591-92.

[10] Plaintiffs without explanation assert that the Commission's "generic campaign activity" regulation departs from its past construction of the FECA, FAC ¶¶ 58-59. However, the term "generic campaign activity" did not appear in the FECA prior to BCRA, and the Commission's pre-BCRA regulations addressed only "generic voter drive" activity. Moreover, to the extent that the Commission's earlier "generic voter drive" regulations are relevant, they too addressed activities directed to the public and not internal party communications. See 11 CFR 106.5(a)(2)(iv) (2001) ("Generic voter drives including voter identification, voter registration and get-out-the- vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate") (emphasis added).

[11] We address the Commission's decision to exclude Internet communications from the definition of "public communication" infra, pp. 36-41.

ambiguous terms, the Commission has discretion to "exclude" circumstances that in context "may fairly be considered *de minimis*." Environmental Defense Fund v. EPA, 82 F.3d 451, 467 (D.C. Cir. 1996). "As long as Congress has not been 'extraordinarily rigid' in drafting the statute ... 'there is likely a basis for an implication of *de minimis* authority to provide [an] exemption when the burdens of regulation yield a gain of trivial or no value.'" Id. at 466 (quoting Alabama Power Co. v. Costle, 636 F.2d 323, 360 (D.C. Cir. 1979)) (brackets in original). The "500 or less" exemption for mailings and phone banks under BCRA's "public communication" provision that the Commission incorporated here is a feature that Congress itself wrote into the Act. See 2 U.S.C. 431(23) and (24). Thus, plaintiffs' apparent view that mailings of 500 pieces or less, or small phone banks of similar size, must be fully regulated to avoid the appearance of corruption conflicts with the lines Congress itself drew in the statute. The Commission simply limited generic campaign activity in the same manner that Congress limited "public communications" in 2 U.S.C. 431(23) and (24), and it could hardly be found unreasonable for the Commission to incorporate into 11 CFR 100.25 a *de minimis* exception originated by Congress itself. Plaintiffs also provide no evidence to support their apparent hypothesis that state and local political parties will, contrary to the Commission's expert view, be able to use phone banks or mailings to 500 people or fewer as effective tools to campaign for Federal office. Thus, there is nothing to suggest that 11 CFR 100.25 is arbitrary or capricious.

7. Regulation 11 CFR 100.26, Excluding The Internet From The Definition Of Public Communication, Is Not Arbitrary Or Capricious.

The Act, 2 U.S.C. 431(20)(iii), defines "Federal election activity," which state and local party committees must generally finance with Federal funds pursuant to 2 U.S.C. 441i(b)(1), to include a "public communication" that "promotes or supports" or "attacks or opposes" a federal candidate. In turn, 2 U.S.C. 431(22) defines "public communication" as "a communication by

means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." The Commission promulgated 11 CFR 100.26, which specifically provides that the term "public communication" does not include "communications over the Internet." Thus, unlike "general public political advertising," 2 U.S.C. 431(22), state and local party Internet communications are not subject to the financing restrictions of 2 U.S.C. 441i(b)(1).

The Commission's conclusion that Internet communications are not within the class of "general public political advertising" regulation under 2 U.S.C. 431(22) is a "permissible construction" under Chevron, 467 U.S. at 843. Since the Internet is not one of the eight types of mass communication Congress listed in 2 U.S.C. 431(22), it is not even arguable that the statute speaks directly to "the precise question at issue." Kanchanalak, 192 F.3d at 1047. Indeed, plaintiffs have not argued that the inclusion of the Internet is compelled by the statute or legislative history, but only that 11 CFR 100.26 allows state and local parties to "spend unregulated soft money on certain federal election activity that is conducted over the Internet, in contravention of BCRA." FAC ¶66. But "Federal election activity" is defined by the Act, not plaintiffs' complaint, and the definition includes no mention of the Internet, despite the inclusion of a lengthy list of other media leading up to the undefined term "general public political advertising." While undefined in the statute, these are words of limitation that must have been intended to exclude some kinds of election-related communications. Plaintiffs view the Internet as a "form of general public political advertising," see FAC ¶¶ 65-66, but this is really nothing more than a disagreement with the Commission's policy choice. Tellingly, plaintiffs' own

comments during the "soft money" rulemaking did not claim that an Internet exclusion would be an impermissible construction of the Act, noting instead that:

> In light of the complexities of this area, we urge the Commission to proceed carefully in delineating the scope of FECA's and BCRA's coverage with respect to Internet and e-mail communications, so that appropriate disclosure requirements and funding restrictions apply to public communications by political party committees via electronic means.

Comments of Shays, Meehan, et al. to FEC, May 29, 2002, Attachment 5, at 10.

As a matter of policy, the Internet's unique nature justifies regulatory caution. The Commission noted that it failed to see a threat of corruption "in a medium that allows almost limitless, inexpensive communication across the broadest possible cross-section of the American population." 67 Fed. Reg. 49072. As one commenter noted, unlike the other media covered by 2 U.S.C. 431(22) the Internet is an "open, decentralized platform" on which widely varied users can "engage in meaningful, two-way dialogue ..." Id. at 49,071-72 (quoting Comments of Mindshare Internet Campaigns to FEC, May 29, 2002, Attachment 6, at 3). The Supreme Court itself has stressed the importance of the "unique" nature of the Internet in considering the extent to which it is subject to regulation, noting that "[u]nlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.'" Reno v. ACLU, 521 U.S. 844, 851, 854 (1997) (quoting district court findings, ACLU v. Reno, 929 F. Supp. 824, 845 (E.D. Pa. 1996)).

The Commission's interpretation is reasonable as a matter of statutory construction. The Internet is not one of the many media Congress carefully listed in 2 U.S.C. 431(22), and as the Commission noted, "[g]eneral language following a listing of specific terms...does not evidence Congressional intent to include a separate and distinct term that is not listed, such as the Internet." 67 Fed. Reg. 49072 (citing Sutherland Statutes and Statutory Construction, section 47;

17 Ejusdem generis, Vol. 2A (6th ed. 2000)). Of course, Congress is well aware of the role the Internet plays in modern society; it explicitly addressed the Internet elsewhere in BCRA, see 2 U.S.C. 434(a)(12), 438a, and it has considered regulation of the Internet on other occasions in recent years, as the Commission noted. 67 Fed. Reg. 49072. Yet Congress listed eight different types of mass communication in 2 U.S.C. 431(22), including broadcast, print, telephone media and even "outdoor advertising facility"—but omitted the Internet from the list. Congress even enacted a specific definition of "mass mailing," one of the listed forms of public communication, that includes fax transmissions but excludes electronic mail. 2 U.S.C. 431(23) ("The term 'mass mailing' means a mailing by United States mail or facsimile ... ").

Other parts of BCRA also support the Commission's interpretation. For example, plaintiffs have not alleged that the limitation in the statutory definition of "electioneering communication" to "broadcast, cable or satellite" communications, 2 U.S.C. 434(f)(3)(A)(i), significantly undermines the effectiveness of that provision. Likewise, plaintiffs do not challenge 11 CFR 100.29(c)(1), the regulation clarifying that "electioneering communication" does not include communications over the Internet, nor did they object to it in their comments on that proposed rule. 67 Fed. Reg. 65196. The Commission's explanation of its exclusion of the Internet from that unchallenged rule is equally applicable to 11 CFR 100.26: "The Commission has decided to include the exemption [for the Internet] in the final rules, rather than attempt to craft a regulation that responds to unknown, future developments." Id. This is a reasonable regulatory approach, particularly in this sensitive First Amendment area of regulation, which leaves open the possibility of revision if "future developments" demonstrate that it is needed.

We are not aware of any legislative history indicating that Congress intended communications over the Internet to be considered "public communications" under 2 U.S.C.

431(22). See 67 Fed. Reg. 49072. Indeed, one commenter noted during the rulemaking that plaintiff Shays himself had been quoted in Forbes while BCRA was before Congress as stating that the "Internet is not really the problem right now" and that there was "a general feeling that, if in doubt, stay away from putting on any restrictions." Comments of Mindshare Internet Campaigns to FEC, May 29, 2002, Attachment 6, at 2. Though statements of individual legislators are not controlling as to Congress' intent, see United States v. McGoff, 831 F.2d 1071, 1090 (D.C. Cir. 1987), this one is significant because it runs counter to plaintiffs' own contention here that the 11 CFR 100.26 Internet exclusion contravenes BCRA.[12]

In fact, Congress had explicit (albeit last minute) notice that new 2 U.S.C. 431(22) was susceptible to different interpretations with respect to the Internet. In the Senate's consideration of the concurrent resolution making technical corrections to BCRA on March 22, 2002, Senator McConnell placed in the record a letter from two FEC Commissioners highlighting this question, noting that the Commission had in the past treated certain types of Internet communications as "general public political communication," and asking for guidance. 148 Cong. Rec. S2340 (March 22, 2002). No guidance was forthcoming from Congress.

Despite their failure to respond when some Commissioners sought guidance from Congress on this question, plaintiffs now seize on the FEC's prior interpretation of the term to argue that the Commission has previously "treated the Internet as a form of 'general public

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[12] As noted supra, p. 37, plaintiffs themselves, in their rulemaking comments on this issue, urged the Commission to "proceed carefully" in light of the "complexities" in this area. Comments of Shays, Meehan, et al. to FEC, May 29, 2002, Attachment 5, at 10. At the rulemaking hearing, one of plaintiffs' counsel before this Court (then representing other clients) conceded that this is an "extremely difficult issue" because "it's an emerging technology and some of the implications are not yet clear." Transcript of FEC Hearing on Soft Money, June 4, 2002, Attachment 4, at 86, 90-91.

political advertising.'" FAC ¶66.[13] But that limited interpretation of the term in advisory opinions -- requiring disclaimers for certain web and mass e-mail communications containing express advocacy or solicitations, but not addressing their financing -- has little relevance to the new financing restrictions BCRA imposes on "Federal election activity." Here, confronting a new statute, a very different application with more onerous regulatory consequences, and the unique legislative and policy factors discussed above, the Commission was clearly not bound by an advisory opinion addressing different and less restrictive pre-BCRA statutory and regulatory provisions.[14]

Given the lack of clear Congressional direction as to whether the Internet should be included in 2 U.S.C. 431(22), the Commission's interpretation is a permissible policy choice well within its broad discretion under Chevron, 467 U.S. at 842-44.[15]

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[13] Before BCRA, former 2 U.S.C. 441d(a) and former 11 CFR 110.11(a)(1) required certain disclaimers identifying who paid for express advocacy communications and for political fundraising communications that constituted "general public political advertising." In advisory opinions, the Commission found that publicly accessible web sites, and e-mails sent to more than 100 separate e-mail addresses in a calendar year, that contained express advocacy and/or solicited contributions must include such disclaimers. See FEC Advisory Opinion 1999-37, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6316, 1999 WL 180366; FEC Advisory Opinion 1998-22, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6277, 1999 WL 823023; FEC Advisory Opinion 1995-9, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6146, 1995 WL 247474.

[14] In fact, the Commission's new regulations still require that the disclaimers mandated by 2 U.S.C. 441d be included in applicable Internet communications and electronic mail, even though their financing is not regulated as Federal election activity. See 11 CFR 110.11.

[15] Plaintiffs also challenge the application of the "public communication" definition's Internet exclusion to the BCRA coordination standards in 11 CFR 109.21(c). See FAC ¶¶ 98, 100. The Commission's exclusion of the Internet in the coordination context was permissible for the reasons explained above, and because it promotes consistency in the regulation of campaign activity. See 68 Fed. Reg. 430. Moreover, neither plaintiffs nor any other rulemaking commenter specifically opposed the application of this exclusion in the coordination context. Indeed, as the Commission noted, those commenters who specifically addressed the use of the "public communication" definition in defining coordinated expenditures all supported the exclusion of the Internet. See id.

8. Regulations 11 CFR 109.3 And 300.2(b), Defining "Agent," Are Not Arbitrary And Capricious.

Many provisions of BCRA address actions by agents of political parties or candidates. See, e.g., 2 U.S.C. 441i(a)(1) and (2) (prohibiting national party committees from soliciting, receiving, or directing soft money); 2 U.S.C. 441i(b)(1) (prohibiting use of soft money for Federal election activity by state, district and local committees); 2 U.S.C. 44i(e)(1) (prohibiting candidates and individuals holding Federal office from soliciting, receiving, directing, transferring or spending soft money in connection with Federal elections).

Congress did not define "agent" in BCRA, but left that determination to the Commission. In 11 CFR 109.3 and 300.2(b), the Commission defined agent to mean "any person who has actual authority, either express or implied," but did not include the common law concept of apparent authority as part of the definition of agent. 67 Fed. Reg. 49082. The Commission's definition is entirely consistent with the normal meaning of the word "agent." See Random House Dictionary of the English Language (Unabridged Ed. 1983) at 27 ("1. a person authorized by another person to act on his behalf"); Black's Law Dictionary, (7th Ed. 1999) at 64 ("1. one who is authorized to act for or in place of another").[16]

The Commission had substantial policy reasons for declining to extend the statutory regulation of agency to those who lack actual authority from the principal. As the Commission observed, "[m]any of the prohibitions and restrictions of BCRA apply to a principal entity, such as a political party committee or a candidate, and to the 'agents' of such principals where they act on behalf of those principals." 67 Fed. Reg. 49081-82.

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[16] Black's Law Dictionary defines "apparent agent" under a separate subheading as "[a] person who reasonably appears to have authority to act for another, regardless of whether actual authority has been conferred." Id.

> [A]pparent authority is largely a concept created to protect innocent third parties who have suffered monetary damages as a result of reasonably relying on the representations of individuals who purported to have, but did not actually have, authority to act on behalf of principals. Unlike other legislative areas, such as consumer protection and anti-fraud legislation, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations. Rather, the Commission interprets Title I of BCRA to use agency concepts to prevent evasion or avoidance of certain prohibitions and restrictions by individuals who have actual authority and who do act on behalf of their principals. In this light, apparent authority concepts are not necessary to give effect to BCRA.

67 Fed. Reg. 49082.

Use of the concept of apparent authority to impose vicarious liability in the context of election campaigns would be particularly problematic. Political campaigns tend to be untidy affairs, in which candidates and political parties call on the services of a variety of employees, vendors and volunteers with widely varying amounts of authority to act in different capacities on behalf of the party or campaign committee. Virtually anyone associated with such an effort might reasonably be viewed by someone as having "apparent authority" to represent the candidate or committee when engaging in many types of campaign activity, depending on the circumstances. It would not be unusual for volunteers caught up in the enthusiasm of a campaign to solicit contributions on their own from friends and relations. Indeed, even individuals who worked on a candidate's prior campaign, but not his other current one, could be thought to have apparent authority from the candidate when raising soft money for others. See FEC Advisory Opinion 2003-10, 1 Fed. Camp. Fin. Guide (CCH) ¶ 6393, 2003 WL 21543560.

It was a reasonable policy choice, therefore, for the Commission to decline to impose such open-ended and undefined potential liability for the actions of campaign workers who have not been authorized — even by implication — to engage in such actions on behalf of the

candidate or party committee.[17] Thus, the Commission concluded that "it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal. This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal." 67 Fed. Reg. 49083.

Despite all this, plaintiffs assert that the Commission was legally required to include as agents those having only apparent, but not actual, authority to act on behalf of the principal. FAC ¶¶ 40-42, 99. But Congress did not so provide, and apparent authority is not invariably sufficient to bind a purported principal even under common law. For example, when courts are asked to determine whether a settlement agreement signed by an attorney is enforceable against her client, the courts apply state contract law and state agency principles. Makins v. District of Columbia, 277 F. 3d 544, 547 (D.C. Cir. 2002). However, there is no consensus whether such a settlement is binding if the attorney only had apparent authority. Id. ("our survey of the law regarding settlements indicates that rather than national uniformity in the federal courts, there is national disarray").[18] Since the term "agent" does not always include those with only apparent authority, Congress was silent on this issue in BCRA, and the Commission had substantial

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[17] The Commission's decision was supported by many commenters. "[S]everal commenters urged the Commission to give full effect to a requirement that the agent must be acting on behalf of the principal before the principal incurs liability derived from the agent's actions." 67 Fed. Reg. 49082. "Two labor organizations commented that the principal's derivative liability should not extend beyond activities the agent has been specifically authorized to conduct. Two national party committees commented that the final definition must impose liability only when a principal exercises actual control over the actions of the agent, arguing that it would be unfair to impose liability for actions beyond the principal's control." 67 Fed. Reg. 49082. "[A] State party committee, framed its suggestion in terms of limiting a principal's liability to actions taken by an agent on the principal's 'explicit instructions.'" Id.

[18] In the District of Columbia, for example, apparent authority is not sufficient to bind the principal in these circumstances. Makins v. District of Columbia, 838 A.2d 300 (D.C. 2003) (on certification from the D.C. Circuit).

reasons for including only those with actual authority from the principal in the statutory regulation of agents, plaintiffs' disagreement with the Commission's policy choices provides no basis for concluding that this regulation is arbitrary or capricious.

9. Regulation 11 CFR 300.2(c)(2), Defining "Establish, Finance, Maintain Or Control," Is Not Arbitrary Or Capricious.

In 2 U.S.C. 441i(e)(1), BCRA prohibits a "candidate, individual holding Federal office, agent of a candidate or an individual holding Federal Office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a candidate or individual holding Federal office, from engaging in certain activity. In 11 CFR 300.2(c)(2), the Commission defined the phrase "directly or indirectly established, maintains, finances, or controls" by listing ten factors to be "examined in the context of the overall relationship between sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity." Plaintiffs do not challenge any of these ten factors. Instead, plaintiffs speculate that the Commission might interpret this regulation to permit circumvention of the new soft money restrictions by officeholders who establish, finance, maintain or control so-called "Leadership PACs." FAC ¶¶ 43-47.[19]

There is no basis for plaintiffs' speculation, for the Commission clearly indicated that its regulations were intended to ensure that statutory restrictions on the raising of soft money by Federal officeholders apply to their leadership PACs:

> [I]n discussing BCRA's restrictions on the solicitation and spending of non-Federal funds by Federal candidates and officeholders, the co-sponsors stated that

[19] A "Leadership PAC" is a political committee (a candidate's authorized campaign committee) formed by a federal officeholder or candidate to engage in activity involving other candidates and elections other than his own.

> these provisions were part of a "system of prohibitions and limitations on the ability of Federal officeholders and candidates, to raise, spend and control soft money "in order "to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." *See* 148 Cong. Rec. S2139 (March 20, 2002) (statement of Sen. McCain). In light of this purpose, the Commission notes that new 11 CFR 300.62 permits Federal candidates and officeholders to solicit, receive, direct, transfer, spend, or disburse funds in connection with Federal and non-Federal elections only from sources permitted under the Act and ... [subject to] the Act's contribution limits ... . In other words, a Leadership PAC that comes within the definition of 11 CFR 300.2(c) [cannot raise money that exceeds the statutory limits on candidate solicitations] ... In addition, the Commission agrees with commenters who pointed out that 11 CFR 300.62 does not permit Federal candidates and officeholders, their agents and entities established, financed, maintained, or controlled by them to solicit, receive, direct, transfer, spend, or disburse non-Federal funds for Federal elections.

67 Fed. Reg. 49107. This is more than enough to foreclose plaintiffs' facial challenge to the regulation, based on nothing more than speculation that the Commission would apply it differently than stated in the Explanation and Justification.

10. Regulation 11 CFR 300.2(c)(3), Assuring That BCRA Does Not Apply In A Retroactive Manner To Entities Created Before Its Effective Date, Is Not Arbitrary Or Capricious.

2 U.S.C. 441i(a)(2) prohibits national political party committees, their officers and agents, "and any entity that is directly or indirectly established, financed, maintained, or controlled by such national committees" from soliciting, receiving, directing or transferring soft money. The Commission promulgated 11 CFR 300.2(c)(3), which provides:

> On or after November 6, 2002, an entity shall not be deemed to be directly or indirectly established, maintained, or controlled by another entity unless, based on the entities' actions and activities solely after November 6, 2002, they satisfy the requirements of this section. If an entity receives funds from another entity prior to November 6, 2002, and the recipient entity disposes of the funds prior to November 6, 2002, the receipt of such funds prior to November 6, 2002 shall have no bearing on determining whether the recipient entity is financed by the sponsoring entity within the meaning of this section.

Plaintiffs allege that 11 CFR 300.2(c)(3) permits circumvention of BCRA's soft money restrictions because entities created prior to November 6, 2002 will "be able to raise and spend soft money after the effective date of BCRA, notwithstanding their establishment by, and affiliation with" the sponsoring entity prior to the date BCRA became effective. FAC ¶¶ 27, 29.[20]

This regulation represents a reasonable policy choice by the Commission. The Commission promulgated this regulation "to prevent a retroactive application of BCRA or, specifically, to prevent the actions and activities of entities before November 6, 2002, that are legal under current [i.e., pre-BCRA] law from creating potential legal liability based on the new requirements of BCRA, which do not take effect until after November 5, 2002." 67 Fed. Reg. 49084. Hence, "the Commission has concluded that BCRA should not be interpreted in a manner that penalizes people for the way they ordered their affairs before the effective date of BCRA. This will help assure that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed." Id.

There is nothing unreasonable about the Commission's conclusion that groups currently operating independently from a national party committee should not forever be bound by statutory restrictions applicable to the party committee because of activities that ceased before BCRA even went into effect. It was Congress, not the Commission, that decided to delay the effective date of BCRA until November 6, 2002, and the Commission's decision not to regulate

[20] Plaintiffs allege that an entity called "Leadership Forum" was created and received soft money from the National Republican Congressional Committee prior to November 6, 2002, but they concede that the Leadership Forum returned all of that money and do not allege any facts indicating that the Leadership Forum had done anything to circumvent the new soft money restrictions since BCRA took effect. If plaintiffs believe the Leadership Forum has engaged in unlawful activity, their recourse under the Act is to file a complaint with the Commission. 2 U.S.C. 437g(a)(1), 437d(e).

prospective activity on the basis of actions that were halted before the Act took effect is amply supported by the policy against retroactivity. "Retroactivity is not favored in the law." Bowen v. Georgetown University Hosp. 488 U.S. 204, 208 (1988). "[W]hen there is a 'substitution of new law for old law' ... the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" Verizon Telephone Company v. FCC, 269 F. 3d 1098, 1109 (D.C. Cir. 2001) (citation omitted).

In sum, the Commission's regulation reasonably implements the effective date provision of BCRA in a manner that avoids an unnecessarily retroactive effect that could be viewed as unfair. This is a reasonable policy choice by the Commission that does not conflict with anything in BCRA evidencing a contrary Congressional intent on this precise issue. Accordingly, the regulation easily satisfies deferential review.

11. Regulations 11 CFR 300.2(m) And (n), Defining "Solicit" And "Direct," Are Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 441i(a) prohibited national party committees from "solicit[ing], receiv[ing] or direct[ing] to another person" a contribution, donation, transfer of funds or any other thing of value that is not subject to the Act's limitations, prohibitions and reporting requirements. Similarly, in 2 U.S.C. 441i(e) Congress limited the ability of federal candidates, officeholders, their agents and entities established, maintained, financed or controlled by them to "solicit, receive, direct, transfer or spend" funds that are not subject to the Act's limitations, prohibitions and reporting requirements.

Congress did not define the terms "solicit" and "direct" in the statute, but left that policy choice to the Commission's discretion. To this end, 11 CFR 300.2(m) defines "to solicit" as "to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether the contribution, donation, transfer of funds, or thing of value, is to

be made or provided directly, or through a conduit or intermediary." Similarly, 11 CFR 300.2(n) defines "to direct" as "to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary." "[M]erely providing information or guidance as to the requirement of particular law" is not a solicitation or direction subject to the Act's restraints. 11 CFR 300.2(m), (n).

The D.C. Circuit has found that "solicit" as used in the FECA is an "inherent[ly] vague[]" term that "can, of course, mean a variety of things." Martin Tractor Co. v. FEC, 627 F.2d 375, 383-84 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980). The term "direct," used in conjunction with "solicit," is no less ambiguous. Thus, the only question for the Court is whether plaintiffs have carried their burden of proving that the Commission's policy choices in defining these terms are permissible. Chevron, 467 U.S. at 842.

Plaintiffs argue that these definitions of "solicit" and "direct" are too narrow to comport with their "plain and commonly understood meaning," FAC ¶¶ 33, 35-37. The Commission's definition of "to solicit" as "to ask" is, however, entirely consistent with its common definition. See e.g., Random House Dictionary of the English Language (unabridged ed. 1983) at 1354 ("1. to seek for by entreaty, earnest or respectful request, formal application, etc."). The Commission's decision to define "direct" in a similar manner properly reflects its placement in the statute in close association with "solicit," and is also consistent with the word's normal definition. See id. at 407 ("4. to give authoritative instructions to; command; order or ordain (something): *I directed him to leave the room*.").

The Commission concluded that, because "solicit" and "direct" are used in the statute to regulate the content of speech, these terms should be precisely defined. 67 Fed. Reg. at 49087.

It considered and rejected more ambiguous definitions of solicit and direct that would have required the Commission to impute intent when a private conversation with a candidate did not clearly involve a request for financial support.

> The commission does not believe it is appropriate to promulgate a regulation that would require examination of a private conversation to impute intent when the conversation is not clear on its face. The Commission is concerned that the ability to impute intent could lead to finding a violation when the individual who made the comment may have had no intention whatever of soliciting a contribution. Such a result is not dictated by BCRA's statutory language, and would raise constitutional concerns.

Id. See also FEC Advisory Opinions 2003-3, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6389, 2003 WL 21032390 and 2003-36, 2003 WL 110634. It was a reasonable policy choice for the Commission to act cautiously and put a high value on clarity when construing ambiguous statutory terms that regulate the content of speech. See Buckley, 424 U.S. at 43.

In fact, the Supreme Court quoted approvingly, and relied upon, the narrowly tailored definitions of "solicit" and "direct" in 11 CFR 300.2(m) and (n) in upholding the constitutionality of 2 U.S.C. 441i(a) against a claim of overbreadth. McConnell, 124 S. Ct. at 670. Therefore, because the Act is silent about the meaning of "solicit" and "direct," and the Commission's definitions represent reasonable policy choices consistent with the statutory language and relied upon by the Supreme Court, 11 CFR 300.2(m) and (n) cannot be found arbitrary or capricious.

12. Regulation 11 CFR 300.30(c)(3), Regulating How Levin Funds May Be Maintained, Is Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 441i(b)(2)(A) provided an exception to the requirement that State, district, and local party committees must spend only hard money for Federal election activities. The "Levin Amendment" permits State, district, and local political party committees to allocate

expenditures for Federal election activity partly to a new category of funds that are commonly called "Levin funds."

Congress in 2 U.S.C. 432(h)(1) required each political committee to maintain at least one account, and such other accounts as the committee chooses, at a bank or depository institution designated by the committee as its campaign depository. The Commission's regulations require each State, district, and local party organization or committee that has receipts or makes disbursements for Federal election activities to establish accounts in accordance with one of three options. 11 CFR 300.30(c). A committee may have one or more federal accounts from which it may make Federal disbursements, non-Federal disbursements and disbursements for Federal election activities subject to certain conditions. 11 CFR 300.30(c)(1). A committee can instead choose to establish three types of accounts – one or more Federal accounts, one or more Levin accounts, and one or more non-federal accounts. 11 CFR 300.30(c)(2). Or a committee can choose to establish only two types of accounts – one or more Federal accounts and an account that functions as both a non-Federal account and a Levin account. If a committee chooses this last option, it "must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission)" that it "has received sufficient contributions of Levin funds" for any disbursements it makes for Federal election activities. 11 CFR 300.30(c)(3).

Plaintiffs complain only about the last option – a committee maintaining only Federal accounts and combined non-Federal/Levin accounts. They argue that allowing State party committees to maintain an account that functions as both a non-Federal and Levin account will allow them to "commingle unregulated soft money funds with Levin funds" and that this

regulation "compound[s] the problem…by failing to require state parties to use accounting procedures in accord with standard industry practices." FAC ¶ 71(c).

However, the Act says nothing at all about the "commingling" of Levin funds with other non-federal funds, contains no requirements about how Levin funds are to be accounted for or deposited, and says nothing about standard accounting procedures. Indeed, the Act explicitly defers to the Commission's rulemaking authority the determination of how expenditures are to be allocated between Federal and Levin funds. 2 U.S.C. 441i(b)(2)(A). In the absence of any applicable statutory language, the Commission concluded it was not necessary to require a separate Levin account for those State, district and local party committees that decide to allocate expenditures for Federal election activities, and decided instead "to provide party organizations with procedural flexibility to facilitate compliance with the substantive conditions and restrictions arising from the Levin Amendment." 67 Fed. Reg. 49093. Giving such flexibility to these committees was especially important in light of the complexities of the Act, and the varied state laws that also apply to these organizations – some of which may require multiple accounts, and others of which may prohibit a committee from using more than one account for its activity. Id. See also Testimony of Mark Brewer (Michigan Democratic Party Chair), Neil Reiff (DNC), and Thomas Josefiak (RNC) before the FEC, June 5, 2002, Attachment 4, at 552-54 (Michigan, Wisconsin, and Connecticut, among others, restrict the number of non-federal accounts that state party committees may maintain).

It was reasonable for the Commission to conclude that the substantive restrictions of the Levin Amendment could be policed effectively by placing on committees who choose to maintain a combined account the burden of demonstrating — using "reasonable accounting method[s]" that must be approved by the Commission, 11 CFR 300.30(c)(3) — that they have in

fact raised sufficient Levin funds to pay for the non-Federal share of all their allocated Federal election activities. This method ensures that the Levin funds properly raised by a party cannot be supplemented with additional non-Federal funds that do not comply with the Levin Amendment.

That is more than enough to sustain the regulation against a facial challenge, particularly since the regulation does not say which accounting methods the Commission will approve in the future. If this regulation proves less reliable in practice than the Commission anticipates, any such problems can be addressed when and if they arise.

13. Regulation 11 CFR 300.32(a)(4) Regulating the Raising Of "Levin Funds" Is Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 441i(c) required that any funds spent by National, State, local or district party committees "to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." To implement this provision, the Commission promulgated 11 CFR 300.32(a)(4), which requires that "State, district, and local party committees that raise Levin funds to be used, in whole or in part, for Federal election activity must pay the direct costs of such fundraising with either Federal or Levin funds."

Plaintiffs claim that this regulation is contrary to the statute, which they contend "explicitly requires that state, district and local parties use only hard money to pay the costs of raising funds (including 'Levin' funds) that are used to pay for 'Federal election activity.'" FAC ¶71(b). In fact, however, the statute does not say that Levin fundraising costs must be paid with "hard money," but with "funds subject to the limitations, prohibition, and reporting requirements of the Act." Levin funds are subject to the limitations and prohibitions found in the Act at 2 U.S.C. 441i(b)(2), and to the reporting requirements found in the Act at 2 U.S.C.

434(e)(2)(A).[21] In fact, plaintiffs themselves admitted in their comments to the Commission during this rulemaking that "Levin funds are subject to an intricate set of restrictions relating to their solicitation, receipt, and disbursement." Comments of Shays, Meehan, et al. to FEC, May 29, 2002, Attachment 5, at 24. Another commenter "suggest[ed] that Levin funds are subject to the limitations, prohibitions and reporting requirements of the Act, as specified in 2 U.S.C. 441i(c)." 67 Fed. Reg. 49096.

The Commission's conclusion in this regard is supported by the language and structure of 2 U.S.C. 441i(b) and (c). In 2 U.S.C. 441i(b)(2)(A)(i) and (ii), Congress designated the two classes of funds between which expenditures for Federal election activity could be allocated. In subparagraph (i), Congress defined the Federal portion of the allocation as consisting "solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than any amounts described in subparagraph (B)(iii)) (emphasis added). This definition plainly recognizes that without the explicit exclusion, Levin funds, which are the subject of subparagraph (B)(iii), would have been included as "contributions subject to the limitations, prohibitions, and reporting requirements of this Act." Subparagraph (ii), defining the Levin funds portion of the allocation, similarly defines those as "amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of

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[21] 2 U.S.C. 441i(b)(2)(B) prohibits the use of Levin funds for activity that refers to a Federal candidate, and 2 U.S.C. 441i(b)(2)(C) prohibits use as Levin funds of money raised by anyone other than the party committee that uses them. 2 U.S.C. 441i(b)(2)(B)(iii) places a $10,000 limit on donations of Levin funds, and 2 U.S.C. 441b and 441e prohibit national banks and foreign nationals from contributing any Levin funds. See 67 Fed. Reg. 49094. 2 U.S.C. 434(e)(2) explicitly requires state and local party committees to report to the Commission for public disclosure "all receipts and disbursements" for federal election activities of $5,000 or more per year, a requirement that clearly includes Levin funds. Thus, Levin funds are subject to prohibitions, limitations and reporting requirements of the Act.

this subsection) (emphasis added). This plainly recognizes that without the explicit caveat, the "requirements of this subsection," which sets out the restrictions on Levin funds, would fall within the phrase "limitations, prohibitions, and reporting requirements of this Act."

In contrast, in the very next subsection, 441i(c), addressing the funds to be used to raise Levin funds, Congress permitted these expenses to be paid with any "funds subject to the limitations, prohibitions, and reporting requirements of the Act," and did not include the caveat to exclude Levin funds from that formulation that it had carefully incorporated into 2 U.S.C. 441i(b)(2)(A)(i) and (ii). It was not unreasonable for the Commission to give meaning to the sharply contrasting language of these adjacent subsections of section 441i, by declining to read into subsection 441i(c) the caveat excluding Levin funds that Congress included explicitly in section 441i(b). See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983).

Thus, in light of the statutory limitations, prohibitions, and reporting requirements to which Levin funds are subject, the Commission reasonably construed 2 U.S.C. 441i(c) to permit State, district, and local party committees to use Levin funds to raise Levin funds. 67 Fed. Reg. 49096-97.

14. Regulation 11 CFR 300.32(c)(4), Establishing A *De Minimis* Exception From The Allocation Between "Federal Funds" And "Levin Funds," Is Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 441i(b)(2) provided that funds used for certain types of Federal election activity may be allocated by state and local party committees between Levin funds and Federal funds. The Commission promulgated 11 CFR 300.32(c)(4), which provides that this allocation requirement is applicable only to disbursements for Federal election activity aggregating more than $5,000 in a calendar year, because "there is no danger that allowing a committee to use entirely Levin funds for allocable Federal election activity that aggregates

$5,000 or less in a calendar year will somehow lead to circumvention of the amount limitations set forth in 2 U.S.C. 441i(b)(2)." 67 Fed. Reg. 49097.

This regulation is designed simply to reduce unnecessary Federal regulatory burdens on party committees that spend only a *de minimis* amount on Federal election activities. 67 Fed. Reg. 49097. The Commission adopted this *de minimis* exemption because it was "particularly sensitive" to the fact that the allocation requirement applies to grassroots activities such as voter registration, voter identification, GOTV and generic campaign activity, even when they do not involve any references to Federal candidates. 67 Fed. Reg. 49097. The Commission concluded that this minor exception for committees whose efforts are focused almost exclusively on state and local elections would not lead to circumvention of the amount limitations set forth in 2 U.S.C. 441i(b)(2) because $5,000 is only half of what any single donor may donate in Levin funds to each State, district and local party committee under the statute. Moreover, this *de minimis* exception precisely tracks the *de minimis* exception from the requirement to report such activities adopted by Congress itself in 2 U.S.C. 434(e)(2)(A) (requiring reporting of Levin funds "unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000").

Plaintiffs claim that 11 CFR 300.32(c)(4) "re-writes the statute to allow state, district and local parties to use more soft money to finance 'Federal election activity' than BCRA permits" by paying for the first $5,000 of such activity with all Levin funds rather than an allocated portion of Levin funds and Federal funds. FAC ¶ 71(a). Plaintiffs misread the regulation in asserting that this rule exempts the "first" $5,000 for a committee that spends more than that on Federal election activities FAC ¶ 71(a). The application of the regulation turns on whether a committee spends an "aggregate" of $5,000 on Federal election activities during a calendar year;

disbursements exceeding $5,000 in the aggregate must be allocated. Moreover, the Commission's adoption here of the same *de minimis* Levin fund threshold level as Congress itself adopted for the parallel reporting requirement can hardly be termed unreasonable or inconsistent with Congressional intent. As we have already shown supra, pp. 35-36, "categorical exemptions from the requirements of a statute may be permissible 'as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*.'" Environmental Defense Fund v. EPA ("EDF"), 82 F.3d 451, 466 (D.C. Cir. 1996) (quoting Alabama Power Co. v. Costle, 636 F.2d 323, 360 (D.C. Cir. 1979)). While a *de minimis* exemption cannot be adopted if it is "contrary to the express terms of the statute," EDF, 82 F.3d at 466, as "long as the Congress has not been 'extraordinarily rigid' in drafting the statute…'there is likely a basis for an implication of *de minimis* authority to provide [an] exemption when the burdens of regulation yield a gain of trivial or no value.'" Id. (citations omitted). Thus, in EDF, the court upheld a *de minimis* exemption created by EPA despite statutory language which prohibited the federal government from engaging in "any activity" that did not conform to an applicable implementation plan. Id. Such *de minimis* exemptions are entitled to deference from the courts. Id. at 467 ("the same deference due to an agency's reasonable interpretation of an ambiguous statute under Chevron may also be due to an agency's creation of a *de minimis* exemption").

In sum, this *de minimis* exemption, following the lead of Congress itself, is well within the Commission's regulating discretion.

15. Regulations 11 CFR 300.33(c)(2) And 106.7(c)(2), Governing Financing Of Salaries Of State Political Party Employees, Are Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 431(20)(A)(iv) defined as Federal election activity "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 connection with a Federal election." The regulation implementing this provision provides that "[s]alaries and wages for employees who spend more than 25% of their compensated time in a given month on Federal election activity or activities in connection with a Federal election must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used." 11 CFR 300.33(c)(2). Conversely, "[s]alaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity or activities in connection with a Federal election" are not required to be paid with Federal funds. 67 Fed. Reg. 49126. See also 11 CFR 106.7(c)(1) (same).

Neither BCRA nor the pre-existing FECA contains any provision addresssing the payment of salaries of state party employees who spend 25% or less of their time on Federal election activity. Prior to the enactment of BCRA, the Commission's regulations provided for allocation of all of a state party's overhead expenses, including employee salaries, between Federal and non-Federal accounts. See 11 CFR 106.5(a)(2) (2001). However, BCRA did away with that allocation scheme by forbidding allocation to non-federal funds of any part of the salary of state party employees spending more than 25% of their time on Federal election activities.

Plaintiffs assert that the Commission should have retained its prior regulatory formula for allocating salaries of those remaining state party employees whose salaries are not addressed by

BCRA. FAC ¶¶ 69-70. However, the Commission's pre-existing allocation scheme for state party committees was never a part of the statute, and thus was always subject to modification by the Commission in the exercise of its broad regulatory discretion. No provision of BCRA purports to codify this pre-existing allocation regulation into statutory law, or to restrict the Commission's otherwise broad discretion to reconsider its previous regulatory policies in light of the new statutory scheme. Congress thus left it up to the Commission to determine how salary expenses not addressed by the statute would be regulated.

In essence, the Commission simply followed the line drawn by Congress with respect to which employees' activities should be deemed to affect a Federal elections sufficiently to require Federal regulation of the funds used to pay their salaries. Congress chose to federalize completely the salaries even of employees who spend a large majority of their time on non-Federal activities, but it appears to have concluded that employees spending only 25 percent or less of their time on Federal election activities do not have a sufficient nexus with Federal elections to require such regulation. 67 Fed. Reg. 49078. Congress could have provided that the salaries of employee spending less than 25% of their time on Federal election activities be allocated between Federal and non-Federal funds, but it did not.

The Commission's regulations also provide significant administrative advantages. They simplify how state party committees pay the salaries of their employees who participate in Federal election activities, and provide a bright line test for which type of funds should be used – if more than 25 percent of a state party employee's time is spent on Federal election activity, then it must be paid with only Federal funds; otherwise, the salary may be paid with funds that comply with State law.

In sum, the Commission's regulation represents a reasonable policy choice that does not conflict with anything in the statute, and it plainly satisfies deferential review.

16. Regulation 11 CFR 300.35 Regulating State Party Building Funds Is Not Arbitrary Or Capricious.

Congress provided in 2 U.S.C. 453(b) that "[n]otwithstanding any other provision of this Act," state and local party committees may "use exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act for the purchase or construction of an office building for such State or local committee." This BCRA provision replaced former 2 U.S.C. 431(8)(B)(viii), which exempted from the definition of contribution the "cost for construction or purchase" of an "office facility."

In 11 CFR 300.35 the Commission used the same language as 2 U.S.C. 453(b), providing that a state party committee may use nonfederal funds "[i]n the purchase or construction of its office building." Plaintiffs do not claim that this regulation, which incorporates the statutory language, conflicts on its face with the statute, nor do they suggest any manner in which the wording of this regulation should be changed. Instead, they ask this Court to review statements in the Commission's Explanation and Justification about how the Commission expects to apply this statutory and regulatory language. We are not aware of any authority for facial judicial review of statements in an agency explanation of a regulation that is itself unobjectionable on its face.

In any event, the Commission's view expressed in the Explanation and Justification that the building fund exemption in 2 U.S.C. 453(b) for the "purchase or construction of an office building" should include capital improvements, is entirely reasonable. The statute does not define these terms and no one presented evidence to the Commission that the legislative history evidenced an intent by Congress to exclude capital improvements from the building fund

exception. See, 148 Cong. Rec. S2143-44 (March 20, 2002) (Sen. Feingold) ("the bill does not ... regulate State or local party expenditures of non-Federal donations received in accordance with State law on purchasing or constructing a state or local party office building").

The lack of evidence of legislative intent on this question in the statements reviewed by the Commission substantially supports the Commission's view, for the Commission had construed the predecessor of this provision, former 2 U.S.C. 431(8)(B)(viii), as applying to capital improvements. See FEC Advisory Opinion 2001-01, Fed. Election Camp. Fin. Guide (CCH) ¶ 6356, 2001 WL 238462 (permitting architectural and construction management fees and renovation of the office building to be financed from the office building fund); FEC Advisory Opinion 1998-7, Fed. Election Camp. Fin. Guide (CCH) ¶ 6262, 1998 WL 271040 (distinguishing capital expenditures from operating expenses and permitting large renovations, as capital expenditures, to be financed from the building fund). In the absence of any indication of Congressional dissatisfaction with this construction, the Commission reasonably concluded there was no statutory intention to overrule it. 67 Fed. Reg. 4902.

Plaintiffs now assert that Congress intentionally changed the term from "facility" to "building" in order to make clear that the provision applies only to a building and not to its associated capital improvements. FAC ¶ 71.d. But the statute does not define these terms and before the Commission plaintiffs provided no legislative history evidencing such an intention. Indeed, such a distinction would not serve any obvious purpose of the Act. See Gottlieb, 143 F.3d at 621-22. ("[B]rightening up the decor at campaign headquarters ... at least arguably did not directly counter or even diminish appellants' attempts to influence the electorate"). The Commission's construction of 2 U.S.C. 453(b) to apply to capital investments in a building also accords with Internal Revenue Service regulations which include the cost of the acquisition,

construction, or erection of buildings, machinery and equipment, furniture and fixtures, and similar property, all together in a single category of capital expenditures. See 26 CFR 1.263(a)-(1) and 1.263(a)-(2).

For all these reasons, 11 CFR 300.35 represents a reasonable policy choice that contravenes no statutory language. Accordingly, it easily satisfies deferential judicial review.

17. Regulation 11 CFR 300.64, Addressing The Attendance Of Candidates And Federal Office Holders At State Political Party Fundraisers, Is Not Arbitrary Or Capricious.

Congress in 2 U.S.C. 441i(e)(3) provided an exception from the restrictions on Federal candidates and officeholders raising soft money, permitting a Federal candidate or officeholder to "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." The Commission in 11 CFR 300.64(b) construed this provision as permitting Federal candidates and officeholders to speak at a state party fundraising event at which Levin or non-Federal funds are raised "without restriction or regulation."

Plaintiffs claim that this regulation is contrary to "the language and purpose of BCRA, which prohibits Federal officeholders form soliciting and directing soft money," because it permits them to make solicitations of soft money at state party committee fundraising events. FAC ¶ 39.22 However, 2 U.S.C. 441i(e)(3) is written as an exception to the soft money solicitation limits in section 441i(e)(1). If section 441i(e)(3) merely allowed candidates and officeholders to attend or speak at a state party fundraiser, but not to solicit funds there, it would not be an exception to section 441i(e)(1) at all, for the only thing that provision restricts is the

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[22] Plaintiffs are mistaken in asserting that BCRA entirely "prohibits" Federal candidates and officeholders from soliciting soft money. As the Supreme Court noted, McConnell, 124 S.Ct. at 682 n.70, although BCRA tightly limits candidates' solicitation of soft money, it permits them to solicit nonfederal money from individuals for use in connection with nonfederal

solicitation (or direction or receipt, etc.) of soft money. Accordingly, the Commission reasonably concluded that 2 U.S.C. 441i(e)(3) should be construed, as it was written by Congress, as an exception from the application of the restriction on solicitation speech in section 441i(e)(1) when a candidate or officeholder appears at a state party fundraiser. See 67 Fed. Reg. 49108. This construction is also supported by general constitutional concerns about regulation of the content of speech, which is what the plaintiffs here seek. In fact, when the Supreme Court upheld the constitutionality of section 441i(e), it found section 441i(e)(3) to be one of the provisions that "preserve[s] the traditional fundraising role of federal officeholders by providing limited opportunities for federal candidates and officeholders to associate with their state and local colleagues through joint fundraising activities." McConnell, 124 S. Ct. at 683 (emphasis added).

Because the Commission's regulation is consistent with the language and structure of the statute, there is no basis for disturbing it under deferential judicial review.

B. The Commission's Title IIA Regulations Are Not Arbitrary Or Capricious

In Title IIA of BCRA, Congress made certain electioneering communications subject to the corporate and union financing restrictions of 2 U.S.C. 441b and the disclosure requirements of 2 U.S.C. 434(f). Specifically, 2 U.S.C. 434(f)(3)(A)(i) defines "electioneering communication" to mean a television or radio communication that refers to a clearly identified federal candidate, is "made" within 60 days of a general election or within 30 days of a primary or convention, and for Congressional elections, is targeted to the "relevant electorate."

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elections, up to the amount of the analogous hard money contribution limits. See 2 U.S.C. 431i(e)(1)(B).

1. Regulation 11 CFR 100.29(b)(3)(i), Excluding From Regulation Broadcast Communications For Which The Broadcaster Charges No Fee, Is Not Arbitrary Or Capricious.

Pursuant to Congress' broad grant of rulemaking authority, 11 CFR 100.29 addresses the abuses upon which Congress focused when regulating "electioneering communications," but carefully avoids the serious risk that the term could be applied to broad classes of media programming and public service announcements as to which there was no evidence of any abuse and that BCRA was never intended to reach. Thus, in 11 CFR 100.29(a)(2), the Commission concluded that requiring that the communications be "made" within the applicable time period means that they be "publicly distributed" within that period. Regulation 11 CFR 00.29(b)(3)(i), provides that "publicly distributed" means disseminated "for a fee" through the relevant television or radio facilities.

Regulation 11 CFR 100.29(b)(3)(i) is well within the Commission's broad regulatory discretion. Because the definition of "electioneering communication" in 2 U.S.C. 434(f)(3) does not address the financing of such communications, Congress has not spoken directly to "the precise question at issue." Chevron, 467 U.S. at 842-44. Drawing a line based upon whether any funds are used to broadcast an advertisement reasonably reflects the statute's most basic purpose: to regulate the way in which campaign speech is financed, not to bar such speech itself. In fact, Congress itself exempted many unpaid communications that would otherwise meet the "electioneering communication" definition, in the "news story, commentary or editorial" exception of 2 U.S.C. 434(f)(3)(B)(i), and in the "candidate debate or forum" exception of 2 U.S.C. 434(f)(3)(B)(iii). Congress also gave the Commission the authority to exempt other communications in order to assure the "appropriate implementation" of the electioneering communications rules. 2 U.S.C. 434(f)(3)(B)(iv).

Before the Commission, plaintiffs did not claim that Congress forbade any exemption for public service announcements, point to legislative history evincing a specific Congressional intent to apply the "electioneering communication" restrictions to unpaid advertising, or even argue that there should not be such an exemption as a matter of policy. Instead, they merely argued that before crafting such an exemption the Commission "must be convinced that such ads have been run in the past during the pre-election windows and that exempting them will not create opportunities for evasion of the statute"—an implicit acknowledgment that the FEC had the discretion to create such an exemption. Comments of Shays, Meehan et al. to FEC, August 23, 2002, Attachment 7, at 6-7. Plainly, the Commission was "convinced" that such ads would not open the statute to circumvention.

In this Court, plaintiffs claim that "[t]here is no basis in BCRA for" the exclusion of unpaid public service announcements because "the statutory definition of 'electioneering communication' does not distinguish between paid and unpaid advertisements, but rather encompasses both." FAC ¶ 83. See also FAC ¶¶ 81-84. To our knowledge, however, not one unpaid communication played any significant role in the legislative history leading up to BCRA's enactment, in the McConnell litigation, or in the FEC rulemaking regarding "electioneering communications." Rather, as the Commission noted in its Explanation and Justification discussing 11 CFR 100.29(b)(3)(i), the evidence is overwhelming that the problem Congress identified involved paid advertisements. See 67 Fed. Reg. 65192-93. Plaintiffs assert that in the past "public service announcements" have shown federal candidates in a "favorable light" and "have [had] all of the elements" of an "electioneering communication." FAC ¶84. But since neither the plaintiffs nor any other commenters offered any evidence to the Commission to support this conclusory assertion, there is no basis in the record for overturning

the Commission's determination. See Comments of Shays, Meehan et al. to FEC, August 23, 2002, Attachment 7, at 6-7.[23]

Nor did plaintiffs provide any evidence to support the speculation in their complaint that broadcasters might use 11 CFR 100.29(b)(3)(i) to conspire with corporations to "exempt" their advertisements from regulation. FAC ¶84. There is no reason to believe that those seeking to influence elections in the future would be able to prevail upon broadcasters to run their ads for free, especially just before elections when advertising time is at a premium. As with so many of plaintiffs' hypothetical concerns, if — contrary to the Commission's expert evaluation — this turns out to be a problem in the future, this regulation can be reconsidered in light of such further experience.

The Commission noted the concern that without an exception like 11 CFR 100.29(b)(3)(i) the statute could be interpreted to restrict a wide range of entertainment, educational and documentary programs that mention or portray a federal candidate only incidentally, since most such programming is produced with significant corporate funds. See 67 Fed. Reg. 65193. Although some such broadcasts might well fall within the "commentary" element of the "news story, commentary or editorial" exception of 2 U.S.C. 434(f)(3)(B)(i), see FEC Advisory Opinion 2003-34, __ Fed. Election Camp. Fin. Guide (CCH) ¶ ____, 2003 WL 23155748, lack of certainty on this point could create a significant chilling effect on non-political programming. Broadcasters would need to review all of the unpaid programming they intended to broadcast, during a wide range of 60- and 30-day pre-election windows, for any reference to, or image of, a federal candidate.

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[23] One commenter in the rulemaking did, however, argue that "free broadcast resources such as public service announcements, community cable access and radio time are not subject to

Plaintiffs also argue that the regulatory exemption for unpaid communications should be eliminated to ensure that the "electioneering communications" definition would capture public service announcements. FAC ¶¶ 81-84. Such a possibility was a focus of concern during the rulemaking. Public service announcements serve an important non-partisan public interest analogous to news commentary and candidate debates that Congress itself exempted in 2 U.S.C. 434(f)(3)(B)(i) and (iii). Charities and government entities commonly use these announcements to provide the public with important information about community issues and events. For instance, the Commission received evidence that many small non-profit groups rely on such announcements and free cable broadcast time in their public education efforts. See Transcript of FEC Hearing on Electioneering Communications, August 29, 2002, Attachment 8, at 117-18. And while there was no historical evidence that a federal candidate had ever used a public service announcement to advance his or her candidacy, if a President seeking re-election or a governor or mayor running for federal office were to make a public service announcement encouraging contributions to relief from a natural or human disaster, such as a hurricane or a terrorist attack, without 11 CFR 100.29(b)(3)(i) broadcasters might not run it for large parts of the election year for fear of implicating the "electioneering communication" restrictions.

Given the Commission's authority to craft exemptions and the lack of evidence of partisan misuse of unpaid communications, 11 CFR 100.29(b)(3)(i) is a permissible application of the statute under Chevron.

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hijacking by soft money interests." See Comments of OMB Watch to FEC, August 21, 2002, Attachment 9, at 5.

2. Regulation 11 CFR 100.29(c)(6), Excluding From "Electioneering Communications" Communications By IRS Section 501(c)(3) Charitable Organizations That Are Already Barred From Partisan Politics, Is Not Arbitrary Or Capricious.

The Commission promulgated 11 CFR 100.29(c)(6) to prevent the Act's "electioneering communication" provisions from inadvertently stifling the ability of the nation's more than 900,000 26 U.S.C. 501(c)(3) organizations[24] —which federal law already strictly bars from any partisan political activity—to carry out their core charitable functions by disrupting or chilling their educational communications.

To this end, 11 CFR 100.29(c)(6) provides that the Act's definition of "electioneering communication" excludes communications paid for by organizations operating under 26 U.S.C. 501(c)(3) (tax-exempt charitable organizations). This regulation is one of the exemptions the Commission promulgated pursuant to its explicit authority under 2 U.S.C. 434(f)(3)(B)(iv) to assure the "appropriate implementation" of the electioneering communications definition. The net result of this statutory provision is that the Commission has broad authority to exempt communications from regulation as long as they are not among those described in 2 U.S.C. 431(20)(A)(iii) (public communications that promote, support, attack or oppose a clearly identified federal candidate). As we show below, Section 501(c)(3) organization communications do not fall into that category. Accordingly, 11 CFR 100.29(c)(6) permissibly provides that the term "electioneering communication" does not include any communication that is paid for by "any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986."

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[24] See "Tax-Exempt Organizations and Other Entities Listed on Exempt Organization Business Master File, by Type of Organization and Internal Revenue Code Section, Fiscal Years 1999-2002," 2002 IRS Data Book (2003), at <http://www.irs.gov/taxstats/article/0,,id=97176,00.html>.

There is no mention in BCRA Title II of Section 501(c)(3) organizations, and thus Congress has not spoken directly to "the precise question at issue" under Chevron. Moreover, as with 11 CFR 100.29(b)(3)(i) above, plaintiffs themselves did not argue in the rulemaking that Congress forbade any exemption for Section 501(c)(3) charities, or even that there should not be one as a matter of policy, but only asserted that before crafting one the Commission "must be convinced that such ads have been run in the past during the preelection windows and that exempting them will not create opportunities for evasion of the statute"—again, an implicit acknowledgment of the Commission's authority to exempt Section 501(c)(3) charities. Comments of Shays, Meehan et al. to FEC, August 23, 2002, Attachment 7, at 6-7. See 67 Fed. Reg. 65199-200.

As the Commission explained, Federal law already strictly forbids Section 501(c)(3) charitable organizations from engaging in the partisan advocacy that is the target of BCRA's "electioneering communications" provisions. 67 Fed. Reg. 65199-200. In particular, the Internal Revenue Code bars Section 501(c)(3) organizations from making the sort of communications the Commission lacks authority to exempt — those that promote, support, attack or oppose a federal candidate. See 2 U.S.C. 431(20)(A)(iii); 434(f)(3)(B)(iv). Specifically, 26 U.S.C. 501(c)(3) itself broadly states that such organizations cannot "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." See 26 CFR 1.501(c)(3)-1. "[N]o degree of support for an individual's candidacy for public office is permitted." Association of the Bar of City of New York v. Commissioner, 858 F.2d 876, 881 (2nd Cir. 1988), (quoting H.R. Rep. No. 413, 91st Cong., 1st Sess. 32 (1969); S. Rep. No. 552, 91st Cong., 1st Sess.

47 (1969)) cert. denied, 490 U.S. 1030 (1989). In fact, "exemption is lost ... by participation in any political campaign on behalf of any candidate for public office. It need not form a substantial part of the organization's activities." Association of the Bar, 858 F.2d at 881 (quoting United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981), cert. denied, 456 U.S. 983 (1982)) (emphasis in original). These broad restrictions—which emphasize the "publishing" and "distributing" of "statements"--clearly cover any communication that would promote, support, attack or oppose a federal candidate under 2 U.S.C. 431(20)(A)(iii).

As might be expected given the broad existing prohibition in the Internal Revenue Code of partisan electoral activity, there was no evidence presented to the Commission that electioneering by Section 501(c)(3) charitable organizations is a problem. As the Commission noted, "all of the examples mentioned in [rulemaking] testimony as the type of ads that Congress meant to limit were based on ads run by 501(c)(4) or other types of organizations, not 501(c)(3) organizations." 67 Fed. Reg. 65200. The Commission received evidence that a recent university research project had found that the vast majority of charities are acutely aware of the tax code's bar to their involvement in partisan politics. See Comments of OMB Watch to FEC, August 21, 2002, Attachment 9, at 5, 7; Transcript of FEC Hearing on Electioneering Communications, August 29, 2002, Attachment 8, at 114, 125-26. Indeed, the Commission noted that rulemaking witnesses agreed that Section 501(c)(3) charitable organizations "make extraordinary efforts to avoid Internal Revenue Service prohibitions against political activity when ads are run," describing the possibility that such activity might occur in the face of existing law as no more than a "theoretical threat." 67 Fed. Reg. 65200.

But it is important to note that 11 CFR 100.29(c)(6) does not purport to exempt an organization that violates section 501(c)(3) by engaging in partisan activity. As the Commission

explained, if the Internal Revenue Service were to determine that an organization had "acted outside its 501(c)(3) status," then the 11 CFR 100.29(c)(6) exemption would not shield it from application of the "electioneering communications" rules. 67 Fed. Reg. 65200. In effect, such an organization would not be "operating under section 501(c)(3)" within the meaning of 11 CFR 100.29(c)(6) in airing a partisan political communication that the IRS later determined to be "act[ing] outside its 501(c)(3) status." A hypothetical organization that misused its Section 501(c)(3) charitable status to run partisan advertising would not, therefore, be excused by the Commission's regulation from application of the Act.

While there was no evidence that Section 501(c)(3) charitable organizations engage in the type of activities that gave rise to Title II of BCRA, there was evidence that subjecting them to application of the "electioneering communication" restrictions would have a substantial chilling effect on the educational and charitable activities that Section 501(c)(3) was enacted to encourage:

> [A]lready the tax rules are complicated enough. If you throw election law on top of that, there are many groups that will just throw up their hands and say we're not going to get involved, it's just too risky, it's too much to take on, but I then also would be concerned about retaliatory actions on people on the other sides of issues. We've already seen some evidence of people on different sides of issues reporting the groups that have opposed them on the issues to various authorities looking for investigation, and even if a nonprofit had in no way violated campaign finance laws, especially if it were a public charity, just being investigated by the FEC would have a devastating effect on the organization.

Transcript of FEC Hearing on Electioneering Communications, Aug. 29, 2002, Attachment 8, at 156. See id. at 114 (Tufts study found complexity of tax rules already a "major barrier to participation"); 157-58 (mere possibility of FEC or IRS attention is "very frightening" for charities because "their tax-exempt status...is what keeps them alive"); 67 Fed. Reg. 65200. Such groups need particularly clear guidance, a need that plaintiffs' own rulemaking comments seemed to support:

> [A]ny exemption that applies to entities other than parties and candidates must preserve the "bright line" quality of the [electioneering] provision. Congress specifically crafted a bright-line test to give clear guidance to entities that are not necessarily political actors. An exemption that creates uncertainty about whether a communication will be covered by the law undermines that crucial aspect of the definition of electioneering communication.

Comments of Shays, Meehan et al. to FEC, August 23, 2002, Attachment 7, at 6. The Commission's Section 501(c)(3) exemption addresses these very concerns.

The legislative history is not inconsistent with the Commission's regulation. Plaintiffs cite (FAC ¶¶77, 80) a single floor statement in which Rep. Shays stated that in the past "some" Section 501(c)(3) charities had "run ads in the guise of so-called 'issue advocacy' that clearly have had the effect of promoting or opposing federal candidates," then stated that "we" do not intend that the Commission use current 2 U.S.C. 434(f)(3)(B)(iv) to create a per se exemption for Section 501(c)(3) organizations. 148 Cong. Rec. H411 (Feb. 13, 2002). But when there is no language in the statute itself addressing the issue, such an isolated floor statement carries too little weight to justify overturning policy choices by the agency assigned by the statute to implement its terms. It is well settled that such floor statements do not establish Congressional intent, as reflected in "the Supreme Court's repeated admonition, grounded both in common sense and democratic theory, that the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." United States v. McGoff, 831 F.2d 1071, 1090 (D.C. Cir. 1987) (citing, inter alia, Weinberger v. Rossi, 456 U.S. 25, 35 n. 15 (1982)); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979)). The D.C. Circuit has repeatedly emphasized that judges must exercise "extreme caution" before concluding that a floor statement may be taken as "statutory gospel." Texas Municipal Power Agency v. EPA, 89 F.3d 858, 875 (D.C. Cir. 1996).

Here, such caution is particularly appropriate. First, it is noteworthy that, with more than 900,000 Section 501(c)(3) charitable organizations, Rep. Shays' statement does not cite a single

actual advertisement that has had the supposed electioneering effect, nor did he submit any examples to the Commission during the rulemaking. Moreover, it is not clear whether the statement's "we" even includes all of BCRA's sponsors, much less the hundreds of other Members who voted for BCRA as a whole. And this statement does not even purport to explain the meaning of any language included in the bill, but instead states Rep. Shays' personal policy view, which he says the Commission — not the Congress —should follow.[25]

Secondly, Rep. Shays is not the only Member to have spoken to this issue: Rep. Meehan made the same comments, on the same day, virtually word for word. Compare 148 Cong. Rec. H411 (Feb. 13, 2002) (Rep. Shays) with 148 Cong. Rec. E178-79 (Feb. 15, 2002, containing remarks of Feb. 13) (Rep. Meehan). The D.C. Circuit warned in Texas Municipal that caution is "especially warranted when...it appears that a colloquy was a direct result of 'a single member...attempting to reassure his own constituency or even to create legislative history for citation by courts.'" 89 F.3d at 875. (quoting Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 892 (D.C. Cir. 1992)). See also IBEW, 814 F.2d at 715-717 (Buckley, J., concurring). Such caution is surely warranted in this case, in which those same two legislators ask this Court to adopt their floor remarks as binding, even though they included no such language in the statute they presented to the House for a vote. See Democratic Congressional Campaign Committee v. FEC, 831 F.2d 1131, 1134 (D.C. Cir. 1987) ("Congress votes only on the statutory

[25] See International Union v. Donovan, 746 F.2d 855, 860-61 (D.C. Cir. 1984) ("The issue here is not how Congress expected or intended the [Commission] to behave, but how it required [the Commission] to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything — the enactment of legislation") (first and second emphases added), cert. denied, 474 U.S. 825 (1985); Committee for Auto Safety v. Peck, 751 F.2d 1336, 1351 (D.C. Cir. 1985) ("[I]t is absurd — indeed, lawless — to give legal effect to ... expressions [of Congress] that purport to relate, not to the meaning of the statute, but to the manner in which a legally unconstrained agent of the Executive will behave under it."); IBEW Local 474 v. NLRB, 814 F.2d 697, 712-715 (D.C. Cir. 1987).

words, and not on statements made in committee reports or on the House or Senate Floor.") In view of all the other law and evidence supporting the Commissions' exercise of its discretion to craft the Section 501(c)(3) charitable exemption, these isolated and unsubstantiated statements of personal policy views during the legislative debates are much too insignificant to justify overturning the Commission's regulation under the deferential standard of review.

C. The Commission's Coordination Regulations Are Not Arbitrary Or Capricious

1. Overview of the Commission's Coordination Regulations

For three decades, the Act has provided that expenditures made "in cooperation, consultation, or concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). BCRA expressly repealed the Commission's pre-BCRA regulations that relied largely upon "collaboration or agreement" to establish "coordinated general public political communications" (former 11 CFR 100.23), and instructed the Commission to develop new regulations on "coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees." BCRA §§ 214(b), (c). Congress placed only two restrictions on the Commission's discretion in formulating the new regulations: that they (1) "shall not require agreement or formal collaboration to establish coordination," and (2) "shall" address four specific aspects of coordinated communications "[i]n addition to any subject determined by the Commission:"

> (1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

BCRA §§ 214(c). The regulations the Commission promulgated pursuant to this provision comply with all of these requirements, specifically incorporating the Congressional requirement that an agreement or formal collaboration is not required for a communication to be considered "coordinated," 109.21(e), and also address other factors the Commission found relevant.

Beyond the factors discussed above, BCRA is totally silent on what other factors the Commission should use in defining coordination, but broadly authorizes the Commission to address in the regulations "any subject determined by the Commission." BCRA § 214(c). Under Chevron, when "Congress explicitly delegates to the agency the responsibility for defining and applying the [statutory] standard," the "Court will only disturb the [agency's] interpretation of this provision if it finds that interpretation 'impermissible.'" American Bankers Ass'n. v. National Credit Union Admin., 93 F.Supp.2d 35, 47 (D.D.C. 2000) (quoting Chevron, 467 U.S. at 845; other citation omitted). Because BCRA is silent about these other factors, the Court should defer to the Commission's expertise in this complex area fraught with constitutional concern, on which Congress has explicitly delegated to the Commission particularly broad quasi-legislative authority.

In summary, the new regulations establish a three-part test for determining when a communication is deemed "coordinated." 11 CFR 109.21. First, the communication must be paid for by someone other than a candidate, authorized committee, political party committee, or an agent of the foregoing. 11 CFR 109.21(a)(1). Second, the expenditure must be for a communication meeting one of four content standards set out in the regulations. 11 CFR 109.21(c)(a). Finally, the expenditure must also meet one of the five types of conduct that satisfy the regulatory standard for coordination. 11 CFR 109.21(a)(d). As the Commission explained, if "any of these types of conduct is present," and the requirements of 11 CFR

109.21(a) and (c) are satisfied, "the communication is not made 'totally independently' from the candidate, the candidate's authorized committee, or the political party committee . . ., and thus is coordinated." 68 Fed. Reg. 431 (citing Buckley, 424 U.S. at 47).

2. BCRA § 214 Delegated Broad Discretion to the Commission Because Congress was Unable to Agree on a Statutory Definition of Coordination.

The particularly broad delegation of legislative authority to the Commission in BCRA § 214 was the direct result of Congress' inability to agree upon how coordinated expenditures should be defined. When the bill that became BCRA was introduced in the Senate in January 2001, it contained a broad statutory definition of "coordinated activity." See S.27, Bipartisan Campaign Reform Act of 2001, 107th Cong. § 214 (Jan. 22, 2001). According to Senator Feingold, this definition "was designed to override [the Commission's agreement or collaboration standard for coordination] issued in December 2000 and scheduled to become effective soon that many observers of campaigns who are concerned about evasions of the law think is far too narrow to cover what really goes on in campaigns." 147 Cong. Rec. S3184 (March 30, 2001). However, when the sponsors were unable to obtain the agreement of the Senate to a new statutory definition of coordination, Senator McCain introduced an amendment deleting the proposed definition, repealing the Commission's existing regulations on coordinated expenditures, and delegating to the Commission the authority to fashion a new definition. Amendment No. 165, 147 Cong. Rec. S3184 (March 30, 2001).

> [T]he amendment instructs the FEC to do a new rulemaking, to interpret and enforce this new and admittedly general statutory provision. The amendment, therefore, gives some guidance to the FEC as to what issues it should address, without actually dictating the result. ... There is one thing I want to make very clear and reiterate: While this amendment instructs the FEC to consider certain issues in the new rule-making, it doesn't require the FEC to come out any certain way or come to any definite conclusion one way or another.

147 Cong. Rec. S3184-3185 (Mar. 30, 2001) (statement of Sen. Feingold).

The McCain Amendment was agreed to by the Senate, and the bill later adopted by the House made some changes in language that resulted in what would become the final language of BCRA § 214(c). See 147 Cong. Rec. H393, H396 (Feb. 13, 2002). The altered bill passed the House was then sent back to the Senate for final approval. During that debate Senator Feingold again explained that "Section 214 directs the FEC to promulgate new regulations on coordinated communications and lists four specific subjects that the FEC must address in those new regulations. It does not dictate how the Commission is to resolve those four subjects." 147 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. Feingold). See also 147 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. McCain).

In their comments during the Commission's rulemaking, plaintiffs explicitly acknowledged the broad discretion that BCRA granted to the Commission to develop a new coordination regulation:

> In repealing the current regulation, Congress did not prescribe a precise standard for coordination, believing that the FEC would be best able through a new rulemaking proceeding to craft a rule to respond to congressional concern that the existing rule was too narrow, and also make sure that the standard does not discourage legitimate non-campaign-related interactions between groups and candidates or parties.

Comments of Shays, Meehan et al. to FEC, October 11, 2002, Attachment 10, at 4. They acknowledged before the Commission that "Congress remained silent on exactly what the new rules should say" and therefore limited themselves to making "only general comments concerning the Commission's proposal rather than specifically analyzing each component." Id.

3. Regulations 11 CFR 109.21(c)(4)(1)(i) And (ii) Are Not Arbitrary Or Capricious.

While their rhetoric is expansive, it appears that the only parts of the coordination regulations that plaintiffs specifically challenge are 11 CFR 109.21(c)(4)(ii), which establishes a

bright-line 120-day cut-off for determining whether the fourth type of content standard is present, and 11 CFR 109.21(c)(4)(i), which requires that a coordinated communication within that 120 day period "refer[] to a political party or to a clearly identified candidate for federal office." 11 CFR 109.21(c)(4)(i). See FAC ¶¶ 93, 95-96.[26] BCRA is silent on those questions, beyond its broad delegation to the Commission to address "any subject determined by the Commission," so plaintiffs have been unable even to assert that the challenged regulatory provisions contravene the language of the statute. Instead, their challenge boils down to a disagreement with the Commission's policy choices in an area Congress explicitly left to the Commission's discretion. Under Chevron, 467 U.S. at 866, that is reason enough to reject their challenge.

Not all spending in cooperation with candidates and parties is subject to regulation as coordinated expenditures. An "expenditure" includes only spending that is "for the purpose of influencing any election to Federal office," 2 U.S.C. 431(9)(A)(i). Plainly, public communications distributed shortly before an election are more likely to be for the purpose of influencing that election than communications distributed many months earlier, and communications that at least mention a candidate or political party are much more likely to have the purpose of influencing an election than communications that only address issues and do not even mention candidates.[27]

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[26] Plaintiffs also challenge two aspects of the "conduct" standards – the definition of "agent," and the definition of "public communications" to exclude communications using the Internet and electronic mail. FAC ¶¶ 99-100. We have already addressed those issues, supra pp. 41-44 (agent) and supra pp. 36-41 (public communications).

[27] In their rulemaking comments to the Commission, plaintiffs agreed that "in order to adequately deal with the real world of campaigns and elections, the standard for coordination may very well need to be more stringent as an election approaches." Comments of Shays, Meehan et al. to FEC, October 11, 2002, Attachment 10, at 4.

Indeed, Congress itself enacted shorter time limits on some of its regulation of campaign speech. BCRA's regulation of "electioneering communications" is applicable only within 60 days of a general election and within 30 days before a primary election. In upholding those provisions, the Supreme Court concluded that studies demonstrated that "the vast majority of ads" during these shorter periods before an election clearly had the purpose of influencing the elections, McConnell, 124 S.Ct. at 696. The Court dismissed the possibility of arguing that this provision "is underinclusive because it leaves advertising 61 days in advance of an election entirely unregulated" because "[t]he record amply justifies Congress' line drawing." Id. at 697. See also id. at 651 ("the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a Federal election.") (emphasis added). Plainly, if Congress itself was justified in drawing a temporal line at 30 and 60 days before the election to separate advertisements to be regulated because they are likely to have the purpose of influencing an election and advertisements not regulated because they more likely lack that purpose, the Commission's drawing of a similar temporal line that regulates communications during twice as long a pre-election period as the one drawn by Congress cannot be found to be unlawfully short in scope. In fact, BCRA itself places a 120 day temporal limit on the regulation of voter registration activities as Federal election activity, 2 U.S.C. 431(20)(A)(i), and the Supreme Court found it "reasonabl[e]" for the Commission to use a temporal limit (the earliest ballot access filing date for a primary election) to narrow the regulation of other activities as Federal election activity. McConnell, 124 S.Ct. at 675 n. 63.

The further in advance of an election a communication is distributed, the more likely it is to be intended to affect legislation or public views on issues important to the speaker rather than

a still distant election, even if the communication is planned in cooperation with a member of Congress who shares the spender's interest in promoting the legislation or issue position. The Act was not intended to put a stop to cooperation between members of Congress and private groups with respect to the enactment of legislation. Plaintiffs themselves told the Commission it should adopt a standard for defining coordinated communications that "does not discourage legitimate non-campaign related interactions between groups and candidates or parties." Comments of Shays, Meehan et al. to FEC, October 11, 2002, Attachment 10, at 4. Plainly, without some temporal limit, the Act's restriction on coordinated expenditures would limit a great deal of interaction between private organizations and members of Congress to promote their common positions on issues and legislation, which is not undertaken for the purpose of influencing a Federal election.

The same can be said for the regulatory provision requiring that, during the last 120 days before an election, a communication that is not a republication of a candidate's own campaign materials will not be treated as a "coordinated expenditure" if it does not at least mention a candidate or political party. This is essentially the same content standard Congress adopted in regulating "electioneering expenditures" during the last 30 and 60 days before an election, plainly reflecting a legislative view that even immediately before an election communications that do not even mention a federal candidate should not be regulated as if they were intended to influence the election. It was not unreasonable for the Commission to follow Congress' lead in this matter and give weight to the constitutional interest in freely addressing issues that may come before Congress, so long as the public communications avoid any mention of a candidate or party on the ballot in an upcoming election.

In fact, the Commission explicitly relied upon the example of the "electioneering message" provisions of BCRA in crafting these regulatory provisions. The Commission noted that it had decided to "include[] content standards in the final rules on coordinated communications to limit the new rules to communications whose subject matter is reasonably related to an election." 68 Fed. Reg. 427. "Taking into consideration the suggestions of the commenters, this content standard is largely based on, but is somewhat broader than, Congress' definition of an electioneering communication." Id. at 429. The Commission explained that "[t]he 120-day time frame is based on 2 U.S.C. 431(20)(a)(i) (see 11 CFR 100.24(b)(1)) and has several advantages. First, it provides a 'bright-line' rule. Second, it focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times. As noted, Congress has, in part, defined 'Federal election activity' in terms of a 120-day time frame, deeming that period of time before an election to be reasonably related to that election. See 2 U.S.C. 431(20)(A)(i)." 68 Fed. Reg. 430.[28]

Given the absence of any specific language in BCRA inconsistent with the Commission's conclusions, the mixed recommendations of commenters, the existence of temporal limits on the regulation of campaign speech in BCRA itself and the Supreme Court's recognition that the Commission could reasonably adopt a temporal bright-line test for Federal election activity, see supra p. 78 n.26, the plaintiffs' disagreement with the Commission's substantial policy and constitutional concerns are insufficient to sustain their burden under Chevron. As with other regulations discussed above, if the plaintiffs' fears of widespread abuse materialize, they can ask the Commission to revise the regulation at that time in light of new experience.

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[28] "[I]n contrast, the 'express advocacy' content standard [for coordinated expenditures] in paragraph (c)(3) of 11 CFR 109.21 applies without time limitation," 68 Fed. Reg. 430 (citations

CONCLUSION

For the foregoing reasons, the Commission's motion for summary judgment should be granted.

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omitted), as does the "republication" content standard in 11 CFR 109.21(c)(2). The Commission considered, but rejected, the use of a time frame shorter than 120 days. Id.