ORAL ARGUMENT NOT YET SCHEDULED

Nos. 07-5360, 07-5361

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS,

Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

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

INITIAL BRIEF FOR THE FEDERAL ELECTION COMMISSION

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January 15, 2008

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
(D.C. Cir. R. 28(a)(1))

(A) *Parties and Amici*. Christopher Shays was the plaintiff in the district court, and the Federal Election Commission (Commission) was the defendant.[*] Senators John McCain and Russell Feingold and the Center for Competitive Politics were amici curiae in the district court and are amici in this Court. Christopher Shays is the appellee and cross-appellant in this Court, and the Commission is the appellant and cross-appellee. There were no intervenors in the district court and there are none in this Court.

(B) *Rulings Under Review*. On September 12, 2007, on cross-motions for summary judgment in a challenge to various regulations promulgated by the Commission, the district court, Kollar-Kotelly, J., granted each party's motion in part and denied it in part. The court found the following regulatory provisions defective: 11 C.F.R. 109.21(c)(4), 109.21(d)(4), 109.21(d)(5), 109.21(h), 100.24(a)(2), and 100.24(a)(3). The court upheld 11 C.F.R. 300.64(b). The district court's opinion is reported at 508 F.Supp.2d 10 (D.D.C. 2007) (Joint Appendix 75-118).

(C) *Related Cases*. This Court previously considered an earlier version of 11 C.F.R. § 109.21(c)(4), the revised version of which is now before the Court. *See Shays v. FEC*, 414 F.3d 76, 97-102 (D.C. Cir. 2005), *aff'g*, 337 F.Supp.2d 28 (D.D.C. 2004). There are no related cases currently pending in any other court.

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[*] Martin Meehan was a co-plaintiff but has since resigned from Congress.

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GLOSSARY

AO	=	Advisory Opinion
A.R.	=	Administrative Record
BCRA	=	Bipartisan Campaign Reform Act of 2002
CMAG	=	TNS Media Intelligence/CMAG
E&J	=	Explanation and Justification
FECA	=	Federal Election Campaign Act
GOTV	=	Get Out The Vote
MUR	=	Matter Under Review
NRDC	=	Natural Resources Defense Council
NPRM	=	Notice of Proposed Rulemaking
PASO	=	Promote, attack, support, or oppose

Oral Argument Not Yet Scheduled

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. 1331 over a facial challenge by Christopher Shays to regulations promulgated by the Federal Election Commission (Commission or FEC). This Court has jurisdiction under 28 U.S.C. 1291 over the Commission's timely appeal filed October 16, 2007 (J.A. 119), from the district court's final judgment entered September 12, 2007.[1] *See Shays v. FEC* (*Shays III*), 508 F.Supp.2d 10 (D.D.C. 2007) (J.A. 75-118).

ISSUES PRESENTED

1. Whether part of the "content" standard for coordinated communications, 11 C.F.R. 109.21(c)(4), is lawful.

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[1] "J.A. __" references are to the Joint Appendix filed with this brief.

2. Whether the "conduct" standards for common vendors and former employees, 11 C.F.R. 109.21(d)(4) and (d)(5), are lawful.

3. Whether the firewall "safe harbor" exception to the conduct standards for coordinated communications, 11 C.F.R. 109.21(h), is lawful.

4. Whether the definition of "voter registration activity," 11 C.F.R. 100.24(a)(2), is lawful.

5. Whether the definition of "get-out-the-vote activity," 11 C.F.R. 100.24(a)(3), is lawful.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set out in the Addendum to this brief.

STATEMENT OF THE FACTS

A. The Parties

Christopher Shays is a Member of the House of Representatives and was a principal sponsor of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002). BCRA significantly amended the Federal Election Campaign Act (Act or FECA), 2 U.S.C. 431-455.

The Commission is the independent federal agency with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the FECA. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. 437c(b)(1), and "to make, amend, and repeal such rules … as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8), 438(d).

B. Substantive and Procedural Background

The Commission appeals the summary judgment of the district court that the following regulations are legally defective: (1) 11 C.F.R. 109.21(c)(4), describing one of the "content" standards for coordinated communications; (2) 11 C.F.R. 109.21(d)(4) and (d)(5), describing "conduct" standards for coordinated communications for common vendors and former employees; (3) 11 C.F.R. 109.21(h), providing a firewall safe harbor exemption from the conduct standards; and (4) 11 C.F.R. 100.24(a)(2) and (a)(3), defining the statutory terms "voter registration activity" and "get-out-the-vote activity."

The district court had reviewed and remanded these and other regulations, except for a revised version of the conduct standard and the firewall provision, in a previous suit filed by Shays. *See Shays v. FEC* (*Shays I*), 337 F.Supp.2d 28 (D.D.C. 2004). This Court reviewed one of the regulations, 11 C.F.R. 109.21(c)(4), in an appeal of that earlier decision. *See Shays v. FEC* (*Shays I Appeal*), 414 F.3d 76 (D.C. Cir. 2005).

1. "Content" Standard for Coordinated Communications

The Act provides that coordinated expenditures — those made "in cooperation, consultation, or concert with or at the request or suggestion" of a candidate or a political party committee — are a "contribution" to the candidate or party. 2 U.S.C. 441a(a)(7)(B). The regulation defining "coordinated communication" (11 C.F.R. 109.21) establishes, *inter alia*, four independently sufficient "content" standards, at least one of which must be met to treat a "coordinated communication" as an in-kind contribution to the federal candidate or political party with whom it is coordinated. This appeal concerns the content standard that is met if a public communication refers to a clearly identified federal candidate or political party and is publicly distributed within a prescribed time frame (90 days before a candidate's election for the

House or Senate, and 120 days prior to a presidential primary and continuing until the general election) and is directed toward voters in certain jurisdictions. 11 C.F.R. 109.21(c)(4)(i), (ii). Outside those time frames, a communication is not deemed coordinated unless it republishes a candidate's campaign materials or "expressly advocates" the election or defeat of a clearly identified candidate for federal office. 11 C.F.R. 109.21(c)(2)-(3).

In *Shays I Appeal*, this Court found that a prior version of the regulation passed both steps of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and concluded that the statute permitted the Commission to draw a bright line rationally separating election-related activity from other activity. 414 F.3d at 98-99. But the Court also found that, contrary to the Administrative Procedure Act (APA), the Commission had "offered no persuasive justification for the … 120-day time frame and the weak restraints applying outside of it." *Id.* at 100.

On remand, the Commission published a new Notice of Proposed Rulemaking (NPRM) (J.A. 291-304), received written comments, held a public hearing, and obtained comprehensive data regarding television advertising run by presidential and congressional candidates during the 2004 election cycle. *See* J.A. 360-64, 373-407, 419-30; Vol. III, Docs. 9-31, 35-43, 53-55.[2] In the final rule, the Commission adjusted the time frames for congressional and presidential elections and explained in its Explanation & Justification (E&J) how the data and other rulemaking evidence supported its decisionmaking. *See* J.A. 421-30.

In *Shays III*, the district court concluded that "the FEC was well within its discretion to rely upon the … data" it had obtained, which supported the "bright lines drawn in the revised content standard." J.A. 93-94. The court further concluded, however, that the Commission did

[2] "Vol.," "Doc.," and "A.R." references are to the administrative record on disks filed in the district court.

not adequately justify reliance on the express advocacy standard outside the pre-election time frames. J.A. 98-99. Accordingly, the court held that "the E&J fails to meet the APA's standard of reasoned decisionmaking." J.A. 99.

2. "Conduct" Standards

a. Common Vendor and Former Employee Conduct Standards

The conduct elements of the coordination rule address, *inter alia*, when a person paying for a communication (payer) obtains information about a candidate's or a political party's plans, activities, or needs from a common vendor or former employee of a candidate or party and then uses that information in a communication. 11 C.F.R. 109.21(d)(4), (d)(5).

In BCRA § 214(c), Congress directed the Commission to address in its regulations "payments for the use of a common vendor" and "payments for communications directed or made by persons who previously served as an employee of a candidate or a political party …." In response, the Commission promulgated the "common vendor" standard in the 2002 coordination rules. That standard is satisfied if (1) the payer contracts with, or employs, a "commercial vendor" to create, produce, or distribute the communication; (2) the commercial vendor has provided specified types of services within the "current election cycle" to the candidate, the candidate's opponent, or a political party committee; and (3) when working for the payer, the commercial vendor uses or conveys material information about the campaign plans, etc., obtained from work done for the candidate or political party. 11 C.F.R. 109.21(d)(4)(2003).

Similarly, the "former employee" conduct standard in the 2002 coordination rules is satisfied if (1) the payer employs a person who was a former employee of a candidate or political party within the "current election cycle," and (2) the former employee, when working for the

payer, uses or conveys material information obtained from work done for the candidate or political party. 11 C.F.R. 109.21(d)(5)(2003).

In 2006, the Commission amended the applicable time period in the rule. *See* J.A. 433-34. Instead of the conduct standard being satisfied if an employee or vendor works for a candidate (or political party) and at any time thereafter during an entire election cycle works for a payer, the standard is now met only if an employee or vendor who has worked for a candidate (or political party) begins working for the payer within 120 days of the previous employment. The Commission made this adjustment based on information in the rulemaking record indicating how the former rule actually functioned.

In *Shays III*, the district court found that the revised temporal limit for the common vendor and former employee conduct standard passes both steps of *Chevron* review. J.A. 100. The regulation reflects a "facially permissible" construction of the statute. The court also found, however, that the Commission did not adequately explain why it changed the time limit to 120 days, and the court therefore held that the regulation violates the APA's arbitrary-and-capricious standard. J.A. 101-02.

b. Firewall Safe Harbor Provision

The firewall safe harbor regulation provides that conduct will not be considered coordinated if a commercial vendor, former employee, or political committee implements an effective firewall that shields material information in its possession from being used for independent communications. 11 C.F.R. 109.21(h). The firewall must be established in a written policy before any information has been shared between relevant employees and must be distributed to all affected employees, consultants, and clients. *Id.* However, the safe harbor does not apply if a breach occurs. *Id.*

The district court concluded that the regulation passes *Chevron* step one. "Congress provided no express guidance … on the use of firewalls, and the Court therefore finds that the statute is 'silent … with respect to the specific issue.'" J.A. 102. The court also found that, "in light of the broad and clear discretion afforded the Commission by Congress, … the FEC's construction of the statute is facially permissible" under *Chevron* step two. *Id.* The district further concluded, however, that the regulation unduly compromises the statute's purposes and is arbitrary and capricious. J.A. 103-05.

3. "Voter Registration Activity" and "Get-Out-the-Vote Activity"

BCRA added a new term to the Act, "Federal election activity," that describes certain activities that state, district, and local party committees must pay for with either "Federal funds" or a combination of Federal and "Levin funds." 2 U.S.C. 431(20), 441i(b)(1).[3] Congress included "voter registration activity" and "get-out-the-vote activity" among the activities encompassed by "Federal election activity," but did not define these subsidiary terms.

In 2002, pursuant to Congress's directive to promulgate regulations implementing BCRA, the Commission issued regulations further defining the terms "voter registration activity" and "GOTV activity." *See* 67 Fed. Reg. 49,064, 49,067-68, 49,110-111 (2002); 11 C.F.R. 100.24(a)(2), (a)(3) (2003). To avoid an overly broad approach that would regulate mere encouragement to register to vote, the Commission's regulation "require[s] concrete actions to assist" individual would-be registrants. 67 Fed. Reg. 49,067. Similar considerations led the

[3] "Federal funds" are funds subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 11 C.F.R. 300.2(g). "Levin funds" may be raised and spent by state and local party committees under more lenient restrictions than those applicable to federal funds. *See* 2 U.S.C. 441i(b); 11 C.F.R. 300.2(i), 300.31, 300.32; *McConnell v. FEC*, 540 U.S. 93, 163-64 (2003).

Commission to define "GOTV activity" by focusing on a state or local party's individual assistance to registered voters. *Id.*

In *Shays I*, the district court found that these regulatory definitions passed *Chevron* review, but concluded that whether the regulations "unduly compromise" the Act's purposes was not ripe for resolution. 337 F.Supp.2d at 99-105.

On remand the Commission received written comments (Vol. I, Docs. 8-15, 19, 21-22), held a public hearing (Vol. I, Docs. 17-18), and repromulgated its earlier definition of "voter registration activity," but with an expanded E&J (J.A. 365-71) that includes additional examples of activities that are and are not "voter registration activity." J.A. 368. The Commission also promulgated a regulation defining "GOTV activity," modifying the 2002 definition in ways irrelevant here. J.A. 368-69.

When Shays again challenged these regulatory definitions, the district court found that the regulations failed to satisfy *Chevron* step two and are arbitrary and capricious because they do not flesh out "gray areas" and, in the court's view, "unduly compromise" the Act's purposes. J.A. 112, 115.

SUMMARY OF ARGUMENT

This Court should review the district court's grant of summary judgment *de novo* and reverse the court's failure to defer to the Commission.

Congress gave the Commission very broad discretion to define the "content" of coordinated communications and required only that coordinated "express advocacy" and "electioneering communications" be treated as coordinated communications subject to the Act's contribution limits. On remand, the Commission properly relied upon comprehensive data about campaign advertising during the 2004 election cycle, adequately justified the time periods and

content requirements in the revised rule, and fully responded to the Court's concerns in *Shays I Appeal*. Based on the data, the revised rule, 11 C.F.R. 109.21(c)(4), rationally separates election-related advocacy from other activity falling outside the Act's expenditure definition and does not permit substantial coordinated expenditures to go unregulated. In recent years, there has been no evidence that candidates and collaborators have shifted their coordinated spending to earlier times to evade the regulation, and no rulemaking commenters provided evidence that any recent early advertising has involved coordination. The district court failed to defer to the Commission's predictive judgment about the effects of its regulation.

The legislative history regarding coordination demonstrates that Congress considered but declined to require regulation beyond coordinated electioneering communications and express advocacy. The district court erred by ignoring this history in its APA analysis.

The coordination rule's bright-line quality promotes enforcement of the Act and obeys this Court's mandate to avoid unnecessarily infringing on First Amendment rights.

The Commission revised the "conduct" standard for coordination, 11 C.F.R. 109.21(d)(4), (d)(5), to reflect the actual marketplace for political consultants and employees. By tailoring the applicable time period for "common vendors" and candidates' former employees to 120 days rather than an entire election cycle, the Commission determined that it could accommodate the concerns of candidates and their consultants without undermining the Act's effectiveness.

The firewall regulation, 11 C.F.R. 109.21(h), reasonably safeguards the Act's coordinated expenditure limits while simultaneously accommodating the right of political committees and other persons to make unlimited independent expenditures. The regulation allows an organization to create an internal barrier to prevent material information from flowing from one

set of employees to another. To qualify for a safe harbor, the regulation must be described in writing to all relevant employees before work begins. If it is ineffective, it will not prevent Commission enforcement action. The district court erred by demanding that the regulation include more detail about what firewall policies must contain, and by assuming that the Commission will not fully enforce its own regulation.

The Commission's definitions of "get-out-the-vote activity" and "voter registration activity," 11 C.F.R. 100.24(a)(2), (a)(3), lawfully include a requirement that persons receive some sort of individualized assistance. Otherwise, mere encouragement to vote or to register to vote would have to be financed with federal dollars. The rulemaking provided several examples of what constitutes these activities, and the legislative history suggests that Congress understood GOTV to mean some sort of personal assistance. The district court erred by finding that the rulemaking left too many "gray areas" and that a single advisory opinion indicates that the Commission has unduly narrowed the regulation. The Commission can flesh out the definitions in future advisory opinions and enforcement matters. The district court also gave short shrift to the context of these regulations, which are part of a larger structure that regulates similar activity.

ARGUMENT

I. STANDARDS OF REVIEW

This Court reviews *de novo* the grant of summary judgment and applies the same standards as the district court was to apply. *Mueller v. Winter*, 485 F.3d 1191, 1197 (D.C. Cir. 2007). The familiar two-step analysis from *Chevron* governs judicial review of regulations expressing the Commission's interpretation of the Act. If Congress has not spoken to the "precise question at issue," the Court must defer to the Commission's interpretation as long as it rests "on a permissible construction of the statute," that is, is a "reasonable interpretation."

Chevron, 467 U.S. at 842-43, 844. The Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [C]ourt believes is the best statutory interpretation." *Covad Communications Co. v. FCC*, 450 F.3d 528, 537 (D.C. Cir. 2006) (internal quotation marks and citation omitted). In particular, "[w]hen a challenge to an agency construction … really centers on the wisdom of the agency's policy, … the challenge must fail." *Chevron*, 467 U.S. at 866. The Commission, which has broad discretionary authority over the administration and interpretation of the Act, "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

The standard established by the APA also applies here. A court can set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Under this "highly deferential standard," *Public Citizen, Inc. v. National Hwy Traffic Safety Admin.*, 374 F.3d 1251, 1260 (D.C. Cir. 2004), "the scope of [judicial] review … is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). *See also, e.g., Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (arbitrary-and-capricious review "presum[es] the validity of agency action").

II. THE "CONTENT" STANDARD IN THE COORDINATED COMMUNICATION REGULATION IS LAWFUL

As this Court explained, the task before the Commission on remand was to promulgate a coordinated communication rule that "*rationally* separates election-related advocacy from other activity falling outside FECA's expenditure definition." 414 F.3d at 102 (emphasis added). The Commission's revised rulemaking has done precisely that by responding to this Court's concerns, obtaining and analyzing a massive evidentiary record, and providing an "assurance that

[its] standard does not permit *substantial* coordinated expenditure" to go unregulated. *Id.* (emphasis added).

A. Background

BCRA repealed the Commission's existing coordination regulations (former 11 C.F.R. 100.23), and instructed the Commission to develop new regulations. BCRA §§ 214(b), (c). Congress placed only two restrictions on the Commission's discretion: the new regulations (1) "shall not require agreement or formal collaboration to establish coordination," and (2) "shall" address four specific aspects of coordinated communications "[i]n addition to any subject determined by the Commission." BCRA § 214(c). In BCRA § 202 (codified at 2 U.S.C. 441a(a)(7)(C)), Congress also required that a coordinated electioneering communication "be treated as a contribution to the candidate supported by the electioneering communication."

Beyond these statutory factors, BCRA is silent on what else the Commission should consider in defining "coordination." This broad delegation of authority was the direct result of Congress's inability to agree upon its own definition. When the bill that became BCRA was introduced in the Senate, it contained a broad definition of "coordinated activity." *See* S.27, Bipartisan Campaign Reform Act of 2001, 107th Cong. § 214 (Jan. 22, 2001). However, when the Senate was unable to reach agreement, Senator McCain introduced an amendment that, *inter alia*, delegated to the Commission the authority to fashion a new definition. Amendment No. 165, 147 Cong. Rec. S3184 (March 30, 2001). As Senator Feingold explained,

> [t]here is one thing I want to make very clear and reiterate: While this amendment instructs the FEC to consider certain issues in the new rule-making, it doesn't require the FEC to come out any certain way or come to any definite conclusion one way or another.

147 Cong. Rec. S3184-3185 (Mar. 30, 2001). *See also* 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. Feingold and Sen. McCain). When Congress delegates this type of authority, the fullest

measure of *Chevron* deference is required. *See supra* p. 11; *Pharmaceutical Research and Mfrs. v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004).

When this Court reviewed the coordination content regulation in *Shays I Appeal*, it held that, "[r]egarding *Chevron* step one, we agree that Congress has not spoken directly to the issue at hand." 414 F.3d at 98. The Court also rejected the plaintiffs' argument that "FECA precludes content-based standards under *Chevron* step one," as well as the "district court's suggestion that any standard looking beyond collaboration to content would necessarily 'create an immense loophole,' thus exceeding the range of permissible readings under *Chevron* step two." *Id.* at 99-100 (quoting 337 F.Supp.2d at 65).[4] The Court found, however, that the Commission's explanation for the regulation was inadequate under the APA. *Id.* at 97, 100.

B. The Revised Coordination Content Standard Has Been Comprehensively Explained and Is Supported By Reliable Empirical Data

On remand, the Commission responded directly to this Court's concerns and developed a revised regulation that satisfies APA review. J.A. 419-30. As this Court previously acknowledged, "to qualify as 'expenditure' in the first place, spending must be undertaken 'for the purpose of influencing' a federal election … [a]nd as the FEC points out, time, place, and content may be critical indicia of communicative purpose." *Shays I Appeal*, 414 F.3d at 99 (citations omitted). In *McConnell*, the Supreme Court approved Congress's timing restrictions in the "electioneering communication" provision, relying heavily upon empirical evidence that showed that "almost all" of the broadcast ads that mentioned candidates and were "specifically intended to affect election results" were "aired in the 60 days immediately preceding a federal

[4] These holdings are now the law of the case. *See, e.g., United States v. Alaw*, 327 F.3d 1217, 1220 (D.C. Cir. 2003); *Association of American R.R. v. Surface Transp. Bd.*, 306 F.3d 1108, 1110-11 (D.C. Cir. 2002).

election." 540 U.S. at 127. The Court also rejected the claim that the provision "is underinclusive because it leaves advertising 61 days in advance of an election entirely unregulated," noting that "[t]he record amply justifies Congress' line-drawing." *Id.* at 208; *see also* J.A. 423. The temporal criteria in the Commission's content standard are the same kind of reasonable line drawing approved by the Court.

To address questions raised by this Court in *Shays I Appeal*,[5] the Commission in its NPRM "specifically invite[d] comments in the form of empirical data that show the time periods before an election in which electoral communications generally occur." J.A. 294, 421. Unfortunately, although some commenters provided unscientific anecdotal evidence, no commenters (including Shays) provided any studies, statistical samples, or other empirical evidence that would help provide an overview of the frequency, pattern, and intensity of political advertising. To fill that void, the Commission licensed data from TNS Media Intelligence/CMAG (CMAG) regarding television advertising spots run by presidential, Senate, and House of Representatives candidates during the 2004 election cycle. J.A. 421. CMAG monitors more than 560 television stations in 101 major markets, 21 hours per day (5:00 a.m. - 2:00 a.m.). J.A. 373-74. The data CMAG provided the Commission include "all candidate sponsored ads for federal races (US House, US Senate, President) from 11/6/02 - 11/2/04" (J.A. 373), and the Commission analyzed well over half a million ad airings. *See* J.A. 381, 383, 393, 395, 400, 402. As the district court found, the "CMAG data represent a reliable source of

[5] The Court suggested three inquiries, 414 F.3d at 102: "Do candidates in fact limit campaign-related advocacy to the four months surrounding elections, or does substantial election-related communication occur outside that window? Do congressional, senatorial, and presidential races … occur on the same cycle…? And, perhaps most important, to the extent election-related advocacy now occurs primarily within 120 days, would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period…?"

data regarding political advertising and … Plaintiff has provided no evidence demonstrating that the FEC's analysis of the CMAG data is generally skewed or unrepresentative." J.A. 83. *See also* J.A. 79-83 (rejecting arguments that the Commission's reliance on data concerning television ads run by candidates in battleground states skewed the data or made them unreliable).

The focus of this Court's concern was the *pattern* of candidate spending over time, and in response to the Court's first question, 414 F.3d 102, the data show that "substantial election-related communication" does *not* occur outside the 90-day line drawn by the Commission for congressional races. The data show that almost all congressional candidates run their ads within 60 days of election and only a small fraction are run between 60 and 90 days before an election. J.A. 423. Beyond 90 days, this candidate advertising "nearly ceases." J.A. 425. *See* J.A. 393-96, 400-03.

> Senate candidates aired 91.60 percent and 94.73 percent of their advertisements within 60 days of the primary and general election, respectively. This represented 93.32 percent and 97.20 percent of the estimates costs of advertisements the Senate candidates ran before the primary and general elections, respectively….
>
> The data show that a minimal amount of activity occurs between 60 and 90 days before an election, and that beyond 90 days, the amount of candidate advertising approaches zero. Senate candidates aired only 0.87 percent and 0.39 percent of their advertisements more than 90 days before their primary and general elections, respectively, which represented 0.66 percent and 0.15 percent of the total estimated costs…. Similarly, House candidates aired only 8.56 percent and 0.28 percent of their advertisements more than 90 days before their primary and general elections, respectively. This represented 3.79 percent and 0.13 percent of the total estimated costs of advertisements run by House candidates….

J.A. 423 (footnotes omitted). The Commission's decision to use a 90-day period for House and Senate races was thus directly responsive to this Court's analysis and, as the district court explained (J.A 94), the "FEC thus reasonably concluded, based on this data, that a vast majority of candidate advertising occurred within the 90 days prior to primary and general elections."

In response to this Court's second question, 414 F.3d at 102, the Commission analyzed the CMAG data and other relevant evidence, and concluded that advertising for presidential campaigns follows a different pattern than congressional races. Under the 2002 regulations, the presidential general election coordinated communication window effectively extended further back than 120 days before the general election because the parties' presidential nominating conventions were also treated as elections under the content standard. Thus, in 2004 the coordination regulations actually applied for 184 days before the general election for Republican candidates and 219 days for Democratic candidates. J.A. 424. Even with this extended period, however, in several states there was a "gap period" between the primary elections and the start of the general election period — with varying lengths depending upon the dates chosen by states for their primaries. The CMAG data revealed that in media markets contained within individual "battleground" states, an appreciable amount of advertising took place during the gap period. In these markets the Republican presidential candidate spent almost $9.5 million on television ads during the gap period, or "14 percent of the total costs of media spots aired by the Republican Presidential candidate in those media markets after the State primaries…. Democratic Presidential candidates spent $1,221,045 on post-primary television advertisements that occurred during the gap period." *Id.*

The Commission's revised content standard closed this gap for presidential campaigns. Under the revised rule, a communication will satisfy the content standard for presidential races if it occurs at any time beginning 120 days before the primary election up through the date of the general election. 11 C.F.R. 109.21(c)(4)(ii).

> According to the [CMAG] data, in the 2004 election cycle, over 99 percent of the estimated media spot spending by Presidential candidates in media markets fully contained within individual "battleground" States occurred during this time period.

J.A. 424 (footnote omitted). *See* J.A. 375-84. Thus, the rule's distinct and lengthy time period for presidential races is reasonable and supported by substantial evidence. The CMAG data showed no similar pattern of "gap" spending by congressional candidates. J.A. 393-407. As the district court properly concluded (J.A. 95), the "Commission's conclusions regarding the differences in the patterns of advertising in presidential and congressional elections appear similarly reasonable."

In response to this Court's third question, 414 F.3d at 102, the Commission reasonably concluded that the minimal value of advertising outside the revised time frames limits the risk that candidates and collaborators would shift their coordinated spending to earlier times. The candidates' own spending pattern indicates the kind of advertising candidates believe effectively influences voters, and they have little incentive to ask outside groups to finance advertisements that they themselves find minimally useful. Although the Commission concluded that the record "overwhelmingly support[s] a 60-day time frame for Congressional candidate communications," its revised rule took a more cautious approach. J.A. 425. "[T]o foreclose the possibility that candidates and groups will shift spending outside the applicable time frame, the Commission has determined to set the Congressional time frame at 90 days." *Id.*

The temporal element of the Commission's 2002 coordination regulation had been in effect for four years at the time of the revised rulemaking, and the record contains no evidence that candidates and collaborators engaged in increased unlawful coordination or shifted their coordinated activity earlier in the election cycle to avoid the challenged rules' restrictions. Although some commenters submitted examples of ads that were run outside 120 days, they presented no evidence that they were coordinated with candidates. More generally, "[n]one of the commenters submitted any evidence that, during the recent election cycles during which the

Commission's 2002 coordination rules were in effect, House or Senate candidates asked outside groups to run advertisements more than 90 days before House or Senate primary or general elections." J.A. 426. Indeed, when the Commission specifically inquired about this issue at the rulemaking hearing, "these commenters acknowledged that there was no evidence that any of these advertisements had been coordinated with a candidate or a political party committee." J.A. 426-27; J.A. 361-62 (testimony of Paul Ryan); J.A. 363 (testimony of Marc Elias). Likewise, none of the commenters who professed concern about the Commission's proposed rule suggested that they had filed any administrative complaints with the Commission alleging acts of coordination, or had even contemplated doing so. *See generally* J.A. 314-55 (comments of Campaign Legal Center, Democracy 21, and Center for Responsive Politics).

Regarding the possibility that coordinated spending might shift outside the rule's time frames, the Commission's judgment is entitled to particularly deferential review. "[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise' are entitled to 'particularly deferential' review as long as they are reasonable." *In re Core Communications, Inc.*, 455 F.3d 267, 282 (D.C. Cir 2006) (citation omitted). "[T]he Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required, since 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981) (citation omitted); *accord Earthlink, Inc. v. FCC*, 462 F.3d 1, 13 (D.C. Cir. 2006). As this Court has repeatedly observed, "'it is within the scope of the agency's expertise to make … a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable

view.'" *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 838 (D.C. Cir. 2002) (citation omitted).

In its ruling, the district court failed to defer to the Commission's predictive judgment and relied heavily upon *National Journal* articles that describe a small number of ads run outside the pre-election windows. J.A. 97-98. The court recognized that those articles only "describe a total of 236 discrete ads run over three elections cycles" and were "unlikely to be statistically significant given the size of the CMAG data pool," which involved over 500,000 airings of ads run in just the 2004 election cycle, J.A. 94 n.23. Nevertheless, the court improperly relied upon this anecdotal evidence to find that there was a sufficient "*risk* of corruption" to render the Commission's regulation unreasonable. J.A. 98. The Commission considered the *National Journal* evidence and described it in its E&J, but the Commission need not base its rule on data that it considers unreliable. *See American Public Communication Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) ("it was prudent and reasonable for the Commission to decide that ... the existing ... data was not reliable enough"). More generally, courts have long recognized that the probative value of statistical evidence varies with sample size. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 463 n.7 (1982). It was thus entirely reasonable for the Commission to rely primarily upon the comprehensive CMAG data. If its predictive judgments are not borne out, the Commission can revisit whether the regulation needs to be amended to address unexpected changes in advertising patterns or attempts to circumvent the Act. *See Earthlink*, 462 F.3d at 13 (the agency "is fully capable of reassessing the situation if its predictions are not borne out").

C. The Revised Coordination Content Standard Reasonably Implements the Only Congressional Requirement: That "Coordinated Communication" Include Coordinated Express Advocacy and Coordinated Electioneering Communications

The revised content standard goes far beyond BCRA's minimum requirements. Although Congress required the Commission to "address" four topics as part of a new regulation governing coordinated communications, BCRA § 214(c), it did "not dictate what the FEC should decide." 148 Cong. Rec. S1530 (March 5, 2002) (statement of Senator McCain). Congress included only one content *requirement*: a disbursement made for a coordinated electioneering communication must be treated as contribution. BCRA § 202. Indeed, Congress's decision to specify that coordinated electioneering communications must be treated as contributions indicates that, in the absence of that provision, the statute would not have required the Commission to treat them as such.

BCRA's language and legislative history contradict the district court's holding (J.A. 98), that the Commission was unreasonable to rely in part on the express advocacy standard in the context of coordinated expenditures. When BCRA was first introduced in the House and the Senate, both bills contained language providing that express advocacy should *not* be a limiting criterion in determining whether a coordinated communication would be treated as a contribution. The original Senate bill introduced on January 22, 2001, would have added the following definition of "coordinated activity" to the definition of "contribution" in 2 U.S.C. 431(8):

> "Coordinated activity" means anything of value provided by a person in connection with a Federal candidate's election who is or previously has been within the same election cycle acting in coordination with that candidate, … (*regardless of whether the value being provided is in the form of a communication that expressly advocates a vote for or against a candidate*)….

Bipartisan Campaign Reform Act of 2001, S.27, 107th Cong. § 214(a)(1) (emphasis added) (J.A. 154). The original House bill would have added virtually identical language. Bipartisan Campaign Finance Reform Act of 2001 (Introduced in House, Jan. 31, 2001), H.R. 380, 107th Cong. § 206(a)(1) (J.A. 161).[6]

The version of the bill passed by the Senate in 2001 contained a similar provision adding coordinated expenditures as a type of disbursement that must be treated as contributions:

> any coordinated expenditure or other disbursement made by any person in connection with a candidate's election, *regardless of whether the expenditure or disbursement is for a communication that contains express advocacy*…

Bipartisan Campaign Reform Act of 2001 (Engrossed as Agreed to or Passed by Senate, April 22, 2001), S.27, 107th Cong. § 214(a)(1)(C) (emphasis added) (J.A. 195).

In the final stages of the legislative process, however, Congress deleted the requirement that express advocacy *not* be a touchstone for whether a coordinated communication is a contribution, and the final language enacted as BCRA § 214 was approved without any such restriction. Bipartisan Campaign Reform Act of 2002 (Engrossed as Agreed to or Passed by House, Feb. 14, 2002), H.R. 2356, 107th Cong. § 214 (J.A. 243-44); Bipartisan Campaign Reform Act of 2002 (Placed on Calendar in Senate, Feb. 27, 2002), H.R. 2356, 107th Cong. § 214 (J.A. 252). Thus, the actual legislative history and language of BCRA evidence a considered congressional choice *not* to require the Commission to define the *content* of coordinated communications more broadly than coordinated express advocacy and electioneering communications. *See Pacific Gas & Elec. Co. v. State Energy Resources*

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[6] As the bills progressed, they included similar language about express advocacy. *See* Bipartisan Campaign Reform Act of 2001 (Referred to House Committee after being Received from Senate, May 22, 2001), S.27, 107th Cong. § 214(a)(1)(C) (J.A. 175); Bipartisan Campaign Reform Act of 2001 (Reported in House, July 10, 2001), H.R. 2356, 107th Cong. § 214(a)(1)(C) (J.A. 185).

Conservation & Development Comm'n, 461 U.S. 190, 220 (1983) ("it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected"). This provision was one of many that emerged in final form through congressional compromise. As the Supreme Court explained in *Chevron*, 467 U.S. at 865:

> Perhaps [Congress] consciously desired the [agency] to strike the balance at this level …; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

See also Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986) ("Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises"); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002) ("The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess."); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("unenacted approvals, beliefs, and desires are not laws").

The district court gave this legislative history no weight, even though it acknowledged that the "Commission nevertheless regulated more broadly" than the minimal congressional requirements. J.A. 98. The court viewed this legislative history as relevant only to whether the Commission's interpretation was reasonable under *Chevron* — which the court agreed it was — but not to the APA question regarding the rule's ability to "'rationally separat[e] election-related advocacy from other activity.'" *Id.* (quoting 414 F.3d at 102). The court erred.

As this Court previously explained regarding this same regulation, the

> inquiry at the second step of *Chevron*, i.e., whether an ambiguous statute has been interpreted reasonably, overlaps with the arbitrary and capricious

> standard…. Both questions require us to determine whether the Commission, in effecting a reconciliation of competing statutory aims, has rationally considered *the factors deemed relevant by the Act.*

414 F.3d at 96-97 (citations and internal quotations marks omitted; emphasis added). "Whether an agency action is to be judged as reasonable, *in accordance with the APA's general arbitrary and capricious standard*, or whether it is to be examined as a permissible interpretation of the statute *vel non* depends, at least theoretically, *on the scope of the specific congressional delegation implicated.*" *National Ass'n of Regulatory Utility Commissioners v. ICC*, 41 F.3d 721, 727 (D.C. Cir. 1994) (emphasis added). Thus, review under APA appropriately takes into account requirements imposed by statute. *See Cellco Partnership*, 357 F.3d at 102 (rejecting APA-based argument that "would have the court ignore the [limits on the] Commission's statutory responsibilities"); *American Coke and Coal Chem. Inst. v. EPA*, 452 F.3d 930, 942 (D.C. Cir. 2006) (conducting APA analysis based on scope of the statutory requirements); *see also Chamber of Commerce v. FEC*, 69 F.3d 600, 606 (D.C. Cir. 1995) (analyzing legislative history within APA review). Indeed, the APA analysis in *Motor Vehicle Mfrs.*, 463 U.S. at 55, discussed the degree to which the agency, in reaching its judgment, took into account congressional intent that "safety … be the preeminent factor." Here, Congress explicitly delegated the Commission broad discretion and mandated only that coordinated express advocacy and electioneering communications be treated as coordinated communications; because the Commission chose to regulate *beyond* those requirements but relied in part upon Congress's own express advocacy standard, the district court plainly erred when it disregarded this congressional direction and held that the Commission regulated too little speech and therefore acted unreasonably.

Like Congress, the Commission adopted objective criteria. Congress steered away from the "shoals of vagueness," *Buckley v. Valeo*, 424 U.S. 1, 78 (1976), when it supplemented the ban on using corporate and union general treasury funds to make independent expenditures (which must include express advocacy) with a ban on using such funds for electioneering communications, BCRA § 203. In its regulation, the Commission greatly *expanded* Congress's electioneering communication content requirement, but reasonably adhered to the kind of objective criteria adopted by Congress. The regulation extends coverage to much longer time periods, 90 and 120 days; it includes references to a political party, not just a federal candidate; it applies to any type of public communication, not just radio and television; and it does not require the "targeted" audience to be 50,000 or more people (*compare* 2 U.S.C. 434(f)(3)(C)). If Congress had wanted to *require* the Commission to treat as coordinated expenditures similar communications that occurred at any time in the election cycle, it could have specified that the electioneering communication content standard would apply without regard to the time limits in the definition of that term.[7] Thus, the regulation's reliance upon express advocacy and republican of campaign materials during times far in advance of election day is entirely

[7] The district court also relied upon (J.A. 98) the Supreme Court's conclusion in *McConnell* that the express advocacy standard is "functionally meaningless," 540 U.S. at 193. That conclusion was reached, however, while analyzing the brief pre-election periods when "almost all" of the election ads were actually run. *Id.* at 127. The Commission's coordination regulation expands those periods to 90 and 120 days, and *McConnell* did not address the merits of partial reliance upon express advocacy outside those times. Of course, by limiting the definition of "electioneering communication" to 30- and 60-day windows, Congress itself continued to rely upon express advocacy for independent expenditures during 21 months of every election cycle. Moreover, the regulation defining "express advocacy," 11 C.F.R. 100.22, is broader than the wooden test of "magic words" found wanting in *McConnell*. This regulation was not modified in BCRA. *See* BCRA § 201(a); 2 U.S.C. 434(f)(3)(A)(ii) ("Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of Title 11," C.F.R.).

reasonable in light of the Commission's mandate from Congress.[8] *See Air Line Pilots Ass'n, Int'l v. Dep't of Transportation*, 791 F.2d 172, 175 (D.C. Cir. 1986) ("agency's change in policy here came in response to Congress' change in the *statute* from which that policy derived").

D. The Commission's Line Drawing Accommodates Core First Amendment Concerns and Does Not Compromise the Act

Longer time frames or a less objective test could unnecessarily chill speech on public issues. As the Commission explained (J.A. 426):

> Retaining a longer time frame that is not supported by the record could potentially subject political speech protected under the First Amendment to Commission investigation. Subjecting activity to investigation that the evidence shows is unlikely to be for the purpose of influencing Federal elections could chill legitimate lobbying and legislative activity. As the Supreme Court has emphasized, where First Amendment rights are affected, "[p]recision of regulation must be the touchstone," *Edenfield v. Fane*, 507 U.S. 761, 777 (1993).

This Court agreed that the Commission could ensure that its rule gives breathing space for politicians to collaborate with outsiders on "legislative and political issues involving only a weak nexus to any electoral campaign," 414 F.3d at 99, and as the data discussed above demonstrate, advertising before the periods defined by the Commission likely has only a "weak nexus" (if any) to election day.

This Court further approved the "FEC's effort to develop an 'objective, bright-line test [that] does not unduly compromise the Act's purposes,' considering that [the Court] approved just such a test for 'contribution' in *Orloski*." 414 F.3d at 99 (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)). Indeed, *Orloski* is directly on point and supports the Commission's

[8] Indeed, Congress did not even *require* that the "republication of campaign materials," BCRA § 214(c)(A), be treated at all times as a coordinated communication, but simply required the Commission to "address" how such materials should be treated, BCRA § 214(c). The Commission ultimately included them within the definition of "coordinated communication," regardless of when they are distributed. 11 C.F.R. 109.21(c)(2).

line drawing here. In that case, the Court recognized that Congress did not intend to "prohibit all corporate donations," *id.* at 163, and that the Act's

> purposes must be read against the clear statutory language that prohibits some corporate donations, but, by necessary implication, permits others. It becomes readily apparent upon reading the statute and its purposes in this way that Congress left a large gap between the obviously impermissible and the obviously permissible. This gap creates the potential for a broad range of differing interpretations of the Act.

Id. at 164. The Court then deferred to the Commission's interpretation, even though, "[c]learly, the FEC's interpretation is one of the most favorable to corporations and incumbents that the agency could have adopted." *Id.* at 165. Like the rule at issue here, the Commission's interpretation at issue in *Orloski* relied in part upon the express advocacy standard to create a bright-line definition to distinguish non-political congressional events from campaign events. *See id.* at 160. Most important, the Court explicitly noted the gray area — indeed, the overlap — between these two kinds of events: "*any* corporate funding of congressional events indirectly influences the election." *Id.* at 163 (emphasis added). In short, the Court did not require the Commission to regulate every bit of corporate spending that could in some way affect an election. The Commission is not required to maximize regulation; "'no legislation pursues its purposes at all costs.'" *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 495 (D.C. Cir. 2004) (citation omitted). Here, as advertising becomes more and more remote from the election, the likelihood of its influencing a federal election greatly diminishes, and the Commission's rule is reasonable even if a very small number of early, non-express-advocacy ads might have some speculative, minimal effect on an election.

The *Orloski* decision not only upheld the Commission's interpretation as reasonable, but also held that administrative exigencies may require "that the FEC adopt an objective, bright-line test[,]… necessary to enable donees and donors to easily conform their conduct to the law and to

enable the FEC to take … rapid, decisive enforcement action." 795 F.2d at 165. Those concerns are even more important here, where the activity at issue is likely to be speech to influence legislation, not simply corporate donations of food to a congressional event, as in *Orloski*. Also, as in *Orloski*, the Commission was concerned that "disgruntled opponents" could "take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters." J.A. 426 (quoting *Orloski*, 795 F.2d at 165). Although the Commission sought comment on a standard that would use a "promote, attack, support, or oppose standard" ("PASO") criterion outside the pre-election period, "most commenters agreed that the Commission should continue to use a bright-line rule," and the Commission concluded that a PASO standard would not provide the "clearest guidance to those seeking to comply with the coordination regulations." J.A. 428.

The new content standard serves fundamental First Amendment interests by eliminating vagueness. "A bright-line prophylactic rule may be the best way…, by offering clear guidance and avoiding subjectivity, to protect speech itself." *Hill v. Colorado*, 530 U.S. 703, 729 (2000). This clarity also serves the purposes of the statute by drastically reducing the possibility that the Commission will ever have to dismiss an administrative complaint because of uncertainty about the scope of the content covered by the definition of "coordinated communication." *See, e.g.*, J.A. 137-41 (Statement of Reasons discussing problems enforcing "electioneering message" standard used at times in 1990s). In turn, this certainty helps ensure that the regulation's full breadth will be enforceable — another reason why it does not create a potential for abuse. *See Orloski*, 795 F.2d at 165.

More generally, bright-line rules can satisfy APA review, even if they are underinclusive to some extent. *See Flynn v. Commissioner of IRS*, 269 F.3d 1064, 1070-71 (D.C. Cir. 2001)

(regulation allowing only current employees to bring a tax court action regarding retirement plan amendments was not "unreasonably underinclusive" or arbitrary or capricious, despite the "categorical distinction between current and former employees" which did "not map perfectly" onto the relevant categories of interests); *Chen v. Ashcroft*, 381 F.3d 221, 229-30 (3rd Cir. 2004) ("rule is not irrational just because it is underinclusive to some extent"). Here, the regulation is not arbitrary or capricious just because a very small percentage of election-related ads have been broadcast outside the regulation's time frames. "The proper *Chevron* inquiry is not whether the agency construction can give rise to undesirable results in some instances … but rather whether, in light of the alternatives, the agency construction is reasonable." *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003).

Finally, the Supreme Court in *United States v. Sun-Diamond Growers of Calif.*, 526 U.S. 398 (1999), found a provision of the anti-gratuity statute, which like FECA is designed to prevent corruption, consistent with a regulation that permits some gifts to be accepted. Rejecting a broad interpretation of the statute that would have foreclosed the permissive regulation, the Court explained, *id.* at 412:

> [T]his regulation, and the numerous other regulations and statutes littering this field, demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.

Especially when dealing with core First Amendment activity, the Commission is not required to interpret the Act to maximize the risk that non-election speech will be chilled or punished. Instead, it "must attempt to avoid unnecessarily infringing on First Amendment interests." *AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (quoted in *Shays I Appeal*, 414 F.3d at 101).

III. THE "CONDUCT" STANDARD AND FIREWALL SAFE HARBOR PASS *CHEVRON* REVIEW AND ARE NOT ARBITRARY OR CAPRICIOUS

A. "Conduct" Standard for Common Vendors and Former Employees

1. Standard of Review

See supra pp. 10-11.

2. The Court Should Reverse the District Court's Judgment and Uphold the "Conduct" Standard for Common Vendors and Former Employees

The conduct standards for common vendors and former employees of candidates or political parties were first promulgated as part of the original BCRA rulemaking. 11 C.F.R. 109.21(d)(4), (5) (2003). During the rulemaking following the *Shays I* remand, the Commission re-evaluated these rules based on their application in practice, and concluded that the standards' temporal limit should be more carefully tailored to reflect the actual marketplace for political consultants and employees. J.A. 299, 431, 433; *see supra* pp. 5-6.

Under the revised rule, the conduct standards are met whenever an employee or vendor who has worked for a candidate or political party begins working for the payer of a communication within 120 days of the previous employment. If an employee leaves a candidate's or a party committee's employment and later performs additional work for the candidate or party, the last day when he or she works restarts the 120-day clock. Thus, the covered time period may be longer than 120 days, and in some instances much longer. For example, if a vendor begins working for a candidate when that individual announces his or her candidacy, and the vendor continues working for that candidate until at least 120 days before an election, the regulation in practice applies to the vendor for the entire election cycle.

Commenters cited problems with the earlier version of the rule. It "had a 'chilling effect' on the retention of consultants and employees because organizations want to avoid the

speculative allegations of improper coordination." J.A. 433. Commenters described the significant interviewing and investigative burden associated with hiring commercial vendors, who can be in short supply, especially in smaller markets. *Id.* Some commercial vendors felt compelled under the prior rule to refuse work from political committees early in an election cycle to preserve the vendors' ability to work for a political party or candidate as the election approaches. *Id.*

The Commission reasonably concluded that the 120-day limit will not undermine the effectiveness of the conduct standards or lead to circumvention of the Act. The Commission heard testimony that material information that could be the basis of a coordinated expenditure has a very short "shelf life" in politics. J.A. 433. Witnesses explained how campaign information from a primary election tends to be irrelevant in a general election, which usually has a very different focus. J.A. 434. Politics are unpredictable and fluid, and to help quantify that fact, the Commission used an analogy (*id.*) to polling data, which become stale. *See* 11 C.F.R. 106.4(g) (between 61 days and 180 days, polling information retains only 5% of its value, and after that drops to zero).

The revised conduct standards are consistent with the goal of the prior rulemaking, where the Commission stated that it was not attempting to "create any prohibition on the use of common vendors" and did not seek to "unduly intrud[e] into existing business practices." 68 Fed. Reg. 421 (2003). The Commission has merely fine-tuned its rule to meet its earlier goal more precisely.

The district court seized on the Commission's concerns about the temporal limits' functioning as a "'cooling off' period during which employment was forbidden" to chastise the Commission for benefiting political consultants and employees "at the expense of BCRA's

statutory goals." J.A. 101. The concerns about those persons are inextricably bound, however, with the Commission's concerns that too restrictive a time limit could inhibit the exercise of the employer's political activities that, in modern American politics, depend heavily on the employer's having expert help. The Commission concluded that the 120-day period would serve the statute's broad goals, and the court should have deferred to the Commission's predictive policy judgment.

In sum, contrary to the district court's conclusion, the Commission presented a reasoned analysis to support its revision of the time limits in the conduct standards for common vendors and former employees. The Commission reasonably considered the fluidity of American politics, the decreased value of information over time, and the practical burdens the old rule imposed. All line drawing is inherently arbitrary in some sense, *see Boyce Motor Lines v. United States*, 342 U.S. 337, 340-41 (1952), and the Commission reasonably chose to tie the time period to when a vendor's or an employee's work actually takes place.

B. The Court Should Reverse the District Court's Judgment and Uphold the Firewall Safe Harbor Regulation

1. Standard of Review

See supra pp. 10-11.

2. The Firewall Safe Harbor Safeguards Against Unlawful Coordination and Reasonably Accommodates the Right to Make Independent Expenditures

The firewall safe harbor provision, 11 C.F.R. 109.21(h), is a reasonable means of safeguarding the Act's coordinated expenditure limits while simultaneously accommodating the right of political committees and other persons to make unlimited independent expenditures.[9]

[9] *Colorado Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("Constitution … grants to individuals, candidates, and ordinary political committees the right to

Persons that are permitted to make contributions can do so with money or in the form of coordinated expenditures, although political party committees have special higher spending limits for coordinated expenditures on behalf of their own candidates. *See* 2 U.S.C. 441a(a)(7)(B), 441a(d). Information about a candidate's or political party's campaign plans or needs gained in coordinating an expenditure with the candidate or political party, however, may be "material" to the "independent" communication and thus undermine the independence necessary for a lawful, unlimited independent expenditure. *See* 11 C.F.R. 109.21. The same result may occur if a speaker intends to make only independent expenditures and works with vendors, employees, or organizations that are privy to a campaign's or party's plans or activities. The Act does not directly address these circumstances. The firewall regulation fills this gap and, contrary to the district court's conclusion, the regulation does not "unduly compromise" the statute's purposes and is not arbitrary or capricious under the APA.

Under the safe harbor regulation, an expenditure is not coordinated if a vendor, former employee, or political committee creates an effective firewall — a barrier erected within an organization to separate staff so as to prevent the flow of information from one set of employees to another. With this barrier in place, employees who are shielded from certain information conveyed by a candidate or political party to other employees within the same organization may plan, produce, and distribute independent expenditures relating to that candidate or political party because the shielded employees do not have access to the information needed to satisfy the Commission's "conduct" standards for coordinated communications. *See* 11 C.F.R. 109.21(c).

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make unlimited independent expenditures"). *See also McConnell*, 540 U.S. at 213-214. Corporations and labor organizations cannot use their general treasury funds to finance independent expenditures. *See id.* at 203; 2 U.S.C. 441b.

To qualify for the safe harbor, a firewall must be effective: It must be established before any information has been shared between relevant employees, and must be described in a written policy that is distributed to all employees, consultants, and clients affected by the policy before those employees begin the applicable work. 11 C.F.R. 109.21(h)(2). "Relevant employees" includes all employees or consultants actually providing services to the person paying for the communication or the candidate or political party committee.

An organization cannot come within the firewall safe harbor simply by alleging that it has an internal firewall. As the E&J states, the Commission will, as it does in every enforcement matter, review the evidence presented by both the complainant and the respondent, and weigh the credibility and specificity of any allegation of coordination against the credibility and specificity of the facts presented in the response. J.A. 435-36. An entity seeking to use the firewall safe harbor must be "prepared to provide reliable information (e.g., affidavits) about an organization's firewall, and how and when the firewall policy was distributed and implemented." J.A. 436. If the organization cannot meet its burden of proof and the Commission determines that the firewall was inadequately designed or was breached after its creation, allowing material information to pass, the organization will not be able to avail itself of the safe harbor. *Id.*

The Commission couched the regulation in general terms because one size does not fit all when it comes to firewalls: "The safe harbor provision does not dictate specific procedures required to prevent the flow of information referenced in new 109.21(h) because a firewall is more effective if established and implemented by each organization in light of its specific organization, clients, and personnel." J.A. 435. For example, firewall measures effective for a large organization may be inadequate for a small organization with few employees. Similarly, an organization whose employees each perform numerous tasks must take measures different from

those suitable for organizations whose employees perform specialized tasks. "Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding … must necessarily be overinclusive or underinclusive." *Basic v. Levinson*, 485 U.S. 224, 236 (1988).

The district court's holding that the firewall regulation is defective rests primarily on two errors. First, the court failed to give due deference to the Commission's judgment as to the appropriate level of detail the regulation should include. "The *Chevron* test applies to issues of how specifically an agency must frame its regulations." *American Trucking Ass'ns v. Dep't of Transportation*, 166 F.3d 374, 378 (D.C. Cir. 1999). Indeed, "[i]n a series of cases … [this Court has] explicitly accorded agencies very broad deference in selecting the level of generality at which they will articulate rules." *Id.* at 379 (citing cases). Even where Congress has required an agency to promulgate a regulation on a topic, the agency is entitled to broad deference in picking the suitable level if Congress has not dictated the level of specificity. *See, e.g., New Mexico v. EPA*, 114 F.3d 290 (D.C. Cir. 1997) (rejecting demand for greater detail). In *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 217-18 (D.C. Cir. 2007), this Court recently reaffirmed its deferential review. The statute there did not mandate any particular level of specificity at which EPA must define the information required in permit applications. "We can set aside the regulation only if it creates no standard at all." *Id.* at 220. The Commission in the present case provided a general standard, and the district court, like this Court in *Cement Kiln*, should have deferred to the agency's decision as to the degree of detail required.

Furthermore, "[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 96 (1995) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267

(1974), and *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)). *Cf. Coosemans Specialties, Inc. v. Dep't of Agriculture*, 482 F.3d 560, 564 (D.C. Cir.) (precise contours of the law "may be better fleshed out through the application of the law to specific cases and their facts"), *cert. denied*, 128 S.Ct. 628 (2007). In *Guernsey Memorial Hospital*, the Supreme Court rejected the suggestion that the Secretary of Health and Human Services had "a statutory duty to promulgate regulations that, either by default rule or by specification, address every conceivable question in the process of determining equitable reimbursement." *Id.* at 96. The Secretary discharged her obligations by issuing regulations and by relying upon an elaborate adjudicative structure to resolve particular details not specifically addressed by regulation. *Id.* For similar reasons, the Commission has discharged its obligation here.

Any organization unsure whether its firewall is adequate can seek an advisory opinion from the Commission about its own particular circumstances. 2 U.S.C. 437f(a). *See Perot v. FEC*, 97 F.3d 553, 559-60 (D.C. Cir. 1996) (under the Commission's debate regulations, an organization has "leeway to decide which specific criteria to use" in selecting candidates for debates, but it "runs the risk the FEC will subsequently determine that it . . . violated [the law]"; organization "acts at its peril, unless it first secures an FEC advisory opinion"). The requester who relies in good faith on the advisory opinion will not be subject to sanctions for the activity in question. 2 U.S.C 437f(c). In addition, any other person undertaking an activity materially indistinguishable from the requester's activity may also rely on the advisory opinion. 2 U.S.C. 437f(c)(1)(B).

Administrative enforcement matters also provide concrete examples of how the Commission construes its regulations. *See* 72 Fed. Reg. 5595, 5604 (2007). Whether the Commission dismisses an administrative complaint because it finds no "reason to believe" or

"probable cause to believe" the Act has been violated, enters into a conciliation agreement, or brings a civil enforcement action, the public can review the Commission's interpretation of the relevant legal standards as applied to the facts of particular matters. For example, in its explanation of the firewall provision, the Commission cited Matter Under Review (MUR) 5506, concerning a firewall EMILY's List had created. J.A. 435. The Commission accepted the General Counsel's recommendation that EMILY's List had submitted "enough" evidence "to sufficiently rebut the complaint." First General Counsel's Report at 6 (J.A. 310).[10]

Second, the district court simply assumed that the Commission will not fully enforce its own regulation. However, the reviewing court "must presume, in this facial challenge," that the Commission will apply its regulations "in good faith," *Sullivan v. Everhart*, 494 U.S. 83, 94 (1990). In particular, the district court misinterpreted the E&J's brief comment (J.A. 436) that "common leadership or overlapping administrative personnel does not defeat the use of a firewall." J.A. 104. Read in context, that comment means only that common leadership by itself does not automatically defeat a firewall. For example, some leaders may act only as fundraisers and general policymakers, with staff handling the details of making coordinated and independent expenditures. In any event, as the district court itself noted (J.A. 102), the firewall regulation provides that the safe harbor "does not apply" if, "despite the firewall, information … material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication." 11 C.F.R. 109.21(h).

[10] These issues can also be brought before the courts, either when the Commission brings a civil enforcement action under 2 U.S.C. 437g(a)(6) or when an administrative complainant seeks judicial review of a Commission decision to dismiss an administrative complaint. *See* 2 U.S.C. 437g(a)(8).

The district court also erred in criticizing (J.A. 104) the Commission for supposedly ignoring its rejection in 2003 of a proposal for a safe harbor for common vendors. *See* 68 Fed. Reg. 421, 437 (2003). The earlier proposal differed from the new regulation because it concerned the effect of a common vendor's signing a confidentiality agreement, not the specific requirement of a firewall. At that time, the Commission disagreed that "the mere existence" of a confidentiality agreement or ethical screen "should provide a de facto bar to enforcement" of the coordinated communication limits. *Id.* But, foreshadowing the new firewall regulation, the Commission further stated, in the context of former employees, "employers may elect to clearly define the scope of employee responsibilities and to institute prudent policies or practices to ensure that the employee adheres to the scope of those expectations." *Id.* at 439. Moreover, in its recent NPRM for the new firewall regulation, the Commission noted that it had earlier considered and rejected proposals to establish rebuttable presumptions concerning common vendors. J.A. 300. The Commission further explained that "[m]ore recently, however, the Commission recognized [in MUR 5506 (EMILY's List)]… that the presence of a firewall … was sufficient to refute certain allegations of coordination in a particular case." *Id.* Because of that experience, the Commission decided the time was ripe to consider a firewall regulation. *Id.* The district court thus erred when it characterized the Commission's new regulation as an unexplained change of course, and it cited no authority requiring an agency to repeat in the E&J for its final rule every explanation it had already made in its NPRM.

In sum, the firewall regulation does not "unduly compromise" the Act; rather, it furthers the Act's purposes by minimizing the likelihood that entities making independent expenditures will violate the statute's contribution limits. The burden remains on the entity invoking the safe

harbor to produce reliable evidence that it has properly implemented a firewall. This Court should uphold the regulation.

IV. THE COMMISSION'S DEFINITIONS OF "GET-OUT-THE-VOTE ACTIVITY" AND "VOTER REGISTRATION ACTIVITY" ARE LAWFUL

Congress did not define "GOTV activity" and "voter registration activity," thereby leaving gaps for the Commission to fill. As the district court found (J.A. 110, 113), these regulatory definitions pass *Chevron* step one. Contrary to the district court's further findings, however, the regulations also satisfy *Chevron* step two and are not "arbitrary" or "capricious" under the APA. This Court, therefore, should reverse the district court and uphold these regulations.

A. Standard of Review

See supra pp. 10-11.

B. The Regulation Defining "Get-Out-the-Vote Activity" Passes *Chevron* and APA Review

The Commission's regulation defining "GOTV activity" covers all actions by state or local party organizations that actually assist individual registered voters to vote and excludes only mere expressions of encouragement, or general exhortations, to vote. 11 C.F.R. 100.24(a)(3); *see* J.A. 367-68. The GOTV regulation does not "unduly compromise" the Act, but is consistent with the Act, provides an understandable and administratively manageable definition, and should be upheld.

After reviewing the statutory language and the legislative history of the "federal election activity" provision, the Commission "found no evidence that Congress intended to capture every state or local party event where an individual ends a speech with the exhortation, 'Don't forget to vote!'" (J.A. 367). By retaining the "assist" and the "individualized means" requirements, the Commission excluded "mere encouragement" from the scope of the rule. Thus, the rule focuses

specifically on the Act's purpose of regulating the funds used to influence federal elections by capturing actual GOTV activity — getting registered voters to cast ballots.

The regulation's examples provide guidance for identifying GOTV activities that "assist" individuals in engaging in the act of voting. Providing individual voters with information such as the date of the election, the times when polling places are open, and the location of particular polling places comes within the regulation, as does offering to transport or actually transporting voters to the polls. 11 C.F.R. 100.24(a)(3)(i), (ii). The E&J includes (J.A. 369) an additional example of GOTV activity: a state party committee hires a consultant one month before an election to design a GOTV program and recruit volunteers to drive voters to the polls on election day. The Commission further stated that its definition of "GOTV activity" would "apply equally to actions taken with regard to absentee balloting or early voting." *Id.*

The GOTV regulation makes clear that the examples included in the regulation are not exhaustive ("Get-out-the-vote activity includes, but is not limited to …"). To clarify that the regulation applies without time limitation, the Commission also deleted a time frame reference ("within 72 hours of an election") that had appeared in the first example in the prior version of the GOTV regulation. Whether a particular action is GOTV activity depends on the particular facts.

The history of another provision of the FECA, 2 U.S.C. 441b, supports the Commission's "GOTV activity" regulation. In 1971, Congressman Hanson successfully offered an amendment to the bill that eventually became the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Title II, § 205, 86 Stat. 10 (1972). The amendment included language permitting corporations and unions to finance certain "nonpartisan registration and get-out-the-vote campaigns" (now codified at 2 U.S.C. 441b(b)(2)(B)). The legislative history of this amendment strongly suggests that Congress understood GOTV to mean personal assistance, such as going

door-to-door to communicate with voters and transporting voters to the polls. *See* 117 Cong. Rec. 43,386-388 (Nov. 30, 1971) (remarks of Cong. Crane, Ashbrook, and Hays). The Third Circuit understood the legislative history that way as well. *Ash v. Cort*, 496 F.2d 416, 425 (3d Cir. 1974) ("The debates … indicate that members of Congress had a fairly specific and limited type of activity in mind when speaking of 'get-out-the-vote' drives, primarily door-to-door canvassing and escorting people to the polls."), *rev'd on other grounds*, 422 U.S. 66 (1975). The Commission's interpretation of "GOTV activity" also accurately reflects the longstanding congressional recognition of the importance of GOTV in other provisions of the Act. *See* J.A. 368; 2 U.S.C. 431(9)(B)(ii) (exception to the definition of "expenditure" for, *inter alia*, nonpartisan GOTV activity).

The district court found the revised GOTV regulation defective primarily because the Commission did not provide examples to cover what the court called the "gray area" (J.A. 115). In reaching this conclusion, the court made the same mistakes it made in reviewing the firewall regulation: It failed to defer to the Commission's judgment as to the appropriate level of detail to include, and it failed to take into account that administrative and judicial proceedings provide further guidance, thereby "coloring" the "gray area." *See supra* pp. 34-36.

The district court also erred in suggesting (J.A. 114-15) that the Commission unduly narrowed the GOTV regulation in Advisory Opinion ("AO") 2006-19 (J.A. 408-418). In that opinion, the Commission considered proposed activities by a local party committee in connection with a nonpartisan, municipal general election to be held on the same day as a federal primary election. The local party committee proposed to make pre-recorded, electronically dialed telephone calls and send a form letter to all registered Democratic voters in the City of Long Beach between four and fifteen days prior to the municipal election to urge the recipient to vote for a particular mayoral candidate (and other local candidates). In advising that the

proposed communications did "not constitute assisting voters in the act of voting by individualized means," the Commission found several facts to be decisive: The communications promoted the election of only nonfederal candidates; the timing of the communications supported the conclusion that they were likely to be "mere encouragement" to vote (*i.e.*, were designed simply to increase general public support for a municipal candidate); and the identical communications did "not provide any individualized information to any particular recipient (such as the location of the particular recipient's polling place)"or "the hours" the polling place would be open.

The Commission based its conclusion on the particular combination of facts presented and might well have decided otherwise if the facts had differed. *See FEC v. National Conservative PAC*, 647 F.Supp. 987, 992, 995 (S.D.N.Y. 1986) (reliance on AO unwarranted where facts different). Indeed, in AO 2006-19 the Commission stressed the fact-dependent nature of its opinion (J.A. 411) and, more generally, the Commission has had few occasions to apply the regulatory definition to specific scenarios. Thus, the district court improperly generalized about the Commission's views from one limited advisory opinion and had no basis for concluding that the Commission has adopted an unduly narrow interpretation of its regulation.

Finally, the district court failed to see the weaknesses in a hypothetical that Shays posed:

> [W]ithin days of a federal election a state party can send out multiple direct mailings to every potential voter sympathetic to its cause urging them to … vote, and can blanket the state with automated telephone calls by celebrities identifying the date of an election and exhorting recipients to get out to vote, without being deemed to be engaged in … GOTV activity.

J.A. 115. This sketchy scenario fails to describe clearly the contents of the hypothetical communications, and the district court cited no evidence that any political party has ever done anything like this. Nor did the court question whether a political party would be likely to spend

money to deliver such a neutral message that only reminds the recipient to vote on a specified date and does not clearly identify any candidate or tout the party, or offer any instructions on when or where to vote, or offer any assistance in getting the recipients to the polls.

The court also discounted the effect of other regulations that work with section 100.24(a)(3) to ensure that nonfederal funds are not used improperly. Even if it were clear that the activities sketched in the hypothetical scenario do not come within the definition of "GOTV activity" (or any other type of "federal election activity"), the state party committee would still be required to finance its activities with federal funds only or with an allocation of federal and nonfederal dollars. *See* 11 C.F.R. 106.7(b), 106.7(c)(5) (requiring use of federal or federal/nonfederal allocated funds for certain mixed activity and voter-drive activities). Thus, even if certain activity falls outside section 100.24(a)(3), it is not necessarily exempt from federal funding requirements.[11]

Moreover, the hypothetical is misleading to the extent it suggests that a broad range of similar activity would fall outside the scope of 2 U.S.C. 431(20)(A)(ii). For example, if party communications do not mention particular candidates but nevertheless urge the recipients to support a particular political party, the communications would fall within the "generic campaign activity" category of "federal election activity." Because "generic campaign activity" and "get-out-the-vote activity" are treated identically under section 431(20)(A)(ii), that an ad may fall within the former but not the latter has no regulatory significance.

[11] Other close variations on the hypothetical facts would bring the activities within the scope of other provisions. For example, if the mass mailings and telephone calls urge the recipients to vote for a clearly identified federal candidate, those communications are undeniably federal election activity that must be paid for entirely with federal funds. 2 U.S.C. 431(20)(A)(iii); 431(22); 11 C.F.R. 100.24(b)(3); 11 C.F.R. 300.33(c)(1).

Finally, a communication's focus on candidates for state office will not necessarily immunize the communication from being considered voter registration or GOTV activity. For example, GOTV efforts by a state or local party committee can satisfy the regulation's "assist" and "individual contact" requirements even if the only clearly identified candidate is a state or local candidate. *See* 67 Fed. Reg. 49,064, 49,070 (2002) (excluding from an exception to the definition of "federal election activity" "a telephone bank on the day before an election where there is a Federal candidate on the ballot and where GOTV phone calls are made to over 500 voters, even if the calls only refer to a State or local candidate.").

In sum, the definition of "GOTV activity" fully supports the Act's purposes when it is viewed, as it must be, as part of a wider regulatory scheme governing the financing of federal election activities. The regulation satisfies the deferential review mandated by *Chevron* and the APA.

C. The Regulation Defining "Voter Registration Activity" Passes *Chevron* and APA Review

The regulation defining "voter registration activity" covers the funding of all activities by state, district, or local party organizations that provide "individualized means to assist" individuals to register to vote 120 days or fewer before the date of a regularly scheduled federal election. 11 C.F.R. 100.24(a)(2). The Commission included the individual assistance requirement to exclude the mere expression of encouragement to register to vote. J.A. 367. This exclusion preserves the traditional role of state and local party organizations in encouraging voter registration and avoids unnecessarily infringing on their First Amendment interests. *See* J.A. 368. In particular, it ensures that every *state or local* party gathering that ended with a

routine "Now remember to register to vote!" is not transformed into "*federal* election activity" that must be financed only with federally regulated funds.[12]

No statutory language or legislative history suggests that Congress intended BCRA to limit the traditional role of state and local party organizations in encouraging citizens to register to vote. Commenters with experience with such organizations explained that a more restrictive regulation could adversely affect the willingness of local political parties, especially those primarily staffed by volunteers, to engage in voter registration activities or to respond to general voter inquiries. *See* J.A. 367; Vol. I, Doc. 8, A.R. 49, 50; Doc. 18, A.R. 189-90, 195-99, 225. With this exclusion, the regulation ensures what really matters — the financing of actual voter registration activity with federally regulated funds — and does not permit circumvention of the Act.

Furthermore, permitting nonfederal funds to be used for a state or local party event at which a speaker concludes his remarks with "Don't forget to register to vote!" will not lead to any actual or apparent corruption of any federal candidates or officeholders, the primary justification for FECA. *See Buckley*, 424 U.S. at 25, 26, 45, 53; *McConnell*, 540 U.S. at 142, 185 n.72, 187. "[N]o legislative history or administrative record [supports the notion] that general encouragement to register to vote or to vote is similar to the corrupting activity Congress was concerned with when it required certain activity to be funded with Federal dollars" (J.A. 368). Indeed, when it enacted BCRA, Congress continued to allow state and local party

[12] Defining "voter registration activity" broadly to include mere encouragement would also affect the ability of party committees and federal candidates to raise funds for section 501(c) charities that organize nonpartisan voter registration drives. The solicitation rules regarding these entities depend on the meaning of "federal election activity." *See* 2 U.S.C. 441i(d), (e)(4).

organizations to use at least some nonfederal funds for voter registration and GOTV activities. *See* 2 U.S.C. 441i(b)(2) (Levin funds).[13]

Even with the exception for mere encouragement, the regulation is very broad. It states that "[v]oter registration activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms." 11 C.F.R. 100.24(a)(2). In *Shays I*, the district court concluded that "it is possible to read the term 'voter registration activity' to encompass those activities that actually register persons to vote, as opposed to those that only encourage persons to do so without more." 337 F.Supp.2d at 99. But in *Shays III*, the court found the regulation defective under *Chevron* step two and the APA, as it had the GOTV regulation, primarily because the Commission did not provide examples to cover the "gray area." J.A. 112. In addition, in the court's view, the Commission was interpreting the regulation too narrowly. J.A. 111. Neither of these reasons withstands scrutiny.

The district court made the same mistake in reviewing the regulatory definition of "voter registration activity" that it did in reviewing the firewall and GOTV regulations. *See supra* pp. 34-36, 40. It failed to defer to the Commission's judgment as to the appropriate level of detail. The regulation includes examples and the expanded E&J presents additional examples, illustrating what does and does not constitute "voter registration activity." For example, providing voter registration forms, providing answers about how to complete them, and mailing

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[13] As the Commission noted (J.A. 368), its regulation is consistent with longstanding congressional policy to support and encourage voter registration. This policy is reflected not only in FECA itself, *see* 2 U.S.C. 431(9)(B)(ii) ("expenditure" does not include "nonpartisan activity designed to encourage individuals to vote or to register to vote"), but in important federal statutes governing voting rights. *See, e.g.*, Voting Rights Act of 1965, 42 U.S.C. 1973b(a)(1)(F)(iii); National Voter Registration Act of 1993, 42 U.S.C. 1973gg(b)(1); Help America Vote Act of 2002, 42 U.S.C. 15483.

completed forms would constitute voter registration activity. J.A. 368. However, responding to voter-initiated inquiries by providing publicly available information about governmental sources, such as the 800 number of a state's Division of Elections, would not. *Id.* Whether a specific action constitutes "voter registration activity" depends on particular facts, and the Commission could not possibly have discussed every conceivable permutation of circumstances. Administrative and judicial proceedings will apply the definition to specific scenarios and thus color the "gray area" that concerned the district court. *See supra* p. 35-36.

The district court criticized the E&J's examples as "straw men" that note only the obvious. J.A. 113. What the court found obvious may not be obvious, however, to everyone in the regulated community. Moreover, in tension with its view that the examples create too large a gray area, the court also stated (J.A. 111) that the examples suggest that the Commission is interpreting the regulation very narrowly. But the Commission made clear that these examples are nonexclusive by emphasizing that they "are illustrations only." J.A. 368. *See United States v. American College of Physicians*, 475 U.S. 834, 843 (1986) ("Attributing to the term 'example' its ordinary meaning, we believe that Example 7 is best construed as an illustration of one possible application under given circumstances of the regulatory standard."). By assuming the worst about how the Commission might apply its regulation, the district court failed to give due deference to the Commission. *Cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("substantial deference" owed to an agency's interpretation of its own regulations).

CONCLUSION

For the foregoing reasons, the judgment of the district court against the Commission should be reversed.

Respectfully submitted,

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January 15, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS, Plaintiff-Appellee, v. FEDERAL ELECTION COMMISSION, Defendant-Appellant.	)	Nos. 07-5360, 07-5361 **CERTIFICATE OF COMPLIANCE**

CERTIFICATE OF COMPLIANCE WITH Fed.R.App.P. 32(a)(7)

As required by Fed.R.App.P. 32(a)(7)(C)(i), I hereby certify that the foregoing brief complies with the length requirements of Fed.R.App.P. 32(a)(7)(B). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 13,839 words.

I further certify that the foregoing brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5)(A), as modified by D.C. Cir. R.32(a)(1), and the type style requirements of Fed.R.App.P. 32(a)(6). The brief has been prepared in a proportionately space typeface using Microsoft Word 2003 in Times New Roman font size 12.

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