**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| REPRESENTATIVE CHRISTOPHER SHAYS, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civil Action No. 04-1597 (EGS) |
| BUSH-CHENEY '04, INC.,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civil Action No. 04-1612 (EGS) |

**FEDERAL ELECTION COMMISSION'S MOTION**
**TO STRIKE THE EXHIBIT OF AMICI CURIAE**
**U.S. SENATORS JOHN MCCAIN AND RUSSELL D. FEINGOLD**

Defendant Federal Election Commission ("Commission"), by and through its undersigned counsel, hereby moves to strike Exhibit A submitted in support of Plaintiffs' Motion for Summary Judgment by Amici Curiae U.S. Senators John McCain and Russell D. Feingold ("Amici") and those portions of Amici's brief that rely on Exhibit A. Exhibit A is a document which Amici did not have permission to file, which is not part of the administrative record, which is an account of predecisional deliberations not from this rulemaking, and which is an inadmissible and unreliable account of a Commission public session unrelated to this litigation.

In support of this motion, the Commission has filed an accompanying memorandum of points and authorities and a proposed order. Counsel for Amici have informed the Commission that they oppose this motion.

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
Richard B. Bader
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_____/s/_____
Colleen T. Sealander
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August 26, 2005

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| REPRESENTATIVE CHRISTOPHER SHAYS, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civil Action No. 04-1597 (EGS) |
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**FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO STRIKE THE EXHIBIT OF AMICI CURIAE U.S. SENATORS JOHN MCCAIN AND RUSSELL D. FEINGOLD**

The Federal Election Commission ("FEC" or "Commission") moves this Court to strike Exhibit A of the Memorandum of U.S. Senators John McCain and Russell D. Feingold as Amici Curiae Supporting Plaintiffs' Motion for Summary Judgment and Opposing Defendant's Motion for Summary Judgment ("Am. SJ Mem."). As we explain below, the Court should strike Exhibit A, which purports to be an unofficial transcript of the Commission's deliberations during consideration of an unrelated Advisory Opinion request, because: (1) Amici did not request, the

parties did not agree to, and the Court did not grant permission for this exhibit to be submitted as evidence; (2) the transcript is not part of the administrative record, which is the exclusive basis for judicial review, Camp v. Pitts, 411 U.S. 138, 142-143 (1973); (3) predecisional deliberative discussions are inadmissible for the impeachment of an agency's formal written opinion, Kansas State Network v. FCC, 720 F.2d 185, 191 (D.C. Cir. 1983); and (4) the transcript is inaccurate and unreliable. The Commission further asks this Court to strike all arguments in Amici's brief that are based on Exhibit A.

## ARGUMENT

### I. AMICI DID NOT REQUEST PERMISSION TO SUBMIT EVIDENCE

This Court should strike Exhibit A because Amici did not seek or receive permission from either the parties or the Court to submit evidence. In their December 13, 2004 motion to participate, Amici "propos[ed] to limit their participation to filing briefs and making arguments on issues before the Court." Unopposed Motion and Supporting Statement of Points and Authorities of U.S. Senators John McCain and Russell D. Feingold to Participate as Amici Curiae at 1. This Court granted Amici's motion on December 14, 2004. The court has the sole discretion to determine the extent and manner of amici's participation. Cobell v. Norton, 246 F.Supp.2d 59, 62 (D.D.C. 2003) (denying third party's request to participate as amici). See also High Sierra Hikers Ass'n v. Powell, 150 F.Supp.2d 1023, 1045 (N.D. Cal. 2001) (excluding evidence which was beyond the scope of a court order granting permission to file a brief), rev'd on other grounds, High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630 (9th Cir. 2004). Cf. Fed. R. App. P. 29 (amici may file an appellate brief only with leave of the court or approval of all parties). The evidence submitted in Exhibit A is outside of the scope of Amici's original request to the court and the parties. Therefore, it should be stricken.

## II. REVIEW OF THE COMMISSION'S RULEMAKING IS LIMITED TO THE ADMINISTRATIVE RECORD THAT WAS BEFORE THE COMMISSION AT THE TIME OF ITS DECISION

This Court should also strike Exhibit A because it is not part of the administrative record. It is well-established that the "focal point of judicial review" of a federal agency's decision in a rulemaking challenged under the Administrative Procedure Act ("APA") as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. 706(2)(A), "should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. at 142. See also Committee for Creative Non-Violence v. Lujan ("CCNV"), 908 F.2d 992, 998 (D.C. Cir. 1990) (review "should normally be based on the full administrative record that was before a decision maker at the time challenged action was taken and not on a de novo review of the facts in the District Court") (citation and internal quotation omitted); Sociedad Anonima Vina Santa Rita v. United States Dept. of Treasury, 193 F. Supp. 2d 6, 17 n.10, 18 n.11 (D.D.C. 2001) (quoting CCNV).[1]

Exhibit A is an unofficial transcript prepared by Amici that purports to document an open meeting of the Commission on February 18, 2004 in which the individual members of the Commission discussed a draft advisory opinion ("AO 2003-37") in response to a request by Americans for a Better Country ("ABC"), an independent federal political committee. The discussion among the six individual Commissioners and Commission staff reflected in Exhibit A

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[1] See also, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) ("review is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision"); Amfac Resorts, L.L.C. v. Department of Interior, 143 F.Supp.2d 7, 11 (D.D.C. 2001) ("The rationale for this rule derives from a commonsense understanding of the court's functional role in the administrative state. . . . 'Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President.'") (quoting San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1325 (D.C. Cir. 1984), vacated in part, 760 F.2d 1320 (D.C. Cir. 1985), aff'd en banc in relevant part, 789 F.2d 26 (D.C. Cir. 1986)).

involves ABC's advisory opinion request as to which of its campaign activities must paid for by money raised in compliance with Federal Election Campaign Act of 1971, as amended ("Act"), and not the regulation of organizations that are not currently registered political committees.[2] Thus, as we explained in our opening brief on the merits, the Commission's decision in AO 2003-37 is immaterial to this litigation.[3] Because ABC was a registered federal political committee, the application of the Act's "political committee" definition to ABC was not at issue.

Even if AO 2003-37 were somehow related to the "major purpose" requirement or the application of the "political committee" definition that are at issue in this case, the transcript of this public session would still not be part of the administrative record. It is a settled principle of law that an agency need not consider every piece of material within its possession when it conducts a rulemaking. See, e.g., Fund for Animals v. Williams, 245 F.Supp.2d 49, 57 n.7 (D.D.C. 2003) (administrative record does not encompass all potentially relevant documents "existing within the agency or in the hands of a third party") (citing, inter alia, Kent County v. EPA, 963 F.2d 391, 396 (D.C. Cir. 1992) (concluding EPA need not "find all documents discussing filtration located in any office" of the agency) (emphasis in original)). Rather, the administrative record in a rulemaking is limited to those materials "compiled by the agency, that

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[2] See, e.g., Exhibit A, T 7-8 (observing that "[q]uestions as to the permissible spending by [unregistered 527's] are outside the scope of [ABC's] request."); T 28 ("I do want to make a couple of clarifying points because when this is – this whole issue is discussed people tend to talk about this as the 527 Ruling. And I think that we need to make clear that . . . we are not dealing with all 527's."); T 34 ("I'd likewise concur that ABC is a political committee registered with the FEC. The issues that we face here today are different than organizations . . . that aren't political committees registered with the FEC.").

[3] See Memorandum in Support of the Commission's Motion for Summary Judgment, and in Opposition to Plaintiff's Motion for Summary Judgment ("FEC SJ Mem.") at 39-40. ABC has been registered with the FEC as a political committee since September 4, 2003, and so it is not one of the unregistered 527 organizations that are the focus of this lawsuit. See Statement of Organization, Committee # C00390047, at http://query.nictusa.com/cgi-bin/fecimg/?C00390047 (last visited August 25, 2005).

were before the agency at the time the decision was made." James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (internal citations omitted; emphasis added). The Commission hearing on which Exhibit A is based occurred on February 18, 2004, nearly a month before the rulemaking proceeding at issue in this case was opened on March 11, 2004.[4] Therefore, this Court should strike Exhibit A and all arguments in Amici's brief that are based on it.

## III. THE PREDECISIONAL DELIBERATIONS OF AN AGENCY ARE GENERALLY UNREVIEWABLE AS EVIDENCE OF AGENCY INTENT OR REASONING

Amici rely on the transcript to support their argument that the Commission's "position on regulating 527's is contradictory"[5] because during the February 18, 2004 advisory opinion hearing, a majority of the Commissioners allegedly expressed a preference for addressing concerns about 527 organizations through a rulemaking, while at the November 23, 2004 conclusion of the rulemaking, the Commission unanimously elected to continue to proceed on a case-by-case basis. Am. SJ Mem. at 8, 10.[6]

Even if the advisory opinion at issue during this meeting were before this Court for review, it is well established that statements made during predecisional deliberations among

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[4] See Notice of Proposed Rule Making on Political Committee Status, 69 Fed. Reg. 11736 (March 11, 2004); Administrative Record ("AR") 246-271.

[5] By way of background, Amici also claim "that the United States Supreme Court concluded that the Commission's actions over the years 'subverted' campaign finance laws enacted by Congress and 'invited widespread circumvention' of the law. McConnell v. FEC, 540 U.S. 93, 142-145 (2003)." Am. SJ Mem. at 3. In its opening brief on the merits, the Commission refuted similar claims by the plaintiffs, and showed that they are meritless. See FEC SJ Mem. at 44 n.32.

[6] Amici claim that the "majority of the Commissioners (Weintraub, McDonald, Toner, and Smith) either spoke in favor of dealing with the issue of regulating 527s in a rulemaking or actually voted in favor of doing so. Tr. at 113." Am. SJ Mem. at 10. This statement is misleading for two reasons: first, although votes were taken on February 18, 2004, those votes were about AO 2003-37; no vote was taken at that time on the initiation of a rulemaking. Second, in the vote Amici cite, the four Commissioners Amici identify split 2-2, not 4-0 as Amici claim.

Commissioners are inadmissible to show that the Commission has changed its position.[7] "Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision." Ad Hoc Metals Coalition v. Whitman, 227 F.Supp.2d 134, 143 (D.D.C. 2002). Evidence of deliberation among the Commissioners is of no consequence because "commissioners [in federal agencies] retain full authority to approve, disapprove, or modify [their opinion] until published." LO Shippers Action Committee v. Interstate Commerce Commission, 857 F.2d 802, 805 (D.C. Cir. 1988). In LO Shippers, the court refused to consider the transcript of a meeting in which commissioners voted on the very decision that the court was scrutinizing. Here, Amici go much further, asking the Court to review the comments of individual Commissioners discussing an advisory opinion during an entirely separate proceeding that was completed well before the rulemaking at issue in this litigation even began.

Amici's exhibit is also cumulative and irrelevant, since there is no dispute that in March 2004 when the Commission initiated the rulemaking sua sponte, it fully anticipated that it would adopt rules interpreting the major purpose requirement in Buckley v. Valeo, 424 U.S. 1 (1976). It was only after considering the thousands of comments and days of testimony that the Commission decided that adopting a general rule at this time would not be wise. In undertaking notice and comment rulemaking under the APA, agencies like the Commission are supposed to

[7] The Commission's regulations explicitly provide that discussions among Commissioners do not represent the opinion of the Commission: "[s]tatements of views or expressions of opinions made by Commissioners or FEC employees at meetings are not intended to represent final determinations or beliefs." 11 C.F.R. 2.3(c). Under the Act, the Commission has the power to render advisory opinions, 2 U.S.C. 437d(a)(7), and to make rules, 2 U.S.C. 437d(a)(8), but only upon the vote of four Commissioners. 2 U.S.C. 437c(c). At the February 18, 2004 advisory opinion meeting, the Commission did not vote to adopt any particular policy concerning section 527 organizations, and did not do so until its decision to continue applying the statute to section 527 organizations on a case-by-case basis, rather than by regulation, published on November 23, 2004. 69 Fed. Reg. 68056; AR 2833.

have a "flexible and open-minded attitude towards [their proposed] rules." Federal Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (quoting National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978)). The APA requires outside participation in order to "enable the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." National Tour Brokers, 591 F.2d at 902 (internal quotation omitted). In this way, agencies are able "to benefit from the expertise and input of the parties who file comments with regard to the proposed rule." Id. Rather than proceeding to a predetermined result, agencies are supposed to consider comments "with a mind that is open to persuasion." Advocates for Highway and Auto Safety v. Federal Highway Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994). Amici quote a statement of Commissioner Weintraub that reflects just such an open-minded attitude: "[w]hen we get to the rulemaking we could supersede what we do today, we could build on it, we could go in an entirely different direction altogether." Am. SJ Mem. at 8 (citing Exhibit A, T 21.)

Finally, it is a settled rule of this Circuit that "agency deliberations at Sunshine Act meetings should not routinely be used to impeach" the written opinion of the agency. Kansas State Network v. FCC, 720 F.2d 185, 191 (D.C. Cir. 1983) (considering a motion to strike the transcript of an open meeting). There is good reason for this rule. "To require the inclusion in an agency record of documents reflecting internal agency deliberations could hinder candid and creative exchanges regarding proposed decisions and alternatives, which might, because of the chilling effect on open discussion within agencies, lead to an overall decrease in the quality of decisions." Ad Hoc Metals, 227 F.Supp.2d at 143. If the rule were "[o]therwise, it would seem, almost any slip of the tongue during an agency's decisionmaking process could be fatal, contrary to the settled principle that up to the point of announcement, agency decisions are freely

changeable . . ." PLMRS Narrowband v. FCC, 182 F.3d 995, 1001-1002 (D.C. Cir. 1999) (internal quotations and citation omitted). In this case, where the predecisional deliberations relied upon are from a separate proceeding unrelated to the rulemaking under review, there is even more reason to reject Amici's submission of a purported transcript of agency deliberations.

## IV. EXHIBIT A IS UNRELIABLE AND UNTRUSTWORTHY

Finally, transcripts of hearings are unreliable records of the views of the Commission "because they consist of informal, collegial interchanges which do not reflect the considered reasons for the Commission's decisions." Common Cause v. FEC, 676 F.Supp. 286, 289 n.3 (D.D.C. 1986). This characterization is particularly true of the statements in Exhibit A. The actual discussion in Exhibit A that is highlighted by Amici more closely resembles a discussion of upcoming events than a substantive interchange about the issues before the Commission in the advisory opinion. For example, Amici quote Commissioner Weintraub as saying "[w]hen we get to the rulemaking we could supersede what we do today . . .[and] in the rulemaking context we will have the option of considering a wider range of options." Am. SJ Mem. at 8 (emphasis in brief omitted; new emphasis added).

Moreover, this particular transcript is especially dubious because the tape on which it is based is of uncertain origin, authenticity and accuracy, and because the transcript bears no testament by the court reporter that it is an accurate transcription of anything. See Fed. R. Civ. P. 56(e) ("affidavits" supporting summary judgment may set forth "admissible" evidence); Fed. R. Evid. 803(8) (reports of agency activities are excludable as hearsay if circumstances "indicate lack of trustworthiness"); Fed. R. Evid. 901(a) (authentication or identification is required for admissibility). On its face, the reliability of the transcript is suspect. Plaintiffs rely on the statements made by particular Commissioners identified in the transcript, but the transcript's

attribution of comments to the particular speakers is unreliable. For example, the first statement attributed to Commissioner McDonald, at pages 51-52, is identical, word for word, to the statement attributed to Chairman Smith at pages 53-54. It is extremely unlikely that two Commissioners repeated each other's lengthy statements, verbatim, but that is what Exhibit A reflects. At other times, the transcript identifies the speaker only as "Speaker," including one instance when the "Speaker" is discussing the issue of making decisions through a rulemaking rather than an advisory opinion -- the basic purpose for which Amici cite Exhibit A. See Exhibit A, T 177-178; Am. SJ Mem. at 8-11. In other sections the transcript misattributes the comments of FEC counsel to Commissioner Smith, Exh. A, T 131-132, and Commissioner Weintraub, id. at T 156. The unofficial transcript's complete lack of sufficient indicia of reliability and trustworthiness provides a separate, independently sufficient reason for this Court to exclude it as evidence.

## CONCLUSION

For the reasons stated above, the Commission respectfully requests that this Court strike Amici's Exhibit A and all arguments in Amici's brief that rely on it.

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
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