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)

BUSH-CHENEY '04, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 04-1612 (EGS)

DEFENDANT FEDERAL ELECTION COMMMISSION'S MOTION FOR SUMMARY JUDGMENT

The defendant Federal Election Commission's ("Commission") now moves pursuant to Fed. R. Civ. P. 56 for summary judgment. In support thereof, the Commission relies on the accompanying memorandum of points and authorities, and statement of material facts not in genuine dispute. A proposed order also accompanies this motion.

Respectfully Submitted,

/s/

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June 7, 2005

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

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INTRODUCTION

This is a consolidated action challenging a decision of the Federal Election Commission as arbitrary, capricious and an abuse of discretion under the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). In 2004, the defendant Federal Election Commission ("Commission" or "FEC") conducted a rulemaking in which the Commission considered, inter alia, whether to issue new regulations further construing the statutory term "political committee." At the conclusion of the rulemaking, the Commission adopted several important new regulations affecting the operation of section 527 organizations, but chose not to adopt a regulation interpreting "major purpose," a judicial gloss on the definition of "political committee" in the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), codified at 2 U.S.C. 431-455, that was adopted by the Supreme Court nearly 30 years ago in Buckley v. Valeo, 424 U.S. 1 (1976). The Commission explained that the issue was a complex one whose consequences for nonprofit groups engaged in advocacy were too uncertain to enable the fashioning of a rule of general application, that the agency had been applying the "major purpose" requirement for many years on a case-by-case basis without additional regulatory definitions, and that it intended to continue to do that. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004) (AR 375 at 2842).[1]

In this action, Representatives Christopher Shays and Martin Meehan and Bush-Cheney '04, Inc. ("plaintiffs") ask this Court to overturn the Commission's decision and order the agency to promulgate a new rule interpreting how the statutory definition of "political

[1] "AR __" citations are to the administrative record filed by the Commission. 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.

committee" applies to nonprofit organizations that qualify for tax exemption under 26 U.S.C. 527. The Commission now moves for summary judgment.

As we explain below, all three plaintiffs apparently lack Article III standing and their claims are unripe. Furthermore, even if plaintiffs had standing and their claims were ripe, the Commission's decision falls within the broad discretion Congress granted the agency to decide how best to administer and enforce the Act. Therefore, the Commission's motion should be granted, and plaintiffs' summary judgment motion denied.

BACKGROUND

A. The Parties

Plaintiffs Christopher Shays and Martin Meehan are Members of the United States House of Representatives and were the principal House sponsors of BCRA.[2] First Amended Complaint ("Shays FAC") ¶¶ 14, 15. Their complaint states that they each intend to seek re-election in 2006. Id.

Plaintiff Bush-Cheney '04, Inc. ("BC '04") was the principal campaign committee of George W. Bush and Richard B. Cheney for the 2004 general election campaign for President and Vice President. See FEC Exh. A, B.[3] Those candidates received public funding for their campaign, and as a precondition for that funding they agreed, inter alia, that BC '04 would not accept private contributions and would submit to a post-election audit. See Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. 9001-9013.

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[2] The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), is the most recent major amendment to the Act.

[3] President Bush and Vice-President Cheney are not parties to this litigation, nor are Mr. Bush's other political committees, Bush-Cheney '04 (Primary), Inc., and Bush-Cheney '04 Compliance Committee.

Defendant Federal Election Commission is the independent agency of the United States Government empowered with exclusive jurisdiction to administer, interpret, and civilly enforce the FECA. See generally 2 U.S.C. 437c(b)(1), 437d(a), and 437g. The Act authorizes the Commission to "formulate policy with respect to" the Act, 2 U.S.C. 437c(b)(1), as well as to promulgate "such rules . . . as are necessary to carry out the provisions" of the Act. 2 U.S.C. 437d(a)(8). It also empowers the Commission to issue written advisory opinions construing the statute and to investigate possible violations of the Act and other federal statutes within the Commission's jurisdiction after receiving a sworn complaint or "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities." 2 U.S.C. 437g(a)(1) and (2).

B. The Statutory and Regulatory Framework

1. Federal Election Campaign Act and Commission Regulations

The Act defines a "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). See also 11 C.F.R. 100.5(a).[4] The Act limits contributions to political committees, 2 U.S.C. 441a(a)(1)(C),[5] and requires any organization that qualifies as a political

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[4] The Act defines "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons[.]" 2 U.S.C. 431(11). A political committee must "file a statement of organization within 10 days after becoming a political committee within the meaning of section 431(4)," 2 U.S.C. 433.

[5] "Contribution" is also 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). Likewise, 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). The definition of "expenditure" includes a lengthy list of exceptions, 2 U.S.C. 431(9)(B), none of which is relevant to this lawsuit.

committee to register with the Commission and file periodic reports of all its receipts and disbursements for disclosure to the public. 2 U.S.C. 433 and 434; see FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238, 253-54 (1986) (plurality opinion); FEC v. Machinists Non-Partisan Political League ("Machinists"), 655 F.2d 380, 391-92 (D.C. Cir. 1981). In other words, once an organization becomes a political committee, the Act requires comprehensive disclosure about all of the organization's receipts and disbursements, even those not specifically intended to influence an election. Although Congress has amended other portions of the Act in recent years, most notably in BCRA, it has not altered the generally applicable definitions of "political committee," "contribution," and "expenditure" since the 1970s.

The Supreme Court has twice construed the statutory term "political committee" to avoid constitutional problems. The Court concluded that the term "political committee" under the FECA need not be applied to an organization that engages in political advocacy unless, in addition to crossing the $1,000 statutory threshold of federal expenditures, the organization is under the control of a candidate or its major purpose is the nomination or election of a candidate. Buckley, 424 U.S. at 79; MCFL, 479 U.S. at 252, 262.

In Buckley, the Court was concerned that the requirement that political committees disclose all their expenditures could raise vagueness problems because the definition of political committee "could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79. The Court concluded, however, that "[t]o fulfill the purposes of the Act [political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Id. This narrower construction avoided the constitutional questions about requiring groups that engage in political

advocacy to disclose all their expenditures and the names of their contributors because the "[e]xpenditures … of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress." Id.

This construction was reaffirmed in MCFL, in which the Court reviewed the campaign expenditures of a nonprofit, nonstock political advocacy corporation. 479 U.S. at 241-42. Quoting Buckley, the Court again stated that "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" MCFL, 479 U.S. at 252 n.6 (plurality opinion). The Court had found that MCFL had made nearly $10,000 in expenditures expressly advocating the election or defeat of federal candidates, 479 U.S. at 248-49. Although these federal election expenditures far exceeded the $1,000 statutory threshold for political committee status, the Court concluded that "[i]t is undisputed on this record that … [MCFL's] central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." Id. at 252 n.6 (plurality). While the Court thus found MCFL's $10,000 in election spending insufficient to make it a political committee, the Court noted that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee" and would thereby become "subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." 479 U.S. at 262 (emphases added).

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.[6] See, e.g., FEC Advisory Opinions ("AOs") 1994-25 and 1995-11.[7] The Commission also has applied this gloss on the statutory term in the enforcement context, including matters the Commission has taken to court. 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).[8]

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[6] Until 1996, the D.C. Circuit seemed to view the Supreme Court's analysis of this issue as applicable to all organizations not connected to a candidate or political party. See Machinists, 655 F.2d at 391-92. However, in Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1997) (en banc), the D.C. Circuit read Machinists narrowly, concluding that the Supreme Court's discussion of "major purpose" in Buckley and MCFL applies only to organizations making independent expenditures, not those making coordinated expenditures or direct contributions. Id. at 741-42. The Supreme Court vacated the D.C. Circuit's decision, FEC v. Akins, 524 U.S. 11 (1998), without reaching the "major purpose" issue.

[7] In March 2001, the Commission published an Advance Notice of Proposed Rulemaking seeking comment on the definitions of "political committee," "contribution," and "expenditure." 66 Fed. Reg. 13,681 (Mar. 7, 2001). In September 2001, the Commission voted to hold that tentative rulemaking in abeyance pending legislative or judicial developments. 69 Fed. Reg. 11,737 n.3 (Mar. 7, 2004) (AR 11 at 248). The Commission rulemaking at issue here is a separate proceeding initiated in February 2004. Id.

[8] Bush-Cheney '04 (Primary), Inc., — President Bush's and Vice President Cheney's principal campaign committee for the 2004 presidential primary campaign — has filed two administrative complaints in which it alleges that several section 527 organizations violated the FECA by failing to register as political committees. See Bush-Cheney '04, Inc. v. FEC, 04-CV-1501 (D.D.C.) (voluntarily dismissed on Dec. 2, 2004). When it filed these complaints, the primary election committee was known as "Bush-Cheney '04" (FEC Exh. C), but changed its name after the Republican convention when a new committee with that name (the plaintiff here) was established to received public funds and conduct President Bush's general election campaign. FEC Exh. D. Plaintiff Bush-Cheney '04 was not an administrative complainant in those matters.

No action by the Commission on the Primary Committee's administrative complaints has been made public because 2 U.S.C. 437g(a)(12)(A) prohibits the Commission from making public "[a]ny notification or investigation . . . without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." Once the Commission's enforcement proceedings are concluded, information must be made public pursuant to 2 U.S.C. 437g(a)(4)(B)(ii).

2. Section 527 of the Internal Revenue Code

Section 527 of the Internal Revenue Code shields "exempt function income" received by "political organizations" from federal taxation. 26 U.S.C. 527(c). "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." 26 U.S.C. 527(e)(2).

All "political committees" under FECA are also "political organizations" under section 527, and thus may take advantage of this favorable tax treatment. The definition of "political organization" in section 527, however, is broader than the definition of "political committee," for it includes organizations that do not receive "contributions" or make "expenditures" of more than $1,000 to influence federal elections, and it includes organizations whose purpose is influencing appointments to non-elective office or to office in political organizations. In 2000, Congress enacted 26 U.S.C. 527(i) and (j) (amended in 2002)[9] to require many section 527 organizations that are not political committees under the FECA, see 26 U.S.C. 527(j)(5)(A), to file disclosure reports with the IRS rather than the FEC.

C. The Commission's Rulemaking Proceeding

1. Notice of Proposed Rulemaking

On March 11, 2004, just three months after a closely divided Supreme Court upheld the constitutionality of most of BCRA in a lengthy and complex series of opinions in McConnell v. FEC, 540 U.S. 93 (2003), the Commission published a Notice of Proposed Rulemaking seeking public comment on a variety of issues involving the definitions of "political committee," "contribution" and "expenditure," and on possible revisions to the allocation requirements for

[9] Pub. L. No. 106-230, 114 Stat. 477 (2000); Pub. L. No. 107-276, 116 Stat. 1929 (2002).

nonconnected political committees that maintain separate accounts for federal and nonfederal election activities. Political Committee Status; Proposed Rule, 69 Fed. Reg. 11,736-60 (March 11, 2004) (AR 11 at 246) (hereinafter "NPRM"). The Commission prepared an expedited schedule that included only four weeks for public comment and hearings on April 14 and 15, 2004. Id.

The NPRM presented several possible ways to identify the kinds of disbursements that would count as "expenditures" in determining whether an organization has met the $1,000 threshold requirement to be a "political committee" under the FECA. The first proposal would include the costs of certain activities — "federal election activity," defined as including particular voter registration, get-out-the-vote, and voter identification efforts, and "electioneering communications" (see 2 U.S.C. 434(f)(3)) — as counting toward the $1,000 expenditure threshold for political committees. NPRM at 11,738-39 (AR 11 at 249-50). Provisions concerning those activities were added to the statute by BCRA, and the Supreme Court upheld those provisions against vagueness and overbreadth challenges in McConnell. The Commission proposed an alternative construction of the term "expenditure" that would include payments for public communications that promote, support, attack, or oppose any political party or clearly identified federal candidate. NPRM at 11,741 (proposed 11 CFR 100.116) (AR 11 at 252). The Commission sought comment on these proposals, and also on the related issue of whether money received and used to pay for such activities should count as "contributions." NPRM at 11,739 (AR 11 at 250).

The NPRM also sought comments on whether the definition of "political committee" should spell out some version of a "major purpose" requirement and, if so, what that requirement should be. NPRM at 11,743-49, 11,756-57 (AR 11 at 254-60, 267-68). The NPRM proposed

that a group that "receives in excess of $1,000 in total federal contributions or makes in excess of $1,000 in total federal expenditures would be a political committee only if 'the nomination or election of one or more Federal candidates is a major purpose' of the group." NPRM at 11,743-44 (emphasis added) (AR 11 at 254-55).

The Commission also requested comments on four possible "tests" to determine a "major purpose" of an entity. NPRM at 11,745-49 (AR 11 at 256-60). The first used the organization's public pronouncements and a $10,000 annual spending threshold for certain kinds of electoral activities; the second focused on whether the organization spent more than 50% of its total annual disbursements on such activities; the third relied on a $50,000 spending threshold; and the fourth proposal, drafted in the alternative, explicitly addressed section 527 organizations. NPRM at 11,748, 11,757 (AR 11 at 259, 268). One alternative provided that, with five exceptions, all section 527 organizations would be considered to have the nomination or election of candidates as a major purpose. NPRM at 11,748 (AR 11 at 259). The other alternative would have eliminated the exceptions. Id.

In addition to seeking comments on the specific proposals, the Commission also asked a series of questions designed to engender comment and advice to the Commission concerning its constitutional and statutory authority to adopt a "major purpose" proposal, as well as the impact of various court decisions on its construction of "major purpose." NPRM at 11,743-49 (AR 11 at 254-60) (listing approximately 50 legal and factual questions concerning "major purpose").

2. Public Comment on the NPRM

The Commission received more than 100,000 comments from political committees, political parties, nonprofit organizations, individuals, campaign finance organizations, and Members of Congress. 69 Fed. Reg. 68,056 (Nov. 23, 2004) (AR 375 at 2833). At the public hearings, the Commission heard from 31 witnesses representing numerous organizations with a

broad range of opinions and concerns about many different issues. AR 352 and 353 (transcripts of hearings). These commenters offered a wide variety of contradictory views regarding the rulemaking's complex, controversial issues.

In both written statements and at the hearing, many commenters supported incorporating a "major purpose" component into the Commission's regulatory definition of "political committee," but they differed widely among themselves about how that concept should be defined. See, e.g., AR 163 at 941 (Prof. Tobin); AR 143 at 782 (Democracy 21, et al.); AR 141 at 718 (Public Citizen). Some commenters proposed that tax-exempt organizations under section 501(c) of the Internal Revenue Code be excluded from any rule defining "major purpose." See, e.g., AR 276 at 1570 (National Voting Rights Institute). Similarly, some commenters believed that the definition of "expenditure" should differ depending on the tax status of the entity doing the spending, distinguishing section 501(c) organizations from section 527 organizations. See, e.g., AR 271 at 1513-14 (Sens. McCain and Feingold; Reps. Shays and Meehan).

In contrast, many other commenters opposed all of the proposals set forth in the NPRM and expressed concerns about the potential impact of the proposed rules on political issue advocacy. See, e.g., AR 139 at 663 (America Coming Together); AR 166 at 1002 (The Media Fund); AR 265 at 1482 (Service Employees International Union). Several provisions in BCRA, including those permitting the use of unlimited funds donated by individuals for broadcasting "electioneering communications" to a candidate's constituents during the weeks before an election (see 2 U.S.C. 434(f)(1), (2)(A), (B), (D); 441b(b)(2)), were cited for the proposition that an overly broad rule defining "political committee" would conflict with BCRA. See, e.g., AR 136 at 621 (MoveOn.org Voter Fund); AR 286 at 1614 (National Association of Realtors). Commenters also argued that because BCRA only applied the "promote, support, attack, or

oppose" standard to party organizations, it would be improper for the Commission to apply that standard to nonparty organizations. See, e.g., AR 139 at 664 (America Coming Together); AR 166 at 1003 (The Media Fund).[10]

Commenters also noted that Congress in BCRA did not change the definition of "expenditure" from that enacted more than 25 years ago. See, e.g., AR 136 at 621 (MoveOn.org Voter Fund). Some commenters pointed out that the FECA has only one definition of "expenditure," and argued that the definition therefore could not vary with the type of entity spending funds. See, e.g., AR 139 at 668 (America Coming Together). Commenters also objected to any proposal that would presume that all section 527 organizations satisfy the "major purpose" requirement, because many such organizations have no role in electing candidates to federal office. See, e.g., AR 136 at 617 (MoveOn.org Voter Fund).

Many commenters also questioned whether new rules were necessary or appropriate at this time and suggested that refinement of Buckley's "major purpose" language might better be addressed by Congress or the Supreme Court. See, e.g., AR 16 at 284 (over 130 Members of Congress); AR 230 at 1288 (VoterMarch); AR 279 at 1588 (Gov. Richardson). A joint comment from 672 nonprofit organizations contended that the Commission did not have access to the sort of comprehensive information Congress had at its disposal, and that the Commission was, therefore, poorly positioned to assess the operations of the variety of organizations that might be affected by new regulations. AR 146 and AR 319 at 739.

Some commenters noted that Congress did not address political committee status in BCRA even though the new section 527 disclosure legislation enacted in 2000 and amended in

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[10] Those commenters borrowed the quoted language from BCRA § 301(20)(A)(iii) (defining "Federal election activity"), codified at 2 U.S.C. 431(20)(A)(iii), which applies only to party committees. See 2 U.S.C. 441i(b). See also McConnell, 540 U.S. at 170 n.64 (holding that this language is not unconstitutionally vague).

2002 demonstrated that Congress was fully aware that some section 527 groups were operating outside FECA's registration and reporting requirements and its contribution limitations and prohibitions. See, e.g., AR 16 at 284 (over 130 Members of Congress); AR 279 at 1588 (Gov. Richardson); AR 158 at 909 (Citizens United); AR 150 at 836 (OMB Watch). These commenters argued that legislation requiring section 527 organizations to file disclosure reports with the IRS indicated that Congress had decided not to require those organizations to register with the Commission as political committees. See id.

Some commenters viewed the "major purpose" limitation as a court-created protection to avoid overbroad application of the FECA's definition of "political committee," and not as a statutory trigger for political committee status. See, e.g., AR 139 at 680-681 (America Coming Together); AR 166 at 997-998 (The Media Fund); AR 265 at 1481-1482 (Service Employees International Union); AR 152 at 852-857 (Focus on the Family, et al.). A "major purpose" test used as a trigger, some commenters argued, would chill constitutionally protected speech, particularly since the commenters believed that the boundaries of such a test would be inherently vague and thus force organizations to curtail permissible activities. See AR 151 at 837 (National Lawyers Guild, et al.); AR 168 at 1033-1035 (Chamber of Commerce); AR 242 at 1371, 1373 (Beigi); AR 146 at 729-736 (672 section 501(c) groups). Several unions, for example, expressed concern that the proposed rules would affect their core activities, from criticizing public officials to representing public employees during an election season. See, e.g., AR 265 at 1477-1478, 1481, 1483 (Service Employees International Union); AR 162 at 936-937 (American Fed. of Government Employees).

Other commenters predicted that the Commission would face practical difficulties in implementing any generally applicable test intended to ascertain a group's "purpose." See, e.g.,

AR 139 at 665-666 (America Coming Together); AR 147 at 816, 818 (NAACP Legal Defense and Educational Fund). These commenters were concerned that the "major purpose" proposals set out in the NPRM might unfairly categorize an organization as a political committee on the basis of a few statements or organizational documents even though those statements and documents might not accurately convey the actual purpose and operation of the organization. See, e.g., AR 139 at 681-682 (America Coming Together); AR 147 at 816 n.3 (NAACP Legal Defense and Educational Fund); AR 168 at 1042-1044 (Chamber of Commerce); AR 136 at 623-624 (MoveOn.org Voter Fund).

Commenters also asserted that the determination of an organization's purpose would often result in intrusive investigations by the Commission into the private internal workings of an organization. See, e.g., AR 168 at 1044-1045 (Chamber of Commerce). Another commenter feared that any definition of "political committee" with even the potential of encompassing nonprofit organizations would force them to choose between accepting corporate donations and advocating ballot questions as a part of their overall activity. See AR 264 at 1463-1464 (National Assoc. of Latino Elected and Appointed Officials).

Some commenters also suggested that the Commission would be in a better position to address the issue after monitoring the behavior of various organizations during at least one election cycle following the enactment of BCRA. See, e.g., AR 19 at 301-302 (Thiel). Other commenters counseled that the Commission had insufficient data demonstrating the existence of corruption or the appearance of corruption from the activities of many of the groups that would be affected to justify the proposed regulations. See, e.g., AR 139 at 660-661 (America Coming Together); AR 27 at 321 (Common Cause); AR 146 at 738-740 (672 section 501(c) groups). Furthermore, some commenters cautioned that the upcoming elections would be disrupted if the

Commission immediately adopted new regulations. See, e.g., AR 139 at 661-662 (America Coming Together); AR 166 at 1012-1013 (The Media Fund).

3. The Commission's Final Rules

After evaluating these comments, the Commission considered two separate draft Final Rules that would have revised the definition of "political committee." Each incorporated modified portions of the rules proposed in the NPRM, and each included a "major purpose" component, although they differed in purpose and operation. See draft 11 CFR 100.5(a), Agenda Document 04-75, proposed by the General Counsel (AR 354 at 2665-2666); draft 11 CFR 100.5(a), Agenda Document 04-75-A, proposed by Commissioners Thomas and Toner (AR 355 at 2677-2679). Both drafts were rejected by a 4-2 vote. See Certification of Commission votes at the August 19, 2004, Open Meeting (AR 364 at 2731-2732).

The first draft Final Rules, proposed by the General Counsel, would have incorporated one interpretation of Buckley's discussion of "major purpose" into the definition of "political committee" in 11 CFR 100.5(a) by requiring an organization to have "as its major purpose the nomination or election of one or more candidates for Federal office." Draft 11 CFR 100.5(a)(1)(ii) of Agenda Document 04-75 (emphasis added) (AR 354 at 2665); see also Buckley, 424 U.S. at 79. Draft paragraph (a)(2) presented three ways in which an organization could satisfy this requirement: (1) by publicly declaring that the purpose of the group is to influence federal elections; (2) by spending more than 50% of its funds on certain specified activities; or (3) by receiving more than 50% of its funding through "contributions," as defined in 2 U.S.C. 431(8) and 11 CFR Part 100, Subpart B. This version of the Final Rules also favored a broader notion of what kind of expenditures a threshold criterion of 50% disbursements for federal election activities would encompass.

The second draft Final Rules — the Thomas-Toner proposal — rested on an interpretation of Buckley that focused on whether an organization's major purpose is the "election of one or more Federal or non-Federal candidates." See draft 11 CFR 100.5(a)(1)(ii) in Agenda Document 04-75-A (emphasis added) (AR 355 at 2677-78). Under that proposal, an organization would have the requisite "major purpose" just by virtue of having filed with the IRS under 26 U.S.C. 527, unless covered by one of five exceptions. Organizations that did not file under 26 U.S.C. 527 would have been subject to the previously existing standards for determining their major purpose. See draft 11 CFR 100.5(a)(4) in Agenda Document 04-75-A (AR 355 at 2678).

After considering these proposals and the public's comments, the Commission concluded that at this time it was not advisable to incorporate a construction of the "major purpose" limitation into the existing regulation's definition of "political committee." The Commission therefore did not adopt any of the proposals when it approved Final Rules addressing the "expenditure," "contribution," and allocation issues involved in this rulemaking and an accompanying Explanation and Justification. See 69 Fed. Reg. 68,056 (Nov. 23, 2004) (AR 375 at 2833) (hereinafter "E&J"). Instead, the Commission decided to continue to apply the "major purpose" limitation on a case-by-case basis. See E&J at 68,065 (AR 375 at 2842).

In its Explanation and Justification, the Commission noted that, as commenters had suggested, "the proposed rules might have affected hundreds or thousands of groups engaged in nonprofit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself" when it amended 26 U.S.C. 527 in 2000 and 2002 to require section 527 groups to file financial reports with the IRS instead of the FEC, and when it "substantially transformed" the FECA itself in 2002 through

BCRA. E&J at 68,065 (AR 375 at 2842). Furthermore, the Commission found that neither BCRA nor McConnell "mandated" revising the Commission's definition of "political committee." Id. As the Commission explained, "major purpose" is not part of the statute written by Congress, but "a judicial construct that limits the reach of the statutory triggers in FECA for political committee status." Id. Finally, the Commission noted that it had been "applying this construct for years [on a case-by-case basis] without additional regulatory definitions," and explicitly confirmed its intention to continue to do so. Id.

The 2004 rulemaking did result in several important new regulations that affect the operation of section 527 organizations. For example, new section 11 C.F.R. 100.57 provides that funds received in response to solicitations that indicate that funds raised will be used to support or oppose a clearly identified candidate must be treated as "contributions" under FECA. E&J at 68,056 (AR 375 at 2833). This provision applies "without regard to tax status, so [it] reach[es] all FECA 'persons,' including, for example, entities described in or operating under section 501(c)(3), 501(c)(4), and 527 of the Internal Revenue Code" and directly affects when such a group qualifies as a "political committee." E&J at 68,057 (AR 375 at 2833). The Commission also adopted rules tightening the allocation requirements in 11 C.F.R. 106.6 for nonconnected political committees with components that engage in federal and nonfederal activities. E&J at 68,060-63 (AR 275 at 2837-40). Since a political committee's nonfederal account is itself a section 527 organization that does not report to the Commission as a "political committee," these allocation regulations also have an important effect on the operation of section 527 groups.

ARGUMENT

I. THIS LITIGATION RAISES STANDING AND RIPENESS ISSUES

Shays, Meehan, and BC '04 bear the burden of establishing that this Court has jurisdiction over their claims. FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). Plaintiffs appear not to have met that burden. However, as we have previously explained to the Court, another suit by Shays and Meehan for review of a Commission rulemaking was argued on May 12, 2005, before the D.C. Circuit, Shays v. FEC, 340 F.Supp.2d 39 (D.D.C. 2004), appeal filed, No. 04-5352 (D.C. Cir. Sept. 30, 2004) ("Shays I"), and it may well resolve that issue. See Joint Local Rule 16 Status Report (filed January 21, 2005), at 2, 6-7. Accordingly, the Commission now only briefly discusses some of the jurisdictional issues presented here, and if the D.C. Circuit's decision in Shays I indicates that this Court lacks jurisdiction, the Commission will file a motion at that time pursuant to Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). See In re Cheney, No. 02-5354, slip op. at 11 (D.C. Cir. May 10, 2005) (en banc) (invoking Rule 12(h)(3) in considering affidavit submitted more than one year after initial complaint filed).

A. Article III Standing

One crucial jurisdictional issue is whether plaintiffs have satisfied their burden to establish their constitutional standing. The three-part test for standing under Article III requires a showing that the plaintiff has suffered a legally cognizable injury traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). At the summary judgment stage, when allegations no longer suffice, plaintiffs must demonstrate standing with admissible evidence. Id.

In their declarations submitted to support their motion for summary judgment, Shays and Meehan do not identify any section 527 organizations that they believe will try to influence elections in which they are candidates without registering as political committees. Nor do they refer to any evidence to support their conclusory assertion that the risk of such an occurrence is "strong," or, indeed, not merely speculative. Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Pl. Mem."), Declaration of Rep. Christopher Shays ¶ 5, Declaration of Rep. Martin Meehan ¶ 5. Their declarations also do not allege that any section 527 organization not registered with the Commission as a political committee opposed them in the 2004 congressional campaigns (in which they were victorious), nor do they even provide evidence that any other congressional candidate in plaintiffs' home states experienced such opposition. Similarly, although Shays and Meehan rely heavily on a claim of informational standing, see Pl. Mem. 21-25, they do not identify any particular organization that they allege has failed to disclose any information required by the Act.[11]

These generalized claims of injury, unconnected to any identified action or plan by any actual section 527 organization, do not satisfy the requirement of the concrete, personal, and imminent injury necessary to establish Article III standing. Since a similar lack of factual specificity characterized plaintiffs' declarations in Shays I (some of the assertions are nearly identical to those in the declarations in the present case), the D.C. Circuit's decision may help resolve whether such vague claims of injury are adequate to satisfy constitutional standing requirements.

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[11] In this regard, plaintiffs differ markedly from the voters in FEC v. Akins, 524 U.S. 11 (1998), and the campaign committee in Kean for Congress Comm. v. FEC, No. 04-00007 (JDB) (unpublished memorandum opinion dated Jan. 25, 2005) (Pl. Exh. 15), who were found to have informational standing in seeking information allegedly unlawfully withheld about specific organizations.

With respect to plaintiff BC '04, even if its complaint adequately alleged an injury in fact to Bush's general election presidential campaign caused by the Commission's regulatory decision, Article III also requires BC '04 to show that it is "'likely,' as opposed to merely 'speculative,'" that this injury would "be 'redressed by a favorable decision.'" Lujan, 504 U.S. at 560 (internal citation omitted). BC '04 did not file its original complaint in this Court until September 17, 2004, only seven weeks before the November 2004 presidential election. The complaint alleged that section 527 organizations were "currently raising and spending enormous amounts of money" and "operat[ing] outside of the prohibitions and limitations of the FECA despite the[ir] purpose of influencing the 2004 presidential election," Complaint ¶ 7, and that "most" were "dedicated to spending money … to oppose the re-election of President Bush." Id. ¶¶ 4, 5. Even if the Court had proceeded on an expedited schedule, found for plaintiff on the merits, and remanded the matter within a few days with instructions to the Commission to draft and adopt a new rule, the rule could not possibly have been adopted and put into effect before the election. See 5 U.S.C. 553(d) (publication in Federal Register required "not less than 30 days before effective date"); 5 U.S.C. 801(a) (rule not effective until promulgating agency submits a report to Congress and the Comptroller General); 2 U.S.C. 438(d) (rule not effective until 30 legislative days have elapsed).[12] Therefore, by the time BC '04 filed its complaint, the informational and other harms that it claimed to be suffering in relation to the 2004 presidential campaign because of activities by organizations not registered with the FEC could not have been redressed by any order of this Court. Cf. Perot v. FEC, 97 F.3d 553, 561 (D.C. Cir. 1996)

[12] The House adjourned on October 9, 2004, and the Senate on October 11, 2004, only three weeks after BC '04 filed its complaint, and neither reconvened until November 16, after the 2004 general election. 150 Cong. Rec. H9174-01 (Oct. 9, 2004); 150 Cong. Rec. S11334-01 (Oct. 11, 2004).

(because candidate debates were imminent, "even an immediate order invalidating the [debate] regulations would not provide [plaintiff] with any meaningful relief from the alleged harms").[13]

In addition to raising issues that may be addressed by the D.C. Circuit in Shays I, the plaintiffs in this case face another obstacle to demonstrating that they are injured by the Commission's decision to continue enforcing the Act's political committee requirements on a case-by-case basis rather than by adopting a rule generally applicable to all section 527 organizations. In Shays I, the plaintiffs grounded their claim of injury on the allegation that the Commission had adopted regulations that authorize private activities that could be directed against their own campaigns and which the Act was intended to prohibit. In this case, however, there is no allegation that the Commission has adopted a regulation that permits activity the Act prohibits, and thus no basis for concluding that the Commission's decision to enforce the Act on a case-by-case basis authorizes section 527 organizations to violate the Act. Without that crucial

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[13] President Bush won re-election in 2004, and since the Constitution prohibits him from serving a third term as president, see U.S. Const. amend. XXII, § 1, he will not again face electoral opposition from unregistered section 527 organizations and BC '04 cannot be redesignated as the principal campaign committee for Mr. Bush for another term. Vice President Cheney recently reiterated that he will not run for the presidency. Transcript of Fox News Sunday (Feb. 7, 2005), available at <http://www.foxnews.com/story/0,2933,146546,00.html>.

Furthermore, despite plaintiffs' claim to the contrary (Pl. Mem. 20), BC '04 cannot, as a practical matter, transform itself from a principal campaign committee into a multicandidate political committee in time to assist congressional candidates in the 2006 federal elections. President Bush and Vice President Cheney accepted public funding to finance their 2004 general election campaign. As a precondition for that funding, they agreed, inter alia, to accept no contributions, limit their expenditures, and consent to the Commission's conducting a detailed post-election examination and audit of BC '04's finances. See Presidential Election Campaign Fund Act, 26 U.S.C. 9001, 9003; 11 C.F.R. 9002.11(a)(1), 9004.11, 9007.2(b)(3). Under the Fund Act, the Commission has until November 2007 — a year after the November 2006 elections — to notify President Bush and BC '04 of any repayments they must make as a result of the statutorily required audit. See 26 U.S.C. 9007(c) (three-year deadline). At least until that process is completed, BC '04 remains a publicly financed principal campaign committee for the 2004 general election and cannot convert into a multicandidate political committee. See also 2 U.S.C. 432(e)(3); 11 C.F.R. 102.13(c) (multicandidate committee cannot serve as a candidate's principal campaign committee).

link, there is no basis for the Court to find that the Commission's decision caused any harm plaintiffs might allege they will suffer from section 527 organizations that violate the Act. If plaintiffs file an administrative complaint, the Commission can enforce the Act itself against any section 527 organization that violates it, regardless of whether there is also a regulation explaining in greater detail what the statute requires.[14] See 2 U.S.C. 437g(a)(1); 437d(e). Any harm plaintiffs might suffer from section 527 organizations that violate the statute would, therefore, be the result of actions by third parties not before the Court that are in no sense authorized or approved by the Commission action under review. In such circumstances, plaintiffs do not have Article III standing. See Lujan, 504 U.S. at 560-62.

The statutory scheme established by Congress supports this conclusion. Congress granted the Commission "exclusive jurisdiction" over the civil enforcement of the FECA, empowered it to investigate alleged violations of the statute, and authorized it to initiate civil enforcement actions in federal district court. See 2 U.S.C. 437c(b)(1), 437d, 437g(a)(2) and (a)(6). Except for the procedure in 2 U.S.C. 437g(a)(8), discussed below, "the power of the Commission to initiate civil actions … shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. 437d(e). To that end, Congress further provided that "[a]ny person" may file an administrative complaint alleging that the FECA has been violated. 2 U.S.C. 437g(a)(1). Thus, Congress has provided a specific remedy for the sort of violations by third parties that Shays, Meehan, and BC '04 allege might occur. Indeed, President Bush's campaign committee for the 2004 primary election, Bush-Cheney '04 (Primary) Inc., has pursued precisely that course by filing administrative complaints with the Commission, even in the absence of the

[14] See e.g., SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

regulation plaintiffs ask this Court to order the Commission to promulgate. See BC '04 FAC ¶¶ 44-45.

B. Ripeness

Like Shays I, this litigation also raises ripeness issues. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 807-08 (2003) (citation and footnote omitted). To determine whether an administrative action is ripe for review, courts generally "evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." Id. at 808 (citation omitted).

Once again, plaintiffs appear unable to meet the relevant test. The Commission has not decided that section 527 organizations are not required to register with and report to the Commission as "political committees"; rather, it has only decided that, for now, its regulation of section 527 organizations will be carried out on a case-by-case basis rather than resting on a regulation of general application that could result in unnecessary chilling of political speech. As we explained supra, p. 21, if an unregistered group actually undertakes activities of the sort hypothesized by plaintiffs, the affected plaintiff may file an administrative complaint with the Commission. Shays, Meehan, and BC '04 may not simply assume that the Commission will conclude that the FECA does not require the group to register with the Commission as a "political committee" or to comply with the legal requirements applicable to such groups. Therefore, until at least one of these plaintiffs files such an administrative complaint, the abstract

issue whether the Commission would apply permissible criteria in enforcing the Act's requirements is unfit for judicial review.

Plaintiffs have also failed to show that they would suffer hardship if the Court does not rule on the merits of their complaints. "Section 704 of the APA subjects to judicial review … 'final agency action for which there is no other adequate remedy in a court.'" National Wrestling Coaches Ass'n v. Department of Education, 366 F.3d 930, 945 (D.C. Cir. 2004), cert. denied, __ S.Ct. __, 73 USLW 3415 (June 6, 2005) (emphasis added). However, plaintiffs do have another adequate remedy in court. If they file an administrative complaint about an unregistered section 527 organization and the Commission dismisses the complaint rather than finding a violation, plaintiffs with Article III standing would be entitled to obtain judicial review of whether the Commission's action is "contrary to law." 2 U.S.C. 437g(a)(8). If the court were to issue such a declaration and the Commission failed to comply with it promptly, the affected plaintiff would have a private cause of action against the alleged violators. 2 U.S.C. 437g(a)(8)(C). Not only does this provide plaintiffs with an adequate remedy, permitting the Court to address these issues in the context of concrete facts rather than abstract theory, but Congress has specified that this is the "exclusive civil remedy" available to a private party for an alleged violation of the Act. 2 U.S.C. 437d(e). Accordingly, plaintiffs' suit asking this Court to decide as an abstract, general matter which section 527 groups should be treated as political committees under the FECA does not appear to be ripe under the Constitution or under section 704 of the APA.

II. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE COMMISSION

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).

A. The Commission Decision under Review Was to Continue Determining Which Section 527 Groups Are Political Committees on a Case-by-Case Basis, rather than by General Rule

As we have described supra, p. 15, rather than adopting a rule of general application, the Commission decided to continue applying the statutory term "political committee" to

organizations on a case-by-case basis, as it has for some 30 years since that statutory definition was enacted in the 1970s. In particular, the Commission did not conclude that section 527 groups are not regulated by Act. Instead, it decided to determine which section 527 groups are required to register as political committees in the concrete setting of the actual activities and circumstances of each group brought into question, rather than promulgating in the abstract a rule of general application, the effects of which on individual advocacy groups the Commission found to be largely speculative at this time.[15]

Plaintiffs' entire brief, however, rests upon the false premise that the Commission decided not to regulate section 527 groups at all. See Pl. Mem. 25 ("whether the FEC violated APA by refusing to regulate 527 groups"); 12 (FEC "decided to do nothing at all" and "gave a 'green light' to 527 groups"); 37 ("the FEC cannot justify refusing to regulate … 527 groups that claim benefits under this section of the tax code when they spend money to influence federal elections"). See also id. at 2, 7, 13, 16, 24, 25, 31, 32, 35, 37, 40. Plaintiffs Shays and Meehan even claim (Pl. Mem. 43) that the Commission has made a "decision not to regulate" two section 527 organizations not registered as "political committees," the Media Fund and Swift Boat Veterans for Truth, that are the subject of administrative complaints that the Commission still has under review. If the Commission had actually made a "decision not to regulate" those

[15] Throughout their brief, plaintiffs ignore that, in addition to the "major purpose" question, the rulemaking addressed many other issues related to an organization's status as a "political committee." Plaintiffs also ignore the Commission's adoption of important new regulations that apply to section 527 groups, see p. 16, supra, including allocation regulations now under review in Emily's List v. FEC, No. 05-CV-0049 (CKK) (D.D.C.) (motion for summary judgment filed May 16, 2005).

groups, these administrative complaints would have been dismissed long ago, a decision that would have been public under 2 U.S.C. 437g(a)(4)(B)(ii).[16]

The Commission's resolution of these complaints, and other specific cases it may be asked to address, may well develop "broad legal principles" that govern some of the issues raised in the rulemaking. Central Texas Telephone Cooperative v. FCC, 402 F.3d 205, 210 (D.C. Cir. 2005).[17] In the meantime, the Commission's reasoned decision to develop policy through its review of concrete cases, rather than by adopting an abstract rule of general application, must be afforded "great weight." NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). In short, plaintiffs' arguments throughout their brief that the Commission acted contrary to the Act by declining to regulate section 527 groups are directed to a straw man of their own devising, not to the decision the Commission actually made.

Instead, this case comes down to a policy disagreement between the plaintiffs and the Federal Election Commission, the agency to which Congress delegated the responsibility for interpreting and administering the Act, as to how best to proceed to approach applying the Act's provisions about which organizations must register as "political committees." It is hornbook administrative law that the decision as to whether to proceed case-by-case or by general rulemaking lies largely within the agency's discretion. National Small Shipments Traffic

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[16] Plaintiffs are well aware that the Commission has made no such decision, for they criticize the Commission for "thus far fail[ing] to resolve any of the administrative complaints that relate to the 527 issue." Pl. Mem. 30. The five administrative complaints plaintiffs filed with their summary judgment motion are complex, containing allegations about hundreds of individuals and organizations and the raising and spending of more than $400 million on various activities during the 2004 election cycle. See FEC v. Rose, 806 F.2d 1081, 1092 (D.C. Cir. 1986). In any event, should any administrative complainant believe that the Commission has unlawfully delayed action, the Act provides a remedy, which does not include an order to adopt a regulation, as plaintiffs seek here. See 2 U.S.C. 437g(a)(8).

[17] Plaintiffs' discussion of Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), is equally off point because the Commission did not adopt a construction of the statute in the decision under review. See Pl. Mem. 26-29.

Conference, Inc. v. I.C.C., 725 F.2d 1442, 1447 (D.C. Cir. 1984). As the Supreme Court has stated, "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). The Commission acted well within this broad discretion in determining that development of standards in the concrete factual context of actual cases through the Act's advisory opinion mechanism and enforcement proceedings, rather than enacting an abstract rule of general application without regard to particular circumstances, would be the best approach to determining which section 527 organizations are required by the Act to register as federal political committees.

> 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.

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) (internal citation omitted). The Act makes no mention of an organization's "major purpose" or how an organization's tax status under 26 U.S.C. 527 might affect a determination of whether it is a "political committee," and nothing in the Act purports to

require the Commission to address these issues by general rule rather than case-by-case.[18] The Commission thus acted well within its broad policy-making authority under 2 U.S.C. 437c(c) in deciding to proceed on a case-by-case basis instead of adopting a general rule, the actual impact of which it viewed as being uncertain. See also RNC v. FEC, 76 F.3d 400, 404-05 (D.C. Cir. 1996) ("the Commission certainly could have chosen to judge 'best efforts' [2 U.S.C. 432i] on a case-by-case basis"). Cf. LaRouche v. FEC, 28 F.3d 137, 142 (D.C. Cir. 1994).

The Commission had ample justification for deciding to proceed on a case-by-case basis in determining whether an organization's "major purpose … is the nomination or election of a candidate," Buckley, 424 U.S. at 79, in lieu of adopting a rule of general application at this time. The stakes are high — as we have described, the "major purpose" requirement is a judicial gloss on the statutory definition of "political committee," and if an organization qualifies as a "political committee" it is obligated to abide by contribution limitations and prohibitions when raising and spending funds, and it must make public all of its receipts and disbursements by filing disclosure reports with the Commission. See generally MCFL, 479 U.S. at 253-54 (plurality). An organization that is not a "political committee" does not face any general disclosure requirements under the Act, and is free to raise money from whomever it chooses in whatever amounts it can for the majority of its public advocacy activities.

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[18] Congress's silence on the Commission's role in addressing the "major purpose" component of the term "political committee" 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(b) and (c) expressly repealed the Commission's existing rules defining "coordinated expenditure" and instructed the Commission to develop new regulations on that topic, subject to certain statutory requirements. Congress thus demonstrated its ability to make clear when it wanted the Commission to address specific issues in a rulemaking context.

The Commission also has a fundamental obligation to avoid overreaching in regulating as "political committees" organizations engaged in public advocacy. The Act's registration and reporting requirements impose substantial burdens on First Amendment activities, Buckley, 424 U.S. at 64; see also McConnell, 540 U.S. at 197-98, and the Commission must take care in administering the statute to avoid imposing unnecessary burdens on public advocacy protected by the First Amendment. 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 Machinists, 655 F.2d at 387). 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 FEC v. GOPAC, Inc., 917 F. Supp. 851, 861 (D.D.C. 1996). The Commission has been "vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." In re Carter-Mondale Reelection Committee, Inc. v. FEC, 642 F.2d 538, 545 (D.C. Cir. 1980).

Against this backdrop, the Commission gave three reasons for its decision to proceed on a case-by-case basis rather than immediately adopt a rule of general application. As we explain below, each supports the Commission's action.

1. The Commission Rationally Concluded that the Impact of the Proposed Rules Was "Both Far-Reaching and Difficult to Predict"

The first reason the Commission offered was that "the proposed rules might have affected hundreds or thousands of groups engaged in nonprofit activity in ways that were both far-

reaching and difficult to predict." E&J at 68,065 (AR 375 at 2842).[19] Whatever construction the Commission might adopt has the potential to affect many organizations engaged in a variety of activities, and the Commission was uncertain what the effect would be.

Plaintiffs erroneously claim (Pl. Mem. 38-39) that the Commission's concern about the wide-ranging and unpredictable effect a new rule might have on nonprofit groups is a "straw-man." Plaintiffs concede (Pl. Mem. 11), however, that both proposals would have affected numerous section 527 organizations, all of which engage in nonprofit activities.

Moreover, such a rule would, contrary to plaintiffs' assertion (Pl. Mem. 39), also have an unpredictable effect on nonprofit organizations that are tax-exempt under 26 U.S.C. 501(c). 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. IRS, 211 F.3d 137, 143 (D.C. Cir. 2000); AR 146 at 733 (comments of 672 501(c) organizations); AR 352 at 2125-26 (hearing testimony of Lawrence 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. 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)

[19] Over 130 Members of Congress submitted a comment urging that there is danger "in reviewing and resolving these issues quickly, on the eve of presidential and congressional elections and in a charged partisan environment. These are not conditions best suited to the task of thoughtful and credible rulemaking on these issues." AR 16 at 284.

AR 134 at 0604 (comments of Harmon Curran).[20] Such a result would have the perverse effect of reducing disclosure, since 501(c)(4) organizations are not required to file disclosure reports with the IRS of the sort section 527 groups must file. Thus, the Commission's explanation squarely addressed why it declined to adopt any of the "major purpose" proposals that were before it, and is well supported in the administrative record.

Plaintiffs assert (Pl. Mem. 35) that the Commission's conclusion of uncertainty is unwarranted because "the analysis that compels the conclusion that a 527 organization should register as a FECA 'political committee' when it spends money to influence federal elections is straightforward and clear," but they support this only with a series of conclusory assertions designed to obscure the actual complexities. They claim, for example, that "groups registered with the IRS under section 527 have self-declared their 'primary' purpose to be influencing elections." Section 527, however, includes groups whose purpose is "influencing or attempting to influence the . . . appointment of any individual to any Federal, State, or local public office" and groups seeking to influence the selection of officers "in a political organization," 26 U.S.C 527(e)(2), neither of which has anything to do with elections.[21] Thus, it is simply not true, as plaintiffs assert (Pl. Mem. 35), that by merely filing with the IRS under 26 U.S.C. 527 a group has automatically "self-declared their 'primary' purpose to be influencing elections." And it is

[20] 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.

[21] Plaintiffs' contention (Pl. Mem. 36-37) that the Commission equated section 527 status to FECA "political committee" status in its NPRM is disingenuous. The "organizations" to which the Commission referred in that passage did not include all 527s, as plaintiffs imply, but only "local committee[s] of political parties," which are not even at issue here. NRPM at 11,745 (AR 11 at 256).

also untrue that "[o]n its face, the tax code definition of section 527 'political organizations' … embodies the same concept as the 'major purpose' test used to determine FECA 'political committee' status." Whether one concludes that the "major purpose" concept includes only influencing the election of specific federal candidates, as one court did, FEC v. GOPAC, 917 F.Supp. 851, 859 (D.D.C. 1996), or more broadly includes electoral activities at the nonfederal level as well, as the Thomas-Toner proposal would have provided, it surely cannot be extended to the groups interested primarily in appointments to office or the selection of officers to political organizations that are included within section 527. [22]

Plaintiffs' solution of exempting certain section 527 organizations that are devoted "exclusively" to these types of non-electoral activities, as well groups devoted solely to state and local elections, ignores entirely the difficulties that arise when an organization has multiple purposes. For example, plaintiffs' approach would treat as a political committee a group that devotes most of its resources to influencing the appointment of federal judges but "occasionally engage[s] in independent spending on behalf of candidates," MCFL, 479 U.S. at 262, whereas the Supreme Court found no need to "automatically" subject such a group "to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." Id.

The difficulty of defining the "major purpose" requirement is demonstrated by the number of different ideas that were put forward during the rulemaking. As we have already described, supra p. 9, the Commission's NPRM set out four possible ideas for assessing an organization's "major purpose," each of which had several possible variations. During the

[22] Plaintiffs place heavy reliance (Pl. Mem. 2-3, 25, 35-36, 38) upon McConnell's observation that section 527 organizations "by definition engage in partisan political activity." But "partisan" activity is not limited to influencing candidate elections, and thus plaintiffs' attempt to conflate these concepts (Pl. Mem. 35-36) is without merit.

rulemaking, commenters suggested a number of other approaches, and the Commission ultimately considered two other options — the Thomas/Toner proposal and the General Counsel's recommendation.[23]

In addition, there are presently two different bills pending in Congress that would amend the Act to address for the first time the circumstances under which section 527 organizations are to be treated as "political committees" under the FECA. The House bill, H.R. 513, called the "527 Reform Act of 2005," sponsored by plaintiffs Shays and Meehan, would amend FECA's definition of "political committee" to include "any applicable 527 organization," excluding organizations "whose election or nomination activities relate exclusively to . . . elections where no candidate for Federal office appears on the ballot." This is not the same as the test proposed by Commissioners Thomas and Toner, or the different one prepared by the General Counsel, both of which are championed by plaintiffs in their brief to this Court.

The current Senate bill, in contrast, would exempt section 527 organizations whose "election or nomination activities . . . relate exclusively to" certain voter registration, voter identification, get-out-the-vote and generic campaign activity and "which do[] not engage in any broadcast, cable, or satellite communications." S. 1053 § 2(b) (May 17, 2005). The Senate bill

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[23] Plaintiffs also rely (Pl. Mem. 36) upon the Commission's General Counsel's recommendations as coming from "an expert in the field." The General Counsel, however, did not recommend that the Commission adopt a "major purpose" requirement that equated an organization's status as a section 527 group with "political committee" status under FECA, and it is well settled in any court that "[t]he Commissioners are appointed by the President to administer the agency, the agency's staff is not." San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1327 (D.C. Cir. 1984), 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). The D.C. Circuit recently rejected as a "rather silly suggestion" the argument than an NLRB decision should be found unreasonable because it conflicted with its General Counsel's advice. "It is of no moment . . . what was the General Counsel's understanding of the case law before the present decision issued, and the court will take no note of it." Chelsea Industries, Inc. v. NLRB, 285 F.3d 1073, 1077 (D.C. Cir. 2002). There is, therefore, no legal basis for plaintiffs' assertion that the Commission is required to explain its decision not to follow its own staff's recommendations.

also contains an additional exception for organizations composed "solely of candidates for State or local office, individuals holding State or local office, or any combination of either . . . if the organization refers only to one or more non-Federal candidates or applicable State or local issues in all of its voter drive activities and does not refer to a Federal candidate or political party in any of its voter drive activities." S. 1053 § 2(b) (May 17, 2005).

These contrasting approaches, and in particular the plaintiffs' inability to decide which of several competing versions they prefer, provides direct support for the Commission's conclusion that the issues presented by the rulemaking were both "far-reaching and difficult to predict." Courts afford "considerable deference" to agency conclusions that further study of an issue is needed before issuing regulations. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1057 (D.C. Cir. 1979).

2. The Commission Reasonably Concluded that Congress Did Not Intend BCRA to Require the Commission to Adopt a Regulation Addressing Section 527 Organizations

The administrative record also supports the Commission's conclusion that neither BCRA nor the recent legislation requiring section 527 organizations to file disclosure reports with the Internal Revenue Service, first adopted in 2000 and then amended in 2002, demonstrated a congressional intent that the Commission adopt a regulatory definition of "major purpose" directed at section 527 organizations. E&J at 68,065 (AR 375 at 2842). The statutory definition of the term "political committee" enacted in 1974 was modified by the Supreme Court to include the "major purpose" concept in its 1976 Buckley decision, and since that time the Commission has applied it on a case-by-case basis, without a general regulation. The Act has been amended several times since, most notably by BCRA in 2002, but in all of those years Congress has not amended the definition of "political committee," addressed the application of FECA to section

527 organizations, or questioned the Commission's case-by-case approach to those questions. As the 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.

These members of Congress explained that they "support[ed] BCRA because we believe that the link between unregulated contributions and federal officeholders, candidates and their parties should be broken," not to address the activities of independent section 527 organizations. AR 16 at 283. In their comments to the Commission, plaintiffs Shays and Meehan agreed that "BCRA was not intended to address 527s" and that BCRA was "concerned with the raising and spending of soft money by the political parties and federal candidates, and with phony issue ads run by organizations in close proximity to an election." AR 271 at 1512. That admission completely contradicts their claim to this Court (Pl. Mem. 40) that the Commission's decision here is contrary to "Congress' overarching purpose in enacting BCRA."[24]

Moreover, as discussed above, Congress was well aware when it enacted BCRA that neither FECA nor the Commission's regulations expressly incorporated the Supreme Court's "major purpose" construction or included anything addressing the political committee status of section 527 organizations. 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

[24] Shays and Meehan's comment also concedes that BCRA's goal of closing "soft-money loopholes" relied upon by plaintiffs (Pl. Mem. 40), was apart from its concern with "phony issue ads," not aimed at the use of soft money by independent groups. AR 271 at 1513.

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 seek now — 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.[25] However, Congress did not enact Senator Lieberman's bill. Instead it enacted legislation that year requiring section 527 organizations that are not registered political committees to file periodic disclosure reports with the IRS, rather than the FEC. See Pub. L. No. 106-230, 114 Stat. 477 (2000). And in 2002, the same Congress that enacted BCRA amended that section 527 disclosure provision, but retained its requirement that section 527 organizations which are not political committees file disclosure reports with the IRS.[26] See Pub. L. No. 107-276, 116 Stat. 1929 (2002).

3. Nothing in the Supreme Court's Decision in McConnell Suggests that the Commission Must Adopt a Rule Construing "Major Purpose"

The third reason why the Commission decided not to adopt a "major purpose" rule, but instead to continue to apply the requirement on a case-by-case basis, was its conclusion that neither BCRA nor the Supreme Court's decision in McConnell required otherwise. E&J at 68,065 (AR 375 at 2842). We have already shown that the Commission's conclusion about

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[25] According to Senator Lieberman, "[i]f this bill were enacted, groups no longer would be able to tell one thing to the IRS to get a tax benefit and then deny the same thing to the FEC in order to evade FECA regulation." 146 Cong. Rec. at S4111.

[26] One BCRA provision, 2 U.S.C. 441i(d)(2), precludes political parties and their agents from raising money or contributing to section 527 organizations. McConnell construed this provision to apply only to soft money, upholding that application to prevent party committees from "raising large sums of soft money to launder through tax-exempt organizations engaging in federal election activities." 540 U.S. at 179. If all section 527 organizations "engaging in federal election activities" to any degree were treated as "political committees" that can only accept hard money for their federal election activities, as plaintiffs insist, this provision enacted by Congress (and the Supreme Court's rationale for upholding it) would have no application.

BCRA was rationally based upon the provisions of that statute as well as the congressional intent behind it, and the Commission's conclusion is equally reasonable as to the McConnell decision. McConnell did not address the Act's definition of "political committee," and nothing in that opinion suggests that the Commission was required to promulgate a new regulation defining that decades-old statutory term.

Since they cannot dispute that McConnell added nothing to the 1976 Act's definition of "political committee," or to Buckley and MCFL's discussion of "major purpose," plaintiffs are left with the weak argument that McConnell "cleared the way for the Commission to implement the existing law by regulating 527 groups." Pl. Mem. 40. That general assertion is a far cry from identifying anything in the opinion requiring the Commission to adopt a rule on the subject, and the Commission only concluded that BCRA and McConnell do not "mandate" such a regulation, not that they prohibited it. AR 375 at 2842. "Having the power to do something and being required to do it are not the same thing." Abdulai v. Ashcroft, 239 F.3d 542, 549 n.3 (3d Cir. 2001).

B. Plaintiffs Have Identified No Legal Basis for Not Affording the Commission's Exercise of Its Policy-Making Discretion Substantial Judicial Deference

As discussed supra, pp. 26-27, the deference afforded the Commission's decision to proceed case-by-case rather than through a rule is very substantial. "Agency 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), and plaintiffs concede that, even when the decision not to issue a new regulation effectively resolves substantive issues, "[t]he degree of deference due a decision not to issue a rule after conducting a rulemaking 'while not extreme, is very substantial.'" (Pl. Mem. 29) (citation omitted). Accordingly, it appears to be uncontested that the Court is to give "substantial deference" to the Commission's decision here.

Despite this concession, plaintiffs devote several pages to setting out factors they argue should reduce the deference due the Commission. Plaintiffs have found no cases reducing the deference courts give to the Commission's administration of the Act on any of the largely ad hominem bases they assert. To the contrary, the Commission "is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981).[27] Plaintiffs' specific arguments are contrary to law.

First, plaintiff assert (Pl. Mem. 30) that "the existence of an extensive rulemaking record covering a period of more than four years . . . militates against extreme judicial deference to the Commission." No doctrine of administrative law states that a large administrative record reduces the level of deference to an agency. Indeed, one would think that an agency's compiling an extensive record would bolster a court's confidence in the care with which the agency approached the proceeding. The two cases plaintiffs cite for this proposition actually concluded that deference to an agency's decision not to adopt a rule after engaging in rulemaking is "very substantial," although not the near-unreviewable standard applied to an agency's refusal to open a rulemaking. See Consumer Federation of America v. CPSC, 990 F.2d 1298, 1305 (D.C. Cir. 1993); Williams v. FERC, 872 F.2d. 438, 444 (D.C. Cir. 1989).[28]

Moreover, even if there were such a doctrine, plaintiffs have misrepresented the facts in asserting that this rulemaking took four years. The Commission published an Advance Notice of Proposed Rulemaking in 2001 regarding the definition of "political committee," but it received

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[27] Accord, e.g., United States v. Kanchanalak, 192 F.3d 1037, 1049 (D.C. Cir. 1999); FEC v. NRA, 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").

[28] It is noteworthy that the Commission's decision to proceed case-by-case was not a decision to retain substantive standards set out in existing regulations, as were the rulemaking terminations in the cases cited by plaintiffs. For example, in Williams, when FERC declined to adopt a new incentive price for natural gas, it left in place the old rule setting a different price that remained fully binding. 872 F.2d. at 444.

only seven comments in response (none from plaintiffs in this litigation), and in September of that year it decided to put the rulemaking on hold. As the NPRM in this case makes clear, however, the rulemaking at issue here is an entirely different proceeding, which was initiated to address entirely different proposals. NPRM at 11737 n.3 (AR 11 at 248) ("This NPRM is a separate proceeding").[29] The rulemaking at issue here was actually a very expedited proceeding, resolved in August 2004, only five months after it had begun, despite a record in excess of 100,000 pages. Thus, plaintiffs' accusation (Pl. Mem. 41) that the Commission engaged in "four years of dithering" in this rulemaking is simply false.

Plaintiffs also assert (Pl. Mem. 30) that "this is not a case where the court owes special deference to an agency's traditional discretion to choose between regulation and case-by-case development of standards" because the Commission "expressly eschewed addressing the 527 issue step-by-step through advisory opinions, despite the opportunity to do so." Pl. Mem. 30. Contrary to plaintiffs' assertion, the Commission did not, in the one advisory opinion they cite for this proposition, avoid an opportunity to address the circumstances under which an unregistered section 527 group would be considered a political committee. AO 2003-37, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6418, 2004 WL 1468254. 2 U.S.C. 437f(a) only permits the Commission to render an advisory opinion "with respect to a specific transaction or activity by the person" requesting the opinion. It does not authorize the Commission to use a request for an advisory opinion as a launching board to address general policy questions not related to that "specific transaction or activity." See 2 U.S.C. 437f(b). "Requests presenting general questions of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do

[29] Indeed, plaintiffs themselves assert (Pl. Mem. 27, 39-40) that the issues in this rulemaking grew out of BCRA and the McConnell decision, both of which postdated the decision to put the earlier rulemaking on hold.

not qualify as advisory opinion requests." 11 C.F.R. 112.1(b). Since the requester in Advisory Opinion 2003-37 was already a registered political committee, questions about what activities would make a section 527 group a "political committee" could not include any "specific transaction or activity" by this requester.[30]

Finally, nothing in Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987), supports reducing deference to the Commission in this case (Pl. Mem. 31). That court rejected Common Cause's challenge to the Commission's construction of the Act as permitting state and local party committees to finance mixed federal and nonfederal campaign activities with allocated amounts from a federal and a nonfederal account, but concluded that the regulation then in effect was too vague to ensure that such allocation was done on a reasonable basis. The court therefore ordered the Commission to clarify the regulation's guidance for how committees should allocate those expenses, and the Commission, agreeing that this was warranted, did not appeal. The court did not conclude, as plaintiffs state (Pl. Mem. 31) that the Commission had "failed to regulate with respect to soft money activity" or that party committees "were allocating money … in ways that undermined the FECA," and the court expressly left it entirely up to the Commission to

[30] Citing an extra-record newspaper article they submitted with their brief, plaintiffs claim (Pl. Mem. 30) that one FEC Commissioner "expressly relied on the Commission's rulemaking authority in explaining why the Commission had failed otherwise to act against the 527 groups." The quoted statement, however — that AO 2003-37 is a "'stop-gap' measure in the regulation of 527s" and that "the FEC would be leaving the 'status quo' in place until it could 'get to the rulemaking'" — does not suggest that even this one Commissioner believed that in AO 2003-37 "the Commission had failed to act [] against the 527 groups," as plaintiffs assert. See also Pl. Mem. 8 (paraphrasing the same article for the proposition that the Commissioner "justified the Commission's inaction"). In any event, even if this article actually supported plaintiffs' assertions, and were more than hearsay, a statement by a single Commissioner to a reporter obviously does not represent the position of the agency itself, which can only act upon the votes of a majority of the six Commissioners. 2 U.S.C. 437c(c).

decide what the substance of the clarified rule should be. Id. at 1395, 1396. Thus, Common Cause provides no basis for any lowered deference to the Commission's decision here.[31]

C. The Commission Articulated a Reasoned Basis for Its Decision to Rely on Case-By-Case Determinations rather than Promulgating a General Rule

The Commission offered several reasons for its decision not to issue a regulation defining "major purpose," but instead to apply the construct on a case-by-case basis, and as we have explained supra, p. 29-37, each of those reasons was rationally based on the administrative record before the Commission, including the comments of thousands of groups and individuals that might have been affected by new rules. Since the Commission is required only to "provide an explanation that will enable the court to evaluate [its] 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 comments it received, detailed in its Explanation and Justification ("E&J"), plainly satisfies what is required to support a "rational connection between the facts found and the choice made" under section 706 of the APA. See Motor Vehicle Mfrs. Ass'n. v. State Farm, 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

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[31] Plaintiffs also make the astonishing claim (Pl. Mem. 31) that the Court need not give any deference to the Commission because the court order plaintiffs seek — directing the FEC to promulgate, on an expedited basis, new regulations targeting groups not at present registered with the agency (BC '04 FAC ¶ 57.B.; Shays FAC ¶ 48.B) — would not interfere with the FEC's discretion to allocate its limited resources. See, e.g., In re Barr Labs., Inc., 930 F.2d 72, 76 (D.C. Cir. 1991) (an agency is in the best "position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way"). The Commission would obviously have to postpone other activities to devote time and resources to crafting a new proposal acceptable to a majority of the Commissioners, see 2 U.S.C. 437c(c). The agency would also have to redirect resources to provide for the notice and comment required by the APA, see 5 U.S.C. 553(b), (c), since the limited "good cause" exception to that requirement, 5 U.S.C. 553(b)(3)(B), does not apply when, as here, there is no emergency and the public interest would not be defeated by advance notice. See, e.g., Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 754-55 (D.C. Cir. 2001).

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).

The Commission's conclusion that it lacked sufficient information about the potential impact of a rule is alone sufficient to survive a challenge under the APA. "[N]othing in the APA precludes an agency from collecting data and monitoring real-world experience with regulatory standards before adopting new standards governing periods of time far into the future … indeed, gathering evidence *before* making a long-term decision is eminently sensible." Public Citizen v. NHTSA, 374 F.3d 1251, 1263 (D.C. Cir. 2004) (emphasis in original). See also Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979) ("SEC may rationally choose to proceed by adjudication for a reasonable period of time, which will provide it with the experience enabling it to determine at a later date whether something other than [its current regulation] is necessary or desirable"). This Court should thus defer to the Commission's reasoned judgment that, at this time, it was better not to adopt a regulation of general application, but to continue making determinations on a case-by-case basis.

Plaintiffs are equally misguided in arguing (Pl. Mem. 37) that "[m]issing entirely from [the E&J] is any rational explanation for the FEC's rejection of alternative approaches to the regulation, including those proposed by Commissioners Thomas and Toner, by the Commission's General Counsel, and by members of the commenting public." However, the Commission did not make any substantive determination about those proposals, but instead decided to continue to apply the "major purpose" construction of the political committee

provision case-by-case, as has for decades. It is that decision that the Commission is obligated to explain and, as we have already shown, it did so here.

By deciding to determine an organization's "major purpose" case-by-case rather than by general rule, the Commission did not adopt or reject any particular construction of "political committee" or "major purpose," nor did it conclude that the Thomas-Toner proposal or the General Counsel's recommendation was wrong as a matter of substance. Indeed, the Commission explicitly "caution[ed] that no inferences should be made as to the Commission's position on any of the issues that are not discussed in this document or on any of the proposed rules that are not adopted as final rules." E&J at 68,063-64 (AR 375 at 2840-2841).

Instead, because Commissioners were unsure of the impact these proposals would have on a variety of groups engaged in public advocacy, they were unable to agree on what the rule should be and, therefore, concluded that, for the time being, the Commission would continue to proceed case-by-case rather than promulgating any general rule. "To us, these efforts suggest not an abuse of discretion, but only an honest disagreement over the proper way to handle the … issue. 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).

Finally, there is no legal basis for denying deference to the Commission just because plaintiffs believe (Pl. Mem. 41) that the Commission cannot be trusted "to act as a rational

decisionmaker."[32] "These contentions boil down to the proposition that the Commission cannot be trusted to fairly implement the statute," but the courts "may not presume that the Commission will perform [its statutory] task in bad faith." SBC Communications Inc. v. FCC, 138 F.3d 410, 421 (D.C. Cir. 1998).[33] Judicial deference to agency decisionmaking is based upon Congress's decision to delegate discretion to an agency to implement the statute, Smiley v. Citibank, 517 U.S. 735, 740-41 (1996), and "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." Common Cause v. Schmitt, 512 F.Supp. 489, 502 (D.D.C. 1980) (3-judge court), aff'd mem., 455 U.S. 129 (1982). "If Congress views [the agency] as "unremittingly hostile" to certain legal changes, "it is free to decrease the agency's discretion in administering [it] or remove [it] from the agency's purview entirely." North Broward Hospital District v. Shalala, 172 F.3d 90, 94 (D.C. Cir. 1999). Since Congress has done no such thing, the Commission's decision is entitled to full deference. The Act provides a remedy should the Commission unlawfully fail to enforce the Act's "political committee" provisions with respect to any particular group, 2 U.S.C. 437g(a)(8), but plaintiffs' apparent dissatisfaction with the

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[32] Equally meritless is plaintiffs' claim (Pl. Mem. 30) that the Commission is not entitled to deference because the McConnell Court concluded that the "FEC had persistently failed to issue sufficient regulations to execute Congress' will regarding limits on soft money." See also id. at 31-32. The Court actually concluded that the Commission erred by issuing regulations permitting national party committees to allocate a portion of their mixed federal/nonfederal expenditures to a soft money account, Even that was dicta in McConnell because the regulation had already been overruled by statute and was not before the Court for review. In any event, without getting into a detailed refutation of plaintiffs' distorted version of McConnell and the history of the Commission's treatment of soft money before BCRA, it is apparent that what the McConnell decision concluded was that the Commission had erroneously construed the statute and that Congress enacted BCRA in part to correct this error. Far from resisting such a change, the Commission had annually been urging Congress to address this issue since 1988 (see FEC 1988 Annual Report). The McConnell Court said nothing that could remotely be construed as questioning the Commission's good faith or suggesting that courts should reduce deference to its regulatory determinations because of this past error. To the contrary, McConnell cited approvingly several recent FEC regulations. See 540 U.S. at 160, 169, 178.

[33] Plaintiff BC '04 is in a particularly poor position to make this argument, since President Bush is the one who will select all of the Commission's members. 2 U.S.C. 437c(a)(1).

Commission cannot affect the judicial deference required by Congress's decision to entrust it with broad discretion to administer and enforce the Act.

CONCLUSION

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

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