

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 07-5360, 07-5361

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS,

Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

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

**INITIAL BRIEF FOR THE
FEDERAL ELECTION COMMISSION**

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January 15, 2008

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

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

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

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

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

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GLOSSARY

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

Oral Argument Not Yet Scheduled

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. 1331 over a facial challenge by Christopher Shays to regulations promulgated by the Federal Election Commission (Commission or FEC). This Court has jurisdiction under 28 U.S.C. 1291 over the Commission's timely appeal filed October 16, 2007 (J.A. 119), from the district court's final judgment entered September 12, 2007.¹ *See Shays v. FEC (Shays III)*, 508 F.Supp.2d 10 (D.D.C. 2007) (J.A. 75-118).

ISSUES PRESENTED

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

¹ "J.A. ___" references are to the Joint Appendix filed with this brief.

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

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

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

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

STATUTES AND REGULATIONS

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

STATEMENT OF THE FACTS

A. The Parties

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

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

B. Substantive and Procedural Background

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

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

1. “Content” Standard for Coordinated Communications

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

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

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

On remand, the Commission published a new Notice of Proposed Rulemaking (NPRM) (J.A. 291-304), received written comments, held a public hearing, and obtained comprehensive data regarding television advertising run by presidential and congressional candidates during the 2004 election cycle. *See* J.A. 360-64, 373-407, 419-30; Vol. III, Docs. 9-31, 35-43, 53-55.² In the final rule, the Commission adjusted the time frames for congressional and presidential elections and explained in its Explanation & Justification (E&J) how the data and other rulemaking evidence supported its decisionmaking. *See* J.A. 421-30.

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

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

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

2. “Conduct” Standards

a. Common Vendor and Former Employee Conduct Standards

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

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

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

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

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

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

b. Firewall Safe Harbor Provision

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

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

3. “Voter Registration Activity” and “Get-Out-the-Vote Activity”

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

ARGUMENT

I. STANDARDS OF REVIEW

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

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

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

II. THE “CONTENT” STANDARD IN THE COORDINATED COMMUNICATION REGULATION IS LAWFUL

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

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

A. Background

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

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

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

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

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

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

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

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

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

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

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

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

data regarding political advertising and ... Plaintiff has provided no evidence demonstrating that the FEC's analysis of the CMAG data is generally skewed or unrepresentative." J.A. 83.

See also J.A. 79-83 (rejecting arguments that the Commission's reliance on data concerning television ads run by candidates in battleground states skewed the data or made them unreliable).

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

Senate candidates aired 91.60 percent and 94.73 percent of their advertisements within 60 days of the primary and general election, respectively. This represented 93.32 percent and 97.20 percent of the estimated costs of advertisements the Senate candidates ran before the primary and general elections, respectively....

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

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

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

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

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

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

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

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

Commission's 2002 coordination rules were in effect, House or Senate candidates asked outside groups to run advertisements more than 90 days before House or Senate primary or general elections." J.A. 426. Indeed, when the Commission specifically inquired about this issue at the rulemaking hearing, "these commenters acknowledged that there was no evidence that any of these advertisements had been coordinated with a candidate or a political party committee."

J.A. 426-27; J.A. 361-62 (testimony of Paul Ryan); J.A. 363 (testimony of Marc Elias).

Likewise, none of the commenters who professed concern about the Commission's proposed rule suggested that they had filed any administrative complaints with the Commission alleging acts of coordination, or had even contemplated doing so. *See generally* J.A. 314-55 (comments of Campaign Legal Center, Democracy 21, and Center for Responsive Politics).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As this Court previously explained regarding this same regulation, the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. “Conduct” Standard for Common Vendors and Former Employees

1. Standard of Review

See supra pp. 10-11.

2. The Court Should Reverse the District Court’s Judgment and Uphold the “Conduct” Standard for Common Vendors and Former Employees

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

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

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

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

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

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

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

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

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

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

1. Standard of Review

See supra pp. 10-11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE COMMISSION’S DEFINITIONS OF “GET-OUT-THE-VOTE ACTIVITY” AND “VOTER REGISTRATION ACTIVITY” ARE LAWFUL

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

A. Standard of Review

See supra pp. 10-11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

completed forms would constitute voter registration activity. J.A. 368. However, responding to voter-initiated inquiries by providing publicly available information about governmental sources, such as the 800 number of a state's Division of Elections, would not. *Id.* Whether a specific action constitutes "voter registration activity" depends on particular facts, and the Commission could not possibly have discussed every conceivable permutation of circumstances.

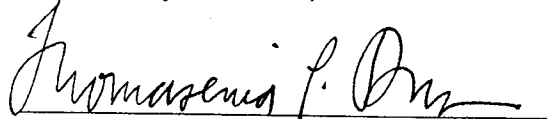
Administrative and judicial proceedings will apply the definition to specific scenarios and thus color the "gray area" that concerned the district court. *See supra* p. 35-36.

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

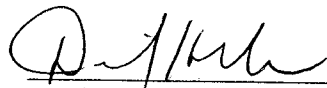
CONCLUSION

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

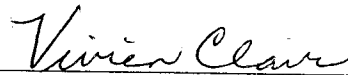
Respectfully submitted,



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January 15, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS,

Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

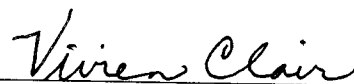
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CERTIFICATE OF COMPLIANCE

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

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

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



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January 15, 2008

ADDENDUM

**STATUTORY AND REGULATORY
ADDENDUM**

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§ 431. Definitions

When used in this Act:

- (8) (A) The term “contribution” includes—
- (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
 - (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

...

- (17) *Independent expenditure.* The term ‘independent expenditure’ means an expenditure by a person—
- (A) expressly advocating the election or defeat of a clearly identified candidate; and
 - (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.

...

- (20) *Federal election activity.*
- (A) *In general.* The term ‘Federal election activity’ means—
- (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
 - (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);
 - (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
 - (iv) 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.

(B) *Excluded activity*. The term 'Federal election activity' does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

(21) *Generic campaign activity*. The term 'generic campaign activity' means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

(22) *Public communication*. The term 'public communication' means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.

...

§ 437c. Federal Election Commission

....

(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.*

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

....

§ 437f. Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from

a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any requests made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

....

§ 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clauses (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission

to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(C) (i) Notwithstanding subparagraph (A), in the case of a violation of any requirement of section 304(a) of the Act (2 U.S.C. § 434(a)), the Commission may—

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination)

a written petition requesting that the determination be modified or set aside.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of \$10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or in the case of a violation of section 320 (2 U.S.C. § 441f), which is not less than 300 percent of the amount involved in the violation and is not more than the greater of \$50,000 or 1000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or

temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of \$10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or in the case of a violation of section 320 (2 U.S.C. § 441f), which is not less than 300 percent of the amount involved in the violation and is not more than the greater of \$50,000 or 1000 percent of the amount involved in the violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

....

§ 441a. Limitations, contributions, and expenditures

(a) *Dollar limits on contributions.*

(1) Except as provided in subsection (i) and section 315A (2 U.S.C. § 441a-1), no person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$2,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political

committees of any candidate, in any calendar year which, in the aggregate, exceed \$25,000;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed \$5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed \$10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed \$15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed \$5,000.

...

(7) For purposes of this subsection—

...

(B) (i) expenditures made by any person in co operation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 304(f)(3)) (2 U.S.C. § 434(f)(3)); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or

committee;
such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

...

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2), (3) and (4) of this subsection.

...

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) \$20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, \$10,000.

§ 441i. Soft money of political parties

...

(b) *State, district and local committees.*

....

(2) *Applicability.*

(A) *In general.* Notwithstanding clause (i) or (ii) of section 301(20)(A) (2 U.S.C. § 431(20)(A)), and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to the extent the amounts expended or disbursed for such activity

are allocated (under regulations prescribed by the Commission) among amounts—

(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

(B) *Conditions.* Subparagraph (A) shall only apply if—

(i) the activity does not refer to a clearly identified candidate for Federal office;

(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than \$10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—

(I) any other State, local, or district committee of any State party,

(II) the national committee of a political party (including a national congressional campaign committee of a political party),

(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

(C) *Prohibiting involvement of national parties, federal candidates and officeholders, and state parties acting jointly.* Notwithstanding subsection (e) (other than subsection (e)(3)), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts—

(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e); and

(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more

State, local, or district committees of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

§ 100.24 Federal election activity (2 U.S.C. 431(20)).

(a) As used in this section, and in part 300 of this chapter,

(1) *In connection with an election in which a candidate for Federal office appears on the ballot* means:

(i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

(ii) The period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

(iii) *Voter Identification and Get-Out-the-Vote Activities Limited to Non-Federal Elections.*

(A) Notwithstanding paragraphs (a)(1)(i) and (ii) of this section, *in connection with an election in which a candidate for Federal office appears on the ballot* does not include any activity or communication that is in connection with a non-Federal election that is held on a date separate from a date of any Federal election and that refers exclusively to:

(1) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates;

(2) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or

(3) The date, polling hours and locations of the non-Federal election.

(B) Paragraph (a)(1)(iii) of this section shall not apply to any activities or communications after September 1, 2007.

(2) *Voter registration activity* means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. Voter registration activity includes, but is not limited to, printing and distributing registration and voting

information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms.

(3) *Get-out-the-vote activity* means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity includes, but is not limited to:

(i) Providing to individual voters information such as the date of the election, the times when polling places are open, and the location of particular polling places; and

(ii) Offering to transport or actually transporting voters to the polls.

(4) *Voter identification* means acquiring information about potential voters, including, but not limited to, obtaining voter lists and creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. The date a voter list is acquired shall govern whether a State, district, or local party committee has obtained a voter list within the meaning of this section.

(b) As used in part 300 of this chapter, *Federal election activity* means any of the activities described in paragraphs (b)(1) through (b)(4) of this section.

(1) Voter registration activity during the period that begins on the date that is 120 calendar days before the date that a regularly scheduled Federal election is held and ends on the date of the election. For purposes of voter registration activity, the term "election" does not include any special election.

(2) The following activities conducted in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot):

(i) Voter identification.

(ii) Generic campaign activity, as defined in 11 CFR 100.25.

(iii) Get-out-the-vote activity.

(3) A public communication that refers to a clearly identified candidate

for Federal office, regardless of whether a candidate for State or local election is also mentioned or identified, and that promotes or supports, or attacks or opposes any candidate for Federal office. This paragraph applies whether or not the communication expressly advocates a vote for or against a Federal candidate.

(4) 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.

(c) *Exceptions. Federal election activity* does not include any amount expended or disbursed by a State, district, or local committee of a political party for any of the following activities:

(1) A public communication that refers solely to one or more clearly identified candidates for State or local office and that does not promote or support, or attack or oppose a clearly identified candidate for Federal office; provided, however, that such a public communication shall be considered a Federal election activity if it constitutes voter registration activity, generic campaign activity, get-out-the-vote activity, or voter identification.

(2) A contribution to a candidate for State or local office, provided the contribution is not designated to pay for voter registration activity, voter identification, generic campaign activity, get-out-the-vote activity, a public communication, or employee services as set forth in paragraphs (a)(1) through (4) of this section.

(3) The costs of a State, district, or local political convention, meeting or conference.

(4) The costs of grassroots campaign materials, including buttons, bumper stickers, handbills, brochures, posters, and yard signs, that name or depict only candidates for State or local office.

[67 FR 49110, July 29, 2002, as amended at 71 FR 8932, Feb. 22, 2006; 71 FR 14360, Mar. 22, 2006]

§ 100.25 Generic campaign activity (2 U.S.C. 431(21)).

Generic campaign activity means a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate.

[67 FR 49110, July 29, 2002]

§ 100.26 Public communication (2 U.S.C. 431(22)).

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.

[71 FR 18612, Apr. 12, 2006]

§ 109.21 What is a “coordinated communication”?

(a) *Definition.* A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

(1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

§ 109.21 What is a “coordinated communication”?

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.

(1) A communication that is an electioneering communication under 11 CFR 100.29.

(2) A public communication, as defined in 11 CFR 100.26, that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A public communication, as defined in 11 CFR 100.26, that satisfies paragraph (c)(4)(i), (ii), (iii), or (iv) of this section:

(i) *References to House and Senate candidates.* The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate’s jurisdiction 90 days or fewer before the clearly identified candidate’s general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

(ii) *References to Presidential and Vice Presidential candidates.* The public communication refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate’s primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, up to and including the day of the general election.

(iii) *References to political parties.* The public communication refers to a political party, does not refer to a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate’s jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election cycle ending on the date of a regularly scheduled non-Presidential general election, the time period in paragraph (c)(4)(i) of this section applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election cycle ending on the date of a Presidential general election, the time period in paragraph (c)(4)(ii) of this section applies.

(iv) *References to both political parties and clearly identified Federal candidates.* The public communication refers to a political party and a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate’s jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed

or otherwise publicly disseminated in the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing only a reference to that candidate applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated outside the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(iii)(B) or (C) of this section that would apply to a communication containing only a reference to a political party applies.

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(d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) *Request or suggestion.* (i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) *Material involvement.* This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

- (i) The content of the communication;
- (ii) The intended audience for the communication;
- (iii) The means or mode of the communication;
- (iv) The specific media outlet used for the communication;
- (v) The timing or frequency of the

communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion.* This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor.* All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

- (C) Polling;
- (D) Fundraising;
- (E) Developing the content of a public communication;
- (F) Producing a public communication;
- (G) Identifying voters or developing voter lists, mailing lists, or donor lists;
- (H) Selecting personnel, contractors, or subcontractors; or
- (I) Consulting or otherwise providing political or media advice; and

(iii) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source. That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor.* Both of the following statements in paragraphs (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

(ii) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed

by the former employee or independent contractor was obtained from a publicly available source. That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(6) *Dissemination, distribution, or republication of campaign material.* A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs.

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(h) *Safe harbor for establishment and use of a firewall.* The conduct standards in paragraph (d) of this section are not met if the commercial vendor, former employee, or political committee has established and implemented a firewall that meets the requirements of paragraphs (h)(1) and (h)(2) of this section. This safe harbor provision does not apply if specific information indicates

that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.

(1) The firewall must be designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee; and

(2) The firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy.

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS,)	Nos. 07-5360, 07-5361
)	(Consolidated)
Appellee and Cross-Appellant,)	
)	CERTIFICATE OF
v.)	SERVICE
)	
FEDERAL ELECTION COMMISSION,)	
)	
Appellant and Cross-Appellee.)	

CERTIFICATE OF SERVICE

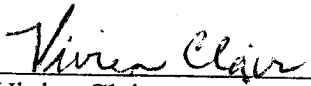
I hereby certify that on this 15th day of January, 2008, I caused to be served by hand-delivery two copies of the Federal Election Commission's Initial Brief and one copy of the Joint Appendix on the following counsel for Christopher Shays:

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I further certify that on this same date, I caused to be served by commercial carrier (next business day delivery) a courtesy copy of each of the same documents on the following additional counsel for Shays:

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