IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christopher Shays and Martin Meehan, Plaintiffs, v. United States Federal Election Commission, Defendant.	Civil Action No. 02-CV-1984 (Judge Kollar-Kotelly)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO FEDERAL ELECTION COMMISSION'S MOTION TO STRIKE PLAINTIFFS' EXHIBITS (DKT. NO. 39) AND REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION REGARDING CONSIDERATION OF EXHIBITS (DKT. NO. 30)

Introduction and Summary of the Argument

Notwithstanding its heated rhetoric, the Commission has not objected to the substantial majority of plaintiffs' proposed exhibits — specifically, Plaintiffs' Exhibits ["PXs"] 1-29, 100-108, 110-113, 116-154, 158-161, 163, and 179.[1] The Court should therefore give consideration to all of these exhibits for the reasons set forth in Plaintiffs' Motion Regarding Consideration of Exhibits (Dkt. No. 30). *See* Appendix A to this memorandum for a complete list of Plaintiffs' Exhibits, with the exhibits challenged by the Commission highlighted in boldface.

The Commission's objections are limited to 22 exhibits identified in its motion and proposed order, to another three exhibits that it specifically attacks in its supporting memorandum, and to this Court's own findings of fact in *McConnell v. FEC,* which the Commission insists "should be stricken" from consideration, along with "the arguments in

[1] There are no exhibits between PX 29 and PX 100.

plaintiffs' briefs relying on them[.]" FEC Mem. at 4 & n.7 (Dkt. No. 39). The challenged exhibits are PXs 109, 114-115, 155-157, 162, 164-178, and 180-182; and the offending citations to this Court's *McConnell* findings appear at Pls.' Summ. J. Mem. at 7-8 n.14, 11-12 n.23, 38-39 & n.65, 41 nn.68-69, and 73 n.129 (Dkt. No. 29).[2]

The Commission's remarkable contention that this Court's own findings of fact in *McConnell* should be "stricken" from consideration is emblematic of a much broader problem in the agency's attitude toward judicial review of its actions. For example, the Commission thinks it improper for this Court to examine a new IRS Revenue Ruling that helps demonstrate the error of the Commission's *per se* exemption of Section 501(c)(3) groups from its Title II-A regulations. (*See* PX 162.) The Commission wants to exclude General Counsel's Reports in MUR proceedings that set forth its prior precedents which have now been discarded and show how the new rules are already being applied to undermine BCRA in the real world of campaign fundraising. (*See* PXs 155-157.) (Ironically, at the same time the Commission is moving to strike this evidence of real-world impacts, it is moving to dismiss plaintiffs' claims for lack of standing and ripeness because there supposedly is no evidence of any real-world impacts.[3]) The Commission wants no mention of a Commissioner's Congressional testimony, which is clearly part of the legislative history (PX 109); no acknowledgement of the rapidly growing importance of political advertising over the Internet (PXs 165-174); and no reference to some of the most infamous examples in American political history of coordinated issue ad campaigns, all of which

[2] The Commission does not list PXs 114, 115, or 162 in its motion or proposed order, but it specifically attacks those exhibits by number in its accompanying memorandum, asking that the legal writings included as PX 114 and 115 be given "little" or "no" weight and that the IRS Revenue Ruling included as PX 162 "be stricken," along with all references to it in plaintiffs' brief. FEC Mem. at 3 n.3 and 4. The Commission likewise does not include this Court's findings of fact in its motion or proposed order, but specifically argues in its memorandum that all references to those findings "should be stricken" from the Court's consideration. *Id*. at 4.

[3] *See* FEC Summ. J. Mem. at 3-14 (Dkt. No. 27).

took place more than 120 days before an election and would therefore be exempt from most regulation under the new coordination rules (PXs 155, 178). The Commission even claims the prerogative to attack Representative Shays's credibility based on a magazine interview that a commenter *misquoted* out of context, while insisting that this Court may not examine the article *itself* to determine what Representative Shays actually said — on the theory that the article is not in the "record," only the comment letter misquoting it. (*See* PX 164.)

Thus, the Commission goes far beyond the bounds of principled disagreement and seeks on spurious grounds to exclude matters of law, legislative history, agency precedent, and jurisdictional fact from the Court's deliberations. It is also rather sharp for the Commission to misquote Representative Shays while seeking to strike the original article from this Court's examination, and for the Commission to claim that standing and ripeness are lacking because the challenged rules have no real-world impacts while simultaneously moving to strike all evidence of how the rules are having real-world impacts. The Commission also is inconsistent in applying the rules it advocates — it includes in its own brief some of the same kinds of materials to which it objects in plaintiffs' brief; it has not, as of the filing of this submission, objected to the inclusion by its supporting *amici* in their briefs of the same kinds of materials;[4] and it purports to invoke the pre-decisional deliberative privilege with respect to some materials after having filed many similar materials as part of its administrative record.

Part I of this response addresses each of the non-transcript exhibits to which the Commission has objected (*i.e.*, PXs 109, 114-115, 155-157, 162, and 164-178), and demonstrates

[4] The *amici* briefs of the AFL-CIO (Dkt. No. 35) and the Alliance for Justice (Dkt. No. 40), both filed in support of the Commission, contain the same kinds of non-record materials that the Commission has moved to strike from plaintiffs' brief. Thus far, the Commission has not objected to the inclusion of these materials in *amici* briefs filed in support of its position.

that each exhibit should be considered by the Court for the purposes for which it was tendered.[5] Part II of this response addresses the Commission's objections to the plaintiffs' proposed use of transcripts of *public* meetings at which the Commission received the advice and recommendations of staff and then, over repeated objection, reworked the draft soft money rules in ways that fundamentally undermine the letter, purpose, and spirit of BCRA (*i.e.*, PXs 180-182).

Before turning to an exhibit-by-exhibit refutation of the Commission's motion to strike, plaintiffs offer three additional points. *First*, consistent with the practice of many of the courts cited in plaintiffs' opening motion regarding exhibits, this Court should decide the exhibit issue in the context of a full review of the cross-motions for summary judgment. One of the pertinent questions at issue is whether these materials provide useful and appropriate background for the Court in its understanding of the issues. *See* Pls.' Mot. *Re* Exhibits at 4-5; *see also* p. 17 *infra*. Another question is whether the tendered exhibits highlight issues that were not, but which should have been, considered by the Commission. *See* p. 18 *infra*. These kinds of inquiries can only be undertaken in the context of a full consideration of the underlying cross-motions. Plaintiffs' opening motion papers identify the specific portions of their brief that are affected by the exhibit disputes; if this Court disagrees with plaintiffs as to a given exhibit, the Court can simply disregard the designated sentence or footnote in the main brief.

Second, although plaintiffs believe their tendered exhibits help establish many grounds for striking down the challenged regulations, plaintiffs also believe there are ample grounds

[5] Plaintiffs have not moved to supplement the record with any of the exhibits discussed in Part I. Rather, plaintiffs simply seek to have the Court *consider* these exhibits either because the materials are among the tools of statutory construction that may be considered as matters of law, *see* Pls.' Summ. J. Mem. at 4-5, or because they are matters for which judicial notice is appropriate.

wholly apart from the disputed exhibits for setting aside the challenged regulations, including many *Chevron* step one grounds that do not implicate the exhibits at all. Consistent with the practice of other courts, this Court should make clear for purposes of appellate review that, although the disputed exhibits provide many grounds that *reinforce* the outcome here, the outcome does not turn on their consideration.[6]

Third, the Commission accuses the plaintiffs of making a "calculated tactical decision" to rely on the challenged exhibits after having been informed by the Office of General Counsel ["OGC"] that these exhibits were forbidden "under well established D.C. Circuit precedent." FEC Mem. at 16. The Commission neglects to mention that plaintiffs' counsel responded that they had already researched the relevant cases and respectfully disagreed with the OGC's reading of the law. In moving to have the Court consider all of their exhibits, plaintiffs took great care to highlight the disputed issues, identify the affected pages and footnotes in their principal brief, disclose potentially adverse precedent, and explain why they believe this precedent is either inapplicable or distinguishable. Rather than simply filing an opposition to plaintiffs' motion for consideration of their exhibits, the Commission has multiplied the proceedings by filing a gratuitous motion to strike, perhaps to ensure that it can have the last word. However, no final reply could ever aspire to explain away some of the positions the Commission has taken either on these record issues or on the underlying merits.[7]

---

[6] *See especially Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1238 (D.D.C. 1987) ("Even if this Court were to exclude certain or all of the documents at issue on the basis that they might be considered internal agency memoranda, review of the remaining portions of the 'administrative record' would lead to the same conclusion on the merits of this case.").

[7] Plaintiffs advise the Court and Commission that it is likely they will tender several more proposed exhibits of the same nature as the initial exhibits to accompany their March 31 opposition to the Commission's cross-motion for summary judgment. These will likely include additional IRS publications, legal commentary, and the Commission's own new precedents applying some of the challenged regulations. Each such reference will be in response to arguments raised in the Commission's motion for summary judgment.

Argument

I. The Court Should Reject The Commission's Objections To The Non-Transcript Exhibits And Consider These Materials For The Purposes For Which They Were Tendered.

(a) This Court's findings of fact in *McConnell.* The Commission's supporting memorandum insists that all citations to this Court's findings of fact in *McConnell v. FEC* "should be stricken" from the briefs, and that this Court should disregard its own findings (which were widely embraced by the Supreme Court) "for 'the truth of facts averred'" in them. FEC Mem. at 4 & n.7 (citation omitted). The Commission specifies by page and footnote each reference in plaintiffs' summary judgment memorandum to this Court's findings that it wants this Court to strike from consideration (*see id.* at 4):

- Pls.' Summ. J. Mem. at 7-8 n.14, which cites this Court's analysis of how "candidate-centered issue advertisements often permit the candidate to avoid running 'negative' advertising or otherwise assist the candidate by running advertising while the candidate is low on funds." *McConnell v. FEC,* 251 F. Supp. 2d 176, 553 (D.D.C. 2003) (Findings ¶ 2.6.8) (Kollar-Kotelly, J.).
- Pls.' Summ. J. Mem. at 11-12 n.23, which cites this Court's analysis of the importance of early advertising campaigns run in 1995-96 by the AFL-CIO and the political parties.
- Pls.' Summ. J. Mem. at 38-39 & n.65, which quote from actual solicitation letters cited by this Court and the Supreme Court as examples of the types of abuses BCRA was designed to eliminate, but which the challenged regulations allow.
- Pls.' Summ. J. Mem. at 41 nn.68-69, which quote from this Court's findings describing examples of solicitations in which speakers "encourage[d]," "suggest[ed],"

"request[ed]," and "recommend[ed]" soft-money contributions. *McConnell,* 251 F. Supp. 2d at 473, 478.

- Pls.' Summ. J. Mem. at 73 n.129, which cites this Court's findings of fact documenting the utter inadequacy of the express advocacy standard in regulating efforts to influence federal elections, findings that led the Supreme Court to conclude that the standard is "functionally meaningless." *McConnell v. FEC,* 124 S. Ct. 619, 689 (2003).

The Commission's objections are spurious. This Court's findings are inextricably intertwined with its conclusions of law and with the Supreme Court's majority opinion (which relies extensively on those findings); they form the foundation for the law of the land against which the challenged regulations must be judged — not *vice versa*. Moreover, the Court's findings largely involve matters of *legislative* fact of broad applicability in formulating and judging the law as opposed to matters of *adjudicative* fact between individual parties; the Commission's hearsay and other evidentiary objections are therefore off-point.[8] And even if this were purely a matter of adjudicative facts in private litigation, the Commission overlooks a fundamental point: The line of cases cited by the Commission holds that one court may not simply take judicial notice of another court's findings of fact involving *different parties*, because this would violate the rules of due process and collateral estoppel by binding someone to the

[8] *See especially* Advisory Committee's Note to Fed. R. Evid. 201(a): "The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. … [The proper] view which should govern judicial access to legislative facts … renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level."

findings of a proceeding to which he had not been a party.[9] Here, of course, the Commission was the lead defendant in *McConnell v. FEC*, had a full opportunity to participate in the shaping of the findings in issue (indeed, many of this Court's findings reflect the Commission's substantial input), and is therefore fully bound by the *McConnell* findings through ordinary principles of collateral estoppel.[10]

(b) Commissioner Mason's Congressional testimony (PX 109). It is a judicially noticeable fact of legislative history that two FEC Commissioners unsuccessfully lobbied to have Congress exclude Internet communications from the federal campaign finance laws. *See* Pls.' Summ. J. Mem. at 25 n.42 and 26 & n.45. Plaintiffs have relied on the May 3, 2000 testimony of Commissioner David M. Mason before the Senate Committee on Rules as part of the legislative history relevant to BCRA's treatment of the Internet. *See id.* at 25 n.42 and 29 n.51. Yet the Commission wants this testimony stricken "because it was not brought to the whole Commission's attention, by plaintiffs or anyone else, as part of the rulemaking." FEC Mem. at 5.

---

[9] The only case cited by the Commission in support of striking this Court's findings is *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426-27 & n.7 (3d Cir. 1999). *See* FEC Mem. at 4 n.7. That case relies upon Wright & Graham's discussion of the interplay of judicial notice and collateral estoppel: "If it were permissible for a court to take judicial notice of a fact because it has been found to be true in some other action, the doctrine of collateral estoppel would be superfluous. If a party cannot be deprived of his right to dispute a fact by a judicial finding of its truth, a fortiori judicial notice cannot be taken of a fact because it is recited in affidavits, testimony, or documents filed in a court record." 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5106, at 283 (2003 Supp.) (citing cases).

[10] *See, e.g., Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. … To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.") (citations omitted). *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-33 (1979); Restatement (Second) of Judgments §§ 27-29 (1982). The cited findings all involve issues on which the Supreme Court *affirmed* this Court's analysis of the law; the findings were necessary to (and frequently cited in) the Supreme Court's decision. *See In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322 (4th Cir. 2004) (*re* standard of necessity in applying collateral estoppel).

This objection should be rejected for at least two reasons. *First*, the legislative history of a statute is not an adjudicative fact subject to rules of evidence or agency procedure, but a matter of law that may be freely researched and cited by the Court. *See* Pls.' Mot. *Re* Exhibits at 3 & n.3. This includes the testimony of witnesses before Congressional committees, including agency officials.[11] *Second*, the Commission itself is relying on a letter that Commissioners Mason and Smith wrote to Senator McConnell shortly before BCRA's final enactment lobbying for the exclusion of Internet communications. *See* FEC Summ. J. Mem. at 39; *see also* Pls.' Summ. J. Mem. at 26 & nn.45-46 (relying on same letter); PX 101 (letter in question). The Commission should not be allowed to pick and choose which communications from Commissioner Mason to Congress may be considered as part of the legislative history.

(c) Commissioner Thomas's legal writings (PXs 114 and 115). Although the Commission does not include these two legal articles written by Commissioner Scott E. Thomas in its motion to strike or proposed order, it specifically attacks them in its supporting memorandum and argues that they should be disregarded because one "was written before the enactment of BCRA and thus has little to do with the issues in this case," and the other contains predictions that "are entitled to no more weight than plaintiffs' own speculation." FEC Mem. at 3 n.3. These objections should likewise be rejected. The article "written before the enactment of BCRA" (PX 114) is an analysis in the *Catholic University Law Review* showing how the

[11] On hearing testimony generally, *see Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980) (hearing testimony was a "principal source[] for edification concerning the meaning and scope of" statute in dispute); *see also id.* at 204-14 (detailed examination of hearing testimony); *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003) (taking note of trade association testimony before Congressional committee); *Austasia Intermodal Lines, Ltd. v. Fed. Mar. Comm'n*, 580 F.2d 642, 645 (D.C. Cir. 1978) (reviewing testimony at Congressional hearings while emphasizing that "[s]uch testimony should not be accorded undue weight"). On hearing testimony of agency officials in particular, *see, e.g., Indep. Bankers Ass'n of Am. v. Fed. Credit Admin.*, 164 F.3d 661, 668 n.11 (D.C. Cir. 1999) (analyzing, *e.g.*, testimony of agency official while ultimately not giving it "undue weight"); *Formula v. Heckler*, 779 F.2d 743, 757 n.17 (D.C. Cir. 1985) (FDA Commissioner); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 n.33 (D.C. Cir. 1982) (EPA Administrators).

Commission has always rejected using an express advocacy test in the context of regulating coordinated expenditures; it is thus *directly* relevant to this case, in which the Commission for the first time ever has adopted an express advocacy test to govern coordination issues during much of the election cycle. *See* Pls.' Summ. J. Mem. at 16 & n.30. The article containing Commissioner Thomas's "predictions" about the loopholes opened by the Commission's new coordination rules (PX 115) is a seminar presentation that provides a thoughtful legal and policy analysis explaining why Commissioner Thomas voted against these misguided rules. There is nothing wrong with a court reading legal articles like these and giving them whatever persuasive weight it deems appropriate.[12]

(d) FEC General Counsel's Reports (PXs 155–157). The Commission demands that three FEC General Counsel's Reports that discuss and analyze Commission rules and precedents be struck from judicial consideration. The three offending reports are:

- June 9, 2000 FEC Gen. Counsel's Rep., MUR 4291 (PX 155), involving the AFL-CIO's 1995-96 "issue advertising" campaign that was undertaken at a point in the election cycle well before the 120-day pre-election window imposed by the Commission's new coordination rules. *See* Pls.' Summ. J. Mem. at 11-12 & n.23. The Commission argues that, since no one reminded it of this infamous episode during the rulemaking, the matter is "not part of the administrative record and may not be submitted to the Court." FEC Mem. at 5. As this Court will recall, it

[12] *See especially Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 n.2 (D.C. Cir. 1997) ("[w]e … appreciate serious discussions of legal doctrine, increasingly rare in the leading law journals").

cited several times to this General Counsel's Report in its findings of fact in *McConnell*.[13]

- Nov. 10, 1994 FEC Gen. Counsel's Rep., MUR 3585 (PX 156), in which the Commission's General Counsel summarized the rules of "apparent authority" that the Commission applied under FECA, emphasizing that FECA reaches not only those with "actual" authority but also one who "'*occupies a position that would lead a third party to believe that he is authorized* to receive contributions.'" Pls.' Summ. J. Mem. at 44 & n.75 (citation omitted). The Commission now demands that agency precedents like these be stricken from consideration because "if not presented to the Commission during the rulemaking, they are not part of the administrative record and may not be submitted to the Court." FEC Mem. at 5.
- March 27, 2003 FEC First Gen. Counsel's Rep., MUR 5338 (PX 157), which demonstrates how the Commission's "grandfather" provision in the post-BCRA national party affiliation rules has already undermined Congress's soft-money ban. Specifically, this General Counsel's Report illustrates how 11 C.F.R. § 300.2(c)(3) impermissibly excludes consideration of any activity or aspect of the party-entity relationship that occurred before BCRA's November 6, 2002 effective date. *See* Pls.' Summ. J. Mem. at 55-58. The Commission demands that this Court ignore this precedent, "generated after the Commission promulgated the regulation at issue, because the APA record restriction directs courts 'not to

[13] *See, e.g.*, 251 F. Supp. 2d at 541-42, 556-557, 582 n.108 (Findings ¶¶ 2.6.1.4, 2.7.3, 2.7.8, and 2.11.8.2) (Kollar-Kotelly, J.).

look to material submitted after the agency has made its decision.'" FEC Mem. at 4 (citation omitted).

The Commission's objections to these General Counsel's Reports fail on many grounds. These reports all fall into the category of official agency materials that "are *judicially cognizable apart from the record as authorities marshaled in support of a legal argument*." *Military Toxics Project v. EPA,* 146 F.3d 948, 954 (D.C. Cir. 1998) (emphasis added) (*re* consideration of agency policy documents and reports in APA case); *see also Ohio Valley Envtl. Coalition v. Whitman,* 33 Envtl. L. Rep. 20,156, 2003 WL 43377, at *6-7 (S.D.W. Va. 2003) (agency materials may be "free[ly]" cited, "like other authorities in support of legal arguments"). Although plaintiffs cited *Military Toxics, Ohio Valley,* and similar cases in their motion regarding exhibits, the Commission has completely ignored this line of authority. The General Counsel's Reports in MURs 3585 and 4291, which predate the Commission's new rules, help demonstrate that those rules sharply, and without adequate explanation, depart from long-standing Commission interpretations and practices, and thus are arbitrary and capricious. The Supreme Court itself has evaluated FEC precedents, as reflected in General Counsel's Reports, to determine "consisten[cy]" of the Commission's construction of FECA.[14]

As for the General Counsel's Report in MUR 5338, which was issued after the promulgation of the challenged rules, the Commission is completely off-point in comparing it with an adjudicative fact submitted after an evidentiary determination. The report is a matter of

[14] *FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 38 & nn.13, 15, 17 (1981); *see also Common Cause v. FEC,* 906 F.2d 705, 707 (D.C. Cir. 1990) (citing General Counsel's Report from other proceedings for evidence of "relevant indicia of affiliation" considered by Commission); *NRA v. FEC,* 854 F.2d 1330, 1333-34 (D.C. Cir. 1988) (discussing progression of General Counsel's Reports in prior MURs). This Court also has relied on General Counsel's Reports from various MURs. In addition to the citations to the report in MUR 4291 (*see* note 13 *supra*), *see* 251 F. Supp. 2d at 543, 545-56, 590 (Findings ¶¶ 2.6.1.4, 2.6.2.2, 2.7.3, and 3.10) (Kollar-Kotelly, J.).

law showing how the challenged rule is being applied in the real world of campaign fundraising. Moreover, by showing that the rules are having concrete, tangible impacts in the enforcement of BCRA, the MUR helps refute the Commission's Article III ripeness defense and thereby demonstrate that this Court has jurisdiction. The Commission therefore errs in claiming that none of the exhibits is relevant to "a dispute over court jurisdiction." FEC Mem. at 6 n.8.[15]

(e) IRS Revenue Ruling 2004-6 (PX 162). Although not included in the Commission's motion to strike or its proposed order, PX 162 is also challenged by the Commission in its memorandum: **"**[T]he Commission also objects to the submission of an IRS Revenue Ruling released this year[.]" FEC Mem. at 4. As plaintiffs showed in their opening summary judgment memorandum, this legal ruling reinforces the conclusion that the Commission committed reversible error in uncritically assuming that IRS enforcement of the tax code would prevent Section 501(c)(3) groups from running the types of sham "issue ads" that Title II-A is aimed at; the new Revenue Ruling treats as exempt "lobbying" communications the very kinds of ads that are supposed to be covered by BCRA Title II-A. *See* Pls.' Summ. J. Mem. at 78-79 & n.139.

The Commission reasons that the IRS Revenue Ruling "should be stricken" because it is new evidence "'submitted after the agency has made its decision.'" FEC Mem. at 4 (citation omitted). But Revenue Rulings are not evidence tendered to a factfinder; they are legal precedents that "'constitute a body of experienced and informed judgment to which courts may properly resort for guidance.'"[16] They are no different from the other agency materials that the

---

[15] The Commission cites to *LeBoeuf, Lamb, Greene & MacRae v. Abraham*, 215 F. Supp. 2d 73 (D.D.C. 2002). This is one of plaintiffs' principal cases. *See* Pls.' Mot. *Re* Exhibits at 4-5. *LeBoeuf* emphasizes that "[p]arties may submit supplemental evidence that is not argumentative" for many purposes in an APA case, including where useful to "demonstrate whether or not jurisdiction exists – a matter which this court must address." 215 F. Supp. 2d at 82. That is precisely the situation here.

[16] *Gladden v. Comm'r of Internal Revenue*, 262 F.3d 851, 853 n.1 (9th Cir. 2001) (citation omitted); *see also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (discussing force of Revenue *(Footnote continued)*

D.C. Circuit has emphasized "are judicially cognizable apart from the record as authorities marshaled in support of a legal argument." *Military Toxics*, 146 F.3d at 954. The Commission has offered no persuasive reason why this Court should defer to the Commission's reading of the Internal Revenue Code while striking from consideration a contrary IRS Revenue Ruling that is squarely on point. In addition, this Revenue Ruling and materials that discuss it, *see* pp. 19-21 *infra*, are directly relevant to the Commission's standing and ripeness defenses, because they help demonstrate that the plaintiffs' claims are not academic exercises regarding theoretical matters that have not yet arisen, but involve concrete issues having a present and immediate real-world impact. These exhibits may therefore be considered in any event as jurisdictional evidence. *See* p. 13 & n.15 *supra*.

(f) The misquoted *Forbes* magazine article (PX 164). During the soft-money rulemaking, one commenter took a press interview with Representative Shays completely out of context in arguing that Congress intended to exclude the Internet from the scope of "public communications" as defined in 2 U.S.C. § 431(22). *See* May 29, 2002 Comments of Mindshare Internet Campaigns LLC, at 2 (quoting Representative Shays as telling Forbes.com that "[t]he Internet is not really the problem right now. There is a general feeling that, if in doubt, stay away from putting on any restrictions.") (PX 10). Plaintiffs have tendered the actual *Forbes* article which demonstrates that, when Representative Shays's remarks are examined in context,

---

Rulings that "reflect the agency's longstanding interpretation of its own regulations"); *Comm'r of Internal Revenue v. Schleier*, 515 U.S. 323, 336 n.8 (1995) (analyzing "a recent Revenue Ruling from the IRS" although the ruling "is not before us"); *Aeroquip-Vickers, Inc. v. Comm'r of Internal Revenue*, 347 F.3d 173, 181 (6th Cir. 2003) ("Revenue rulings … constitute 'precedents to be used in the disposition of other cases,'" and "also serve as 'official interpretation[s] by the IRS of the tax laws.'") (citations omitted); *W. Co. of N. Am. v. United States*, 323 F.3d 1024, 1032 (Fed. Cir. 2003) ("[T]his court may refer to general counsel memoranda and revenue rulings for guidance and accept that reasoning in whole or in part to assist its understanding of the language of the revenue code."); *Weisbart v. U.S. Dept. of Treasury*, 222 F.3d 93, 98 (2d Cir. 2000) (IRS Revenue Ruling receives "'great deference'" and "is presumed to have 'the force of legal precedent unless unreasonable or inconsistent with the provisions of the Internal Revenue Code'") (citation omitted).

it is clear that he was explaining why the new provisions regarding "electioneering communications" in Title II-A extend only to "ads on broadcast, cable and satellite outlets, but not the Internet." Ian Zack, *Congress' Gift to the Internet*, (Feb. 26, 2002), *available at* http://www.forbes.com/2002/02/26/campaignfinance.html (PX 164). Congress's decision to limit this Title II-A provision governing *independent* expenditures to certain "broadcast, cable, or satellite communication[s]," BCRA § 201(a), FECA § 304(f)(3)(A), 2 U.S.C. § 434(f)(3)(A), says nothing about the entirely separate statutory provision governing *coordinated* expenditures for "*any* … form of general public political advertising," BCRA § 101(b), FECA § 301(22), 2 U.S.C. § 431(22) (emphasis added).

The Commission now attempts to rely on this misquotation of the *Forbes* article, claiming that Representative Shays's statement "is significant because it runs counter to plaintiffs' own contention here that the 11 CFR 100.26 Internet exclusion contravenes BCRA." FEC Summ. J. Mem. at 39. Incredibly, the Commission also moves to strike the actual *Forbes* article that is misquoted in the administrative record. The Commission reasons that "plaintiffs, or any of the commenters, could have brought [this article] to the attention of the Commission during the rulemaking but did not." FEC Mem. at 5.

This objection is baseless. Putting to one side fundamental fairness, the Commission's objection violates the elementary APA principle that when a document in the record refers to or quotes from another document, the source document is properly included as part of the record. *See, e.g., McConnell Douglas Corp. v. NASA*, 895 F. Supp. 319, 323-24 (D.D.C. 1995) (supplementing record with documents that were "specifically referenced" in a letter included in the certified record; agency could not "pick and choose" which information in cited materials could be considered by the court). The Commission's position is untenable: either its staff

looked at the *Forbes* article (in which case the underlying article has been improperly excluded from the record) or the Commission attacked Representative Shays without bothering to check its sources (which speaks more broadly and disturbingly to the quality of the Commission's decisionmaking in general).

(g) Articles on the growing importance of political advertising over the Internet (PXs 165-173). In footnote 50 of their opening brief, plaintiffs observed that, "[s]olely as a matter of background and to illustrate the significance of this issue, the Court may take judicial notice of pertinent articles and reports describing the continued growth in the political use of the Internet." Pls.' Summ. J. Mem. at 27. The Commission challenges the plaintiffs to name a case authorizing the use of "background information"; the Commission contends that plaintiffs "do not quote a case using that term." FEC Mem. at 6 n.8. The term is, in fact, used in the D.C. Circuit's decision in *Environmental Defense Fund v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981), which recognized the propriety of "a judicial venture outside the record … [for] background information, or to determine the presence of the requisite fullness of the reasons given."

It is appropriate to consider these exhibits on multiple grounds. *First*, the Commission's hearsay and judicial notice objections are misguided. The Supreme Court itself has emphasized the propriety of relying on news articles and studies to demonstrate a "perception" and "appearance" of corruption. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 n.5 (2000). The First Circuit likewise relied on "[a]n abundant file of press clippings includ[ing] both news stories and editorial comment" in evaluating efforts to combat the appearance of corruption. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000). The articles here are no different. By demonstrating the growing volume and importance of the political advertising on the Internet excluded from regulation under the new rules, they

underscore the appearance (if not the actuality) of corruption that is likely to persist given the under-inclusiveness of the rules.

Second, although the Commission denies that there are any cases permitting the examination of "background information," plaintiffs earlier pointed to several: *Beach Communications, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992) ("Where this court 'needs more evidence to enable it to understand the issues clearly,' we have discretion to supplement an administrative record.") (citation omitted); *Am. Rivers v. U.S. Army Corps of Eng'rs,* 271 F. Supp. 2d 230, 248 n.13 (D.D.C. 2003) (documentary exhibits may be "appropriately relied upon ... in order to obtain a thorough background of the case"); *Leboeuf,* 215 F. Supp. 2d at 84, 86 ("The D.C. Circuit has instructed that parties may supplement the record to help explain issues to the court when the record is unclear," so long as the supplementary material is "explanatory in nature" as opposed to "argumentative") (*citing Esch v. Yeutter,* 876 F.2d 976, 991 (D.C. Cir. 1989)). The Commission's efforts to distinguish these cases are all unpersuasive.[17] Ultimately, the Commission's objections boil down to the claims that its E&Js are sufficient, that "the Commission's action has been adequately explained," and that "the Court needs [no] additional evidence to understand the issues." FEC Mem. at 8; *see also id.* at 6. With all respect, these are matters for the Court and not the Commission to decide. If the Court disagrees with the Commission, it may examine the exhibits.

[17] The Commission argues that *Beach Communications* is distinguishable because the E&Js in this case provide sufficient explanations. *See* FEC Mem. at 6 n.8. That, of course, is something for the Court and not the Commission to decide. The Commission claims that *LeBoeuf* only applies where jurisdiction is in issue. *Id*. The case is not so restricted, and in any event the Internet materials are relevant to jurisdiction because they reinforce the ripeness of this challenge. *See* pp. 18-19 *infra*. The Commission claims that *American Rivers* can be ignored because "this is not a case involving a preliminary injunction." *Id*. That is true, but *American Rivers* emphasized that this was simply "one of our Circuit's stated exceptions for allowing consideration of extra-record [evidence] in administrative review cases," and that "a number of District Court decisions in this Circuit have acknowledged that the *Esch* decision described the instances in which supplementation of the administrative record is allowed." 271 F. Supp. 2d at 247 & n.10 (collecting numerous authorities).

Third, the news reports and studies assist the Court in deciding whether the Commission considered all the relevant factors in adopting its *per se* exclusion for Internet communications. This is another long-recognized exception to the rule against consideration of extra-record materials.[18] The Commission's response is predictable: the exception does not apply because "the Commission properly considered the relevant factors" and the challenged exhibits fail to "point out a relevant factor that [the Commission] failed to consider." FEC Mem. at 8. This is incorrect. The exhibits reinforce the conclusion that the Commission failed to consider the growing importance of general public political advertising over the Internet; failed to consider the numerous ways in which Internet political advertising functions just like political advertising over other media for all purposes relevant to FECA and BCRA; and failed to account for the many situations in which political advertising over the Internet is not "cheap" and "inexpensive," but bought and paid for with large sums of money and thus inescapably a "[t]hing of value" under the statutory definitions of "expenditure" and "contribution." *See generally* Pls.' Summ. J. Mem. at 20-29.

Fourth, contrary to the Commission's claims that these articles are not relevant "for purposes of a dispute over court jurisdiction," FEC Mem. at 6 n.8, the tendered Internet exhibits demonstrate the growing importance of paid advertising campaigns over the Internet and thus undermine the Commission's jurisdictional defense that the Internet dispute is simply an

[18] *See, e.g., AT&T Info. Sys., Inc. v. GSA*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (recognizing in *dictum* that "the record may be supplemented to provide, for example, background information or evidence of whether all relevant factors were examined by an agency"); *Costle*, 657 F.2d at 285-86; *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *Friends of the Earth, Inc. v. U. S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 35 (D.D.C. 2000) (considering additional evidence "when it was necessary to identify unaddressed impacts"); *Pub. Citizen*, 653 F. Supp. at 1237 ("Moreover, this Court is free to include in its review the challenged document to ascertain whether the Secretary considered all of the relevant factors she should appropriately have considered in reaching her decision."); *Conservation Law Found. of New England, Inc. v. Clark*, 590 F. Supp. 1467, 1474-75 & n.5 (D. Mass. 1984) (allowing extensive "supplementation of the record to show factors the agency should have considered, but

(Footnote continued)

academic exercise lacking any present, concrete effects. *See* FEC Summ. J. Mem. at 3-14. The exhibits may therefore be examined even if only for their bearing on ripeness and other jurisdictional issues. *See LeBoeuf*, 215 F. Supp. 2d at 82.

Finally, even if the matter were one of adjudicative rather than legislative fact, and even if Fed. R. Evid. 201 thus governed the outcome, the points for which the Internet articles and studies are tendered all qualify for judicial notice: plaintiffs believe it is indisputable that a growing amount of political advertising takes place over the Internet, that much political advertising over the Internet is bought and paid for, and that this paid advertising functions much like other paid advertising over other media. Whether the Court takes judicial notice of these propositions or remands for the Commission to address these points, the Commission's E&J cannot be reconciled with these realities.[19]

(h) Section 501(c)(3) issues (PXs 175-176). To help illustrate the importance of their legal dispute, both sides have cited to Section 501(c)(3) information that is not within the four corners of the record. Plaintiffs have cited to a *National Journal* article on an "issue ad" run in the 2000 campaign by the Federation for American Immigration Reform ["FAIR"], and have cited to FAIR's website identifying the group as a Section 501(c)(3) organization. *See* Pls.' Summ. J. Mem. at 78 n.138; *see also* PXs 175-176. The Commission, on the other hand, cites to the IRS website in support of its assertion that there are "more than 900,000 26 U.S.C. 501(c)(3) organizations" whose "core charitable functions" might be "*disrupt[ed] or chill[ed]*" by Title II-A. FEC Summ. J. Mem. at 67 & n.24 (emphasis added).

---

did not"), *aff'd sub nom. Conservation Law Found. of New England, Inc. v. Sec'y of Interior*, 864 F.2d 954 (1st Cir. 1989).

[19] Plaintiffs emphasize again that they see no need for a remand to the Commission on the Internet issues, given that the Commission's *per se* exclusion violates BCRA and *Chevron* step one on so many different grounds.

Many of the factors discussed in connection with earlier exhibits apply with equal force here. Thus, if nothing else, the exhibits help demonstrate the "appearance of corruption" that the *per se* exemption for Section 501(c)(3) groups is helping to perpetuate. *See* pp. 16-17 *supra.* These exhibits also provide appropriate background information, help verify whether the Commission considered all of the relevant factors, and are directly relevant to jurisdiction because they show that the Section 501(c)(3) dispute is concrete and tangible. *See* pp. 17-19 *supra.* But even putting all of these factors to one side, the Commission offers no principled reason why it should be able to cite to publicly available information that is relevant to its Section 501(c)(3) arguments but plaintiffs should be prohibited from doing so. Nor is there any reason why the Commission's supporting *amicus* on the issue, the Alliance for Justice, should be allowed to rely on a variety of extra-record materials in its defense of the Commission while plaintiffs are forbidden from using the same kinds of materials.

(i) *Roll Call* article on implications of new IRS Revenue Ruling (PX 177). This article presents the views of several tax law experts on the likely implications of IRS Revenue Ruling 2004-6, discussed on pages 13-14 above. They express concern that the IRS interpretations, in light of the Commission's Title II-A regulation exempting charities, "may have inadvertently handed campaign strategists an enormous loophole." Damon Chappie, *New IRS Guidance May Open Loophole*, Roll Call, Jan. 26, 2004, at 2 (PX 177). One expert said the new IRS interpretation, combined with the Commission's Title II-A regulation, "could very well make 501(c)(3) charities 'the ideal vehicle for interventionist advertising.'" *Id.* Another tax expert said the IRS guidance opened up "a very real and likely loophole." *Id.* at 3. This is entirely consistent with written and public hearing comments in the record.

Many of the principles already discussed apply with equal force to this article. Like other exhibits, it is "judicially cognizable apart from the record as [an] authorit[y] marshaled in support of a legal argument." *Military Toxics*, 146 F.3d at 954; *see* pp. 12-13 *supra*. This article is functionally no different than the law review literature discussed above. *See* pp. 9-10 & n.12 *supra*. It also reinforces the immediacy of this dispute, thereby helping to establish this Court's jurisdiction in the face of the Commission's ripeness arguments; provides appropriate background information; and assists in determining whether the Commission gave adequate consideration to all relevant factors. *See* pp. 17-19 *supra*.[20]

(j) Excerpt from Dick Morris, *Behind the Oval Office* (PX 178). The plaintiffs quote from Dick Morris's book on the 1995-96 Clinton reelection campaign to illustrate what anyone who is familiar with modern American political history will readily recall: The Democratic National Committee ran a barrage of "issue ads" promoting President Clinton's reelection beginning in the summer of 1995; this was well beyond the 120-day pre-election "timeframe" test created by the Commission's new coordination rules, and thus would have been largely exempt from regulation under the new rules.[21] The DNC/Clinton media campaign was of course widely reported in the press, in the Thompson Committee report, in official Commission documents investigating the ad campaign, and in the *McConnell* litigation. The Commission

[20] This *Roll Call* article is also cited by the Alliance for Justice and attached as an exhibit to its *amicus* brief in support of the Commission. The Commission thus far has raised no objection to the Alliance for Justice's friendly use of this article, only to plaintiffs' use of it.

[21] "'Week after week, month after month, from early July 1995 more or less continually until election day in '96, sixteen months later, we bombarded the public with ads. The advertising was concentrated in the key swing states … . This unprecedented campaign was the key to success. … As election day approached, the free media began to cover the Clinton- and Dole-campaign ads with greater intensity. But by then, the early advertising had so locked the campaign into its basic pattern that the advertising — and the reports on it — had little impact. A given ad would produce a blip up or a blip down in the polls, but none realigned what had been set in place by our earlier ads.'" Pls.' Summ. J. Mem. at 11-12 n.23 (quoting Dick Morris, Behind the Oval Office: Winning the Presidency in the Nineties 139-40 (Random House 1997) (PX 178)).

cannot seriously contend that it was unaware of this episode when it limited the regulation of most coordinated expressive communications to those occurring within 120 days of a primary or general election. Even if treated as a purely adjudicative fact, this is a matter that is perfectly appropriate for judicial notice, is legitimate background information, and assists the Court in determining whether the Commission considered all relevant factors and adequately explained its belief that coordinated public communications occurring more than 120 days before an election are unlikely to be "reasonably related" to the election *unless* they contain express advocacy or republish the campaign's own materials. *See* Pls.' Summ. J. Mem. at 13-14, 19.[22]

II. The Court Should Reject The Commission's Objections To The Public Meeting Transcripts And Consider These Materials For The Purposes For Which They Were Tendered.

Although the Commission criticizes the plaintiffs for submitting "unofficial" transcripts of open, public meetings that were widely reported in the press, plaintiffs believe that governing precedent fully permits the use of these transcripts in the manner they propose.[23] To begin, the decisions that the Commission relies on — and which plaintiffs first brought to the Court's attention — recognize that "[t]here may be cases where a court is warranted in examining the deliberative proceedings of the agency,"[24] but caution that courts should not "*regularly*,"[25]

---

[22] As discussed in plaintiffs' motion regarding exhibits, this Court already is familiar with Mr. Morris's memoir, having relied upon it in *McConnell*. *See, e.g.*, 251 F. Supp. 2d at 441-42 (Findings ¶ 1.6); *id*. at 654, 685 (Kollar-Kotelly, J.).

[23] The only reason that PXs 180-182 are "unofficial" transcripts is that the Commission has refused to transcribe the official tapes. As detailed in the Umberger Declaration (Dkt. No. 29), plaintiffs obtained copies of the official tapes of these meetings from the Commission and then had certified transcripts prepared from the tapes. The Commission has not objected to the authenticity and accuracy of the transcripts.

[24] *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 45 (D.C. Cir. 1986) (*en banc*).

[25] *Id.* (emphasis added).

"*routinely*,"[26] or "*ordinarily* study predecisional transcripts of deliberations within an agency."[27] Plaintiffs understand and accept these strictures. As plaintiffs have demonstrated, however, this is not a "regular," "routine," or "ordinary" APA case.

A. It Is Appropriate To Consider Staff Recommendations And Analyses, As The Commission Already Has Conceded With Respect To Other Exhibits.

Federal courts have frequently analyzed Office of General Counsel evaluations and recommendations over the past generation in assessing the legality of FEC actions, and plaintiffs' requested use of OGC evaluations and recommendations fits comfortably within this long tradition. *See* Pls.' Mot. *Re* Exhibits at 6-8 & n.9. The Commission makes several responses that can quickly be dispatched. *First*, the Commission argues at some length that it "has no *obligation* to accept its staff's views or recommendations." FEC Mem. at 13 (emphasis added). Plaintiffs have never suggested otherwise. The cases do, however, make clear that agency decisionmakers must at the very least respond to agency precedent and policy concerns raised by staff, and deal with those concerns in a reasoned manner. *See* Pls.' Mot. *Re* Exhibits at 7-8 & n.9. The Commission has entirely ignored *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1237-38 (D.D.C. 1987), one of plaintiffs' principal cases, which emphasizes that an agency's failure to respond to professional concerns and criticisms voiced by agency personnel would be "indicative of a lack of rationality on the part of [the agency] in the decisionmaking process," and that the agency "would have abused [its] discretion by failing to consider vitally important information offered by the agency's own experts in the field." Another case ignored by the Commission, *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12-13

---

[26] *Kan. State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (emphasis added); *see also PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999).

[27] *Deukmejian v. NRC*, 751 F.2d 1287, 1324 (D.C. Cir. 1984) (emphasis added), *aff'd in part sub nom. San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26 (D.C. Cir. 1986) (*en banc*).

(D.D.C. 2001), emphasizes that "if the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included [in the record] as well."

Second, the Commission's attempt to distinguish between enforcement and rulemaking proceedings in terms of judicial examination of OGC input holds no water. *See* FEC Mem. at 14-15. In both situations, the OGC studies campaign finance law and FEC precedents (in the form of MURs, AOs, and otherwise) and recommends how the Commission should act on the matter before it. Although a rulemaking may be more of a legislative function while an enforcement proceeding is a more prosecutorial/judicial function, there is no sound reason why the courts should look to the OGC for an unbiased, nonpartisan analysis in one context but not the other. In addition, courts have relied on OGC views in the rulemaking context, as witnessed by the remand in *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987), that was occasioned by the Commission's failure to deal sufficiently with the "strongly worded" input of its OGC on matters involving soft-money rulemaking.[28]

Third, the Commission argues at length that analyzing staff input during the public meetings at which the majority significantly reworked the final rules would violate the "pre-decisional deliberative" process "similar to the harm caused by the disclosure of predecisional agency documents." FEC Mem. at 13 n.15; *see also id.* at 11-14. But the staff input here took place during open, public-record meetings. This case does not involve, and does not in any way

[28] The Commission purports to distinguish one D.C. Circuit case on the grounds that the court only relied on an OGC internal memorandum "in explaining why the case was being remanded to the agency for a statement of reasons." FEC Mem. at 15 n.17. This is no distinction at all; the Court might decide to do precisely the same thing here. (Plaintiffs do not believe a remand for further explanation is necessary since the Commission's rules fail on so many different *Chevron* step one grounds, but it is certainly a possibility that this Court might decide to require further explanations and justifications by the agency.) In the cited case, the D.C. Circuit expressed concern that, "[i]n failing to follow its General Counsel's recommendation and, instead, dismissing the complaint against the NRCC, the FEC may have slighted its own precedent and accorded similar cases dissimilar treatment, thereby proceeding on a course 'contrary to law.'" *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987). The same sort of failings repeatedly occurred in the challenged BCRA rulemakings.

threaten, private consultative privileges between an agency and its staff behind closed doors.[29] Moreover, the Commission has tendered as an important part of its record numerous documents covered by the pre-decisional deliberative privilege, including staff drafts, explanations, recommendations, memos, and other candid expressions of professional views and opinions.[30] The Court can trace the internal deliberative process in detail based on the record submitted by the Commission, except at the very end when the working majority of Commissioners extensively rewrote the final rules over the strong legal and policy objections of the OGC. The Commission has offered no explanation for why the Court is entitled to examine the internal drafting and deliberative process all the way up until the moment of decision, at which point a deliberative privilege is somehow resurrected with respect to matters occurring in an *open, public meeting*. That is both senseless and unfair. As the D.C. Circuit has cautioned, a government agency may not "cherry-pick[] the materials to be made public" by selectively disclosing some information while invoking the deliberative process privilege with respect to similar information. *Army Times Pub. Co. v. Dep't of Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993). "[G]overnment will function best if its warts as well as its wonders are available for public review." *Id.* The same holds true for judicial review of agency action.[31]

---

[29] This serves to distinguish this case from *Deukmejian* and *San Luis Obispo*, which involved transcripts of *closed* meetings of the Nuclear Regulatory Commission.

[30] *See, e.g.*, FEC Admin. R. Doc. Nos. 5, 10, 94, 98, 109, 120, 178, 239, 295, 306, 316-17, 319, 335, 340, 343, and 359-60 (Dkt. No. 28).

[31] As the D.C. Circuit emphasized in *Army Times*, strict rules of waiver do not apply to the deliberative process privilege "simply because [the agency] has released information similar to that requested." *Id.* at 1071. However, the release of documents containing similar information does tend to suggest that the release of the information in issue poses no genuine threat to the agency's deliberative process. *Id.*; *see also In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (court must assess "'possibility of future timidity by government employees'" if information is released) (citations omitted).

To illustrate, the Commission has included in its record a predecisional draft in which the OGC emphasized that the proposed "blanket exemption" of Section 501(c)(3) corporations from the Title II-A regulations *"is too*

(Footnote continued)

Finally, the Commission argues that, whatever rules may apply to staff comments reflected in "written materials," different rules apply to the "oral remarks" of staff reflected in meeting transcripts. FEC Mem. at 15. This is not a meaningful distinction. As Judge Mikva emphasized, it is "appropriate" to "examine agency transcripts" to ascertain "the tangible ingredients that entered the agency's decision," and against which the decision must be judged:

> The *Overton Park* rule protects the administrative decisionmaker's mental processes from routine judicial scrutiny. In other appropriate cases, a court may examine agency transcripts without entering this sensitive terrain of the decisionmaker's thought patterns. The most fruitful yield from agency transcripts may well be information about the tangible ingredients that entered the agency's decision, not inferences about the decisionmaker's biases, motivations, and human weaknesses.

San Luis Obispo Mothers for Peace, 789 F.2d at 45 (Mikva, J., concurring). Consistent with this principle, Judge Jackson studied both "the General Counsel's recommendations as well as the transcript of the Commission's deliberations" in reviewing an FEC dismissal of a complaint. *Stark v. FEC*, 683 F. Supp. 836, 838 (D.D.C. 1988). Another federal court has held that transcripts of "staff comments to Board members at any briefing session, limited to what the staff member said, are included as part of the administrative record." *Wash. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 526 F. Supp. 343, 352 (N.D. Ohio 1981). There is simply no functional difference between the input of OGC expert views in writing and the input of such views in a transcribed public meeting. Nor is there any meaningful distinction between the Commission's failure to respond adequately to the OGC's concerns and objections up until the

---

broad for the limited exemption authority BCRA provides to the Commission." Pls.' Summ. J. Mem. at 76 (quoting PX 23) (emphasis added). The Commission has not objected to plaintiffs' use of this written predecisional recommendation. Yet if the General Counsel made the identical remarks in a public meeting, the Commission's position would be that the remarks were privileged and must be stricken. That distinction makes no sense. There is no evidence that the "possibility of future timidity," *In re Sealed Case,* 121 F.3d at 738, is any different in one context than the other. If anything, judicial review of an internal draft would seem to risk more of a chill than review of public meeting comments.

culmination of the rulemaking process and its failure to respond adequately to the OGC's concerns and objections voiced during the final meeting itself while the rules were being rewritten.[32]

B. It Is Appropriate In This Case To Consider The Commissioners' Public Comments Regarding The Meaning Of And Reasons For Amendments To The Proposed Regulations.

The Commission harshly criticizes the plaintiffs for failing to follow a qualified rule that does not allow the "regular," "routine," and "ordinary" use of transcripts of deliberative meetings. *See* pp. 22-23 *supra*. Plaintiffs demonstrated in their opening summary judgment submission and in their motion regarding exhibits that this is an unusual case that warrants uncommonly searching, careful review of the Commission's regulations and of all relevant background materials, including transcripts of public Commission meetings. The Commission's response is simply to deny that there is anything out of the ordinary about this case. But the Supreme Court and this Court have found that prior FEC regulations "subverted," "eroded," and "circumvent[ed]" the Federal Election Campaign Act, thereby helping to trigger a campaign finance crisis that ultimately required the intervention of Congress, the President, and the federal courts. *See* Pls.' Summ. J. Mem. at 1 & n.2. The Commission's demand for deference on these *same* issues rings somewhat hollow here. Moreover, the control group of Commissioners that adopted the challenged regulations took an exceedingly narrow and unfriendly view of

[32] The Commission cites *Common Cause v. FEC,* 676 F. Supp. 286 (D.D.C. 1986), in which the court chose not to rely on a meeting transcript in attempting to determine which legal standard the majority of the Commission had actually applied. The court conducted "[a] hasty perusal" of the transcript and decided it did "not reflect the considered reasons for the Commission's actions." *Id*. at 289 n.3. The court found that the Commission's dismissal was "in flat disagreement with the General Counsel's analysis and recommendation," and that the Commission at the very least had to provide an explanation for its decision, the standard it applied, and how its decision could be reconciled with other agency precedents. *Id*. at 289; *see also id*. at 289-93. Here, plaintiffs seek to use the transcripts in part to document the same kinds of "General Counsel's analys[e]s and recommendation[s]" that the court in *Common Cause* found important in its review. Moreover, a review of the transcripts in this case shows that they do reflect the "considered reasons" for the majority's various revisions of the draft rules, and that they help explain the purpose and intended scope of the amendments.

Congress's authority under the First Amendment, repeatedly asserting views during their meetings that have since been rejected and overridden by the District Court and Supreme Court opinions in *McConnell.* At times the meeting transcripts read like an exercise in agency nullification of statutory directives, with the control group of Commissioners repeatedly seeking to rework BCRA based on its constitutional and policy disagreements with Congress. This should qualify as a form of "'improper behavior'" warranting careful judicial review of the relevant public meeting transcripts. *See San Luis Obispo Mothers for Peace,* 789 F.2d at 44 (citation omitted).

Moreover, although the transcripts unquestionably present an unflattering view of FEC decisionmaking, the plaintiffs are not simply seeking to "impeach" the Commission's final rules. Rather, they seek to use the Commissioners' remarks to clarify and explain ambiguities in the final E&J and to confirm the reasonableness of plaintiffs' reading of the regulations. Plaintiffs included a number of examples on page 9 of their motion regarding exhibits, none of which have been addressed by the Commission. The Commission should not be heard to challenge plaintiffs' characterizations of the new rules when those characterizations come directly from the sponsoring Commissioners themselves. The Commissioners' remarks are also relevant to the question of *Chevron* deference, if the Court finds it necessary to reach step two of the *Chevron* analysis. As documented in the transcripts, the control group of Commissioners repeatedly reshaped the rules because they believed that BCRA suffered from serious constitutional and policy flaws. The more apparent this motivation becomes, the less appropriate *Chevron* deference becomes. *See* Pls.' Summ. J. Mem. at 6 n.11 (citing cases).

Finally, the Commission already has included in the record various pre-decisional deliberative materials authored by individual Commissioners, including drafts, comments, and

recommendations.[33] The Commission should not be allowed to submit materials that are subject to the pre-decisional privilege, thereby waiving any claims as to those materials, while reserving the right to invoke the privilege with respect to *public* meeting transcripts that it wishes to bar from the record. The Court should not allow such "cherry-picking." *Army Times*, 998 F.2d at 1072; *see* pp. 25-26 & n.31 *supra*.

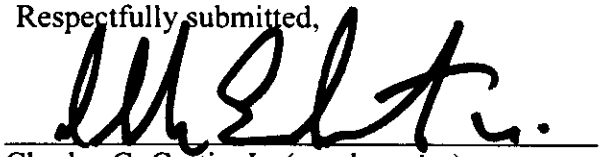
CONCLUSION

For these reasons and the reasons set forth in plaintiffs' motion and supporting memorandum, the Court should consider all of plaintiffs' requested exhibits. The Court should take judicial notice of these materials to the extent required, and it should supplement the record with the meeting transcripts included as PXs 180-182.

[33] *See, e.g.*, FEC Admin. R. Doc. Nos. 7, 9, 72-75, 77-78, 81, 100, 112-13, 117, 214-15, 221, 296-300, 304-05, 320-21, 324, 326-27, 331-34, 336, 339, 341, 364, and 369.

Dated this 16th day of March, 2004.

Respectfully submitted,



Roger M. Witten (Bar No. 163261)
David A. O'Neil (*pro hac vice*)
WILMER CUTLER PICKERING LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800

Charles G. Curtis, Jr. (*pro hac vice*)
Michelle M. Umberger (Bar No. 480620)
Michael M. Markman
Sarah E. Reindl
HELLER EHRMAN WHITE & McAULIFFE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
(608) 663-7460

Randolph D. Moss (Bar No. 417749)
Stacy E. Beck (Bar No. 480540)
WILMER CUTLER PICKERING LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Brent N. Rushforth (Bar No. 331074)
Carl S. Nadler (Bar No. 395279)
Martina M. Stewart
HELLER EHRMAN WHITE & McAULIFFE LLP
1666 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 912-2000

Donald J. Simon (Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Fred Wertheimer (Bar No. 154211)
Alexandra Edsall (Bar No. 453518)
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, D.C. 20006
(202) 429-2008

Attorneys for Plaintiffs Christopher Shays and Martin Meehan

APPENDIX A

Plaintiffs' Exhibits Submitted in Support of Their Motion for Summary Judgment

APPENDIX A

Plaintiffs' Exhibits Submitted in Support of Their Motion for Summary Judgment

(Exhibits Challenged by FEC Shown in Boldface)

PX1	Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49,064 (July 29, 2002) (codified at 11 C.F.R. pts. 100, *et al.*)
PX2	FCC Database on Electioneering Communications; Final Rules, 67 Fed. Reg. 65,190 (Oct. 23, 2002) (codified at 11 C.F.R. pts. 100 and 114)
PX3	Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 421 (Jan. 3, 2003) (codified at 11 C.F.R. pts. 100, *et al.*)
PX4	Oct. 11, 2002 Comments of Center for Responsive Politics
PX5	Oct. 11, 2002 Comments of Common Cause and Democracy 21
PX6	Oct. 11, 2002 Comments of Sen. McCain, *et al.*
PX7	Oct. 24, 2002 Transcript of Public Hearing on Proposed Rulemaking on Coordinated and Independent Expenditures
PX8	Oct. 11, 2002 Comments of the Campaign and Media Legal Center
PX9	Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76,962 (Dec. 13, 2002) (codified at 41 C.F.R. pts. 100, 101, *et al.*)
PX10	May 29, 2002 Comments of Mindshare Internet Campaigns LLC
PX11	Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Proposed Rules, 67 Fed. Reg. 35,654 (May 20, 2002)
PX12	Contribution Limitations and Prohibitions; Final Rule, 67 Fed. Reg. 69,928 (Nov. 19, 2002) (codified at 11 C.F.R. pts. 102 and 110)
PX13	May 8, 2002 Memorandum from Commissioner Thomas to Commission
PX14	May 29, 2002 Comments of the Campaign and Media Legal Center
PX15	May 29, 2002 Comments of Common Cause and Democracy 21
PX16	May 29, 2002 Comments of Center for Responsive Politics

PX17	May 29, 2002 Comments of Sen. McCain, *et al.*
PX18	May 29, 2002 Comments of Democratic National Committee, *et al.*
PX19	May 29, 2002 Comments of Michigan Democratic Party
PX20	Agenda Doc. No. 02-44, "Final Rule for Excessive and Prohibited Contributions: Non-Federal Funds or Soft Money," June 17, 2002
PX21	Agenda Doc. No. 02-36, "Soft Money Rules: Draft Notice of Proposed Rulemaking," May 6, 2002
PX22	Aug. 21, 2002 Comments of Alliance for Justice
PX23	Aug. 21, 2002 Comments of Independent Sector
PX24	Agenda Doc. No. 02-68, "Final Rule, Interim Final Rule, and Explanation and Justification for Electioneering Communications," Sept. 24, 2002
PX25	Agenda Doc. No. 02-96, "Minutes of an Open Meeting of the Federal Election Commission," Dec. 18, 2002
PX26	Agenda Doc. No. 02-75, "Minutes of an Open Meeting of the Federal Election Commission," Oct. 10, 2002
PX27	Coordinated and Independent Expenditures; Proposed Rule, 67 Fed. Reg. 60,042 (Sept. 24, 2002)
PX28	Electioneering Communications; Notice of Proposed Rulemaking, 67 Fed. Reg. 51,131 (Aug. 7, 2002)
PX29	Reorganization of Regulations on ""Contribution" and "Expenditure"; Final Rules, 67 Fed. Reg. 50,582 (codified at 11 C.F.R. pt. 100)
PX100	148 Cong. Rec. H410-11 (daily ed. Feb. 13, 2002)
PX101	148 Cong. Rec. S2340 (daily ed. Mar. 22, 2002)
PX102	148 Cong. Rec. S2138-45 (daily ed. Mar. 20, 2002)
PX103	147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001)
PX104	147 Cong. Rec. S2696 (daily ed. Mar. 22, 2001)
PX105	145 Cong. Rec. S12676 (daily ed. Oct. 15, 1999)

PX106	145 Cong. Rec. S12834-35 (daily ed. Oct. 19, 1999)
PX107	145 Cong. Rec. H8255 (daily ed. Sept. 14, 1999)
PX108	117 Cong. Rec. 43,379 (1970)
PX109*	**Testimony of Commissioner David M. Mason before the Committee on Rules, United States Senate (May 3, 2000)**
PX110	Webster's Third New International Dictionary (2002)
PX111	The Oxford English Dictionary (2d ed. 1989)
PX112	Black's Law Dictionary (7th ed. 1999)
PX113	The Random House Dictionary of the English Language (2d ed. 1987)
PX114**	**Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 Cath. U. L. Rev. 133 (1999)**
PX115**	**Scott E. Thomas, *The 'soft money' and 'issue ad' mess: How we got here, how Congress responded, and what the FEC is doing*, Campaigns & Elections Law Compliance Seminar, Washington, D.C., 2003**
PX116	FEC Advisory Opinion 2003-34
PX117	FEC Advisory Opinion 2003-25A
PX118	FEC Advisory Opinion 2000-16
PX119	FEC Advisory Opinion 2000-7
PX120	FEC Advisory Opinion 1999-25
PX121	FEC Advisory Opinion 1999-24
PX122	FEC Advisory Opinion 1999-17
PX123	FEC Advisory Opinion 1999-9

* The Federal Election Commission has moved to strike this exhibit.

** Although these exhibits are not included in the Commission's motion to strike, they are criticized in the Commission's supporting memorandum.

PX124 FEC Advisory Opinion 1999-7

PX125 FEC Advisory Opinion 1999-6

PX126 FEC Advisory Opinion 1998-22

PX127 FEC Advisory Opinion 1997-16

PX128 FEC Advisory Opinion 1996-48

PX129 FEC Advisory Opinion 1996-16

PX130 FEC Advisory Opinion 1996-11

PX131 FEC Advisory Opinion 1996-2

PX132 FEC Advisory Opinion 1995-35

PX133 FEC Advisory Opinion 1995-33

PX134 FEC Advisory Opinion 1995-9

PX135 FEC Advisory Opinion 1994-15

PX136 FEC Advisory Opinion 1992-37

PX137 FEC Advisory Opinion 1992-6

PX138 FEC Advisory Opinion 1991-3

PX139 FEC Advisory Opinion 1990-5

PX140 FEC Advisory Opinion 1989-32

PX141 FEC Advisory Opinion 1988-27

PX142 FEC Advisory Opinion 1988-22

PX143 FEC Advisory Opinion 1988-2

PX144 FEC Advisory Opinion 1986-37

PX145 FEC Advisory Opinion 1986-26

PX146 FEC Advisory Opinion 1984-55

PX147	FEC Advisory Opinion 1984-13
PX148	FEC Advisory Opinion 1983-38
PX149	FEC Advisory Opinion 1983-12
PX150	FEC Advisory Opinion 1982-65
PX151	FEC Advisory Opinion 1980-65
PX152	FEC Advisory Opinion 1980-64
PX153	FEC Advisory Opinion 1979-66
PX154	FEC Advisory Opinion 1979-13
PX155*	**June 9, 2000 FEC General Counsel's Report, MUR 4291**
PX156*	**Nov. 10, 1994 FEC General Counsel's Report, MUR 3585**
PX157*	**Mar. 27, 2003 FEC First General Counsel's Report, MUR 5338**
PX158	FEC Campaign Guide for Corporations and Labor Organizations (2001)
PX159	The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations; Proposed Rules, 66 Fed. Reg. 50,358 (Oct. 3, 2001)
PX160	General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures; Final Rule, 65 Fed. Reg. 76,138 (Dec. 6, 2000) (codified at 11 C.F.R. pts. 100, 109 and 110)
PX161	Use of the Internet for Campaign Activity; Notice of Inquiry, 64 Fed. Reg. 60,360 (Nov. 5, 1999)
PX162**	**IRS Rev. Rul. 2004-6, *published in* Int. Rev. Bulletin 2004-4 (Jan. 26, 2004)**

* The Commission has moved to strike these exhibits.

** Although this exhibit is not included in the Commission's motion to strike, the Commission's supporting memorandum requests that it be stricken.

PX163 May 3, 2002 Order Granting Motion to Intervene, Docket No. 40, *McConnell v. FEC*

PX164* **Ian Zack, *Congress' Gift to the Internet* (Feb. 26, 2002) *available at* http://www.forbes.com/2002/02/26/campaignfinance.html**

PX165* **E-Voter Institute, *E-Voter 2002 Study Reveals Internet Use in Senate Races* (Nov. 13, 2002) *available at* http://www.e-voterinstitute.com/public/rel-search.php?action=list**

PX166* **The Pew Research Center For The People & The Press, *Perceptions of Partisan Bias Seen As Growing ¾ Especially by Democrats ¾ Cable and Internet Loom Large In Fragmented Political News Universe,* The Pew Research Center News Release, Jan. 11, 2003**

PX167* **Jonathan Roos, *Internet top tool for candidates* (Nov. 17, 2003) *available at* http://www.dmregister.com/news/stories/c4789004/22779230.html**

PX168* **Kate Ackley, *Interest Groups Vow: We'll Still Be Heard,* Legal Times, Dec. 15, 2003**

PX169* **Cliff Sloan, *Political Ads + Internet = A Good Fit* (Jan. 2, 2004) *available at* http://www.newsday.com/news/opinion/ny-vpslo023608369jan02,0,5803906.story?coll=ny-viewpoints-headlines**

PX170* **Alexis Rice, *Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning* (Jan. 2004) *available at* http://www.campaignsonline.org/reports/online.pdf**

PX171* **Dana Milbank, *Curtain Goes Up on Glass-House Attack,* Washington Post, Feb. 15, 2004**

PX172* **Jim Rutenberg, *In Politics, the Web Is a Parallel World With Its Own Rules* (Feb. 22, 2004) *available at* http://www.nytimes.com/2004/02/22/weekinreview/22rute.html**

PX173* **Bob Tedeschi, *E-Commerce Report: Your Web surfing is being interrupted to bring you a paid video commercial. Advertisers think you will stick around,* New York Times, Jan. 19, 2004**

PX174* **Chris Cillizza, *GOP Group Joins Soft Money Fray,* Roll Call, Nov. 24, 2003**

---

* The Commission has moved to strike these exhibits.

PX175*	**National Journal Group Inc., *Group Says Abraham's Pushing Out Jobs* (Mar. 23, 2000) *available at* nationaljournal.com**
PX176*	**Federation for American Immigration Reform Website http://www.fairus.org/html/contribute.html**
PX177*	**Damon Chappie, *New IRS Guidance* May *Open Loophole,* Roll Call, Jan. 26, 2004**
PX178*	**Dick Morris, Behind the Oval Office: Winning the Presidency in the Nineties (Random House 1997)**
PX179	Michael Barone & Richard E. Cohen, The Almanac of American Politics–2004 (National Journal Group) (2003)
PX180*	**June 19, 2002 FEC Open Meeting Transcript**
PX181*	**June 20, 2002 FEC Open Meeting Transcript**
PX182*	**June 22, 2002 FEC Open Meeting Transcript**

* The Commission has moved to strike these exhibits.