Oral Argument Scheduled For May 12, 2005

No. 04-5352

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS and MARTIN MEEHAN,

Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because appellees have not demonstrated standing or ripeness. As candidates, appellees have no comprehensive right to have the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 91-92, enforced as they wish. Appellees also cannot demonstrate standing based on either competitive or informational injuries. Because appellees have another adequate remedy, review under the Administrative Procedure Act ("APA") is also precluded.

The Federal Election Commission's ("FEC" or "Commission") BCRA regulations are valid. The definitions of "solicit" and "direct" under BCRA are not as narrow as appellees

believe, and these terms need not be construed in pari materia with an entirely different part of the statute. The Commission's use of timing as one criterion in a content standard defining coordinated expenditures is reasonable. The Commission did not abandon its prior allocation system or permit circumvention when it construed BCRA to allow soft money to be used to pay the salaries of state and local party employees who spend 25% or less of their time on federal election activity. The Commission properly exercised its inherent authority to establish a de minimis exception allowing Levin funds to pay for very low levels of federal election activity. The Commission's interpretation of "electioneering communication" to include only communications disseminated "for a fee" reasonably balances competing interests and the lack of evidence of abuse of unpaid programming.

ARGUMENT

I. APPELLEES HAVE NOT PROVEN JURISDICTION

A. Beginning with its answer (JA 80), the Commission has challenged Article III standing. "[I]f a party raises a comprehensive challenge to a petitioner's standing, the petitioner is well advised to respond with precision and clarity to make it clear that standing is present." American Library Ass'n v. FCC ("ALA"), 2005 WL 588994, *5 (D.C. Cir. Mar. 15, 2005). Appellees have failed to do so.

1. In its opening brief (Br. 11-16), the Commission showed that appellees' (and the district court's) theory that all candidates have standing to contest any regulation of campaign financing is foreclosed by McConnell v. FEC, 540 U.S. 93 (2003). In denying the standing of candidate plaintiffs to challenge particular BCRA provisions, the Court (id. at 225-30) made clear that Article III demands that all plaintiffs, including candidates and officeholders, bear the burden of satisfying the three-part test for standing, particularly the requirement of a "concrete

and particularized," "actual or imminent" injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Appellees argue (Br. 7-8) that BCRA's goal to protect federal candidates and officeholders from corruption in itself gives those persons "enforceable rights … to insist that … [BCRA's reforms] are properly implemented." But BCRA was intended to protect the public interest in the integrity of our democracy, not to guarantee candidates personal help in avoiding the temptations of corrupting influences. Indeed, candidates are among the targets of regulation in the Act, not its primary beneficiaries. Unlike provisions such as ballot-access rules and the franking privilege that directly give or deny candidates or officeholders certain rights, the BCRA provisions at issue here were not designed to bestow a personal right upon candidates to be "protected" from the influence of donors or the zealous competition of their opponents. Thus, the numerous cases appellees cite (Br. 7 & nn. 3, 4) that do involve such enforceable rights of candidates are inapposite.

Appellees liken themselves (Br. 8) to the plaintiff in Animal League Defense Fund, Inc. v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (en banc), but that plaintiff did not allege standing as an animal lover to challenge all Agriculture Department regulations he believed inadequately protected animals. Rather, he provided an "affidavit describ[ing] both the animal exhibition that he regularly visits, and the specific animals there whose condition caused [him] injury." Id. at 438. See also, id. at 431-32. These specific facts established that he had "more than an abstract, and uncognizable, interest in seeing the law enforced." Id. at 432. In contrast, appellees' declarations contain little more than "general averment, conclusory allegations, and speculative 'some day' intentions," which "are inadequate to demonstrate injury in fact." ALA, at *7 (internal quotation marks and citations omitted). See FEC Br. 11-14.

Appellees also rely (Br. 9-10) upon "procedural rights" cases, an argument never presented to the district court. However, the merits issues here involve substantive restrictions on the campaign activity of private citizens, not procedures by which the agency adopted those regulations. Thus, cases like Electric Power Supply Ass'n v. FERC, 391 F.3d 1255, 1262 (D.C. Cir. 2004), in which a "regular participant[] in contested FERC hearings" alleged that a specific agency procedure (exempting some ex parte communications from the Sunshine Act) violated its own statutory rights, are wholly inapposite.

In sum, appellees' broad claim as candidates to a right "to campaign in a regime that reflects Congress' mandate as articulated in BCRA" (Br. 13, quoting JA 135) is just another way of asserting "a justiciable interest in the enforcement of the law," which this Court has rejected as a basis for standing. Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997).[1]

2. This Court has "never completely resolved th[e] 'thorny issue'" of political competitor standing, Gottlieb v. FEC, 143 F.3d 618, 620 (D.C. Cir. 1998), and McConnell emphasized that there is no legally cognizable right to equal participation in the electoral process (540 U.S. at 227-28). The district court found (JA 136 n.12) that appellees had neither "allege[d] any competitive injury from the [Commission's] regulations" nor cited "any factual support … for such a contention." See also JA 134 n.9.

[1] Appellees refer (Br. 1) to the unpublished interlocutory order of the three-judge court in McConnell v. FEC, No. 02-582 (D.D.C. May 3, 2001), granting appellees' motion to intervene. Such an order has no precedential authority, see, In re Executive Office of the President, 215 F.3d 20, 24 (D.C. Cir. 2000). Moreover, it did not address the burden of proof applicable at the summary judgment stage, and it only addressed intervention by members of Congress with an explicit statutory right to do so, not the court's jurisdiction.

Even if this Court were to extend the "competitive standing" doctrine to the political arena, and even if appellees had clearly invoked it, no evidence supports their assertion of competitive injury. While courts often "credit allegations of future injury that are firmly rooted in the basic laws of economics," even in that context this Court need not "accept allegations founded solely on the complainant's speculation." United Transp. Union v. ICC, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989). Moreover, unlike competition for business markets, "[t]he endless number of diverse factors potentially contributing to the outcome of … elections … forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event." Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir. 1980) (citation omitted). Appellees have provided neither evidence, nor even speculation, about how any of the regulations they challenge would cause them to win fewer votes.

None of the regulations that appellees challenge creates new electoral competitors or grants their opponents special benefits. Any competitive injury appellees believe they might suffer by forgoing activities permitted by a regulation they believe unlawful would be attributable to their own choice, rather than to the regulations themselves. McConnell is dispositive on this point. The "Adams plaintiffs-candidates" were found not to have suffered a competitive injury from BCRA's increase in the statutory contribution limits because "their alleged inability to compete stems not from the operation of [BCRA] §307, but from their own personal 'wish' not to solicit or accept large contributions, i.e., their personal choice." 540 U.S. at 228. Appellees try (Br. 13) to distinguish themselves on the ground that the Adams candidates contended that the BCRA provisions they challenged were inconsistent with the Constitution, while appellees contend that the regulations they challenge are inconsistent with BCRA. What matters, however, is that any competitive injury to either set of plaintiffs derives not from the

evenhanded provisions they challenge, but from their own wish not to engage in the activity permitted because of their view that the provision is invalid and the activity corrupting.

3. Appellees' claim to informational standing rests on a few scattered, general references in the complaint to the Act's "disclosure requirements"[2] and a conclusory assertion in the appellees' declarations.[3] In their initial summary judgment memorandum, appellees did not even mention informational standing (see JA 8, Item 29, at 84-87), and their brief to this Court argues primarily that the Commission's regulations permit activities that should be prohibited, not just better disclosed. Appellees' essentially nominal invocation of informational injury to establish standing, when their arguments on the merits are about the failure to "'get the bad guys,'" is insufficient under Article III. See Common Cause, 108 F.3d at 418.

Appellees are unlike the voters in FEC v. Akins, 524 U.S. 11 (1998). Those plaintiffs identified a particular organization, AIPAC, and alleged that it had violated the requirement that a "political committee" register and disclose information about its contributions and expenditures. Id. at 16. The Akins Court described the plaintiffs' harm as "failing to receive particular information about campaign-related activities." Id. at 22 (emphasis added). Appellees' declarations, in contrast, merely refer vaguely to "the disclosure of campaign finance information by covered persons and entities." Supra n.3.[4]

Moreover, because the Court in Akins found "no reason to doubt" that the information "would help [plaintiffs, who opposed AIPAC,] … to evaluate … candidates who received

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[2] JA 14 ¶¶ 3,4; JA 15 ¶ 6; JA 53 ¶ 95.

[3] JA 84 ¶ 9; JA 87 ¶ 9.

[4] Appellees' assertion (Br. 14) that all the challenged regulations deprive them of information is exaggerated. For example, no provision of the Act requires reporting of "solicitations," so redefining that term would not increase the information disclosed, and 2 U.S.C. 434(e)(2)(A) explicitly exempts from disclosure all spending covered by the Commission's de minimis regulation (see FEC Br. 37-41).

assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election," the Court "consequently" found that plaintiffs' injury was "concrete and particular." Id. at 21 (emphasis added). See also Common Cause, 108 F.3d at 418 (information must be "useful in voting"). Appellees, in contrast, do not identify any races, candidates, or supporters about which they seek information. Their affidavits do not identify what information they seek or suggest what they would do with it. If an occasion arises in which they are denied specific information about particular activities that would be relevant to elections in their districts, they can litigate that question under 2 U.S.C. 437g, just as the Akins plaintiffs did.

B. 1. As our opening brief notes (at 16-17), the Supreme Court has distinguished the APA's general review provisions, under which "'a regulation is not ordinarily considered the type of agency action ripe for judicial review,'" National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808 (2003) ("NPHA") (citation omitted), from specific statutory provisions for immediate review of regulations, which are subject to a "lower standard" for ripeness permitting "'judicial review directly, even before the concrete effects normally required for APA review are felt.'" Whitman v. American Trucking Ass'n, 531 U.S. 457, 479-80 (2001) (citation omitted). Appellees ignore this fundamental distinction and rely primarily upon cases involving the latter type of statutes.[5] They do not even attempt to sustain their burden of showing why these regulations do not fall within the default rule that APA review must wait until "the scope of the controversy has been reduced to more manageable proportions, and its factual components

[5] Their reliance (Br. 17) upon Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998), is inapt not only because it was not an APA case, but because it involved an order permitting a specific company to engage in specific activities in competition with the plaintiff, not a generally applicable regulation. Chamber of Commerce v. FEC, 69 F.3d 600, 603 (D.C. Cir. 1995), involved a regulation that required the plaintiff immediately to change its own primary activity (speech), which is the "major exception, of course," to the general rule that regulations are not ripe for judicial review under the APA. NPHA, 538 U.S. at 808.

fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." NPHA, 538 U.S. at 808.[6]

2. Appellees fail to refute the Commission's showing (Br. 18) that section 437g(a)(8) provides another "adequate remedy in court" that precludes jurisdiction under the APA, 5 U.S.C. 704. First, they argue (Br. 19) that section 437g(a)(8) "is not the proper mechanism for challenging a rule," and (Br. 18) that litigation over specific alleged violations would come only after they "have harmed the electoral process." But the APA inquiry turns on demonstrated injury to the plaintiff, not the "electoral process," and this Court has "interpreted the APA 'to bar suits where a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action,'" Washington Legal Foundation v. Alexander, 984 F.2d 483, 486 (D.C. Cir. 1993) (emphasis in original, citations omitted). Congress explicitly provided that section 437g(a)(8) is the exclusive private remedy "for the enforcement of the provisions of this Act," 2 U.S.C. 437d(e). Appellees' preference for a quicker and more streamlined judicial remedy than Congress provided, for any injury they might one day suffer from actions they believe would be unlawful, does not make section 437g(a)(8) inadequate. See Council Of And For The Blind v. Regan, 709 F.2d 1521, 1532 (D.C. Cir. 1983) (en banc) ("Even if we agreed that one nationwide suit would be more effective than several section 124 suits, that does not mean that the remedy provided by Congress is inadequate) (emphases in original); Coker v. Sullivan, 902 F.2d 84, 90 n.5 (D.C. Cir. 1990).

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[6] Perot v. FEC, 97 F.3d 553, 560 (D.C. Cir. 1996), noted that any challenge to a Commission regulation should be brought under the APA because the FECA has no provision for direct review of regulations. The challenge there was summarily dismissed, however, and the Court did not address any of the ripeness requirements under the APA that are at issue here. See LaShawn v. Barry, 87 F.3d 1389, 1395 n.7 (D.C. Cir. 1996) (en banc).

Second, appellees assert (Br. 19-20) that a court could not decide whether a regulation is contrary to the Act in a section 437g(a)(8) suit because section 438(e) provides "a complete defense to all liability" for anyone who acts in accord with a Commission regulation. The language elided from appellees' quotation of section 438(e) contradicts this argument, however, for it only forecloses the imposition of "any sanction."[7] Addressed only to the available remedy, section 438(e) does not provide "a complete defense to all liability" (Br. 19-20) that could bar a court from determining in a section 437g(a)(8) suit whether a regulation relied upon is contrary to the statute.

Finally, appellees argue (Br. 20) that they might not be able to discover violations involving some of these regulations in order to file an administrative complaint. We have already shown that disclosure would not be affected by reversal of some of these regulations, and appellees offer no explanation of how a coordinated expenditure promoting or attacking a candidate or a public service announcement broadcast on television could be kept secret. In any event, section 437g(a) is the exclusive procedure provided by Congress for enforcing the Act, and appellees' assertion that it is inadequate to uncover all violations should be addressed to Congress.

In sum, although appellees might find it "easier, and certainly cheaper" to litigate their policy differences with the Commission in an omnibus facial challenge, the "ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or

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[7] The limited term "sanction" denotes a "penalty or coercive measure that results from failure to comply with a law, rule, or order." BLACK'S LAW DICTIONARY 1341 (7th ed. 1999). Thus, section 438(e) would bar a civil penalty but not, for example, declaratory or injunctive relief. See, e.g., Edgar v. MITE Corp., 457 U.S. 624, 650 n.2 (1982) (Stevens, J., concurring) ("'a declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions'") (internal citation omitted)); LaRouche v. FEC, 28 F.3d 137, 142 (D.C. Cir. 1994).

unnecessary ordinarily outweigh the additional costs of — even repetitive — postimplementation litigation." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 734-35 (1998). See also Sabri v. United States, 124 S.Ct. 1941, 1948 (2004) ("Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular").

II. THE REGULATIONS ARE VALID

Appellees hardly respond to the Commission's showing (Br. 19-21) that its regulations are entitled to substantial deference under Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). While conceding (Br. 21-22) that the Commission has a "duty to 'allow the maximum of first amendment freedom of expression in political campaigns'" consistent with congressional aims, they claim (Br. 21) that this results in less deference because constitutional issues implicate "judicial" rather than "administrative" expertise. However, unlike in appellees' cases (Br. 21 n.15), the Commission does not seek deference to a constitutional determination, but to a narrow statutory construction that is appropriately "influenced by constitutional considerations." Branch v. FCC, 824 F.2d 37, 47 (D.C. Cir. 1987). As the result of numerous legislative compromises, BCRA not only restricts certain political activities but also "promotes important first amendment values, promotes enhanced citizen participation in our democracy, is workable, and is carefully crafted to steer clear of asserted constitutional pitfalls." 148 Cong. Rec. S2138 (Mar. 20, 2002) (Sen. McCain). The Commission's consideration of these statutory policies in drafting its BCRA regulations represents "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," Chevron, 467 U.S. at 845.[8]

[8] We lack space for a rebuttal of amici's grossly distorted ad hominem attack on the Commissioners, but the district court correctly explained (JA 141-42 n.21) why this would not

A. Rather than address the Commission's explanation of the true breadth of the definitions of "solicit" (11 C.F.R. 300.2(m)) and "direct" (11 C.F.R. 300.2(n)), appellees create a straw man that they attack as too narrow and permissive. Appellees dismiss the FEC's published explanations (FEC Br. 24-25; JA 360) of the broad scope of these definitions, and provide nothing to support their claim (Br. 28, 34) that the regulations instead require "explicit" requests couched in "magic words" to trigger the statutory limitations.[9] Although the Commission explained (JA 360) that an "affirmative verbalization or writing" is necessary, that does not mean that a solicitation must explicitly say "please give," as appellees claim (Br. 28). Rather, a communication need only "reasonably [be] understood to … convey a request for some action" (JA 360) to constitute a solicitation.[10] The issue in this facial challenge is not whether the regulation could be interpreted in a strained and unduly permissive manner, but whether — assuming the issue is even ripe — the Commission's own interpretation of its regulation is a permissible construction of the statute.

Appellees dispute (Br. 29-34) the district court's determination (JA 159-60) that the words "solicit" and "direct" have more than one meaning and are therefore ambiguous. But this Court has itself found the term "solicit" in FECA to be an "inherent[ly] vague[]" term that can

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affect the application of Chevron deference, even if it were accurate. See also SBC Communications, Inc. v. FCC, 138 F.3d 410, 421 (D.C. Cir. 1998).

[9] For example, despite the Commission's explicit statement that "terms such as 'demand,' 'instruct,' or 'tell' … are captured by the term 'ask'" (JA 360), appellees assert that the Commission would find the statement, "I direct you to make a contribution," to fall outside the definitions.

[10] Appellees quote (Br. 29) out of context from the Explanation and Justification ("E&J") the phrase "permissible and impermissible solicitations" (JA 360). Not all solicitations, however, are impermissible; candidates are free to solicit hard money contributions and some soft money for state or local political parties, 2 U.S.C. 441i(e)(1)(B), and for certain tax-exempt organizations, 2 U.S.C. 441i(e)(4).

"mean a variety of things," Martin Tractor Co. v. FEC, 627 F.2d 375, 383-84 (D.C. Cir. 1980), and dictionaries similarly contain numerous meanings for "direct."

Appellees argue that the definitions should extend to conduct like "'a salesman who extols the virtues of his company's product … even if he does not come right out and ask the retailer to buy some'" (Br. 30 (emphasis in original) (quoting Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 223 (1992))). Whatever its virtue in taxing the marketing of chewing gum, incorporation of such a standard in BCRA would make a prohibited "solicitation" out of a party official merely "extol[ling] the virtues" of a candidate for state office — purely political advocacy that BCRA does not purport to restrict. This is just the sort of "impressionistic or subjective" application of the statute that the Commission reasonably sought to avoid by requiring a "communication intended to, and reasonably understood to, convey a request for some action" (JA 360).

Appellees insist that "direct" be defined in a way that does not overlap with "solicit" (Br. 32), but we previously explained (Br. 26-27) that under the Commission's construction these terms serve distinct but complementary purposes. Together, they capture any form of request for a contribution, whether initiated by a solicitor (e.g., a party official or federal candidate) or by a potential contributor. Because they are used together in the statute to define a single class of communications, all of which are subject to identical regulation, no statutory purpose requires the drawing of strict lines between them. Like the words "separate" and "segregated" in the statutory phrase "separate segregated fund" ("SSF"), 2 U.S.C. 431(4)(B), they need not have entirely independent definitions to accomplish their common function in the legislative scheme. See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 426 (1972) ("term 'separate' … is synonymous with 'segregated'").

Finally, appellees contend (Br. 33) that "solicit" has a well-established meaning in the context of regulating solicitations made by corporate and union SSFs. We have shown (Br. 22) that Congress did not in BCRA adopt earlier FEC advisory opinions construing "solicit" as used in 2 U.S.C. 441b(b). See, e.g., AFL-CIO v. Brock, 835 F.2d 912, 915-16 (D.C. Cir. 1987); United Technologies Corp. v. EPA, 821 F.2d 714, 723 (D.C. Cir. 1987).[11] Moreover, section 441b(b), which regulates administration of an SSF, serves entirely different purposes than the BCRA restrictions on solicitation of soft money. For example, the concern discussed above about inadvertent restriction on advocacy of candidates has no application to extolling the virtues of a separate segregated fund. Accordingly, these different provisions, enacted decades apart and addressing different concerns, need not be construed in pari materia. Common Cause v. FEC, 842 F.2d 436, 441-42 (D.C. Cir. 1988).

B. As previously explained (FEC Br. 27-34), BCRA §214 delegated particularly broad discretion to formulate a new regulatory definition of coordinated expenditures, and the Commission created a clear, objective test using the same type of time and content standards that Congress itself used in BCRA and the Supreme Court approved in McConnell. Indeed, appellees do not contest that BCRA §214 delegated what the district court described (JA 149) as "vast discretion" because Congress could not agree upon its own definition of coordinated expenditures.[12]

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[11] In contrast, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 193-194 (2002), noted that Congress had "adopted a specific statutory provision [in the ADA] directing" that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973.…" See also Gray Panthers Advocacy Committee v. Sullivan, 936 F.2d 1284, 1287-1290 (D.C. Cir. 1991).

[12] As the Commission noted (Br. 28), Senator McCain introduced the amendment deleting a proposed statutory definition of coordination in BCRA and instead delegating to the FEC the authority to fashion a new one, as he and Senator Feingold emphasized at that time. Thus, the

Appellees do not defend the district court's erroneous conclusion that no coordination content standards are permissible (see FEC Br. 29-30). Thus, the only dispute is whether the specific content standard in 11 C.F.R. 109.21(c)(4) — defining certain targeted communications that (1) refer to a political party or a clearly identified candidate and (2) are publicly disseminated 120 days or fewer before a federal election, convention, or caucus — is a permissible construction of the Act.

The district court correctly rejected (JA 148) appellees' arguments that this violates Chevron step one. Clearly, BCRA has not "directly spoken to the precise question at issue," Noramco of Delaware, Inc. v. DEA, 375 F.3d 1148, 1152 (D.C. Cir. 2004) (citations omitted), because BCRA §214 is completely silent about the criteria in this content standard. Although appellees admit (Br. 24) that BCRA §214 "does not speak directly to the issue of 'content' and time-frame standards," they nevertheless argue (Br. 23-25) that 2 U.S.C. 431(9)(A)(i) forbids any use of a time standard because (Br. 24) that provision contains "no hint" of a time-frame criterion. This is insufficient under Chevron because "such silence … normally creates ambiguity. It does not resolve it." Barnhart v. Walton, 535 U.S. 212, 218 (2002).

As the Commission explained (Br. 31-34), 11 C.F.R. 109.21(c)(4) satisfies Chevron step two because the content standard strikes a reasonable balance between regulating speech made for the purpose of influencing a federal election and avoiding unnecessary regulation of speech made to influence public policy. Appellees argue (Br. 26-27) that 11 C.F.R. 109.21(c)(4) is underinclusive, but they fail to counter our showing (Br. 31-33) that speech further in time from an election is less clearly intended to influence it. As we explained (Br. 31-32), when

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broad policy-based argument the Senators make as amici here (Br. 11) appears to reflect an effort to obtain from the judiciary what they could not from Congress.

McConnell upheld the similar but far narrower electioneering communication standard, it found reasonable Congress's judgment that most advertisements (that refer to a candidate) broadcast right before an election have the purpose of influencing the election, and it rejected claims that the standard is underinclusive merely because identical advertising run 61 days before a general election remains unregulated. See 540 U.S. at 208. Appellees assert vaguely (Br. 26-27) that there are "other ways" to protect "genuine lobbying and issue advocacy" from undue regulation, but their apparent current view that the Commission cannot consider time, or even party or candidate identification, would expose a great deal of non-electoral speech to regulation.[13]

Appellees also argue (Br. 25) that because Congress was "expanding" regulation of campaign activity in various ways, it could not have intended that the Commission "constrict the traditional regulation of coordinated expenditures." But appellees fail to show that Congress gave any consideration to the effect of content or timing on the regulation of coordinated expenditures (as opposed to conduct, see FEC Br. 34), and they also fail to show that the Commission actually has narrowed the prior regulation of coordinated expenditures. Compare cases in footnote 11, supra p. 13.

Appellees are correct (Br. 26) that the Commission has historically taken the position that coordinated expenditures need not be limited to communications containing express advocacy. Indeed, the FEC was the party opposing the express-advocacy-only standard advocated by the defendant in FEC v. Christian Coalition, 52 F.Supp.2d 45 (D.D.C. 1999). However, the new regulation reaches far beyond express advocacy. Under 11 C.F.R. 109.21(c), communications

[13] Before the Commission, appellees noted that "the standard for coordination may very well need to be more stringent as an election approaches" and observed that during "a significant amount of time before an election" a targeted ad that "deals with a candidate's qualifications, character, or fitness for office" could be included (JA 278-79). Thus, appellees' prior position apparently embraced the concept of a standard that is less stringent when an election is not near.

that contain express advocacy or that republish campaign materials always satisfy the content standard, but when elections begin to approach, the scope of regulation expands accordingly — just as in other parts of BCRA.[14] Thus, within 120 days of any federal election, convention or caucus, any targeted public communication in a wide range of media that refers to a political party or federal candidate is a contribution if it has been coordinated with a candidate. See 11 C.F.R. 109.21(c)(4). Appellees complain (Br. 22-23) that the new standard allows candidates to coordinate ads on helpful themes outside the 120-day pre-election periods, but they supply no evidence of abuse from such ads and point to none in the administrative record. Nor do they point to any pre-BCRA cases finding such a communication to be a coordinated expenditure.[15]

Contrary to appellees' argument (Br. 27-28), the Commission provided ample "reasoned analysis," devoting nearly six columns of Federal Register text to the 11 C.F.R. 109.21(c)(4) standard alone (JA 369-71). It explained why it had chosen certain objective standards and discussed the new rules' relationship to the definitions of "electioneering communications" (2 U.S.C. 434(f)(3)(A)) and "Federal election activity" (2 U.S.C. 431(20)(A)(i)), which use comparable objective timing standards to determine what activity is likely to be election-related (JA 370). This is more than enough to explain "'what major issues of policy were ventilated'" and "'why the agency reacted to them as it did,'" RNC v. FEC, 76 F.3d 400, 407-08 (D.C. Cir. 1996) (citation omitted).

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[14] Appellees rely (Br. 26 n.18) upon Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986), but that decision upheld the Commission's interpretation of a contribution limit as including an express advocacy criterion as one part of the applicable test. See id. at 160, 167.

[15] Appellees suggest (Br. 27 n.19) that the lack of any examples in the administrative record of ads that might support their circumvention concerns is of little moment because the Court can simply take judicial notice of "massive ad campaigns" in various election cycles. But this case concerns what was before the Commission in the rulemaking, see 5 U.S.C. 706(2)(A), and counsel's vague, unsupported factual assertions two years later cannot satisfy appellees' burden of proof.

C. As previously explained (FEC Br. 34-37), 2 U.S.C. 431(20)(A)(iv) clearly provides that the salaries of state and local party employees who spend more than 25% of their time on federal election activity must be paid with hard money but is entirely silent on the funding of salaries of employees who spend 25% or less of their time on such activities. Thus, at Chevron step one, the district court correctly found (JA 187) that there is "no basis for concluding that Congress directly spoke" to the question of how salaries of such state and local party committees employees may be funded. Appellees concede (Br. 36-37) that "BCRA is silent about employees who spend 25% or less of their time on Federal elections," and identify no language in the statute that is inconsistent with the district court's conclusion.

At Chevron step two, appellees essentially argue (Br. 37) that the overall purpose of the Act requires the Commission to "tighten" its regulations at every turn, but the statute does not say that. Compare cases in footnote 11, supra p. 13. It is irrelevant under Chevron that appellees would prefer a more stringent construction, for it is plainly reasonable to construe Congress's decision to draw a line at the 25% level as indicating that protecting federal elections from corruption does not require using federal funds to pay party employees who spend the vast majority of their time on nonfederal activity. See JA 234.

Appellees argue (Br. at 37) that the Commission is "abandoning" its prior allocation system, but Congress itself created a new statutory provision that displaced the prior allocation system.[16] Thus, when the Commission promulgated its new regulation, it was not changing its mind but starting afresh to implement BCRA's new provisions. See Air Line Pilots Ass'n, Int'l

[16] Contrary to appellees' assumptions, the Commission's prior rules did not require allocation of each state party employee's salary according to the individual's federal or state activities. Instead, a committee's entire overhead, including payroll, was allocated to reflect the committee's federal and state activities. See 11 C.F.R. 106.5(a)(2) (2001).

v. DOT, 791 F.2d 172, 175 (D.C. Cir. 1986) ("[A]ny 'presumption' that an agency's existing policies best maintain fidelity to congressional intent simply has no application here. Given the modification of its statutory charter, it is hardly surprising that the [agency] reconsidered its longstanding policy"). In any event, the Commission is free to alter its regulations provided that its construction is consistent with a permissible reading of the statute. See United States Air Tour Ass'n v. FAA, 298 F.3d 997, 1005-06 (D.C. Cir. 2002); United States Telecom Ass'n v. FCC, 359 F.3d 554, 589 (D.C. Cir.), cert. denied, 125 S.Ct. 313 (2004).

Finally, appellees' speculation (Br. 37) that the new rule could lead to circumvention is unsupported by any evidence and cannot overcome deference to the Commission's expert judgment. In fact, appellees offer no response to the Commission's explanation (Br. 36 n.9) of the practical barriers to their circumvention theory.

D. The Commission properly exercised its discretion in establishing a de minimis exception allowing state and local parties to use Levin funds to pay for very low levels of federal election activity ($5,000 or less annually) (see FEC Br. 37-41). An agency has inherent authority to establish a de minimis exception unless the statutory scheme is "extraordinarily rigid." Environmental Defense Fund v. EPA ("EDF"), 82 F.3d 451, 466 (D.C. Cir. 1996). Aside from conclusorily asserting that the language of 2 U.S.C. 441i(b)(1)-(2) is extraordinarily rigid, appellees have provided nothing to support their argument (Br. 38-39).

Appellees do not contest that Congress demonstrated flexibility concerning low levels of federal activity by state and local party committees when it exempted the very same level and type of activity from the Act's reporting requirements. See 2 U.S.C. 434(e)(2)(A); JA 241; FEC Br. 37-38. They do not contest the Commission's conclusion that "there is no danger that allowing a committee to use entirely Levin funds for allocable Federal election activity that

aggregates $5,000 or less in a calendar year will somehow lead to circumvention" because the statute itself permits each donor to contribute $10,000 in Levin funds to every state and local party committee. JA 241; see 2 U.S.C. 441i(b)(2). Appellees do not even try to distinguish most of the line of cases approving de minimis exceptions (FEC Br. 39-40) and mischaracterize the holding of the one they do address. EDF does not place a burden on an agency to "demonstrate[] that the absence of the exemption would lead to 'absurd or futile results'" (Br. 38, quoting EDF, 82 F.3d at 466); rather, it recognizes agencies' inherent authority to create de minimis exemptions unless Congress has shown extraordinary rigidity. Because appellees are unable to demonstrate that Congress has been unusually rigid here, the Commission's de minimis regulation should be upheld.

Appellees have also failed to show any genuine benefit to be gained from regulating this low level of federal activity (see FEC Br. 40-41). "'[T]here is likely a basis for an implication of de minimis authority to provide [an] exemption when the burdens of regulation yield a gain of trivial or no value.'" EDF, 82 F.3d at 466 (citations omitted). The Commission explained in its E&J the reasons for adopting a de minimis exception (FEC Br. 37-38; JA 241), and appellees have not identified a single meaningful benefit in requiring state and local parties to use allocated funds when their annual disbursements for federal election activity total less than $5,000.

E. The Commission showed (Br. 41-46) that 11 C.F.R. 100.29(b)(3)(i) permissibly interprets "electioneering communication" in 2 U.S.C. 434(f)(3)(A)(i) to include only communications disseminated "for a fee," in order to avoid capturing nonpartisan media programming and public service announcements ("PSAs"). There was no specific evidence in

the rulemaking that such communications had ever been a vehicle for electoral advocacy, much less that BCRA was targeted at them.

Appellees argue (Br. 40-41) that 11 C.F.R. 100.29(b)(3)(i) could exclude from the definition of "electioneering communication" an unpaid ad that would "support" or "oppose" a federal candidate, which is beyond the Commission's legislative exemption authority in 2 U.S.C. 434(f)(3)(B)(iv). But as the Commission explained (Br. 46), this regulation is not a legislative exemption promulgated pursuant to 2 U.S.C. 434(f)(3)(B)(iv), but instead a construction of the general definition of "electioneering communication." Some aspects of the general definition of "electioneering communication," such as the timing and targeting requirements, do have the practical effect of excluding from regulation communications that "support" or "oppose" a federal candidate. See, e.g., 11 C.F.R. 100.29(b)(6)(i) (determining whether a broadcast is targeted to reach 50,000 persons in the relevant area). In any event, appellees have supplied no evidence from the rulemaking or BCRA's legislative history of even one unpaid broadcast communication that has ever been used to support or oppose a federal candidate.[17]

Appellees argue (Br. 41) that PSAs excluded by 11 C.F.R. 100.29(b)(3)(i) could conceivably have electoral purposes, but they virtually ignore the Commission's extensive showing (Br. 43-44) of the vital role PSAs play in promoting the public interest and the lack of

[17] Appellees try (Br. 42 n.27) to counter the Commission's explanation (Br. 41-42) that the exclusion of unpaid communications reflects FECA's most basic purpose — to regulate how campaign speech is financed — with an incomplete quote from 2 U.S.C. 434(f)(1). That provision actually applies to those who spend a certain amount on "the direct costs of producing and airing electioneering communications" (emphasis supplied). Congress's use of this language, rather than "producing or airing," supports an interpretation that the provision applies only to communications for which both production and broadcasting costs are incurred. Of course, no matter how much is spent on its production, a communication cannot become an "electioneering communication" unless and until it is actually broadcast in a manner that triggers the statute, see 2 U.S.C. 434(f)(3)(A).

any specific evidence that such abuse is a realistic prospect.[18] In fact, PSAs are like the media programming that appellees do not dispute (Br. 42-43) is properly excluded from the "electioneering communication" definition, because a broadcaster typically receives no fee for broadcasting either media programming or PSAs. The broadcast of PSAs is, like regular media programming, a matter of broadcaster editorial discretion, which is subject to the many practical constraints the Commission has described (Br. 44-45). In response to our point (Br. 45) that broadcasters can already air their own advocacy under the press exemption, appellees suggest (Br. 42) that there are "practical limits" on the airing of editorials, and that airing the ads of others "may serve to augment" broadcasters' own efforts to influence an election. But appellees provide no evidence to support this vague speculation.[19]

Appellees do not dispute that nonpartisan entertainment, educational, and documentary programming that incidentally mentions a federal candidate is properly excluded from the definition of "electioneering communication." Citing two FEC advisory opinions, they argue (Br. 42-43) that the press exemption in 2 U.S.C. 434(f)(3)(B)(i) adequately protects all such speech. However, advisory opinions only apply to a "specific transaction or activity" or one that is "indistinguishable in all its material aspects," 2 U.S.C. 437f(c)(1). For example, although

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[18] Appellees claim (Br. 41, 43) that the Commission "recognized" that a PSA exemption could be abused. In fact, the language quoted by appellees merely described and repeated comments the Commission received, noting that some commenters had "pointed to the possibility" of abuse (JA 322). The proposal rejected by the Commission would have excluded paid PSAs, which present the danger the Commission found absent for unpaid PSAs.

[19] Appellees' citation (Br. 42) of the example of Sinclair Broadcasting, which is not part of the administrative record and not properly before the Court, actually illustrates the constraints on such behavior the FEC described (Br. 44-45). See Bill Carter, Broadcaster's Stock Picks Up After Change on Kerry Film, N.Y. Times, Oct. 21, 2004, at A27, 2004 WLNR 5607731 (describing company's "battered" stock price, canceled advertising, planned shareholder litigation, and complaints of critics, including institutional investors and the Kerry campaign). Moreover, this was not an unpaid advertisement, but a program initiated by the broadcaster to air and discuss a film.

Advisory Opinion 2003-34 found a Showtime "reality" show involving "candidate" contestants to be "commentary" under the press exemption, it offered no broad assurance that all entertainment, educational, and documentary programming would fall within the press exemption. See also Advisory Opinion 1996-48. As we explained (Br. 43), lack of certainty here could chill nonpartisan speech and impose a huge burden on broadcasters that Congress did not evidence any intention of imposing. Appellees compare (Br. 43) this burden to the one broadcasters have long faced in ensuring that their general programming does not include independent expenditures. But the danger of inadvertently including in a broadcast a mere nonpolitical reference to, or image of, a federal candidate, which is all the electioneering communication definition requires, is much greater than the pre-existing risk of mistakenly broadcasting express advocacy of "the election or defeat of a clearly identified candidate." 2 U.S.C. 431(17).

CONCLUSION

The Court should reverse the district court's judgment and remand with instructions to dismiss for lack of jurisdiction or, alternatively, to enter judgment for the Commission.

Respectfully submitted,

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