UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE CHRISTOPHER SHAYS, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 04-1597 (EGS) MEMORANDUM

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF THE COMMISSION'S SECOND MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR FURTHER RELIEF

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INTRODUCTION

On remand from this Court, the Federal Election Commission ("FEC" or "Commission") published a comprehensive explanation of the decisions it made in its 2004 rulemaking, including whether and how organizations are regulated as political committees under the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), 2 U.S.C. 431-455. In particular, the Commission has explained that the Act and relevant Supreme Court precedent require a fact-intensive, conduct-based analysis of an organization's activities, spending, and purpose to determine whether it is a political committee. The Commission further explained that it will continue to conduct that analysis based on its new rules and the well-established framework of statutory, judicial, and regulatory guidance. Representatives Christopher Shays and Martin Meehan ("plaintiffs"), however, ask the Court to reject this reasoning and demand an inflexible, expansive regulation that relies upon the tax code, despite the absence of any precedent or statutory provision requiring such a result. This Court correctly rejected that same request last year, and plaintiffs offer no sound reason to revisit that ruling. Plaintiffs' motion for further relief should be denied and summary judgment should be granted for the Commission.

As we explain below, the Commission's decision falls within the broad discretion Congress granted the agency to decide how best to administer and enforce the Act. The Commission's supplemental explanation describes in detail why its rulemaking decisions serve the purposes of the Act in a way that is consistent with congressional intent and Supreme Court precedent, and how the Commission's recent regulatory actions — including significant conciliation agreements with section 527 groups — demonstrate the effectiveness of its approach. That explanation easily satisfies the highly deferential standard of review applicable here. Plaintiffs assume that the order they seek would lead to a final regulation that accords with

their expansive regulatory vision, but the substance of any potential regulation is simply not before the Court, and plaintiffs cannot prevail on the basis of speculation about the nature or effects of such an unwritten regulation.

BACKGROUND

A. Statutory and Regulatory Framework

1. "Political Committees" Under the FECA

The Act defines "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A). Commission regulations first promulgated in 1975 essentially repeat the statutory definition of "political committee." See 11 C.F.R. 100.5(a).[1] The Act limits contributions to political committees, 2 U.S.C. 441a(a)(1)(C), and requires any organization that qualifies as a political committee to register with the Commission and file periodic reports of all its receipts and disbursements for disclosure to the public. See 2 U.S.C. 433 and 434.

The Supreme Court has twice construed the statutory term "political committee" and narrowed its reach to avoid constitutional problems. The Court concluded that the term "political committee" under the Act cannot constitutionally be applied to an organization that engages in political advocacy unless, in addition to crossing the $1,000 statutory threshold of contributions or expenditures, the organization is "under the control of a candidate" or its "major purpose … is the nomination or election of a candidate." Buckley v. Valeo, 424 U.S. 1, 79

[1] "Contribution" is defined broadly to include "any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); see also 11 C.F.R. 100.51 et seq. The term "expenditure" means "any purchase, payment, distribution, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i); see also 11 C.F.R. 100.110 et seq.

(1976). See also FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238, 262 (1986) ("organization's major purpose may be regarded as campaign activity"). The Court has held that this limitation is necessary because the statutory definition of "political committee" could raise "vagueness problems" as it "could be interpreted to reach groups engaged purely in issue discussion." Buckley, 424 U.S. at 79.

Relying upon Buckley and MCFL, the Commission has long interpreted the statutory term "political committee" as including a "major purpose" component when assessing whether an organization not connected to a candidate is a "political committee" under the Act. See, e.g., FEC Advisory Opinions ("AOs") 1994-25, 1995-11, 2006-20. The Commission has also applied the major purpose test in the enforcement context, including matters the Commission has taken to court. See, e.g., FEC v. Malenick, 310 F.Supp.2d 230, 234-235 (D.D.C. 2004), amended on reconsideration, 2005 WL 588222 (D.D.C. Mar. 7, 2005); FEC v. GOPAC, Inc., 917 F. Supp. 851, 851-62 (D.D.C. 1996).

Congress has amended other portions of the Act, most notably in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002). However, Congress has not altered the generally applicable definitions of "political committee," "contribution," or "expenditure" in response to the Supreme Court's major purpose doctrine or the Commission's implementation of those terms through its regulations, advisory opinions, and enforcement actions.

2. "Political Organizations" Under the Internal Revenue Code

Section 527 of the Internal Revenue Code shields "exempt function income" received by "political organizations" from federal taxation. See 26 U.S.C. 527(c). "Political organizations" are defined as groups "organized and operated primarily" for the purpose of an "exempt

function." See 26 U.S.C. 527(e)(1). "Exempt function" includes "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State or local public office or office in a political organization, or the election of Presidential electors." See 26 U.S.C. 527(e)(2). Other tax-exempt groups organized under section 501(c)(4) (social welfare organizations), 501(c)(5) (labor organizations), and 501(c)(6) (business leagues) may also engage in "exempt activity," so long as such activity is not the "primary" purpose of the organization. See 26 U.S.C. 501(c). However, exempt activity spending may be taxed for these 501(c) groups. See 26 U.S.C. 527(f)(1).

All "political committees" under FECA are also "political organizations" under section 527. However, the definition of "political organization" in section 527 is significantly broader than the definition of "political committee," for it includes organizations whose purpose is to influence non-federal elections, appointments to the judicial or executive branches, or appointments to offices in political organizations. 26 U.S.C. 527(e). In 2000, Congress enacted 26 U.S.C. 527(i) and (j) (amended in 2002) to require many section 527 organizations that are not political committees under the Act to file disclosure reports with the IRS, not the FEC. See 26 U.S.C. 527(j)(5)(A). (Groups organized under 26 U.S.C. 501(c) are not subject to similar disclosure and periodic reporting requirements.)

B. The Commission's Rulemaking

In 2004, the Commission initiated a rulemaking to reexamine the scope of the definitions of "political committee," "expenditure," and "contribution" after McConnell v. FEC, 540 U.S. 93 (2003), and to consider changes to the allocation provisions that establish the extent to which certain activities by certain political committees must be paid for with funds subject to federal limits, prohibitions, and reporting requirements ("federal funds"). Political Committee Status;

Proposed Rule, 69 Fed. Reg. 11,736-60 (March 11, 2004) (AR 11, at 246) ("NPRM").[2] This rulemaking generated an extraordinary amount of public engagement on the issue of when sections 501(c) and 527 tax-exempt organizations should have to register with and report their activities to the FEC. The Commission received and considered over 100,000 written comments, including comments from approximately 150 Members of Congress, numerous political party organizations, and hundreds of nonprofit organizations, academics, trade associations, and labor organizations. Additionally, the Commission heard testimony from 31 witnesses during two days of public hearings in April 2004. As the Commission previously explained in detail to this Court, the written comments and testimony submitted to the Commission offered a wide diversity of views regarding the rulemaking's complex and controversial issues. See FEC Memorandum in Support of Motion for Summary Judgment at 9-14 (June 7, 2005).

At the end of this extensive process, the Commission amended its regulations in two significant ways to address alleged abuses in the use of non-federal funds by a wide variety of organizations. See Political Committee Status; Final Rule, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (AR 375, at 2833) (hereinafter "E&J").[3] First, the Commission amended the definition of "contribution" to include funds specifically solicited for the purpose of supporting or opposing the election of a federal candidate. See 11 C.F.R. 100.57(a). This provision applies to groups that are not political committees and applies to all organizations without regard to their tax-exempt status. Any organization receiving more than $1,000 in funds in response to a solicitation meeting the requirements of 11 C.F.R. 100.57(a) passes the statutory test for political committee status. After considering comments regarding political committees' use of non-

[2] "AR __" citations are to the administrative record filed by the Commission in 2005. The first number following "AR" is the tabbed index number where the document can be found. The pinpoint cite is to the page number in the Adobe document filed on CD-ROM.

[3] These new rules became effective on January 1, 2005.

federal funds for activity in connection with federal elections, the Commission also included in the rule an anti-circumvention measure that requires political committees to treat at least 50%, and as much as 100%, of the receipts of a solicitation meeting the requirements of 11 C.F.R. 100.57(a) as contributions regardless of any additional references to non-federal candidates or political parties in the solicitation. 11 C.F.R. 100.57(b).

The Commission also significantly revised the allocation regulations for political committees, as urged by many commenters (including the congressional sponsors of BCRA), to curb the use of non-federal funds by political committees to pay for voter mobilization efforts and public communications supporting federal candidates. See 11 C.F.R. 106.6. Under the revised regulations, any political committee that maintains both federal and non-federal accounts and participates in both types of electoral activity must pay at least 50% of its administrative costs with funds from the federal account. Similarly, any voter drive or public communication that refers to a political party, but does not mention any specific candidates, must be funded with at least 50% federal funds. The new rules also require voter drives and public communications that refer to a federal candidate, but no non-federal candidates, to be paid for 100% from the federal account. Because a political committee's non-federal account is itself usually a section 527 tax-exempt organization that does not report to the Commission, these new allocation rules have a very significant effect on the operation of such section 527 organizations.

After considering the other proposed rules amending the definitions of "political committee" and "expenditure," the Commission decided not to adopt any of the proposals establishing a special "political committee" definition that singles out section 527 organizations, nor any of the proposed amendments to the "expenditure" definition. See E&J, 69 Fed. Reg. at 68,065 (AR 375, at 2842). In the E&J, the Commission noted that the proposed rules would

have "entailed a degree of regulation that Congress did not elect to undertake itself," either when it amended the Internal Revenue Code to require section 527 tax-exempt organizations to report to the IRS or when it substantially revised the FECA in the BCRA amendments. See id. at 68,065 (AR 375, at 2842). The Commission also explained that it would continue to apply the judicial "major purpose" doctrine as it had done for many years, noting that nothing in BCRA or McConnell required revising the regulatory definition of "political committee." Id.

C. This Court's Memorandum Opinion

In its 2006 decision, this Court rejected plaintiffs' claim that the Commission is required by law to promulgate a general regulation, rather than continue to decide whether section 527 groups are "political committees" by applying the regulatory and statutory definitions together with Supreme Court precedent regarding the major purpose doctrine. Shays v. FEC, 424 F.Supp.2d 100, 114 (2006) ("Shays II"). The Court concluded that neither the Act, nor Congress's most recent amendments in BCRA, nor the Supreme Court's decision in McConnell required the Commission to adopt such a rule. The Court further explained that "a statutory mandate is a crucial component to a finding that an agency's reliance on adjudication [is] arbitrary and capricious." Shays II, 424 F.Supp.2d at 114. The Court found, however, that the Commission had "failed to present a reasoned explanation for its decision that 527 organizations" can be effectively regulated "through case-by-case adjudication rather than a general rule." Id. at 117. Accordingly, the Court rejected the plaintiffs' request that it "direct[ ] the FEC to promulgate a rule" defining "when a 527 group must register as a political committee," and instead remanded the case to the Commission "to explain its decision or institute a new rulemaking." Id. at 116.

D. The Commission's Supplemental Explanation and Justification

Following this Court's decision remanding this case, the Commission issued a Supplemental Explanation and Justification explaining further "(a) the basis for the measures it adopted [in the 2004 rulemaking] and (b) the reasons it declined to revise the regulatory definition of 'political committee' to single out organizations exempt from Federal taxation under section 527 of the Internal Revenue Code." Political Committee Status; Supplemental Explanation and Justification, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J") (Exh. 1). The Commission explained that its decision is consistent with Supreme Court precedent and congressional actions, that the new Commission regulations will enhance enforcement in this area, and that recent enforcement actions by the Commission underline the sufficiency of its approach and provide substantial guidance to the regulated community. See id. at 5596-5606.

The Commission explained that "an organization's conduct has always been the basis for determining whether it is required to register and abide by the Act's requirements as a political committee." Supplemental E&J at 5596. In making that determination, the Commission first analyzes whether an organization has met the statutory criteria for political committee status: that is, whether it has received $1,000 or more in contributions or made $1,000 or more in expenditures. If so, the Commission must then analyze whether the organization's "major purpose" is federal campaign activity. See Supplemental E&J at 5596-97; Buckley, 424 U.S. at 79.

> Additional regulations defining "contribution" and "expenditure" would not obviate the need for a case-by-case investigation and determination in a Commission enforcement proceeding. Neither would a regulation defining "major purpose" that singled out 527 organizations, as the Shays II plaintiffs seek, obviate the need for case-by-case investigations and determinations in the Commission's enforcement process regarding the organization's major purpose.

Supplemental E&J at 5597.

The Commission explained why an organization's tax status "is not sufficient evidence in itself that the organization satisfies FECA and the Supreme Court's contribution, expenditure, and major purpose requirements." Supplemental E&J at 5597-98. "By definition, 527 organizations may engage in a host of State, local, and non-electoral activity well outside the Commission's jurisdiction." Id. at 5598. The Commission also observed that its rulemaking decisions were consistent with the relevant statutory framework and congressional actions regarding section 527 organizations. See id. at 5599-5601. Congress has enacted legislation modifying the regulation of section 527 organizations, but it has chosen not to incorporate section 527 status into the definition of "political committee," nor has it directed the Commission to consider section 527 status in such determinations. Id. at 5599-5600.

The Commission further explained that it adopted two broad anti-circumvention measures in the 2004 rulemaking, 11 C.F.R. 100.57 and 11 C.F.R. 106.6, to "ensure that organizations that participate in Federal elections use funds compliant with the Act's restrictions." Supplemental E&J at 5602. See also id. at 5602-03. The Commission discussed how "the combined effect of these two rules significantly curbs the raising and spending of non-Federal funds in connection with Federal elections." Id. at 5602. The Commission noted that the solicitation rule affects whether an organization meets the definition of "political committee," and that the allocation rule affects the use of section 527 organizations (not registered as political committees) acting as non-federal accounts for political committees. Id. at 5062-5603.

The Commission also noted that its recent enforcement activities demonstrate the sufficiency of its approach to determining political committee status and provide considerable guidance to the regulated community. See Supplemental E&J at 5603-06. These actions include the resolution of significant administrative enforcement matters involving section 527 and other

organizations, the filing of a major enforcement suit against a section 527 organization, and the ongoing use of the Act's advisory opinion process. See id.

ARGUMENT

In its 2004 rulemaking, the Commission took a comprehensive approach to the regulation of political committees under the Act. As explained in the Supplemental E&J, the Commission adopted two important new regulations, declined to establish a separate definition of the Supreme Court's "major purpose" test that relies upon the tax code, and provided substantial guidance consistent with congressional intent and Supreme Court precedent. The result is a detailed framework of judicial, statutory, and regulatory guidance regarding political committee status. The supplemental explanation also describes how the Commission has successfully applied that framework in a number of important conciliation agreements with section 527 organizations that had failed to register as political committees.

Section I below establishes that the Commission's Supplemental E&J, which occupies 11 pages in the Federal Register, provides a rational basis, well-grounded in the administrative record, for the Commission's decisions. Because the Commission is required only to "provide an explanation that will enable the court to evaluate [the agency's] rationale at the time of decision," Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 654 (1990), the Commission's analysis of the regulatory issues and the comments it received plainly satisfies what is required to support a "rational connection between the facts found and the choice made" under section 706 of the Administrative Procedure Act ("APA"). See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). As long as this Court finds that any one of those reasons rationally supports the result the Commission reached, the

Commission's decision should be sustained. See Carnegie Natural Gas Co. v. FERC, 968 F.2d 1291, 1294 (D.C. Cir. 1992) (courts usually sustain an agency decision resting on several independent grounds if any of those grounds validly supports the result).

Section II below explains what is not at issue here: any substantive evaluation about whether all, some, or no section 527 groups must register as political committees under the Act. The record reflects that the Commission has successfully pursued enforcement action against a number of major section 527 groups, and its law enforcement approach does not prejudge any future substantive conclusion it may reach about the political committee status of any particular organization. Thus, the Court's limited judicial review in this case cannot be based on speculation about substantive decisions the Commission has not yet made or on plaintiffs' view of the ideal regulation they would like to see promulgated. Those substantive determinations are simply not before the Court.

I. SUMMARY JUDGMENT SHOULD BE GRANTED FOR THE COMMISSION

A. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Tao v. Freeh, 27 F.3d 635, 638 (D.C. Cir. 1994) (citing Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 250, 255 (1986)). However, in an action like this one for judicial review of agency action, the "district court sits as an appellate tribunal" and the "entire case on review is a question of law." Marshall v. Shalala, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993). Accordingly, the Court's review is to be based upon the record compiled by the Commission during the rulemaking. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

Under the APA, a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The "arbitrary and capricious" standard of review is "highly deferential" and "presumes the validity of agency action." Cellco Partnership v. FCC, 357 F.3d 88, 93-94 (D.C. Cir. 2004). It is also narrow, and forbids a court from substituting its judgment for that of the agency. Citizens to Preserve Overton Park, 401 U.S. at 416; Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976). When, as here, an agency has made a determination that falls within its area of special expertise, deference is at its zenith. See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1983).

The Commission is the agency to which Congress delegated the responsibility for interpreting and administering the Act, including how best to apply the Act's provisions about which organizations must register as political committees. For this kind of policy decision, the Commission "is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981). Accord, e.g., United States v. Kanchanalak, 192 F.3d 1037, 1049 (D.C. Cir. 1999); FEC v. National Rifle Ass'n of America, 254 F.3d 173, 187 (D.C. Cir. 2001); Common Cause v. FEC, 842 F.2d 436, 448 (D.C. Cir. 1988) (deference "particularly appropriate in the context of FECA").

B. The Court Should Not Revisit Its Prior Holding that There Is No Basis for Ordering the Commission to Promulgate a Rule

"The law of the case doctrine provides that a court involved in later stages of a lawsuit should not decide questions that already were decided by that court or a higher court in earlier stages of the litigation." District Council 20, AFSCME v. District of Columbia, 150 F.Supp.2d 136, 142 (D.D.C. 2001). See also, e.g., Association of American R.R. v. Surface Transp. Bd.,

306 F.3d 1108, 1110-11 (D.C. Cir. 2002); LaShawn A. v. Barry, 87 F.3d 1389, 1393, 1395 (D.C. Cir. 1996) (en banc). The doctrine is a rule of practice that encourages courts to exercise "disciplined self-consistency" and discourages a "loser's misplaced attachment to a properly rejected argument." 18B Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Fed. Prac. & Proc. Juris.2d §§ 4478, 4478.1 (2d ed. 2002), at 637, 692. See also, e.g., Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815 (1988) (the law of the case doctrine "promotes the finality and efficiency of the judicial process").

Plaintiffs assert (Motion at 1) that the Commission is violating the APA "because the FEC has failed to issue a rule governing when section 527 groups must register as 'political committees' under the [Act]." However, plaintiffs previously argued vigorously that the Commission should be ordered to issue such a rule, and this Court rejected those arguments. In its 2006 decision in this case, the Court unequivocally held that the Commission was not required to promulgate a regulation further defining the statutory term "political committee" and defining when a section 527 group must register as a political committee. E.g., 424 F.Supp.2d at 103 (no "compelling circumstances" justified requiring the Commission to promulgate regulation); id. at 114 ("[T]he Court is not persuaded that the Agency's decision to pursue adjudication over rulemaking is, per se, an abuse of discretion."); id. at 116 (The remedy of requiring the Commission to promulgate a rule "is reserved for 'only the rarest and most compelling of circumstances.' … Such circumstances are not present here.") (internal citation omitted.); id. at 117 (denying plaintiffs' motion for summary judgment in part). Because the plaintiffs have failed to identify any intervening changes in the relevant legal standards, this Court should not revisit its earlier ruling in this case that the Commission is not required to promulgate such a regulation. See LaShawn A., 87 F.3d at 1393 (The law-of-the-case may be

revisited only if there is an intervening change in the law or if the previous decision was "clearly erroneous and would work a manifest injustice") (internal quotation marks and citation omitted).

C. The Commission's Rules, Together with the Act's Requirements and Supreme Court Precedent, Provide Conduct-Based Standards that the Commission Applies to Enforce the Restrictions Applicable to Political Committees

As the Commission explained in its Supplemental E&J (at 5596):

> Political committee status, whether articulated in FECA, Supreme Court interpretations of FECA, or the Commission's regulations, must be applied and enforced by the Commission through a case-by-case analysis of a specific organization's conduct. Existing regulations, bolstered by the adoption of the 2004 Final Rules, leave the Commission with a very effective mechanism for addressing claims that organizations of any tax status should be registered as political committees under FECA. The Commission's recent enforcement experience confirms this conclusion.

By adopting a new regulation "under which any organization may be required to register as a political committee and by tightening the rules governing how political committees fund activity for the purpose of influencing Federal elections, the Commission has acted to prevent circumvention not by just 527 organizations, but by groups of all kinds." Id. In light of that legal framework and those new regulations, the Commission's decision "not to use tax law classifications as a substitute for making determinations of political committee status under FECA," id., was reasonable and fully explained in the Supplemental E&J.

1. The Commission's New Regulations Provide Additional Guidance and Anti-Circumvention Measures Beyond the Rules Established by the Act and Supreme Court Precedent, and Apply to All Groups, Including Section 527 Organizations

The Act's definition of "political committee," together with the Supreme Court's "major purpose" test, are the foundation of the Commission's analysis of whether a particular organization must register and report as a political committee. These standards are all based on an organization's conduct, not its tax status. As the Commission demonstrated in its recent

resolution of several enforcement matters concerning section 527 organizations, applying these standards requires a "thorough investigation of all aspects of the organization's statements and activities to determine first if the organization exceeded the $1,000 statutory and regulatory threshold for expenditures or contributions in 2 U.S.C. 431(4)(A) and 11 CFR 100.5(a), and then whether the organization's major purpose was Federal campaign activity." Supplemental E&J at 5603-04.

Although the Act defines "contribution" and "expenditure" in considerable detail, see 2 U.S.C. 431(8), (9), to "best ensure that organizations that participate in Federal elections use funds compliant with the Act's restrictions, the Commission decided in the 2004 rulemaking to adopt two broad anti-circumvention measures. The first expands the regulatory definition of 'contribution' to capture funds solicited for the specific purpose of supporting or opposing the election of a Federal candidate. See 11 CFR 100.57." Supplemental E&J at 5602. Because this broadened definition of "contribution" is central to the contribution prong of the statutory definition of "political committee" in 2 U.S.C. 431(4), new section 100.57 "codifies a clear, practical, and effective means of determining whether an entity, regardless of tax status, is participating in activity designed to influence Federal elections, and, therefore, may be required to register as a political committee." Supplemental E&J at 5602.[4] In addition, 11 C.F.R. 100.57(b) addresses circumvention by providing that at least 50% of the funds received in response to such solicitations are considered contributions regardless of additional references to political parties or non-federal candidates. Id. at 5603. Thus, section 100.57 provides "clear

[4] Plaintiffs assert (Mem. at 22) that the solicitation rule, 11 C.F.R. 100.57(a), does not cover a solicitation that promotes or attacks a candidate by name unless the soliciting communication makes a "clear reference" to the use of the solicited funds in connection with the candidate's election. To the contrary, the rule requires only some "indicat[ion]" that "any portion" of the funds raised will be used to support or oppose the election of the named person. See Supplemental E&J at 5602; 2004 E&J, 69 Fed. Reg. 68,056-68,057 (AR 375, at 2833-34).

guidance to the regulated community that any organization, regardless of tax status, may be required to register as a political committee based on its solicitations." Supplemental E&J at 5603.

The Commission also explained that the new allocation rules at 11 C.F.R. 106.6 limit "the non-Federal funds a registered political committee may use to engage in certain activity, such as voter drives and campaign advertisements, which has a clear federal component." Supplemental E&J at 5602. See id. at 5603. This overhaul of the allocation regulations means that organizations that conduct activities through registered political committees and non-federal accounts — both of which are section 527 entities — will be required to finance communications with a percentage of federal funds that fairly reflects the federal content of the communications. See id. In effect, 11 C.F.R. 106.6 restricts the ability of the many section 527 entities that operate with affiliated political committees to use non-federal funds to finance activities in connection with federal elections.

Taken together, these new regulations "significantly curb[] the raising and spending of non-Federal funds in connection with Federal elections, in a manner wholly consistent with the existing political committee framework." Supplemental E&J at 5602. These rules thus address this Court's concerns about the effectiveness of the Commission's approach, the improper use of non-federal funds, and the regulated community's need for clear guidance. See Shays II, 424 F.Supp.2d at 115-16. Indeed, the Supplemental E&J observed (at 5602) that the effect of these new regulations on section 527 organizations has already been noted (citing Paul Kane, Liberal 527s Find Shortfall, Roll Call (Sept. 25, 2006) (Exh. 10)).[5]

[5] A recent Campaign Finance Institute report likewise suggests that these new regulations have had a significant impact on recent section 527 organization activities, see Stephen R. Weissman and Kara D. Ryan, Soft Money in the 2006 Election and the Outlook for 2008

2. The Commission's Recent Enforcement Efforts Demonstrate the Effectiveness of the Commission's Approach and Provide Guidance About the Applicable Legal Standards

Several recent enforcement actions demonstrate the sufficiency of the Commission's approach and also provide considerable guidance to the regulated community. See Supplemental E&J at 5603-06. These actions include the resolution of significant administrative enforcement matters involving section 527 and other organizations, the filing of a major enforcement suit against a section 527 organization, and the ongoing use of the Act's advisory opinion process. See id. Like the new regulations discussed above, the Commission's successful enforcement actions address this Court's concerns. See Shays II, 424 F.Supp.2d at 115-16. In fact, the Commission's resolution of these complaints, and other specific cases it may be asked to address, may well develop further "legal principles" that govern some of the specific issues raised when applying existing law to section 527 organizations. Central Texas Telephone Cooperative v. FCC, 402 F.3d 205, 210 (D.C. Cir. 2005).[6]

In particular, several high-profile section 527 organizations that should have registered with the Commission as political committees have now entered into conciliation agreements with the Commission, paid significant civil penalties, and agreed to register as political committees if they engage in similar activity in the future. Supplemental E&J at 5602, 5604-05. See Exhs. 2-7. Besides demonstrating the Commission's commitment to enforcing the Act against those groups that unlawfully fail to register as political committees, these conciliation agreements

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(Campaign Finance Institute 2007), at 3-4 (Exh.8). As the Commission clearly stated in its Federal Register notice, those rules did not become effective until January 1, 2005, after the 2004 elections. 69 Fed. Reg. 68056, 68063 (Nov. 23, 2004) (final rules) (AR 375, at 2840). Thus, plaintiffs err in suggesting (Mem. at 21) that there could be a causal connection between these rules and money spent in the 2004 elections.

[6] Moreover, like the new regulations, the Commission's recent enforcement actions have had a reported impact on the activities of section 527 organizations. See Weissman and Ryan, Soft Money in the 2006 Election and the Outlook for 2008, at 3-5.

serve as concrete examples of how the Commission construes the "expenditure" and "contribution" paths to political committee status. In Matters Under Review ("MURs") 5511 and 5525 (Swiftboat Vets) and 5753 (League of Conservation Voters), the Commission found that the organizations' communications had "expressly advocated" the election or defeat of a clearly identified federal candidate under the two definitions of that term in 11 C.F.R. 100.22, and that respondents had met the $1,000 expenditure threshold. See Supplemental E&J at 5604. In those MURs, and in MUR 5754 (MoveOn.Org Voter Fund), the Commission also closely examined solicitations of the respondent entities to determine whether they had sought funds to support or defeat a federal candidate, and it found that respondents had met the $1,000 contribution threshold. See Supplemental E&J at 5604-05.[7]

After determining that respondents in the above MURs had met one or both statutory thresholds for political committee status, "the Commission then investigated whether each organization's major purpose was Federal campaign activity." Supplemental E&J at 5605. "Each organization's full range of campaign activities was evaluated, including whether the organization engaged in any activities that were not campaign related." Id. These investigations involved rigorous examination and "comprehensive analysis" of a range of the organizations' political and financial activities, including review of both internal and public documents, fundraising solicitations, mission statements, budgets, and planning documents. Id. The Commission noted that it had determined that respondents in each matter met the "major

[7] The Commission's analysis of the respondents' solicitations relied in part upon the reasoning in FEC v. Survival Educ. Fund, Inc. ("SEF"), 65 F.3d 285 (2d Cir. 1995). Supplemental E&J at 5604. "The Commission's new rule at 11 CFR 100.57 codifies the SEF analysis." Supplemental E&J at 5602. These recent conciliation agreements therefore demonstrate how the Commission's new regulation will help organizations understand when they have met the "contribution" criterion for becoming a political committee under 2 U.S.C. 431(4).

purpose" standard, and obtained conciliation agreements with respondents. Id.[8] Moreover, the Commission also highlighted another recently conciliated enforcement action with a section 501(c)(4) organization that failed to register and report as a political committee, demonstrating in practice that section "527 organizations are not the only groups whose major purpose is Federal campaign activity." Id. at 5605; see Freedom Inc. conciliation agreement (MUR 5492) (Exh. 4).

The Commission also explained that recent enforcement matters that have not resulted in conciliation agreements — either because conciliation was unsuccessful or because the Commission found no probable cause to believe the Act had been violated — nevertheless provide guidance as to the standards for determining political committee status. See Supplemental E&J at 5605-06. For example, after attempts to conciliate, the Commission "filed suit against [a] 527 organization, the Club for Growth, Inc. ('CFG'), for failing to register and report as a political committee in violation of FECA. See FEC v. Club for Growth, Inc., Civ. No. 05-1851 (RMU) (D.D.C. Compl. pending)." Supplemental E&J at 5605. The Commission explained that the complaint in Club for Growth provides examples of expenditures and contributions and extensive evidence showing that the major purpose of the organization was influencing federal elections. See id. Conversely, the Commission explained that Commission findings that a particular organization need not register as a political committee also provide

[8] Indeed, the Commission has continued to resolve enforcement matters addressing the political committee status of section 527 organizations, and one very recent conciliation agreement requires a section 527 group to pay a $750,000 fine for failing to register and report as a political committee. See Progress for America Voter Fund Conciliation Agreement (MUR 5487) (Exh. 2); Press Release (Exh. 3). These matters, like all pending matters on the Commission's docket, were subject to confidentiality requirements at the time of the Supplemental E&J and could not be discussed in that document. See Supplemental E&J at 5062 n.14. Similarly, at this time there may be other matters on the Commission's docket which have not yet been made public, but no inference should be drawn that these matters are not being actively pursued by the Commission.

guidance to the regulated community. Id. As an example, the Commission pointed to MUR 5751, in which the Commission determined after an investigation that the Leadership Forum had not made expenditures or contributions under the Act where the group's only public communication had reprinted governmental voting information, without any mention of candidates or political parties. Id. at 5605-06.

Moreover, the Act provides a remedy should the Commission unlawfully fail to enforce the Act's "political committee" provisions with respect to any particular group. The Commission's governing statute provides that Commission decisions to dismiss administrative complaints are subject to judicial review. See 2 U.S.C. 437g(a)(8); Chamber of Commerce v. FEC, 69 F.3d 600, 603 (D.C. Cir. 1995) (Commission's governing statute "is unusual in that it permits a private party to challenge the FEC's decision not to enforce"). If a court finds that the Commission has dismissed a complaint for a reason that is "contrary to law," the court may remand the case to the Commission and order it to conform its actions to the court's decision within 30 days. See 2 U.S.C. 437g(a)(8)(C). Through such actions, the courts may also have an opportunity to address the political committee issue in specific cases. See, e.g., FEC v. Akins, 101 F.3d 731 (D.C. Cir. 1997) (en banc), vacated on other grounds, 524 U.S. 11 (1998).

Finally, the Commission explained that "[a]ny entity that remains unclear about the application of FECA to its prospective activities may request an advisory opinion from the Commission. See 2 U.S.C. 437f; 11 CFR part 112." Supplemental E&J at 5605. The Commission noted that such an opinion can "provide guidance to an organization about how the Commission would apply the major purpose doctrine to its proposed activities, and whether the organization must register as a political committee." Id. The Commission stated that it has provided just such guidance in both recent and earlier opinions. See id. n.30 (citing seven

advisory opinions addressing the major purpose doctrine, including two recent ones). For example, in the Commission's most recent advisory opinion on this subject, the Commission advised an organization that it would have to register as a political committee once it made planned expenditures to gain ballot access for the candidates it expected to nominate for federal office. Advisory Opinion 2006-20.[9]

3. The Commission's Approach Provides the Flexibility Necessary to Implement Congressional Intent and Supreme Court Precedent

When the Commission explained how it applies the major purpose doctrine, it stressed that "[b]ecause Buckley and MCFL make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to [its] activities unrelated to campaigns, any rule must permit the Commission the flexibility to apply the doctrine to a particular organization's conduct." Supplemental E&J at 5601-02. "[N]either FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status." Id. at 5598. The Commission thus concluded that application of the major purpose doctrine is "incompatible with a one-size-fits-all rule." Id. at 5601. The Commission also considered this Court's concerns about delay, the need for clear guidance, and other issues in the enforcement process, see Shays II, 424 F.Supp.2d at 115-16, and concluded that any regulation the Commission might adopt that explicitly made section 527 status a factor in determining political committee status "would still have to be interpreted and applied through the very same" congressionally mandated procedural requirements in 2 U.S.C. 437g(a). Supplemental E&J at 5602. The enforcement process would

[9] The organization that requested the advisory opinion has since filed suit to challenge the Commission's determination. See Unity08 v. FEC, Civ. No. 07-0053 (D.D.C. compl. filed Jan. 10, 2007).

thus still entail "investigations of the specific statements, solicitations, and other conduct by particular organizations." Id.

Therefore, given the requirements of the major purpose test and the enforcement procedures Congress directed the Commission to use, presenting the regulatory decision as a stark choice between "case-by-case" analysis and adoption of a "rule" is an oversimplification, if not a false dichotomy. Plaintiffs themselves concede (Mem. at 26) that "some kind of factual examination would be necessary" even if the specific regulation they desire were in place. And they do not quarrel (Mem. at 20) with the Commission's statement that "[a]ny revised rule adopted by the Commission would still have to be interpreted and applied through the very same statutory enforcement procedures as currently exist" (Supplemental E&J at 5602).

As explained supra pp. 2-3, 8, the major purpose analysis mandated by Supreme Court precedent is an "additional hurdle to establishing political committee status" (Supplemental E&J at 5601) that requires the Commission to make an overall assessment of an organization's activities and spending. Weighing such factors as an organization's public and private statements and the extent of its spending on federal campaign activity requires a "fact-intensive inquiry giving due weight to the form and nature of [such] statements" and an evaluation of the "organization's spending on Federal campaign activity, as well as any other spending by the organization." Id. The Commission reasonably concluded that "none of the competing proposed rules would have accorded the Commission the flexibility needed to apply the major purpose doctrine appropriately." Id. at 5602. In sum, "[e]ven if the Commission had simply adopted a rule in 2004 that listed the factors considered in determining an organization's major purpose, the rule would still have had to be enforced through investigations" of the conduct of particular organizations. Id.

D. Congress Has Not Directed the Commission to Promulgate a Targeted Rule Concerning Section 527 Organizations' Status as Political Committees or to Rely Upon the Tax Code

The Commission's rulemaking decisions are consistent with congressional intent. Neither the Act nor any of BCRA's amendments mentions an organization's "major purpose" or how an organization's tax status under 26 U.S.C. 527 might affect a determination of whether the organization is a "political committee." Likewise, the Act does not require the Commission to address these issues by general rule rather than case by case or to rely in any way upon the tax code in determining political committee status. As this Court explained in its 2006 opinion in this case, "a statutory mandate is a crucial component to a finding that an agency's reliance on adjudication was arbitrary and capricious." 424 F.Supp.2d at 114.[10]

Indeed, Congress's total absence of direction to the Commission concerning "major purpose" stands in stark contrast with BCRA sections 402 and 214, which specifically directed the Commission to promulgate regulations regarding other provisions of the Act. 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); BCRA § 214 (repealing Commission's existing rules defining coordinated communications and instructing Commission to develop new regulations on that topic). Congress thus demonstrated its ability to make clear when it wanted the Commission to address specific issues in a rulemaking context, and the Commission has acted well within its

[10] In Massachusetts v. EPA, 127 S. Ct. 1438 (2007), upon which plaintiffs rely (Mem. at 10), the Supreme Court construed a very different statute directing the EPA that it "shall by regulation prescribe" standards applicable to the emission of certain air pollutants, 127 S. Ct. at 1459-60 (emphasis added). In contrast, the present case arose from the Commission's sua sponte decision to consider a new regulation, not from any comparable congressional mandate.

broad policy-making authority here in deciding not to single out section 527 organizations in a new regulation.

The Commission explained how its decision is consistent with the broader statutory framework applicable to section 527 organizations. Supplemental E&J at 5599-5601. During the past decade, in the context of widespread public attention to issues surrounding section 527 organizations, Congress has enacted legislation specifically modifying the regulation of those organizations. However, rather than requiring section 527 groups to register as political committees and report their financial activity to the FEC, Congress in 2000 instead required section 527 organizations that are not registered political committees to file periodic disclosure reports with the IRS. See Pub. L. No. 106-230, 114 Stat. 477 (2000). And in 2002, the same Congress that enacted BCRA amended the section 527 disclosure provisions, but retained the requirement that section 527 organizations that are not political committees file disclosure reports with the IRS. See Pub. L. No. 107-276, 116 Stat. 1929 (2002). In doing this, the Commission noted, Congress changed nothing about the FECA's definition of "political committee": Congress itself did not make section 527 status a factor — much less a dispositive criterion — in deciding whether an organization is a political committee, nor did it direct the Commission even to consider section 527 status in such determinations. See Supplemental E&J at 5599-5600; Branch v. Smith, 538 U.S. 254, 280-81 (2003) ("courts do not interpret statutes in isolation, but in the context of the corpus juris of which they are a part, including later-enacted statutes").

In addition, in BCRA "Congress directly addressed the Federal activity of unregistered 527 organizations, but again, declined to take any other action to regulate 527 organizations as political committees or otherwise alter the existing political committee framework."

Supplemental E&J at 5600. As a rulemaking comment submitted by more than 130 Members of Congress noted,

> Congress, of course, did not amend in BCRA the definition of "expenditure" or, for that matter, the definition of "political committee." Moreover, while BCRA reflects Congress' full awareness of the nature and activities of "527s,["] it did not consider comprehensive restrictions on these organizations like those in the proposed rules.

AR 16, at 284. Even more recently, bills have been introduced (but not enacted) that would require section 527 organizations to register as political committees, including one bill supported by the plaintiffs in this case. Id. at 5601; H.R. 513, 109th Cong. (2006); S. 2828, 108th Cong. (2004).[11] In sum, "[n]either FECA, its subsequent amendments, nor any judicial decision interpreting either, has substituted tax status as an acceptable proxy for [a] conduct-based determination." Supplemental E&J at 5597.

As the Commission also explained, the broader statutory framework indicates why an organization's tax status does not alone determine whether it is a political committee under the Act. See Supplemental E&J at 5597-99. Section 527 of the Internal Revenue Code exempts certain political activities from taxation, but an organization's status under that provision "is not sufficient evidence in itself that the organization satisfies FECA and the Supreme Court's contribution, expenditure, and major purpose requirements." Supplemental E&J at 5597-98 (emphasis added). In particular, the Commission noted that section 527 status is based on a

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[11] On May 17, 2000, two years before BCRA was passed, Senator Lieberman introduced S.2582 on behalf of himself and, inter alia, Senators McCain and Feingold (BCRA's principal Senate sponsors) that would have limited the "tax exemption under Section 527 ... only to organizations regulated under FECA (unless an organization focuses exclusively on State or local elections or does not meet certain other explicit FECA requirements)." 146 Cong. Rec. S4114 (May 17, 2000) (statement of Senator Lieberman) (daily ed.). This bill would have enacted into law what plaintiffs now seek— a broad rule that all section 527 organizations be treated as political committees under FECA unless their activities are focused exclusively on state or local elections. Congress did not, however, enact Senator Lieberman's bill.

"different and broader set of criteria" than political committee status under FECA; thus, while all political committees are section 527 organizations, "[i]t does not necessarily follow that all 527 organizations are or should be registered as political committees." Id. at 5598.[12] In fact, the Commission explained, organizations availing themselves of the section 527 exemption include a wide range of entities involved in federal, state, and local political activities, including many groups that have little or no involvement in federal elections. Id. Indeed, the section 527 umbrella includes groups that seek to influence only the appointment of judicial or executive branch officials and are thus not involved in any kind of candidate election. Id. "'Because of its unique policies and idiosyncrasies, the tax law has an exceptionally broad definition of "political organization," one that has the potential to capture ideological as well as partisan organizations.'" Id. (quoting Gregg D. Polsky, A Tax Lawyer's Perspective on Section 527 Organizations, 28 Cardozo L. Rev. 1773, 1774 (Feb. 2007)).

Finally, the Commission's approach is consistent with congressional intent because it does not "frustrate [the] separate reporting scheme created by Congress in the 2000 and 2002 amendments to section 527." Supplemental E&J at 5600. It also avoids the undesirable "effect of reducing disclosure" which could arise "[i]f a rule singled out 527 organizations" because

> those entities could then either shift the same election-related conduct to a related section 501(c)(4) organization that shares common management, or perhaps even reorganize as a section 501(c)(4) organization in order to avoid a rule that singled out 527 organizations.

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[12] The Commission also noted that the "facts and circumstances" test that the Internal Revenue Service uses in making section 527 determinations is inadequate in the constitutionally sensitive FECA context, and that it is inappropriate to use the tax law as a proxy for campaign finance law enforcement, since "[i]t is the FEC, not the IRS, that is charged with enforcing FECA." Supplemental E&J at 5598-99 (quoting Shays v. FEC, 337 F.Supp.2d 28, 126 (D.D.C. 2004), aff'd, 414 F.3d 76 (D.C. Cir. 2005)).

Id. It is well established that the Internal Revenue Code permits groups to establish affiliated entities organized under 26 U.S.C. 501(c)(3), 501(c)(4), and 527 to conduct their educational, lobbying, issue advocacy, and political activities. See, e.g., Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000); AR 146, at 733 (comments of 672 section 501(c) organizations); AR 352, at 2125-26 (hearing testimony of Laurence Gold); AR 353, at 2593 (hearing testimony of Elliot Minceberg). Both commenters and witnesses who testified during the hearing explained that a "major purpose" requirement subjecting the section 527 arms of such groups to the Act's restrictions would have a substantial impact on such nonprofit organizations, and might actually induce such groups to shift some of the activities they now run through their section 527 organization to a 501(c)(4) affiliate.[13] Such a result would have the perverse effect of reducing disclosure, because 501(c)(4) organizations are not required to file disclosure reports with the IRS of the sort section 527 groups must file.[14] See 26 U.S.C. 6012(a)(6); Supplemental E&J at 5600 & n.11.

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[13] See AR 352, at 2190 (hearing testimony of Nan Aron); AR 352, at 2230 (hearing testimony of Craig Holman); AR 353 at 2593 (hearing testimony of Elliot Minceberg); AR 352, at 2287 (hearing testimony of John Pomeranz); AR 308 at 1758 (comments of Public Campaign) AR 134, at 0604 (comments of Harmon Curran). For example, Public Campaign observed that "the proposed rules, if enacted, could create yet another shift, increasing the political value of certain moneyed players in the system, while devaluing others. If all Section 527 organizations are forced to raise funds under the rules established for political committees, we can expect a number of changes that would include … potentially, a shift in funds from existing Section 527 organizations into issue groups, for much the same activity, but without the public disclosure provisions currently applied to the 527s." AR 308, at 1758.

[14] Indeed, one recent report on campaign finance developments has commented that, "[a]s [the Commission's] regulatory pressure has increased on certain 527s, some leading organizations and donors have switched their funding emphasis from 527s to these alternative [section 501(c)] groups." Weissman and Ryan, Soft Money in the 2006 Election and the Outlook for 2008, at 1 (Exh. 8). See also Jeffrey H. Birnbaum, To Conceal Donors, Some Political Groups Look to the Tax Code, Wash. Post, April 17, 2007, at A19 (Exh. 9).

E. The Commission's Comprehensive Explanation for Its Rulemaking Decisions Easily Satisfies the Highly Deferential Standard of Review

As we have explained, the Commission in its rulemaking "amended its regulations in two significant ways," declined to "establish a separate political committee definition singling out 527 organizations," and provided significant guidance about how it interprets and applies both the statutory criteria for political committee status and the Supreme Court's major purpose test. Supplemental E&J at 5596. To the extent that plaintiffs' case rests on their view that the Commission should have done more to change its regulations, "an agency's burden of supplying a 'reasoned analysis' justifying its policy is lower where, as here, an agency is continuing a long-standing policy compared to where the agency is suddenly changing that policy." Bellevue Hosp. Center v. Leavitt, 443 F.3d 163, 176 (2nd Cir. 2006). As the Supreme Court has noted, a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 41-42 (quoting Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973)).

Plaintiffs object to the Commission's rejection of a rule that would have "substituted tax status for the conduct-based determination required for political committee status" (Supplemental E&J at 5598), and its judgment that continuing to develop the law as applied to section 527 organizations on a case-by-case basis is most consistent with congressional intent and Supreme Court precedent. As we have explained, however, framing the choice here as a stark one between case-by-case analysis and a general rule is misleading because of the comprehensive regulatory framework within which case-by-case determination of political committee status occurs. In any event, even on those terms, "the choice made between

proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). Indeed, "[a]gency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication." American Gas Assoc. v. FERC, 912 F.2d 1496, 1519 (D.C. Cir. 1990) (emphasis added). See National Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442, 1447 (D.C. Cir. 1984) (the decision as to whether to proceed case-by-case or by general rulemaking lies largely within the agency's discretion). In Massachusetts v. EPA, the Supreme Court explained that "[r]efusals to promulgate rules are susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential.'" 127 S. Ct. at 1459 (quoting National Customs Brokers & Forwarders Ass'n of America, Inc. v. United States, 883 F.3d 93, 96 (D.C. Cir. 1989)). Thus, "agencies are entitled, just as courts, to proceed case by case." McClatchy Newspapers v. NLRB, 131 F.3d 1026, 1035 (D.C. Cir. 1997). "When Congress has not specified an approach for the agency to follow, the form of rulemaking or adjudicative procedure 'lies primarily in the informed discretion of the administrative agency.'" Michigan v. EPA, 268 F.3d 1075, 1087 (D.C. Cir. 2001) (citation omitted).

The Commission acted well within this broad discretion. "Given the fact-intensive nature of the Commission's role in these proceedings, it is surely within the agency's authority to proceed on a case-by-case basis rather than by rulemaking." Busse Broadcasting Corp. v. FCC, 87 F.3d 1456, 1463-64 (D.C. Cir. 1996).

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.… There is thus a very definite place for the case-by-case evolution of statutory standards.

Chenery, 332 U.S. at 202-03. In light of the comprehensive, comparative facts necessary to determine whether an organization's "major" purpose is campaign activity or some other pursuit,

and the wide range of reasons organizations may have for registering as section 527 organizations, the precise contours of the law "may be better fleshed out through the application of the law to specific cases and their facts, rather than by drafting an exhaustive list of all hypothetical conduct that would constitute a violation." Coosemans Specialties, Inc. v. Department of Agriculture, ___ F.3d ___, 2007 WL 1029049, at *3 (D.C. Cir. Apr. 6, 2007).

Finally, in the sensitive First Amendment area at issue here, the Commission must avoid unnecessary burdens on political advocacy, and Congress has "vested [it] 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 Comm., Inc. v. FEC, 642 F.2d 538, 545 (D.C. Cir. 1980). 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)). In this "delicate first amendment area, there is no imperative to stretch the statutory language.... Achieving a reasonable, constitutionally sound conclusion ... requires just the opposite." Machinists, 655 F.2d at 394. See also GOPAC, 917 F. Supp. at 861; Orloski v. FEC, 795 F.2d 156, 165 (D.C. Cir. 1986) (deferring to FEC's interpretation that was "one of the most favorable to [regulated entities] that the agency could have adopted").

II. PLAINTIFFS' MOTION FOR FURTHER RELIEF SHOULD BE DENIED

A. The Substantive Standard that Might Be Included in Another "Political Committee" Regulation Is Not Before the Court

Plaintiffs' most fundamental error is their pervasive assumption that the Court can now decide what the substance of a regulation about section 527 organizations would or must say.

Plaintiffs compound this error by assuming that any actual regulation must govern section 527 groups according to plaintiffs' own expansive regulatory vision. However, the only issue before this Court is the adequacy of the Commission's explanation for its rulemaking decisions. The Court's deferential review of the Commission's reasoning cannot depend upon a premature decision outside the Court's jurisdiction regarding the appropriate substance of a regulation that has not yet been written. Thus, despite plaintiffs' insistence, this Court should (1) reject plaintiffs' repeated invitations to judge the Commission's reasoning against their view of what a hypothetical, ideal regulation would look like, and (2) refuse to require the Commission to promulgate a regulation that encapsulates plaintiffs' substantive policy preferences.

Plaintiffs' arguments repeatedly leapfrog over the actual APA question presented in this case and presume that the Commission has already made a substantive decision about whether particular kinds of section 527 groups will be regulated as political committees. In fact, the Commission has merely determined that it will approach this substantive question by applying the Act, Supreme Court precedent, and the Commission's existing regulations in enforcement matters and advisory opinions. In particular, plaintiffs assume that if a regulation targeted at section 527 organizations were promulgated, it would have to be at least as restrictive as two of the proposals considered during the 2004 rulemaking. See Mem. at 20-21 ("A rule — particularly the type of rule proposed by Commissioners Toner and Thomas, and by the General Counsel — would provide clear, advance guidance to 527 groups"); id. at 27 (arguing for a rule that "allows the use of tax status as a logical and fair baseline indicator for meeting the major purpose test in the case of 527 groups (with a limited number of clear exceptions that were

detailed in the proposed rules from the 2004 rulemaking)").[15] Plaintiffs thus repeatedly ignore the simple fact that the substantive content of any such rule is not before the Court — neither explicitly as a regulation subject to review, nor implicitly as a standard by which case-by-case adjudication can be judged. Cf. Pfizer v. Shalala, 182 F.3d 975, 179-80 (D.C. Cir. 1999) (rejecting challenge to first tentative step in FDA's approval process because plaintiff's argument "assume[d] its own conclusion" that the FDA's final decision would harm plaintiff's interests).

Plaintiffs strongly object to the Commission's applying on a case-by-case basis the relevant statutory and regulatory framework to decide whether particular section 527 organizations are political committees, but plaintiffs do not quarrel with the Commission's case-by-case review of the activities of all other groups to make that same determination. See Mem. at 26-27. This inconsistency in plaintiffs' arguments highlights the fact that their real concern is their fear that the Commission will not regulate enough section 527 organization activity, not that the plaintiffs have any legitimate criticism of a case-by-case approach.[16]

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[15] At other times, plaintiffs are less specific about the regulation they have in mind, but their repeated references to a "baseline rule" clearly suggest a similarly expansive regulation. See, e.g., Mem. at 11 (arguing that case-by-case adjudication is inadequate in the "absence of a baseline rule"); id. at 14 (compliance would allegedly be "significantly enhanced by promulgation of a baseline 'major purpose' rule"); id. at 17 ("without a baseline rule"); id. at 18 (same).

[16] Plaintiffs' renewed request (Motion at 2) that the Court remand this case to the Commission with instructions to adopt "an appropriate regulation focused on 527 groups" within 90 days would, if granted, interfere with the proper relationship between the branches of government. "[R]espect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities." In re Barr Labs., Inc., 930 F.2d 72, 74 (D.C. Cir. 1991). An order directing an agency to engage in expedited rulemaking "constitutes extraordinary relief, and is to be granted only upon a finding of unreasonable delay or imminent risk to public health and welfare." Consumer Fed'n of America v. United States HHS, 83 F.3d 1497, 1507 n.8 (D.C. Cir. 1996) (citations omitted). Furthermore, plaintiffs' proposed remedy would intrude into the work of the Commission beyond interfering with its choice of priorities, for plaintiffs want the Court to dictate the substance of the regulation ("an appropriate regulation") (emphasis added). However, "[t]he court is the steward, not the craftsman, of the law." Sandoz, Inc. v. Leavitt, 427 F.Supp.2d 29, 38 (D.D.C. 2006).

Plaintiffs make their most egregious error about the necessary substance of a political committee regulation when they argue that what is needed is a "prophylactic 527 rule." Mem. at 12. This argument turns Buckley on its head. A prophylactic rule is one, like the Act's contribution limits, that restricts a particular kind of activity because it presents an inherent risk, not because every instance of that activity is itself harmful.[17] But the Supreme Court's narrowing construction of "political committee" that gave rise to the "major purpose" test is the opposite of a prophylactic rule. Because the Act's statutory definition of "political committee" could raise vagueness problems and impermissibly "reach groups engaged purely in issue discussion," 424 U.S. at 79, the Court narrowed the Act's scope to lessen the statute's prophylaxis. And the major purpose test is not a bright-line prophylactic rule like the Act's definition of "political committee," but is instead a standard that adds significant nuances to the statutory definition by requiring a fact-dependent inquiry into the particular circumstances and purposes of each organization.

In any event, plaintiffs incorrectly attribute to the Commission the view that "a group's 527 status proves nothing at all about its major purpose." Mem. at 24. See also id. at 26 ("E&J II disavows the relevance of 527 status"). The Commission regards section 527 tax status as a relevant factor, but not a determinative one. As the Commission explained, an "organization's election of section 527 tax status is not sufficient evidence in itself that the organization satisfies FECA and the Supreme Court's contribution, expenditure, and major purpose requirements." Supplemental E&J at 5597-98 (emphasis added). Plaintiffs themselves cite (Mem. at 25) factual

[17] For example, when the Supreme Court addressed the $1,000 limit on contributions from individuals to federal candidates, it was willing to assume that "most large contributors do not seek improper influence over a candidate's position." Buckley, 424 U.S. at 29-30. Nevertheless, the Court upheld the prophylactic limit because the "interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." Id.

and legal analyses adopted by the Commission that include section 527 status as one of several indicators about a group's major purpose. Plaintiffs claim that the Commission's overbreadth concerns about relying on section 527 status are a "straw man" (id. at 22), but the kind of broad regulation that plaintiffs favor would presume that all section 527 organizations are political committees; an organization with that tax status would only be able to rebut the presumption by showing that it engaged "exclusively" or "solely" or "purely" in activities unconnected with federal candidate elections. Thus, according to plaintiffs' view, if a section 527 organization spent only a few dollars in connection with a federal candidate election, it would be deemed a political committee. See Mem. at 22-23 & nn. 25, 26. Again, although this substantive dispute is beyond the narrow issue before the Court, plaintiffs do not explain how the kind of expansive regulation they prefer can be reconciled with the Supreme Court's instruction that a group cannot be regulated as a political committee unless its "major purpose" is campaign activity.

B. Plaintiffs Cannot Substantiate Their Speculation that the Commission's Approach Will Be Ineffective as a Deterrent to Potential Violations of the Act

Plaintiffs argue that only a regulation of the kind they seek can provide adequate deterrence and promote voluntary compliance. See Mem. at 13-15, 18. This argument rests on speculation and anecdotes. It also suffers from plaintiffs' recurring, fundamental error: It assumes that the substance of any lawful regulation would reflect plaintiffs' policy views or, at the least, that any regulation would closely resemble the proposal of then Commissioners Toner and Thomas or the General Counsel. There may, however, be numerous possible regulations that the Commission, in its discretion, would have the authority to adopt in this area, including ones that are not nearly as expansive as what plaintiffs seek. In any event, a regulation,

however strict, is not self-enforcing, and deterrence in the form of high penalties can only arise through the application of the Commission's congressionally mandated enforcement procedures.

It is also entirely reasonable to assume that actual civil penalties of hundreds of thousands of dollars — like those recently obtained by the Commission — will provide a deterrent at least as effective as an abstract rule on the books. As the Commission explained, to "the extent uncertainty existed [before the recent section 527 conciliation agreements], these 527 settlements reduce any claim of uncertainty because concrete factual examples of the Commission's political committee status analysis are now part of the public record." Supplemental E&J at 5604. See generally Colin S. Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 393, 430 (1981) ("While non-incrementalist [i.e., regulation-based] policies are doomed to rigidity ..., the modesty of incremental [i.e., adjudicatory] undertakings enables them more readily to adapt to novel circumstances.").

Moreover, plaintiffs' attempts to disparage the quality of the guidance the Commission has provided in the recent section 527 cases are unavailing. Contrary to plaintiffs' assertions (Mem. at 19 n.21), it is irrelevant that the recent conciliation agreements do not contain blanket admissions of liability by the respondents. It is obviously the Commission's view of the law that matters, and that is clearly set out in those agreements; the respondents' assertions and denials for purposes of settlement do not undermine the Commission's own findings or legal interpretations. Every conciliation agreement is an official action of the Commission, see 2 U.S.C. 437c(c) (majority voting requirement), and thus represents a Commission decision about the applicability of the law to the administrative respondent's activities.

More generally, plaintiffs fail to acknowledge that the operation of the Commission's approach is analogous to the operation of the common law in Anglo-American jurisprudence:

Interested persons keep up with judicial decisions (and legislative enactments that affect the common law), and although each common-law case is fact-specific, the ever-increasing decisions provide guidance.[18] Contrary to plaintiffs' claim (Mem. at 20), there is nothing "internally inconsistent" about the Commission's explaining both that a general regulation is unworkable because of the unique facts presented in each case and that a series of individual precedents will, over time, provide adequate guidance. What this dispute really boils down to is the level of generality that is appropriate at this point in the development of the definition of "political committee" as applied to section 527 organizations. The Supreme Court's "major purpose" test — like the common law's "negligence" standard, for example — is itself a standard, but a very general one. The Commission will apply that standard, but at this time has determined that fine-tuning it in the abstract is unnecessary, and potentially counterproductive. Plaintiffs' criticism proves too much, because it is almost always the case that general standards

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[18] Plaintiffs suggest (Mem. at 19) that the Commission was irrational in deciding that guidance could be obtained from public legal documents such as Federal Register notices, prior conciliation agreements, and advisory opinions. Plaintiffs' attack, however, is without foundation, since publication in Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it." 44 U.S.C. 1507; see also Yakus v. United States, 321 U.S. 414, 435 (1944) ("The regulations ... are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them."). Moreover, "FEC advisory opinions … reflect the Commission's considered judgment made pursuant to congressionally delegated lawmaking power" and are entitled to deference. FEC v. National Rifle Ass'n of America, 254 F.3d 173, 184-86 (D.C. Cir. 2001). Cf. In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000) (holding that Commission's probable cause determination and underlying statutory interpretation warrant deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). As a practical matter, the Commission's website provides easy access to documents in closed FEC enforcement matters, advisory opinions, and other information, thereby placing all affected parties on notice of the Commission's interpretations of law embodied in these documents. See 5 U.S.C. 552(a)(2) (providing that an agency's "statements of policy and interpretations ... may be relied on, used, or cited as precedent by an agency against a party" if the agency has made such statements and interpretations "available for public inspection and copying"); Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1989) (finding HHS Social Security ruling enforceable as interpretive statement that agency had made available to public under section 552(a)(2)).

could be more precisely defined, yet that only begs the question about whether such precision would yield greater guidance without also bringing a new source of confusion or unintended consequences. The answer to that question belongs within the expert discretion of the Commission.

"An agency's enforcement of a general statutory or regulatory term against a regulated party cannot be defeated on the ground that the agency has failed to promulgate a more specific regulation." United States v. Cinemark, USA, Inc., 348 F.3d 569, 580 (6th Cir. 2003) (citing Chenery, 332 U.S. at 201, and NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974)). In any event, to the extent groups like PFA-VF believed the law was unclear when they violated the Act (see Pl. Mem. at 20), the recent settlements make it infeasible for such groups to make that argument in the future. Indeed, the conciliation agreements contain promises from the respondents that they will register as political committees if they engage in similar activity in the future, so these agreements have undeniably provided significant clarity and deterrence for these groups and others that are similarly situated.

Similarly, plaintiffs' suggestion (Mem. at 15-16) that the Commission's reliance on a case-by-case approach could raise Due Process and First Amendment issues is meritless. Even if plaintiffs were themselves section 527 organizations and had standing to raise these potential issues, section 527 organizations (and other groups) have multiple sources of guidance to alert them when they would trigger political committee status. See supra pp. 14-21. "There is certainly no conceivable due process claim that could be predicated on the notion that an agency must proceed to establish such standards through rulemaking rather than case-by-case determinations." Lightfoot v. District of Columbia, 448 F.3d 392, 398 (D.C. Cir. 2006) (citation omitted). As the D.C. Circuit recently explained:

> Retroactivity is the norm in agency adjudication no less than in judicial adjudications. See SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency."). As Judge Friendly observed in NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966), "courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct."

AT&T v. FCC, 454 F.3d 329, 332 (D.C. Cir. 2006) (citations omitted). Moreover, as noted supra pp. 20-21, "should plaintiffs [or others] feel that they need further guidance, they are able to seek advisory opinions for clarification, see 2 U.S.C. § 437f(a)(1), and thereby 'remove any doubt there may be as to the meaning of the law.'" McConnell, 540 U.S. at 170 n.64 (quoting Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 580 (1973)). See also Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995) (availability of an advisory opinion "substantially reduce[s] any remaining uncertainty"). In these circumstances, organizations have received fair notice of the requirements for political committee status.

If the Commission were to initiate administrative enforcement proceedings against a section 527 group for failure to register as a political committee, the FECA grants the group an opportunity to submit briefs raising due process and First Amendment arguments or any other defense. See 2 U.S.C. 437g(a)(3). Furthermore, the Commission itself cannot impose any civil penalty or any sanctions whatsoever and, if conciliation efforts fail, see 2 U.S.C. 437g(a)(4), can only seek to enforce the Act's requirements by filing a de novo civil suit in federal district court, where the section 527 organization may again challenge the Commission's position. See 2 U.S.C. 437g(a)(6); Blount, 61 F.3d at 948 ("[O]f course, if the SEC actually brings an

enforcement action, the affected party may challenge the particular application of the rule as not reasonably foreseeable under the rule's language.").[19]

C. Plaintiffs Concede that Another Regulation Would Not Speed Up the Enforcement Process

Although both the parties and the Court would prefer to see the Commission's enforcement process advance as rapidly as possible, plaintiffs admit (Mem. at 15) that the Commission might be "right that promulgation of a rule [directed at section 527 groups] would not speed completion of individual enforcement actions." The enforcement procedures Congress established for the Commission serve as important safeguards to protect the administrative respondents and to limit the potential for abuse of 2 U.S.C. 437g(a)(8) by politically motivated complainants. In Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996), the court observed that the Act's enforcement "procedures [are] purposely designed to ensure fairness not only to complainants but also to respondents [and] must be followed before a court may intervene."

> We assume that in formulating those procedures Congress, whose members are elected every two or six years, knew full well that complaints filed shortly before elections … might not be investigated and prosecuted until after the event.

Id. See also FEC v. Rose, 806 F.2d 1081, 1084, 1091-92 & n.17 (D.C. Cir. 1986) (FEC's two-year investigation not unreasonably long). In sum, even if the Commission were to promulgate a regulation singling out section 527 organizations, enforcement of that rule would still take place according to the congressionally mandated procedures set out in 2 U.S.C. 437g(a). Those procedures include, inter alia, various notifications to respondents and opportunities for them to respond to the allegations against them, "reason to believe" and "probable cause to believe" findings by the Commission, an investigation of the facts, efforts at conciliation, and, if

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[19] For these reasons, the defense raised by Club for Growth (see Pl. Mem. at 16) in response to the Commission's enforcement action brought under 2 U.S.C. 437g(a)(6) is without merit.

necessary, a Commission vote to initiate civil enforcement litigation. Because these procedures are applicable regardless of the source of the Commission's legal interpretation of "political committee," there is no basis for concluding that the pace of the Commission's enforcement efforts will be any faster or slower because the Commission has decided not to promulgate the regulation that plaintiffs seek.

D. The Supplemental E&J Properly Interprets the Law

Plaintiffs devote many pages (Mem. at 28-35) to arguing that their interpretation of the FECA and the Supreme Court's Buckley and McConnell decisions is preferable to the Commission's. However, their discussion is irrelevant to the limited issue now before this Court, and it is yet another instance of their improper attempt to transform this case into an examination of the merits of their substantive legal and policy views, with the goal of imposing them on the Commission.

Plaintiffs wrongly imply (Mem. at 28) that the Buckley Court found the statutory definition of "political committee" problematically vague because of its purported reliance on the definition of "expenditure." Rather, the Court was concerned that the $1,000 thresholds in the statutory definition of "political committee" were so easy to meet that the definition "could be interpreted to reach groups engaged purely in issue discussion," and those groups would then be burdened by having to report all their receipts and disbursements. Buckley, 424 U.S. at 79 & n.106. To remedy the related but distinct problems of potential vagueness in the definitions of "expenditure" and "political committee," the Court adopted two different solutions. First, to prevent issue groups from being categorized as political committees, the Court established what has become known as the "major purpose" test as an additional criterion to the statutory requirements for political committee status. Id. at 79. Second, to prevent the unnecessary

imposition of the Act's disclosure requirements on spenders who are not political committees or under the control of candidates, the Court adopted the express advocacy test for "expenditures" for communications made by such entities. Id. at 79-80. See also McConnell, 540 U.S. at 169 n.64.

Plaintiffs leap from these two distinct narrowing constructions in Buckley to the unsupported conclusion that, in determining whether a section 527 group has qualified for political committee status, the Commission (and presumably the courts) must first apply the major purpose test and only after that task apply the statutory criteria. See Mem. at 30. But neither Buckley nor McConnell specifies a step-by-step process for determining whether a section 527 organization or any other group is a political committee. The cases merely state that expenditures of "political committees" — construed as organizations "under the control of a candidate or the major purpose of which is the nomination or election of a candidate" — are, "by definition, campaign related." Buckley, 424 U.S. at 79; McConnell, 540 U.S. at 169 n.64 (quoting Buckley).

Consistent with this precedent, the Commission's political committee inquiry begins with the statutory criteria. See Supplemental E&J at 5596-5597. Plaintiffs' interpretation takes a contrary approach and suffers from the critical flaw of writing the $1,000 criterion for "expenditures" out of the statute. According to plaintiffs, once a group's major purpose is ascertained, it can be assumed that every dime the group spends is an expenditure, thereby making the statutory $1,000 criterion superfluous for any group that spends more than $1,000. This interpretation violates "a cardinal principle of statutory construction … that a statute ought … to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal

quotation marks and citations omitted). Accord, e.g., Donnelly v. F.A.A., 411 F.3d 267, 271 (D.C. Cir. 2005). Thus, plaintiffs, not the Commission, are "collapsing" terms, creating "a hollow shell," and misinterpreting the law (Pl. Mem. at 35).

Even if this Court were to disagree with the Commission's interpretation, that disagreement would not create a basis for rejecting the Supplemental E&J. The Commission's discussion of Buckley in the E&J provides the public with guidance as to how the Commission analyzes political committee status, but, contrary to plaintiffs' assertions (Mem. at 31, 34), those views are not a necessary part of the Commission's decision not to rely upon the tax code in a regulation targeted at section 527 organizations. Nor did that decision depend upon, for example, the Commission's view of what constitutes "express advocacy" or the appropriate use of the PASO standard ("promote, attack, support, oppose"). See Pls. Mem. at 33-34 & n.32. Indeed, a group can be found to have attained political committee status without its having engaged in express advocacy communications, either because it has accepted more than $1,000 in contributions or because it has spent more than $1,000 on expenditures whose purpose is to influence federal elections. See, e.g., AO 2006-20 (finding expenses to obtain ballot access for organization's eventual nominees for President and Vice President were "expenditures"); Supplemental E&J at 5597 n.6. As explained supra pp. 4-10, the Commission's rulemaking decisions rested on several factors, including the need for a fact-intensive inquiry into the activities of particular organizations, the inappropriateness of using tax status as a proxy for determining an organization's "major purpose" under the FECA, and the goal of properly implementing congressional intent and Supreme Court precedent.

Although plaintiffs criticize the Commission's approach of first applying the statutory criteria for political committee status before applying the major purpose test, plaintiffs do not

argue that any of the section 527 cases that have recently been resolved came to the wrong conclusion about the various respondents' status as political committees. In the future, if the Commission dismisses an administrative complaint filed by the plaintiffs and they disagree with the Commission's application of the law, they can seek judicial review of such a dismissal under 2 U.S.C. 437g(a)(8). But the Commission's legal interpretation, though correct, is irrelevant to the narrow question before the Court concerning the adequacy of the Supplemental E&J's reasoning.

Plaintiffs' arguments ultimately rest on policy differences with the Commission. Plaintiffs want the Commission to regulate more section 527 groups and to promulgate a general regulation that locks in a very expansive interpretation based on the tax code — one that Congress has considered but chosen not to enact. As the Commission's Supplemental E&J shows, however, neither the language nor the legislative history of the Act requires the result that plaintiffs seek. See also Personal Watercraft Indus. Ass'n v. Department of Commerce, 48 F.3d 540, 544 (D.C. Cir. 1995) ("Regulations … are not arbitrary and capricious just because they fail to regulate everything that could be thought of to pose any sort of problem."). In the final analysis, Congress granted the Commission, not the plaintiffs, the authority to make policy under the Act and the discretion to determine how to enforce it. The Commission has explained the many reasons why its rulemaking decisions were justified, and the Court should defer to that judgment.

CONCLUSION

For the reasons stated above, the Commission respectfully requests that the Court grant the Commission's motion for summary judgment and deny plaintiffs' motion for further relief.

Respectfully submitted,

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