Oral Argument Scheduled For May 12, 2005

No. 04-5352

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS and MARTIN MEEHAN,

Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

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

STATEMENT OF JURISDICTION

Plaintiffs Shays and Meehan ("appellees") alleged jurisdiction under 28 U.S.C. 1331 over their claims that regulations promulgated by the Federal Election Commission ("the Commission" or "FEC") are facially invalid under the Administrative Procedure Act (J.A. 16 ¶8).[1] The Commission contests the district court's jurisdiction. See infra pp. 9-19. This Court has jurisdiction under 28 U.S.C. 1291 over the Commission's timely appeal filed September 28, 2004, from the district court's final judgment entered September 18, 2004.

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

ISSUES PRESENTED

1. Whether appellees have standing under Article III of the Constitution to challenge Commission regulations implementing the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002).

2. Whether the challenge to the regulations is ripe for judicial review under the Administrative Procedure Act.

3. Whether the definitions of "solicit" and "direct," 11 C.F.R. 300.2(m)-(n), are arbitrary, capricious, or contrary to law.

4. Whether the "content standards" for coordinated communications, 11 C.F.R. 109.21(c)(4), are arbitrary, capricious, or contrary to law.

5. Whether 11 C.F.R. 300.33(c)(2), regarding the payment of state, district, and local political party employee wages and salaries, is arbitrary, capricious, or contrary to law.

6. Whether 11 C.F.R. 300.32(c)(4), establishing a de minimis exception for "Levin funds," is arbitrary, capricious, or contrary to law.

7. Whether 11 C.F.R. 100.29(b)(3)(i), stating that communications must be publicly distributed "for a fee" to be regulated as "electioneering communications," is arbitrary, capricious, or contrary to law.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set out in the Addendum ("Add.") to this brief.

STATEMENT OF THE CASE

The Commission appeals the September 18, 2004, judgment of the United States District Court for the District of Columbia in this facial challenge to numerous regulations promulgated

by the Commission to implement BCRA, which amended the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), codified at 2 U.S.C. 431-455. After concluding that appellees have standing and the case is ripe, the district court found 15 regulatory provisions unlawful, either substantively under the test of Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), or because of procedural defects under the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). (J.A. 131-99.) The court remanded the regulations found invalid to the Commission "for further action consistent with" the court's decision. (J.A. 199-200.)

The Commission appeals the district court's threshold jurisdictional determinations and its rulings on the merits on five of the regulations.

STATEMENT OF FACTS

A. THE PARTIES

Christopher Shays and Martin Meehan are Members of the House of Representatives and were candidates for re-election in 2004. (J.A. 82 ¶1, 85 ¶1, 130.) They were the principal sponsors of BCRA in the House (id. at 82 ¶2, 85 ¶2, 130) and submitted comments in the Commission's rulemakings. Id.

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). Congress specifically directed the Commission to promulgate regulations to implement BCRA. See BCRA §§214(c), 402(c)(1)-(c)(2); 2 U.S.C. 434(f)(3)(B)(iv).

B. STATUTORY AND REGULATORY BACKGROUND

BCRA added new restrictions on the solicitation and use of "nonfederal" funds, commonly called "soft money" — funds that do not meet FECA's source and amount limitations. See Title I of BCRA, codified in part at 2 U.S.C. 441i. In the "Levin Amendment," Congress provided an exception to the requirement that state, district, and local party committees spend only federal funds ("hard money") for federal election activities. See 2 U.S.C. 441i(b)(2) and infra pp. 37-41. Among the Commission's regulations implementing Title I's soft money provisions are these regulations at issue here: 11 C.F.R. 300.2(m) and (n) (defining "to solicit" and "to direct"); 300.32(c)(4) ("Levin funds"); 300.33(c)(2) (salaries and wages of state and local party employees) (Add. 78-79, 81, 82). See Final Rules and Explanation and Justification on "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money." 67 Fed. Reg. 49,064 (July 29, 2002); J.A. 230-49.

Title II of BCRA added a new category of communications, "electioneering communications," to those already regulated by the Act. See 2 U.S.C. 434(f)(3). Among the Commission's regulations on "electioneering communications" is 11 C.F.R. 100.29(b)(3)(i) (defining electioneering communications as public communications disseminated for a fee), at issue here. See 67 Fed. Reg. 65,190 (Oct. 23, 2002); J.A. 309-32; Add. 65. Title II also modified the Act's treatment of coordinated expenditures — those that are treated as contributions because not made independently of the intended beneficiary. Most notably, Congress repealed the regulations on coordinated communications and instructed the Commission to promulgate new ones. See BCRA §214; 2 U.S.C. 441a(a)(7)(C). The Commission's new regulations on coordinated communications include 11 C.F.R. 109.21(c)(4) (content standards). See 68 Fed. Reg. 421 (Jan. 3, 2003); J.A. 361-98; Add. 73-74.

C. THE DISTRICT COURT'S DECISION

After finding that appellees have standing and that their challenge is ripe for resolution (J.A. 131-40), the district court held that four of the regulatory provisions at issue are valid and fifteen are inconsistent with the underlying statute or violate the APA (J.A. 200). We summarize here only the court's discussion of the issues on appeal.

1. Standing and Ripeness

Noting that appellees did not rely on their sponsorship of BCRA to establish standing, the court also concluded that they neither alleged nor provided facts to support a competitor theory of standing (J.A.136 n.12). Instead, the court found that appellees meet Article III's injury-in-fact requirement because they "are directly regulated by the rules they challenge in that the regulations shape the environment in which Plaintiffs must operate" (J.A. 134). Moreover, "the rights they seek to vindicate — in essence, to campaign in a regime that reflects Congress's mandate as articulated in BCRA — are legally cognizable" (J.A. 135). The court concluded that causality was satisfied because this alleged harm "is connected to all of the regulations they challenge" (J.A. 136).

Acknowledging that "Plaintiffs' suit is of a type 'ordinarily' considered unripe for review" (J.A. 138), the court concluded it was nonetheless ripe because it is "purely legal, and … no judicial or agency considerations warrant[] delay in reviewing the regulations" (J.A. 139).

2. The Merits

a. 11 C.F.R. 300.2(m)-(n) define "solicit" and "direct" as used in the provisions of BCRA that restrict how national party committees, candidates, and officeholders can solicit funds and direct donations. See BCRA §§ 309, 323; 2 U.S.C. 441i(a), (b)(2)(C), (d), (e). The court found that the Commission's definitions satisfy Chevron step one (J.A. 158-59). At

Chevron step two, however, the court decided that the definition of "direct" is "out of line with the dictionary definition and common understanding" and "renders the term superfluous" (J.A. 160). Although it found the definition of "solicit" "permissible on its face under Chevron step two" (J.A. 161), the court nevertheless rejected it as "incongruent with Congress's legislative purpose in enacting BCRA." (J.A. 162.)

b. The court decided that 11 C.F.R. 109.21(c)(1)-(4), which uses a "content standard" in defining which communications will be treated as expenditures coordinated with a candidate or political party, satisfies Chevron step one. Under Chevron step two, the court found that "[the agency's] construction of the statute is facially permissible" (J.A. 149). The court found the regulation invalid nonetheless, concluding that any consideration of the content of a communication would facilitate circumventing the Act's contribution limits (J.A. 149-51).

c. 11 C.F.R. 300.33(c)(2) implements 2 U.S.C. 431(20)(A)(iv) and provides that "[s]alaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity … shall be paid from funds that comply with State law." The district court found that section 300.33(c)(2) satisfies Chevron step one and is facially permissible under Chevron step two (J.A. 187). The court still rejected the regulation on the ground that it creates the potential for abuse (J.A. 188).

d. 11 C.F.R. 300.32(c)(4) creates a de minimis exception to 2 U.S.C. 441i(b)(1) and (2), allowing a state or local party committee to pay for its federal election activity entirely with "Levin funds" if the disbursements aggregate no more than $5,000 in a calendar year. The court held that this "violates Chevron step one" (J.A. 190).

e. 11 C.F.R. 100.29(b)(3)(i) defines "publicly distributed," a term the Commission used in defining "electioneering communication." 11 C.F.R. 100.29(a)(2). "Publicly

distributed" communications are only those "disseminated for a fee." 11 C.F.R. 100.29(b)(3)(i). Acknowledging that "BCRA does not discuss the financing of 'electioneering communications'" (J.A. 198), the district court nonetheless invalidated the provision under Chevron step one because the "for a fee" requirement "cannot be squared with the plain meaning of BCRA's text" (J.A. 199) (footnote omitted).

SUMMARY OF ARGUMENT

A. Appellees' claim is that the Commission's regulations are flawed because they do not regulate the activities of other people more strictly. Despite the heightened burden to establish standing on such a claim and the evidentiary requirements at the summary judgment stage, appellees provided no specific facts to support their standing. Instead, they offered only vague and speculative allegations of hypothetical risks of actions that might be taken by unidentified third parties. Moreover, they completely failed to show the necessary causal connection between each of the challenged regulations and an alleged personal injury. The district court erred by finding that appellees have standing merely because the challenged "regulations shape the environment in which [appellees] must operate" (J.A. 134); such a generalized grievance about the proper enforcement of the law is not sufficient under Article III.

Appellees' claims are not ripe because they are based on appellees' speculation about how the regulations will be applied, not on any concrete application. Appellees also have another adequate remedy in court, which makes facial review of the regulations unavailable under the Administrative Procedures Act.

B. Judicial review of the challenged regulations is highly deferential, and none of them is arbitrary and capricious or inconsistent with the statute.

1. The definitions of "solicit" and "direct" implement BCRA's limitations on the raising of soft money. Congress delegated to the Commission the task of defining these terms, and the Commission reasonably defined them to require an affirmative verbalization or writing to avoid both vagueness and unnecessary interference with candidates' and political parties' associational interests. The district court erred by holding that the Commission was required to define these terms more broadly.

2. Congress instructed the Commission to write new regulations defining when communications coordinated with a candidate or political party would constitute coordinated expenditures and thus be treated as contributions under the Act. The district court concluded that the Commission's reliance upon the content of a communication as one factor in this determination is unlawful, but the Act itself defines the underlying term "expenditure" as including only disbursements for the purpose of influencing a federal election. The Commission reasonably followed Congress's lead in other provisions of the statute in relying upon the proximity to an election and whether the communication addresses candidates or elections as factors in defining whether a coordinated communication is sufficiently election-related to be regulated as a coordinated expenditure.

3. In BCRA, Congress required salaries of state or local employees who spend more than 25% of their monthly time on federal election activity to be paid with federal dollars. Congress did not specify how employees who spend less time on federal election activity must be paid, and the Commission reasonably concluded that such employees could be paid entirely with nonfederal dollars.

4. The Levin Amendment allows state and local parties, subject to certain restrictions, to use soft money to pay for part of some federal election activity. Congress

exempted low levels ($5,000 or less annually) of such activity from the Act's reporting requirements, and the Commission reasonably created a de minimis exception that allows state and local parties to pay for the same limited amount of such activity entirely with soft money. This exception cannot lead to circumvention of the Act's contribution limits, and adoption of a de minimis exception is presumed to be within the agency's authority.

5. The Commission reasonably interpreted "electioneering communication" to apply only to paid broadcast advertisements. The Act's purpose is to regulate how campaign speech is financed, and without the fee requirement a wide range of entertainment and educational programs, as well as public service announcements, could fall within the definition of electioneering communication even though there is no evidence that they present any of the problems this provision was intended by Congress to correct.

ARGUMENT

I. SHAYS AND MEEHAN HAVE NOT SATISFIED THEIR BURDEN OF PROVING JURISDICTION

A. STANDARD OF REVIEW

This Court reviews de novo whether the district court had jurisdiction. National Wrestling Coaches Ass'n v. Department of Education, 366 F.3d 930, 937-38 (D.C. Cir. 2004); Pfizer, Inc. v. Shalala, 182 F.3d 975 (D.C. Cir. 1999).

B. SHAYS AND MEEHAN FAILED TO DEMONSTRATE STANDING

"The requirement that jurisdiction be established as a threshold matter … is 'inflexible and without exception.'" Steel Company v. Citizens for Better Environment, 523 U.S. 83, 94-95 (1998) (citation omitted). To establish their standing, appellees bear the burden of demonstrating (1) a "concrete and particularized," "actual or imminent" injury that is (2) fairly traceable to the challenged regulations and (3) is likely to be redressed by a favorable decision. Lujan v.

Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); McConnell v. FEC, 540 U.S. 93, 225 (2003). "Particularized" means "the injury must affect the plaintiff in a personal and individual way," Lujan, 504 U.S. at 560 n.1, and cannot be merely a generalized interest in the proper enforcement of the law. FEC v. Akins, 524 U.S. 11, 23 (1998); Lujan, 504 U.S. at 573-74.

At the summary judgment stage, when mere allegations no longer sufficed, appellees had to prove standing with admissible evidence. Lujan, 504 U.S. at 561. See also FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990) ("'[T]he necessary factual predicate may not be gleaned from the briefs and arguments'") (citation omitted). They had to make "a factual showing of perceptible harm" to themselves. Lujan, 504 U.S. at 566.

As the district court concluded, appellees conceded that their sponsorship of BCRA does not support their standing (J.A. 132; J.A. 8, Item 29, at 85), and they neither alleged a competitor theory of standing nor made a factual showing that the regulations give their opponents a competitive advantage (J.A.136 n.12).[2] Instead, appellees chose to rely exclusively on their nearly identical declarations (J.A. 82-87, 133, 136 n.12), which merely repeat some of the complaint's vague and speculative allegations. By relying on the same general allegations to litigate the validity of 19 diverse regulations, without connecting any specific injury to any specific regulation, appellees ignored the admonition that "standing is not dispensed in gross." Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996).[3] "Art[icle] III standing requires an injury with a

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[2] This Court has not decided whether the "competitive standing" doctrine used in the economic sphere applies to the political context. Gottlieb v. FEC, 143 F.3d 618, 620 (D.C. Cir. 1998). In any event, the regulations challenged here apply in the same way to the appellees and their supporters as they do to their electoral opponents.

[3] See also International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77 (1991) (superseded by statute on other issues) ("Standing ... is gauged by the specific common-law, statutory or constitutional claims that a party presents"); Catholic Social Service v. Shalala, 12 F.3d 1123, 1125 (D.C. Cir. 1994) ("plaintiff's standing must be analyzed with reference to the particular claim made").

nexus to the substantive character of the ... regulation at issue," Diamond v. Charles, 476 U.S. 54, 70 (1986). Appellees did not even attempt to produce facts demonstrating how they will suffer an imminent personal injury from each of the regulations they challenge.

Appellees' declarations essentially rely on their mere status as candidates and officeholders to give them general standing to challenge every aspect of campaign finance regulation, but the Supreme Court recently foreclosed this claim by finding that candidates who were unable to show a concrete, personal, imminent harm from the particular provision of campaign finance law they challenged lacked standing. See McConnell, 540 U.S. at 225-26 (Senator McConnell lacked standing to challenge BCRA §305 because he could not show that the provision would cause him an injury that was imminent); id. at 226-28 (despite their general stake in the electoral process, candidates lacked standing to litigate the validity of BCRA's increased contribution limits).

Other than describing appellees, the declarations present only conclusory assertions, not facts within the "personal knowledge" of the declarants that "would be admissible in evidence." Fed. R. Civ. P. 56(e). Appellees broadly assert, for example, that they "will be forced … to raise money, campaign, and … discharge … [their] public responsibilities in a system … corrupted by … special-interest money" (J.A. 83 ¶4, 86 ¶4). As the district court noted in rejecting standing on that basis, the allegation of corruption "is too speculative … and is made devoid of any evidence" (J.A. 134 n.8). They assert that the public's perception of officeholders will be "affect[ed]" if the challenged regulations remain in force (J.A. 83 ¶5, 86 ¶5), but present no facts whatsoever about the public's actual perception of the regulations (or of anything else), let alone of how that perception might be affected by a change in these regulations. Appellees claim harm from unspecified regulations governing the funding of state and local party committees (J.A.

83-84 ¶6, 86 ¶6), but offer no evidence about the finances of party committees in their own respective states or how such financing would create any imminent harm to themselves.

More generally, the declarations recite no facts indicating that any identifiable person or entity has had any plans to engage in any activities to affect their own election campaigns, of the sort they believe should be prohibited, nor do they offer any factual basis for concluding that any such activities that might occur are more likely to hurt than to support the appellees' own reelection efforts. See United Transportation Union v. ICC, 891 F.2d 908, 914 (D.C. Cir. 1989) (rejecting standing "primarily because it is wholly speculative whether decreased competition in the railroad industry will harm rather than help UTU members"). For example, appellees assert (J.A. 84 ¶7, 87 ¶7) that they "will be open to attack, during critical … periods[,] … in broadcast advertising campaigns." They do not identify any specific regulation, but may have in mind 11 C.F.R. 100.29(b)(3)(i), which regulates communications publicly disseminated "for a fee" within 60 days of an election. Yet appellees offer no evidence that anyone has ever broadcast an advertisement attacking any candidate without a fee, or that anyone planned to do so now, against themselves or any other candidate. See McConnell, 540 U.S. at 226 ("'threatened injury must be certainly impending to constitute injury in fact'") (citation omitted; emphasis in original).

Appellees also claim that, as party members, they "might be expected to raise soft money" for state party committees (J.A. 83-84 ¶6, 86 ¶6) and might be punished by their parties if they refuse to do so (J.A. 18 (First Amended Complaint ("FAC") ¶15)). However, BCRA does not prohibit federal candidates from soliciting soft money for state parties from individuals; it merely limits the amounts they may solicit from any one person. McConnell, 540 U.S. at 181 n.70. Since nothing in the regulations requires a reluctant candidate to raise soft money, any

retaliation against appellees by a political party for refusing to solicit soft money would be an "'unfettered choice[] made by independent actors … not before the courts,'" Lujan, 504 U.S. at 562 (citation omitted), in response to appellees' own personal choices. See McConnell, 540 U.S. at 228 (the "inability [of candidate-plaintiffs] to compete stems not from the operation of [BCRA §307's increased hard-money contribution limits], but from their own personal 'wish' not to solicit or accept large contributions, i.e., their personal choice").

The district court concluded that appellees demonstrated an Article III injury in fact because they "are directly regulated by the rules they challenge in that the regulations shape the environment in which Plaintiffs must operate" (J.A. 134). However, appellees do not challenge the way any regulation restricts their own conduct, but only allege the regulations should limit the conduct of others more strictly. Therefore, the court's broad statement does not identify any injury to appellees from the regulations, and is nothing more than a version of the "status-as-candidate" argument, which we have shown cannot survive McConnell.[4] See Whitmore v. FEC, 68 F.2d 1212, 1215 (9th Cir. 1995) (that candidate "had a stake in the congressional campaign finance laws does not imply that the law caused her injury"). The district court further stated that "the rights [the appellees] seek to vindicate — in essence, to campaign in a regime that reflects Congress's mandate … in BCRA — are legally cognizable" (J.A. 135). It is well established, however, that "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984) (black parents' interest in ensuring racially nondiscriminatory schools held

[4] See also Lujan, 504 U.S. at 565-566 (rejecting as too abstract an "ecosystem nexus" theory of standing, under which "any person who uses any part of a 'contiguous ecosystem' adversely affected by a [governmentally] funded activity has standing") (emphasis in original).

inadequate to support standing); Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997) (no justiciable interest in proper enforcement of the campaign finance laws).

Relying on two First Circuit cases, the court also stated that appellees are harmed by "having to adjust their campaigns to account for activities that they maintain should be banned but are permitted by the regulations" (J.A. 136). This explanation suffers from several independently fatal defects. First, appellees' declarations do not even allege that they will make any adjustments to their campaign to account for the mere possibility that someone might engage in such activities affecting them, much less provide supporting facts, such as identifying adjustments they were planning. Each declarant merely makes the conclusory assertion that his "activities are … directly affected by the fact that others … are subject to the same regulation" (J.A. 83 ¶3, 86 ¶3).

Second, having attributed to appellees a claim of injury they did not make, the court failed to require any evidence of a causal connection between such harm and each of the challenged regulations, as Supreme Court and D.C. Circuit precedents require. See supra pp. 10-11. Instead, the court summarily concluded that the "harm … is connected to all of the regulations they challenge" (J.A. 136). This does not explain how or why the appellees' might "adjust" their campaigns in response, for example, to the possibility that the salaries of some state and local party employees concerned primarily with nonfederal elections might be paid entirely, rather than partially, with soft money (11 C.F.R. 300.33), or in response to the possibility that a candidate or party official somewhere might somehow induce a contribution of soft money to some state party committee without asking for it (11 C.F.R. 300.2(m)).

Third, the First Circuit cases on which the district court relied differ significantly from this one, and applying them to this case would violate controlling precedent. In Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993), a gubernatorial candidate was found to have standing to challenge a statute that conferred competitive advantages on candidates who accepted public financing and required the plaintiff, when she declared her candidacy, to make an irrevocable choice whether to do so. Id. at 30. The court concluded that "the coerced choice between public and private financing 'colored [the plaintiff's] campaign strategy from the outset.'" Id. at 37 (internal citation omitted). Far from imposing such a "coerced choice" on appellees themselves, the regulations are challenged here because they allegedly do not restrict private choices about campaign activities enough. Moreover, unlike appellees, the plaintiff in Vote Choice presented evidence to support a defined and imminent injury.

The district court's reliance on Becker v. FEC, 230 F.3d 381 (1st Cir. 2000), was also erroneous. A sharply divided court in Becker accepted Ralph Nader's argument that he faced a competitive injury because his philosophical opposition to accepting corporate contributions would lead him to decline, if offered, an invitation to join the corporate-sponsored presidential debates. Unlike the appellees here, Nader at least alleged specific campaign adjustments (higher spending on advertising) that he argued were traceable to specific pending activities (corporate sponsorship of the planned debates) that were authorized by specific regulations.

But Becker is not only factually distinguishable; it is wrongly decided. McConnell would require that court to conclude today that the alleged injury was traceable to Nader's personal choice not to accept corporate-sponsored benefits, not to the Commission's regulations generally authorizing privately sponsored candidate debates. See supra pp. 12-13. The McConnell Court's conclusion that candidates who did not wish to accept large contributions lacked standing to

challenge a statutory increase in contribution limits because "their own personal 'wish' not to solicit or accept large contributions" was the true cause of their self-inflicted harm, 540 U.S. at 228, would be directly applicable to Nader's personal wish not to accept the benefit of corporate sponsorship of a debate permitted by the regulations at issue in Becker.[5] It is also applicable to appellees' attempt to invalidate regulations that permit activities in which they do not personally wish to engage.

C. THE ABSTRACT POLICY DISPUTES PRESENTED IN THIS CASE ARE NOT RIPE UNDER THE CONSTITUTION OR THE APA

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

> "Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until the scope of the controversy has been

[5] The Becker court also erred by accepting Nader's self-serving assertion of how corporate sponsorship of debates would affect his campaign, without requiring any factual substantiation of the causal relationship, 230 F.3d at 387 ("we do not think it proper to second-guess a candidate's reasonable assessment of his own campaign"). The Court's acknowledgment that identifying an actual causal connection "would require the clairvoyance of campaign consultants or political pundits," id., would lead to a conclusion that standing has not been proven, under this Court's precedent. Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir. 1980) ("the endless number of diverse factors potentially contributing to the outcome of … elections … forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event'").

> reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation …."

NPHA, 538 U.S. at 808 (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990) (second bracket added)). Neither BCRA nor FECA provides for immediate judicial review of agency regulations; appellees rely on the APA's general review provisions.

"Under the fitness for review prong, the court considers not only whether the claims present purely legal questions … but also whether the courts and agency would benefit from postponing review until the questions at issue have taken on a more definite form," NRDC v. FAA, 292 F.3d 875, 881 (D.C. Cir. 2002), for "even purely legal issues may be unfit for review." Atlantic States Legal Foundation v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003). The claims by appellees are grounded largely on their own speculation about how the Commission would construe and apply the general language of the regulations, and how other persons might exploit "loopholes" to engage some day in activities that the appellees believe should be unlawful. See, e.g., J.A. 26-28, 46-48, 51-54, 82-87. In these circumstances, "we have 'the classic institutional reason to postpone review: we need to wait for "a rule to be applied [to see] what its effect will be.'" Atlantic States, 325 F.3d at 385 (citations omitted).

For reasons similar to those involving standing, see supra pp. 9-16, appellees will suffer no hardship if their challenge is found unripe in this litigation. See Louisiana Environmental Action Network v. Browner, 87 F.3d 1379, 1384 (D.C. Cir. 1996) (discussing overlap of standing and ripeness). They neither alleged in their complaint nor demonstrated in their declarations any way in which any challenged regulation "as a practical matter requires the plaintiff[s] to adjust … [their] conduct immediately." NPHA, 538 U.S. at 808 (internal quotation marks and citation omitted). Where, as here, "there is no immediate effect on the plaintiff's

primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 386 (1999) (emphasis added). See also National Wildlife Federation, 497 U.S. at 891.

The district court concluded that, even though this case was brought under the APA, the hardship prong could be disregarded because the issues presented were purely legal ones (J.A. 139). However, the APA actually makes hardship from delay an explicit statutory prerequisite to judicial review. "Section 704 of the APA subjects to judicial review '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.'" Wrestling Coaches, 366 F.3d at 945 (emphasis added). See also Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 n.4 (1986) (finding this statutory restriction satisfied because "the issue ... will not otherwise arise in litigation").

Appellees do have another adequate remedy in court. The FECA contains an unusual provision authorizing a court to decide whether the Commission's decision not to take enforcement action on an administrative complaint is "contrary to law." 2 U.S.C. 437g(a)(8). Thus, if any of the activities appellees hypothesize actually occur, they can file an administrative complaint and, if the Commission dismisses it in reliance upon one of the regulations at issue here, they can file suit for a declaration that the dismissal is "contrary to law" because the regulation relied upon by the Commission conflicts with the Act. If the Commission fails to comply with such a declaration promptly, appellees would have a private cause of action against the alleged violators. 2 U.S.C. 437g(a)(8)(C). In Wrestling Coaches, 366 F.3d at 945, this Court found that a private cause of action directly against the alleged private violators "constitutes an adequate remedy that bars appellants' case" against the agency under the APA, even though this

would not enable them to obtain judicial review of the agency's own announced policy regarding the issue.

Thus, section 437g(a)(8) provides appellees a specific statutory cause of action to obtain judicial determination of the validity of the agency's regulations, in addition to a private cause of action against the alleged violators if the regulations are declared invalid and the agency still declines to accept that result. Moreover, under section 437g(a)(8), review would be in the context of specific applications of the regulations to concrete facts, an important traditional factor for postponing review under the first prong of the general ripeness test (see supra pp. 16-17). Accordingly, for this reason as well, the district court lacked jurisdiction over appellees' omnibus attack on a variety of regulations that they do not allege improperly restrict their own primary conduct in any way.

II. THE COMMISSION'S REGULATIONS ARE NOT ARBITRARY AND CAPRICIOUS

A. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. Haynes v. Williams, 392 F.3d 478, 481 (D.C. Cir. 2004).

B. JUDICIAL REVIEW OF THE COMMISSION'S REGULATIONS IS HIGHLY DEFERENTIAL

A court may set aside a regulation under the APA only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This standard is "highly deferential" and "presumes the validity of agency action." Cellco Partnership v. FCC, 357 F.3d 88, 93-94 (D.C. Cir. 2004). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." San Luis Obispo Mothers For Peace v. NRC, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

The Commission's construction of its own governing statute is entitled to substantial deference under Chevron. See Noramco of Delaware v. DEA, 375 F.3d 1148, 1152 (D.C. Cir. 2004) (under the "familiar two-step Chevron framework," the Court "first ask[s] 'whether Congress has directly spoken to the precise question at issue,'" and if not, whether the agency's interpretation is "based on a permissible construction of the statute" (citations omitted)). "'[U]nder Chevron, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views.'" FEC v. NRA, 254 F.3d 173, 187 (D.C. Cir. 2001) (quoting Serono Labs, Inc. v. Shalala, 158 F.3d 1313, 1321 (D.C. Cir. 1998)). Thus, "'the job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility.'" AT&T Corp. v. FCC, 349 F.3d 692, 699 (D.C. Cir. 2003) (quoting Verizon Communications Inc. v. FCC, 535 U.S. 467, 539 (2002)). The Commission, which has broad discretionary authority over the administration, interpretation and civil enforcement 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). Accord, United States v. Kanchanalak, 192 F.3d 1037, 1049 (D.C. Cir. 1999).

Deference to the Commission's balancing of the competing policy interests should be enhanced in this case because appellees' claims all rest on the proposition that the Commission's regulations do not limit private campaign activity as strictly as appellees would like. The Commission is "[u]nique among federal administrative agencies" in that "its sole purpose [is] the regulation of core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" AFL-CIO v. FEC, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting FEC v. Machinists Non-Partisan Political League, 655 F.2d

380, 387 (D.C. Cir. 1981)). In this "delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique inferences of Congressional intent," Machinists, 655 F.2d at 394. See also Galliano v. United States Postal Service, 836 F.2d 1362, 1370 (D.C. Cir. 1988). "The Commission has been vested with a wide discretion … to not overstep its authority by interfering unduly in the conduct of elections." In re Carter-Mondale Reelection Comm., 642 F.2d 538, 545 (D.C. Cir. 1980).

Thus, construing the statute narrowly in some respects to avoid unnecessary interference with constitutionally protected political association and advocacy is a policy choice well within the Commission's discretion. See AFL-CIO, 333 F.3d at 179 (in drafting regulations the "Commission must attempt to avoid unnecessarily infringing on First Amendment interests"). Indeed, in McConnell the Supreme Court repeatedly construed the provisions of BCRA narrowly to avoid unnecessary intrusion on political activity, relying on some of the very Commission regulations challenged in this case. See, e.g., 540 U.S. at 160-61 (relying on regulation defining "solicit" and "direct").

C. THE DEFINITIONS OF "SOLICIT" AND "DIRECT"

In Title I of BCRA, Congress prohibited national party committees from "solicit[ing], receiv[ing] or direct[ing] to another person" a contribution, donation, transfer of funds or any other thing of value that is not subject to the Act's limitations, prohibitions and reporting requirements. 2 U.S.C. 441i(a). In other subsections of BCRA §101(a), Congress prohibited political parties from soliciting funds for, or making or directing any donations to, certain organizations that fall under sections 501(c) or 527 of the Internal Revenue Code, 2 U.S.C. 441i(d), and likewise limited the ability of federal candidates and officeholders to

"solicit, receive, direct, transfer or spend" funds that do not comport with the requirements of the Act, 2 U.S.C. 441i(c).

Congress did not define the terms "solicit" and "direct" in BCRA or FECA, however, but left that policy choice to the Commission. The Commission's regulations define "to solicit" (11 C.F.R. 300.2(m)) as

> to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided directly, or through a conduit or intermediary.

Similarly, "to direct" is defined (11 C.F.R. 300.2(n)) as

> to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary.

Each regulation further states that "merely providing information or guidance as to the requirements of particular law" is not a solicitation or direction subject to the Act's restraints. 11 C.F.R. 300.2(m), (n).

These definitions clearly satisfy Chevron step one, as the district court found. (J.A. 158-59.) Dictionaries variously define "solicit" and "direct," and two members of the Senate indicated in a written colloquy that "solicit" as used in BCRA was not self-explanatory. See 148 Cong. Rec. S1529 (March 5, 2002) (statement of Sen. McConnell) (asking that BCRA "clearly define what we can and cannot do" regarding solicitation); id. at S1530 (statement of Sen. McCain) ("Like many other terms in the bill, 'solicitation' will be subject to definition by the FEC in regulations."). This Court has previously noted that "'solicit' can, of course, mean a variety of things." Martin Tractor Co. v. FEC, 627 F.2d 375, 383 (D.C. Cir. 1980). "Direct,"

used in close conjunction with "solicit" in the relevant statutory provisions, is no less fraught with multiple possible meanings.

Under Chevron step two, the Commission's policy choices in defining these terms are permissible. The Commission rejected more ambiguous definitions of each term because

> [t]he Commission does not believe it is appropriate to promulgate a regulation that would require examination of a private conversation to impute intent when the conversation is not clear on its face. The Commission is concerned that the ability to impute intent could lead to finding a violation when the individual who made the comment may have had no intention whatever of soliciting a contribution. Such a result is not dictated by BCRA's statutory language, and would raise constitutional concerns.

67 Fed. Reg. 49,087 (J.A. 239). See also FEC Advisory Opinions ("AO") 2003-3, 1 Fed. Election Camp. Fin. Guide (CCH) ¶689, 2003 WL 21032390, and 2003-6, 2003 WL 110634. "By using the term 'ask,' the Commission defined 'solicit' to require some affirmative verbalization or writing, thereby providing members of Congress, candidates and committees with an understandable standard." 67 Fed. Reg. 69,942 (J.A. 360).[6]

The Commission reasonably placed a high value on clarity when construing ambiguous statutory terms that regulate the content of speech. See Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("solicitation is characteristically entwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views"). As this Court recognized in reviewing another Commission statutory interpretation, a "bright-line test … is necessary to enable donees and donors to easily conform their conduct to the law and to enable the FEC to take the rapid, decisive enforcement action that is called for in the highly charged

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[6] The Office of Personnel Management has defined "solicit" in a similar manner when faced with balancing competing interests in deterring corruption and avoiding unnecessary interference with political speech. See 5 C.F.R. 734.101 (defining "solicit" as "to request expressly of another person that he or she contribute something to a candidate, a campaign, a political party, or partisan political group").

political arena." Orloski v. FEC, 795 F.2d 156, 165 (D.C. Cir. 1986). Indeed, the Supreme Court described the regulations at issue here as "consistent" with the view that the terms "solicit" and "direct," inter alia, as used in 2 U.S.C. 441i(a) were not intended to interfere with the freedom of national party committees to associate with their state and local committees, rejecting arguments to the contrary as "hing[ing] on an unnaturally broad reading of the statutory terms[.]" McConnell, 540 U.S. at 96-97.

The district court nevertheless found that neither definition satisfied the second step of Chevron. (J.A. 159-62.) Construing the Commission's definition of "solicit" to require "express requests for nonfederal donations" or "direct 'verbalizations or writings,'" the court believed "permit[ting] such individuals and entities to funnel nonfederal money into different organizations by simply not 'asking' the donors to do so, but using more nuanced forms of solicitation, would permit conduct that would render the statute largely meaningless." (J.A. 161.) The court thus found that the definition would "'unduly compromise[] the Act's purposes,'" id. (quoting Orloski), even though the court's concerns about hypothetical "nuanced" communications were not supported by any specific examples, or even a general description, of any actual abuses the definition might allow.

The district court's decision is grounded upon a narrow interpretation of the regulatory definitions that is contrary to the rulemaking record. During the rulemaking, many commenters recommended that the Commission limit "solicit and direct" to mean "an explicit request," rendering the definition "concrete" and providing "clear definitive guidelines." 67 Fed. Reg. 49,086 (J.A. 238). The Commission did not, however, so limit its definitions of "solicit" and "direct." Instead, it used the word "ask," which does not carry with it any requirement that a solicitation or direction be "explicit" or "express." When later defining the term "solicit" in a

different statutory provision, the Commission incorporated the definition at 11 C.F.R. 300.2(m) into 11 C.F.R 110.20(a)(6). Responding to comments characterizing the definition at 300.2(m) as "radically underinclusive," 67 Fed. Reg. 69,942 (J.A. 360), the Commission carefully explained its intended scope.

> By using the term "ask," the Commission defined "solicit" to require some affirmative verbalization or writing, thereby providing members of Congress, candidates and committees with an understandable standard. It is the impressionistic or subjective aspects of the term "suggest" and "request" that the Commission rejected in the Title I rulemaking. The Commission also notes that while the terms "suggest" and "request" recommended by one commenter encompass a wide variety of activity, it is not clear that they would cover more direct verbalizations or writings captured by terms such as "demand," "instruct," or "tell," which the Commission believes are captured by the term "ask."
>
> …. The Commission notes that "request" and "ask" are essentially synonymous. (See American Heritage College Dictionary, 34d Edition….) The Commission was unwilling to use the far more expansive term "suggest," for concern that such a vague term could subject persons to investigation and prosecution based on highly subjective judgments about whether a particular remark or action constituted a "suggestion." The definition of "solicit" is intended to include "a palpable communication intended to, and reasonably understood to, convey a request for some action ***"

67 Fed. Reg. 69,942 (J.A. 360) (emphases added; citation omitted). Thus, the challenged definitions of "solicit" and "direct" are not as narrow as the district court believed.

Next, although this Circuit has observed that "if the FEC's interpretation unduly compromises the Act's purposes, it is not a 'reasonable accommodation' under the Act," Orloski, 795 F.2d at 164 (citing Chevron), the district court repeatedly applied that statement here in a manner that conflicts with this Court's actual holding in Orloski. Even though Orloski had contended that the Commission should have adopted a stricter rule, the Court deferred in that case to the Commission's "bright-line test" and noted that "[a] subjective test based upon the

totality of the circumstances would inevitably curtail permissible conduct." Orloski, 795 F.2d at 165.

> We recognize that [the FEC's] interpretation carries with it a greater potential for abuse than does the interpretation advocated by Orloski. Indeed, it can be argued that this interpretation is at the outer bounds of permissible choice. But because it is still a "reasonable choice within a gap left open by Congress … [Orloski's] challenge must fail."

Id. at 167 (quoting Chevron, 467 U.S. at 866). Thus, the holding of Orloski is directly contrary to the district court's reliance upon some of its language to reject the Commission's adoption of a clear test to avoid chilling permissible speech, even though a stricter rule might carry less potential for abuse.

The district court also criticized the Commission for construing "solicit" in another section of the Act, 2 U.S.C. 441b(b)(4)(A), "in a broader manner" than in the regulations under review. (J.A. 162.) However, the statutory regulation of corporate solicitation of hard money contributions to their separate segregated funds at issue in the advisory opinion cited by the court was beyond the scope of this rulemaking regarding the new, and very different, regulation of solicitation of soft money by candidates and political parties under BCRA. The Commission carefully explained why it found these definitions appropriate for implementing the new BCRA provisions regulating candidates and political parties that were the subject of this rulemaking, and whether the Commission might conclude that those concerns would warrant revisiting the conclusions in earlier advisory opinions involving section 441b(b)(4)(A) is a question for another case.

Finally, contrary to the district court's holding (J.A. 160), the regulatory definition of "direct" is not superfluous because the definitions of "solicit" and "direct" serve distinct but complementary purposes. The creation of a distinct definition of "direct" was in response to,

among other commenters, the appellees. They specifically objected to the definition originally proposed because it did not "include the concept of suggesting to whom an already willing contributor should send a contribution." Comments of Shays, Meehan to FEC, May 29, 2002 (J.A. 229). The Commission responded to this and similar comments by clarifying that "direct" includes a request to give funds to a third party when the potential contributor has already expressed an intent to make a contribution. The term thus differs from, and is not entirely subsumed by, the definition of "solicit." See Gutierrez v. Ada, 528 U.S. 250, 258 (2000) (construction need not do "heavy work" to "bar the rule against redundancy from disqualifying an otherwise sensible reading").

D. THE CONTENT STANDARDS IN THE COMMISSION'S COORDINATION REGULATIONS

For three decades, the Act has provided that a coordinated expenditure, i.e., one "made … in cooperation, consultation, or concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). In turn, an "expenditure" is defined to include "anything of value … made … for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). In BCRA Congress delegated to the Commission particularly broad discretion to formulate a regulatory definition of coordinated expenditures, and the Commission exercised that discretion reasonably by ensuring, inter alia, that coordinated communications are not subject to regulation unless their content reflects the purpose of influencing a federal election.

1. Congress Delegated To The Commission What The District Court Described As "Vast Discretion" To Devise New Coordination Regulations

BCRA expressly repealed the Commission's existing regulations that relied largely upon "collaboration or agreement" with a candidate as a test for "coordinated general public political

communications" (former 11 C.F.R. 100.23), and instructed the Commission to develop new regulations on "coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees." BCRA §§214(b), (c). Congress placed only two restrictions on the Commission's discretion in formulating the new regulations: they (1) "shall not require agreement or formal collaboration to establish coordination," and (2) "shall" address four specific aspects of coordinated communications not at issue here "[i]n addition to any subject determined by the Commission." BCRA §214(c) (emphasis added).

The district court itself described this delegation of legislative authority in BCRA §214 as "vast discretion" (J.A. 149). Beyond the factors listed in the statute, BCRA is totally silent on what else the Commission should consider in defining coordination. This delegation of authority was the direct result of Congress's inability to agree upon its own definition of coordinated expenditures. 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) (Add. 050-56). However, when the Senate was unable to reach agreement on a new statutory definition of coordination, Senator McCain introduced an amendment deleting the proposed definition, repealing the Commission's existing regulations on coordinated expenditures, and delegating to the Commission the authority to fashion a new definition. Amendment No. 165, 147 Cong. Rec. S3184 (March 30, 2001).

> [T]he amendment instructs the FEC … to interpret and enforce this new and admittedly general statutory provision.... There 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) (statement of Sen. Feingold). See also 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. Feingold and Sen. McCain).

2. The Commission's Coordination Content Standards Represent A Permissible Construction Of The Statute

The Commission's new coordination regulation complies with all of BCRA's requirements, specifically providing that agreement or formal collaboration is not required for a communication to be considered "coordinated," 11 C.F.R. 109.21(e), and addressing other factors the Commission found relevant. The new regulations establish a three-part test for determining when a communication is deemed "coordinated." 11 C.F.R. 109.21(a). First, the communication must be paid for by someone other than a candidate, authorized committee, political party committee, or an agent of the foregoing. 11 C.F.R. 109.21(a)(1). Second, the communication must meet one of four content standards. 11 C.F.R. 109.21(c). Third, the communication must meet one of five conduct standards. 11 C.F.R. 109.21(d).

Appellees challenged the fourth content standard, which applies the coordination rules to a "public communication" (as defined in 11 C.F.R. 100.26) that (1) "refers to a political party or to a clearly identified candidate for Federal office" (11 C.F.R. 109.21(c)(4)(i)); (2) is "publicly disseminated" 120 days or fewer before a federal election, convention or caucus (11 C.F.R. 109.21(c)(4)(ii)); and (3) is "directed to" voters in the jurisdiction of the clearly identified candidate (11 C.F.R. 109.21(c)(4)(iii)).[7] In particular, they argued that the 120-day limit of 11 C.F.R. 109.21(c)(4)(ii) left unregulated outside that time frame too many communications that might be intended to influence federal elections.

The district court, however, took a much broader approach, finding that any content standard that "exclude[s] certain types of communications regardless of whether or not they are coordinated would create an immense loophole" (J.A. 151). The court reasoned that any

[7] The only parts of the coordination content standards that appellees specifically challenged were 11 C.F.R. 109.21(c)(4)(i) and (ii). See FAC ¶¶ 93, 95-96 (J.A. 51-54).

communication coordinated with a candidate or party — regardless of its timing, content or geographic placement — has value to the political actor, and that to exclude any such communication would create "'the potential for gross abuse'" (id. (quoting Orloski, 795 F.2d at 165)). On this basis, the court held that the regulation failed Chevron step two, even though the court had first held that the regulation satisfied Chevron step one and was "facially permissible" even under Chevron step two (J.A. 148).

The district court's broad ruling against content standards in general is plainly wrong, because an "expenditure" under the Act includes only spending that is "for the purpose of influencing any election to Federal office," 2 U.S.C. 431(9)(A)(i). Thus, subjecting communications to the coordinated "expenditure" limits regardless of whether they even mention any election, candidate, or political issue, would improperly exceed the reach of the underlying definition of "expenditure." Indeed, disregarding content would extend the statute even to purely commercial advertisements for a candidate's business. Thus, the Act effectively requires consideration of content to classify a communication as a coordinated "expenditure."

Moreover, Congress has expressly designated for treatment as coordinated expenditures two classes of communications based on content: "republication" of "campaign materials," 2 U.S.C. 441a(a)(7)(B)(iii), and "electioneering communications" (which must refer to a candidate) that are coordinated with a candidate or party committee. 2 U.S.C. 441a(a)(7)(C). Both of these provisions would be superfluous if Congress had intended for all coordinated communications to be coordinated expenditures, regardless of content. The Commission therefore reasonably "include[d] content standards in the final rules on coordinated communications to limit the new rules to communications whose subject matter is reasonably related to an election." 68 Fed. Reg. 427 (J.A. 367).

Given BCRA's silence as to the specific standards the Commission was to adopt, as well as the broad authority Congress delegated to the FEC, the Commission's content standards not only satisfy Chevron step one but are also a reasonable interpretation under Chevron step two. Those content standards reflect the development of campaign speech regulation since the advent of the FECA, and appropriately rely primarily on the content of the speech and its temporal proximity to a federal election. Some speech, by virtue of its content, is so clearly made for the purpose of influencing a federal election that it is subject to regulation without regard to when, where, or how it is disseminated. Thus, communications that expressly advocate the election or defeat of federal candidates are subject to the Act's financing restrictions regardless of these factors, see McConnell, 540 U.S. at 190-92, and "the 'express advocacy' content standard [for coordinated expenditures] in paragraph (c)(3) of 11 C.F.R. 109.21 applies without time limitation," 68 Fed. Reg. 430 (J.A. 370) (citations omitted). In addition, the republication of a federal candidate's own campaign materials is a coordinated communication under 11 C.F.R. 109.21(c)(2), regardless of when or where it occurs.

For communications that are not that explicit, however, the time and place of distribution is important in determining whether their purpose is to influence a federal election or to influence public policy or political opinion. For example, BCRA's "electioneering communication" provisions regulate independent speech, but only if it is disseminated 60 days before a general election or 30 days before a primary or convention, and only if it refers to a clearly identified federal candidate and is broadcast to the relevant electorate. 2 U.S.C. 434(f)(3)(A). In McConnell, the Supreme Court approved Congress's time and location restrictions in the "electioneering communication" standard. In upholding those provisions, the Court found it reasonable to conclude that "the vast majority of ads" mentioning candidates

during these immediate pre-election periods had the purpose of influencing the elections, and 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." McConnell, 540 U.S. at 206, 208. The Court thus upheld Congress's judgment that the timing of public communications can be a decisive factor in determining whether speech is sufficiently election-related to be regulated.

The 120-day temporal factor in the Commission's fourth content standard represents the same kind of line drawing. It is a reasonable regulation of speech that distinguishes express advocacy, which is always treated as having a purpose of influencing elections, from communications like "electioneering communications" that mention a candidate but do not expressly advocate an election result, which are treated as having an election influencing purpose when the candidate is running in an upcoming election. Drawing a clear, bright line with objective criteria, the standard uses the same type of time and content measures that Congress has used and the Supreme Court has approved. As the Commission explained, the standard "is largely based on, but is somewhat broader than, Congress' definition of an electioneering communication." 68 Fed. Reg. 429 (J.A. 369). See 2 U.S.C. 434(f)(3)(A).

The Commission noted that the 120-day time frame has key advantages (68 Fed. Reg. 430 (J.A. 370)):

> First, it provides a "bright-line" rule. Second, it focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times.

If Congress was justified in drawing a line at 30 and 60 days before the election for regulating independent "electioneering communications," then the Commission's drawing of a temporal

line two to four times as far from the election for similar communications that are coordinated is surely permissible.[8]

Appellees do not complain that the line drawn by the Commission regulates too much speech, but rather that it regulates too little. Limiting the scope of the Commission's content regulation, however, properly accommodates important First Amendment interests, because speech outside the 120-day window is more likely to be intended to affect legislation or public views on issues, rather than the still distant election. This is so even if the communication is planned in cooperation with a member of Congress who shares the spender's interest in promoting the legislation or issue. Obviously, the Act was not designed to halt association between members of Congress and private groups for the purpose of addressing public issues or promoting legislation. Appellees themselves argued for a coordination standard that "does not discourage legitimate non-campaign related interactions between groups and candidates or parties," and they expressed concern that "a lobbying meeting between a group and a candidate should not trigger a finding that subsequent communication is coordinated." Comments of Shays, Meehan to FEC, October 11, 2002 (J.A. 278, 279).

The district court essentially held that the Commission was required to define coordination in a way that maximizes the regulation of this kind of political speech. However, "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) (citations and internal quotation marks omitted). "The task of statutory interpretation cannot be reduced to a mechanical choice in which the interpretation that would advance the statute's general purposes to a greater extent must always

[8] Nor is a 120-day standard for election-related activity a novel one. In BCRA, Congress itself defined "Federal election activity" to include voter registration activity within 120 days of an election. See 2 U.S.C. 431(20)(A)(i).

prevail over one that would both advance the same ends — though to a slightly lesser extent — and have fewer drawbacks." Totten, 380 F.3d at 495. Indeed, as discussed supra pp. 25-26, Orloski itself, upon which the district court relied heavily, found a Commission bright-line test to be a "reasonable accommodation" even though the Commission also could have adopted a "stricter test" distinguishing permissible and impermissible corporate donations for congressional events. 795 F.2d at 165.

Moreover, the district court failed to explain just how the Act's purposes would be undermined by the specific content standard at issue. The opinion cites no specific public communications from the administrative record that would support such concerns. One purpose of BCRA §214 may have been, as the district court stated (J.A. 150), to "enlarge the concept" of what constitutes coordination in one respect, since Congress specifically directed that certain conduct ("agreement or formal collaboration") would no longer be required. But there is no evidence that was the case as to content, timing, or targeting, and Congress explicitly authorized the Commission to take into consideration "any subject determined by the Commission" in defining coordinated expenditures. BCRA §214(c) (Add. 048) (see supra pp. 27-28). Accordingly, the district court's decision should be reversed.

E. THE REGULATION GOVERNING FINANCING OF SALARIES OF STATE AND LOCAL POLITICAL PARTY EMPLOYEES

In 2 U.S.C. 431(20)(A)(iv), Congress defined as Federal election activity "services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election." The regulation implementing this provision provides that "[s]alaries and wages for employees who spend more than 25% of their compensated time in a given month on Federal election activity or activities in connection with a

Federal election must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used." 11 C.F.R. 300.33(c)(2). Conversely, "[s]alaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity or activities in connection with a Federal election" are not required to be paid with federal funds. Id.

In reviewing 11 C.F.R. 300.33(c)(2), the district court properly concluded that Chevron step one was satisfied because "the Court ha[d] no basis [to] conclud[e] that Congress directly spoke on the question of how state parties should fund the activities of their employees who spend less than 25 percent of their compensated time on Federal election activities." J.A. 187 (emphasis in original and footnote omitted). Indeed, both 2 U.S.C. 431(20)(A)(iv) and the pre-BCRA Act are completely silent about the funding of such salaries. Although the Commission's pre-BCRA regulations provided for allocation of a state party's overhead expenses, including employee salaries, see 11 C.F.R. 106.5(a)(2) (2001), BCRA eliminated that allocation scheme by forbidding allocation to nonfederal funds of any part of the salary of state party employees spending more than 25% of their time in a month on federal election activities.

In essence, the Commission's new regulation simply applies the threshold created by Congress regarding which employees' activities are sufficiently related to federal elections to require that federal funds be used to pay their salaries. Congress chose to federalize completely the salaries of employees who spend as much as 74% of their monthly time on nonfederal activities, but it appears to have concluded that employees spending only 25% or less of their time on federal election activities do not have a sufficient nexus with federal elections to require such regulation. 67 Fed. Reg. 49,078 (J.A. 234). Congressional intent is particularly evident "[in] the context of the statute's precisely drawn provisions," United States v. Erika, 456 U.S.

201, 208 (1982), and it was within the Commission's discretion to draw a corollary conclusion regarding state party employees who spend less than 26% of their time on federal activities.

The regulation also provides significant administrative advantages. It simplifies how state party committees may pay the salaries of employees who participate only occasionally in federal election activities, and provides a bright-line test for which type of funds can be used.

At Chevron step two, the district court correctly explained that the absence of an express statutory requirement "precludes the Court from finding that the Commission's construction of the statute is facially impermissible under Chevron step two" (J.A. 187). Nonetheless, the district court rejected the regulation, speculating that "this change to the regulation 'create[s] the potential for gross abuse'" (J.A. 188 (citing Orloski, 795 F.2d at 165)). The court based this conclusion on the theoretical possibility that a state party could circumvent the Act by having numerous employees spend less than 25% of their time on federal election activity (id.). However the court pointed to no evidence to substantiate its concern, nor did it explore the implications of its own speculation.[9] If Congress had shared this concern, it could have provided that salaries of employees spending 25% or less of their time on federal election activities be allocated between federal and nonfederal funds, as it did for other types of Federal election activity, 2 U.S.C. 441i(b)(2)(A), but it did not. See Solite v. EPA, 952 F.2d 473, 484 (D.C. Cir. 1991) ("We see no legislative command for the scheme petitioners ask us to order").

[9] Any attempt to abuse this provision would face serious obstacles. Because the regulation is framed in terms of a percentage of compensated time, a state party could not simply hire part-time employees to spend 40 hours a month on federal activities and pay for their salaries with nonfederal dollars; rather, each employee would have to be paid for another 120 hours every month to engage in nonfederal activities. There was simply no evidence before the district court that state parties have either an incentive or the necessary flexibility in their workloads and staffing to abuse the regulation by doling out small monthly assignments of federal election activity to a large number of employees, solely to avoid using hard money for a small part of their salaries.

The district court essentially expressed its preference for the pre-BCRA regulatory formula for allocating salaries of those state party employees whose salaries are not addressed by BCRA. However, the Commission's pre-existing allocation scheme was never a part of the statute, and thus was always subject to modification by the Commission. See United States Air Tour Ass'n v. FAA, 298 F.3d 997, 222 (D.C. Cir. 2002) ("An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.") (quotations and citation omitted). No provision of BCRA purports to codify this pre-existing allocation regulation or to restrict the Commission's otherwise broad discretion to reconsider its previous regulatory policies in light of the new statutory scheme.

F. The Regulation Establishing A De Minimis Exception From The Allocation Between "Federal Funds" And "Levin Funds"

In regulating state and local parties, Congress sought to accommodate these entities through the Levin Amendment, which allows state and local parties to continue to use soft money raised and spent under certain restrictions ("Levin funds"), see 2 U.S.C. 441i(b)(2), to pay for a portion of certain types of federal election activity. Congress also exempted low levels of this activity ($5,000 or less annually) from the Act's reporting obligations. 2 U.S.C. 434(e)(2)(A).

The Commission was well within its regulatory discretion in promulgating a de minimis exception to the Levin Amendment restrictions that allows state and local parties to use nonfederal funds to finance federal election activity if their total annual disbursements for such activity are no more than $5,000. 11 C.F.R. 300.32(c)(4). In creating the de minimis exception, the Commission used the same line drawn by Congress in the similar exception from the Act's reporting requirements. 2 U.S.C. 434(e)(2)(A) (requiring reporting of Levin funds "unless the

aggregate amount of such receipts and disbursements during the calendar year is less than $5,000"). The Commission concluded that the reporting exception "suggest[s] that Congress did not take a rigid approach to low levels of Federal election activity." 67 Fed. Reg. 49,097 (J.A. 241).

The Commission also explained it was "particularly sensitive" to the fact that the allocation requirement applies to grassroots activities such as voter registration, voter identification, GOTV and generic campaign activity, even when they do not involve any references to federal candidates. 67 Fed. Reg. 49,097 (J.A. 241). It was reasonable for the Commission to consider the greater burden, for example, on a local committee whose only disbursement during a calendar year is a volunteer GOTV effort that totaled $5,000 or less, compared with a state or local party committee engaged in a more significant level of activity to affect federal elections. In the former instance, absent the de minimis exception, the single small project could require the state or local party to establish an additional bank account and initiate new accounting and fundraising practices. Cf. FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 255 (1986) ("Faced with the need to assume a more sophisticated organizational form ... it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it").

The Commission found that "there is no danger that allowing a committee to use entirely Levin funds for allocable Federal election activity that aggregates $5,000 or less in a calendar year will somehow lead to circumvention of the amount limitations set forth in 2 U.S.C. 441i(b)(2)." 67 Fed. Reg. 49,097 (J.A. 241). The Commission reasoned that $5,000 is only half of what any single donor may give in Levin funds to each and every state, district, and local party committee under BCRA, so there is no danger that the de minimis exception could lead to

circumvention of the $10,000 Levin fund donation limit. See id. All of these factors show that the Commission's regulation is a reasonable implementation of section 441i(b) and comports with congressional intent.

The district court invalidated the de minimis exception at Chevron step one, finding that "Levin funds are clearly permitted to be spent on the enumerated federal election activities only when allocated with federal funds" (J.A. 188 (footnote omitted)). The court then concluded that the de minimis exception "runs contrary to Congress's intent, and therefore violates step one" (J.A. 190).

However, given the nature of a de minimis exception, Chevron step one analysis alone is inappropriate. "[T]he same deference due to an agency's reasonable interpretation of an ambiguous statute may also be due to an agency's creation of a de minimis exemption." Environmental Defense Fund v. EPA ("EDF"), 82 F.3d 451, 467 (D.C. Cir. 1996); Association of Administrative Law Judges v. FLRA, 2005 WL 181585 *4 (D.C. Cir. Jan. 28, 2005) ("Unless [Congress] has been 'extraordinarily rigid'... [w]e proceed accordingly to ... Chevron step two"). In EDF the Court explained that "categorical exemptions from the requirements of a statute may be permissible 'as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis.'" EDF, 82 F.3d at 466 (first two emphases added) (quoting Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979)). While a de minimis exception cannot be adopted if it is "contrary to the express terms of the statute," EDF, 82 F.3d at 466, as "long as the Congress has not been 'extraordinarily rigid' in drafting the statute …'there is likely a basis for an implication of de minimis authority to provide [an] exemption when the burdens of regulation yield a gain of trivial or no value.'" Id. (citations omitted). Although it recited this test, the district court did not explain why it thought Congress

had been "extraordinarily rigid" in this statute, and did not respond to the Commission's conclusion (see supra p. 38) that Congress's own exception of low levels of Levin funds from some statutory requirements indicated it "did not take a rigid approach" to this question.

EDF elucidates the principles the district court should have applied. In that case, the Court upheld a de minimis exemption created by EPA that excluded from statutory review certain government functions (e.g., judicial proceedings) that are unlikely to create air pollution. EDF, 82 F.3d at 466. Even though the statutory language prohibited the federal government from engaging in "any activity" that did not conform to an applicable implementation plan, the Court reasoned that "it seems eminently reasonable for the EPA to interpret this provision to refer to 'any activity' that is likely to interfere with the attainment goals in [the statute]." Id. Accord State of Ohio v. EPA, 997 F.2d 1520, 1535 (D.C. Cir. 1993) (de minimis exception upheld when it "squared with the ... purpose of statute"). As in EDF, the Commission here carved out a de minimis exception "'when the burdens of regulation yield a gain of trivial or no value.'" 82 F.3d at 466 (citation omitted); see 67 Fed. Reg. 49,097 (J.A. 241).

The district court relied upon Public Citizen v. FTC, 869 F.2d 1541, 1557 (D.C. Cir 1989), for the proposition that it is impermissible for the Commission to conclude that "the benefits of enforcing the law against such entities is outweighed by the costs ... " (J.A. 189 at n.94). That case, however, involved warning labels on tobacco-related products that had "conceded benefits." Public Citizen, 869 F.2d at 1556-57. In that context, the Court explained that even though "agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn ... " Id. at 1557. Here, however, the de minimis exception — involving no more than $5,000 in an entire year by a state or local party committee — is so clearly at the

margins of the regulatory field that Congress itself exempted the same activity from the statutory reporting requirement. Neither the appellees nor the district court has identified any substantive benefit to eliminating the exception. Thus, when properly analyzed under EDF, the Commission's de minimis regulation was lawfully within the agency's discretion.

G. THE REGULATION EXCLUDING FROM THE DEFINITION OF "ELECTIONEERING COMMUNICATION" BROADCAST COMMUNICATIONS FOR WHICH THE BROADCASTER CHARGES NO FEE

BCRA subjected certain "electioneering communications" to the corporate and union financing restrictions of 2 U.S.C. 441b and the disclosure requirements of 2 U.S.C. 434(f). It defined "electioneering communication" to mean a television or radio communication that refers to a clearly identified federal candidate, is broadcast within 60 days of a general election or within 30 days of a primary or convention, and for congressional elections, is targeted to the "relevant electorate." 2 U.S.C. 434(f)(3)(A)(i). Pursuant to Congress's broad grant of rulemaking authority, 11 C.F.R. 100.29 avoids the risk that the term "electioneering communication" could be applied to unpaid media programming and public service announcements as to which there was no evidence of any abuse, and there is no evidence that BCRA was intended to reach. Thus, in 11 C.F.R. 100.29(a)(2), the Commission concluded that requiring that the communications be "made" within the applicable time period means that they be "publicly distributed" within that period, and 11 C.F.R. 100.29(b)(3)(i) provides that "publicly distributed" includes the requirement that the communication be disseminated "for a fee."

The definition of "electioneering communication" in 2 U.S.C. 434(f)(3) does not address the financing of such communications. There is simply no mention of funding anywhere in the

definition, in stark contrast to the definition of "expenditure" in 2 U.S.C. 431(9)(A). Therefore, Congress has not spoken directly to "the precise question at issue," Chevron, 467 U.S. at 842-44.

Moreover, because 11 C.F.R. 100.29(b)(3)(i) is well within the broad regulatory discretion delegated to the Commission, the Court should defer to the Commission's expertise in the second stage of Chevron analysis.[10] Drawing a line based on whether funds are spent to broadcast an advertisement reasonably reflects the FECA's most basic purpose: to regulate the way in which campaign speech is financed. Indeed, Congress's purpose in regulating "electioneering communications" was not to preclude such communications from being broadcast, but only to subject them to the Act's financing requirements and to require disclosure about their costs and who paid for them. See 2 U.S.C. 434(f)(1), 441b(b)(2), 441d(a). Congress itself exempted many unpaid communications that would otherwise meet the "electioneering communication" definition, in the "news story, commentary or editorial" exception of 2 U.S.C. 434(f)(3)(B)(i) and the "candidate debate or forum" exception of 2 U.S.C. 434(f)(3)(B)(iii). Congress also authorized the Commission to exempt other communications in order to assure the "appropriate implementation" of the new rules. 2 U.S.C. 434(f)(3)(B)(iv).

In its rulemaking, the Commission was concerned that without an exception like 11 C.F.R. 100.29(b)(3)(i), BCRA could be interpreted to restrict a wide range of entertainment,

[10] During the rulemaking, appellees did not deny the Commission's authority to promulgate a provision like 11 C.F.R. 100.29(b)(3)(i), but instead asserted that before crafting an exemption for public service announcements, the Commission "must be convinced that such ads have been run in the past during the pre-election windows and that exempting them will not create opportunities for evasion of the statute." See Comments of Shays, Meehan to FEC, August 23, 2002 (J.A. 259-60).

educational, and documentary programs that mention or portray a federal candidate only incidentally. See 67 Fed. Reg. 65,193 (J.A. 313). Although some such broadcasts might fall within the "commentary" element of 2 U.S.C. 434(f)(3)(B)(i), see AO 2003-34, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6415, 2003 WL 23155748, lack of certainty on this point could chill a great deal of nonpartisan programming. Broadcasters would need to review all of their programming during a wide range of 60- and 30-day pre-election windows for any reference to, or image of, a federal candidate. See Comments of Independent Sector to FEC, August 21, 2002, at 5-7, available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/independent_sector.pdf (describing "enormous" burden to review all programming "for even the slightest mention or picture of a current federal candidate").

Moreover, the risk that the "electioneering communication" definition would inappropriately restrict public service announcements ("PSAs") was a focus of concern during the rulemaking. Since the formation of the Advertising Council during World War II, PSAs have promoted "education and awareness of significant social issues in an effort to change the public's attitudes and behaviors and stimulate positive social change." "What is Public Service Advertising?" The Ad Council, available at http://www.adcouncil.org/np/tips_psa_definition/. Rulemaking commenters explained that charities and government entities commonly use PSAs to provide the public with important information about community issues and events. See, e.g., Comments of Alliance for Justice and the Sierra Club Foundation to FEC, August 21, 2002, at 10-11, available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/alliance_for_justice.pdf; Comments of OMB Watch to FEC, August 21, 2002 (J.A. 251). In particular, the Commission

received evidence that many small nonprofit groups rely on such announcements and free cable broadcast time in their public education efforts. See Transcript of FEC Hearing on Electioneering Communications, August 29, 2002 (J.A. 273-74).

PSAs thus serve nonpartisan public interests analogous to the press and debate broadcasts that Congress exempted in 2 U.S.C. 434(f)(3)(B)(i) and (iii). In fact, PSAs are a critical way in which broadcasters satisfy the "public interest" element of the licensing requirements in 47 U.S.C. 309.[11] But without 11 C.F.R. 100.29(b)(3)(i), if any public official or other prominent citizen running for federal office were to participate in a PSA encouraging citizens to donate blood, for example, broadcasters might not run it for large parts of the election year for fear of implicating the "electioneering communication" restrictions. See Comments of Alliance for Justice and the Sierra Club Foundation to FEC, August 21, 2002, at 11.

The evidence is overwhelming that the problem Congress addressed in regulating electioneering communications involved paid advertisements, see 67 Fed. Reg. 65,192-93 (J.A. 312-13), and there was no specific historical evidence before the Commission that an independent group had ever used an unpaid announcement to advance the electoral interests of a federal candidate. To our knowledge, not one unpaid communication played any significant role in the legislative history leading up to BCRA's enactment, in the McConnell litigation, or in the FEC rulemaking regarding "electioneering communications." No rulemaking commenter, including appellees, offered any specific evidence that such behavior had occurred or that BCRA was directed at unpaid advertisements.

Likewise, there was no evidence that those seeking to influence elections in the future

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[11] See, e.g., Monroe Communications Corp. v FCC, 900 F.2d 351, 353 (D.C. Cir. 1990); FCC v. League of Women Voters of California, 468 U.S. 364, 376 (1984).

would be able to prevail upon broadcasters to run their ads for free, especially just before elections, when advertising rates are high and broadcasters are under great pressure to treat all sides equally. One commenter in the rulemaking argued forcefully that "free broadcast resources such as public service announcements, community cable access and radio time are not subject to hijacking by soft money interests." See Comments of OMB Watch to FEC, August 21, 2002 (J.A. 251). The Commission noted that the "judgment to provide free distribution services shares some characteristics of the broadcaster or system operator's editorial judgments in the use of the news story exemption, which is recognized in FECA, BCRA and Commission regulations. 2 U.S.C. 431(9)(B); 2 U.S.C. 434(f)(3)(B)(i); and 11 C.F.R. 100.132." 67 Fed. Reg. 65,193 (J.A. 313). In fact, it is not clear why any broadcaster would want to conspire with third parties to circumvent the Act, when it is entirely lawful for a broadcaster to broadcast its own electoral advocacy without restriction under the press exemption. 2 U.S.C. 434(f)(3)(B)(i). But if — contrary to the Commission's expert evaluation and experience in the rulemaking — such unpaid ads do someday become a problem, the regulation can then be reconsidered in light of such further experience.

The district court found, in a discussion that occupied only one paragraph of its lengthy decision, that 11 C.F.R. 100.29(b)(3)(i) violated step one of Chevron analysis (J.A. 198-99). This summary holding, however, is contradicted by elements of the court's own discussion. The court found that 11 C.F.R. 100.29(b)(3)(i) goes beyond the limits Congress set on the Commission's authority to create exemptions in 2 U.S.C. 434(f)(3)(B)(iv) and thus "cannot be squared with the plain meaning of BCRA's text" (J.A. 199). Yet, in this same discussion, the court admits that "it is not clear whether Congress had a view on whether payment for broadcasts should affect whether or not a communication should be considered an 'electioneering

communication,'" but then states that "Congress's silence on that matter suggests to the Court that it considered this factor irrelevant." (J.A. 198-99 & 199 n.115.) If, as the district court correctly concluded, Congress has been "silent" and its view is "not clear," the regulation at issue plainly cannot fail Chevron step one, which asks only whether Congress has "directly spoken to the precise question at issue," or whether it was instead "silent or ambiguous" on the issue. 467 U.S. at 842-43. Thus, the court's analysis is directly at odds with Chevron.

The Court's apparent view that 11 C.F.R. 100.29(b)(3)(i) exceeds the Commission's authority under 2 U.S.C. 434(f)(3)(B)(iv) to create regulatory exemptions, under which the Commission may not exempt communications that "promote," "support," "attack" or "oppose" a federal candidate, is irrelevant. 11 C.F.R. 100.29(b)(3)(i) is not a legislative exemption of the sort authorized by section 434(f)(3)(B)(iv), but an interpretation of the general definition of "electioneering communication." The Commission explained that it believed the Congressional intent about which communications should be covered was "best accomplished by incorporating the criterion in the definition, rather than creating an exemption from the definition." 67 Fed. Reg. 65,193 (J.A. 313). Moreover, as explained above, there was no evidence before the Commission that unpaid communications have ever been used to "attack" or "promote" federal candidates. Nor was evidence presented that the longstanding press and candidate debate exemptions of 2 U.S.C. 431(9)(B)(i) and 11 C.F.R. 110.13, which allow the dissemination of communications that do support or oppose federal candidates, have been abused by the broadcast media.

In sum, Congress's definition of "electioneering communication" is silent on whether unpaid communications are to be covered, and the Commission acted well within its discretion to construe that provision as limited to paid advertisements.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment and remand with instructions to dismiss this entire case for lack of jurisdiction. If the Court finds jurisdiction, it should reverse the district court's decision on the merits on each of these regulations, and instruct the district court to enter summary judgment for the Commission.

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