UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE CHRISTOPHER SHAYS, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 04-1597 (EGS)
BUSH-CHENEY '04, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 04-1612 (EGS)

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF THE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

REGULATIONS

INTRODUCTION

In its opening brief, the Commission questioned plaintiffs' Article III standing to challenge the Commission's decision not to adopt a rule defining "major purpose" and the ripeness of their claims. In addition, the Commission demonstrated that it rationally based its decision not to adopt a definition of "major purpose" on the facts presented to it during the rulemaking and provided a reasoned basis for its conclusion, all that is required to satisfy deferential review under the Administrative Procedure Act ("APA").

Plaintiffs' response is that the court of appeals' recent decision in Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) ("Shays I") resolves their standing and ripeness problems and, joined by Amici Curiae Senators John McCain and Russell D. Feingold ("Amici"), argue that this Court should refuse to believe the Commission's official explanation for its decision that it intends to enforce the Federal Election Campaign Act of 1971, as amended, ("the Act" or "FECA") against section 527 organizations that are required to register as "political committees" under the FECA. As we explain below, plaintiffs badly misread Shays I, and neither they nor Amici have provided any legal or factual basis for this Court to question the Commission's integrity or its decision to enforce the Act on a case-by-case basis.

ARGUMENT

I. PLAINTIFFS HAVE NOT SATISFIED THEIR BURDEN OF PROVING JURISDICTION

A. Plaintiffs Have Failed to Prove Article III Standing

The Commission demonstrated that plaintiffs have not established Article III standing with admissible evidence, as required at the summary judgment stage. See Defendant FEC's Memorandum in Support of the Commission's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("FEC SJ Mem.") at 17-22; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). We explained (FEC SJ Mem. at 18) that the declarations of Shays and Meehan contain only generalized and conclusory speculation about

the possible activities in which unidentified section 527 organizations might engage, which is insufficient to show the concrete, personal and imminent injury required by Supreme Court precedent. We also showed (FEC SJ Mem. at 19-20) that plaintiff Bush-Cheney '04, Inc. ("BC '04") has failed to prove standing for the additional reasons that its claimed injury concerning the 2004 presidential election could not have been redressed by a decision of this Court in time to affect that election, and its claimed injury in the upcoming 2006 congressional elections is wholly speculative, since BC '04 is not authorized by the Act to participate in those contests. Plaintiffs' response is that the recent decision in Shays I controls the standing issue completely. See Plaintiffs' Memorandum in Joint Reply and Opposition to Defendant FEC's Motion for Summary Judgment ("Pl. SJ Opp.") at 1-3. As we explain below, Shays I has no application here because the Commission has not adopted a rule or taken any other action that even arguably authorizes anyone to violate the Act.[1]

Shays I held that Shays and Meehan were injured by the alleged "illegal structuring of a competitive environment" effected by rules adopted by the Commission that they alleged contravened the Act. Id. at 85. The Commission's actual promulgation of regulations governing election campaigns was crucial to this finding of an Article III injury: the court explained that competitive injuries of the type it found occur when "agencies set the rules of the game in violation of statutory directives," stressing that plaintiffs faced "intensified competition" because they had to "anticipate and respond to a broader range of competitive tactics" from political rivals exploiting "FEC rules permitting what BCRA prohibits," which the court called "safe harbors." Id. at 84-89 (emphasis in original).

[1] Plaintiffs do not respond in their brief to the Commission's showing (FEC SJ Mem. at 18 and n.11) that they have failed to support their theory of "informational standing" with evidence that any particular organization has failed to disclose information required by the Act, much less an organization about which they have personally requested information. Shays I did not address plaintiffs' informational standing claims. See Shays I, 414 F.3d at 94.

Here, there are no such Commission rules, no "safe harbors," and thus no cognizable injury traceable to the Commission's rulemaking under the Shays I analysis, which depended entirely upon the existence of actual FEC regulations that allegedly narrowed the reach of the Act. As we have explained (FEC SJ Mem. at 20-22), section 527 organizations are subject to the same statutory restrictions today as they were prior to the rulemaking. Just as before the rulemaking, the administrative complaint process in 2 U.S.C. 437g(a)(1) remains available for parties like plaintiffs to bring to the Commission's attention allegations that a section 527 organization is a "political committee" under the Act. Moreover, because there is no regulation, section 527 organizations cannot rely upon the protection against "any sanction" that 2 U.S.C. 438(e) affords to parties who rely in good faith on Commission regulations, an element that was critical to the Shays I court's finding of causation. See 414 F.3d at 82, 92-95. Thus, there is no new FEC regulatory impediment to plaintiffs' ability to use 2 U.S.C. 437g(a)(8) to seek judicial review if the Commission were to dismiss an administrative complaint alleging that a 527 organization unlawfully failed to register as a political committee. [2]

In short, because plaintiffs face no risk in this case that an adverse party will cause them harm through exploitation of a "safe harbor" created by any "challenged rule," Shays I provides no basis for relaxing the usual standing requirement that plaintiffs prove a concrete and particularized injury traceable to the Commission action they seek to challenge. Plaintiffs have

[2] Indeed, in plaintiffs' opposition to the FEC's motion to strike (but not in their merits brief), they claim that certain materials from outside the rulemaking record, including five administrative complaints about section 527 organizations' conduct, show that the Commission's alleged failure to enforce the Act adequately has "real-world impacts." See Plaintiffs' Memorandum in Opposition to Defendant's Motion to Strike Plaintiffs' Exhibits ("Pl. Strike Opp.") at 3, 7-9. These materials simply underscore the fact that plaintiffs are trying in this suit to circumvent the statutory procedures Congress enacted in 2 U.S.C. 437g(a)(8) for judicial resolution of complaints about the Commission's enforcement actions.

failed to meet this burden, and simple citation to the decision in Shays I is no answer to the deficiency.[3]

Shays I also provides no help for the additional standing problems suffered by BC '04. We explained in our opening brief that any injury BC '04 could have suffered in the 2004 election as a result of the Commission's decision not to adopt a rule would not have been redressable by this Court before those elections were decided. For the 2006 election cycle, BC '04 cannot suffer any such injury because, as a publicly funded second-term President's principal campaign committee in the midst of a lengthy statutory audit process, it is prohibited by law from participating in those elections. See FEC SJ Mem. at 19-20, 20 n.13. Thus, in the 2006 cycle, BC '04 cannot suffer from any "competitive tactics" by political "rivals" authorized by a regulation, as the court found to be the case in Shays I. See 414 F.3d at 86-88.

Plaintiffs also argue (Pl. SJ Opp. at 3 n.1) that BC '04 could theoretically "transform" itself into a multicandidate political committee in time to participate in the 2006 elections, despite the Commission's ongoing audit required by the public financing statute. But even if it were appropriate to disregard the ongoing legal restrictions on BC '04 as the recipient of $74 million in public funds for the 2004 presidential general election, "[r]edressability must be satisfied now to establish jurisdiction," University Med. Ctr., 173 F.3d at 442 (emphasis in original). BC '04 is not now a political committee that can support any candidate or party in the 2006 elections, and it has provided no evidence of any plans to become one for 2006 (or later).

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[3] Plaintiffs' assertion (Pl. SJ Opp. 2) that parties may "have standing to challenge agency inaction that causes them cognizable harm" begs the question, for they have failed to show that the Commission's decision to enforce the Act on a case-by-case basis "causes them cognizable harm." Moreover, neither of the cases plaintiffs cite for this proposition involved agency inaction, and both cases ruled that the plaintiff lacked standing. See Capital Legal Found. v. Commodity Credit Corp., 711 F.2d 253, 258-61 (D.C. Cir. 1983) (private organization had no standing to challenge agency's actions in concluding financial agreements with creditors of Poland); University Med. Ctr. of S. Nevada v. Shalala, 5 F.Supp.2d 4, 7-9 (D.D.C. 1998) (hospital lacked standing to challenge agency's determination of its eligibility for program where order would not redress alleged injury), aff'd on other grounds, 173 F.3d 438 (D.C. Cir. 1999).

It might theoretically be possible that some day it could become such a committee, but "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." Lujan, 504 U.S. at 564 (emphasis in original).[4]

B. Plaintiffs Have Failed to Show Their Claims Are Ripe

The Commission also explained (FEC SJ Mem. at 22-23) that plaintiffs have failed to show that the abstract, general policy issues they present are fit for judicial review and have failed to demonstrate that any hardship would occur should the court withhold consideration. See National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 807-08 (2003).[5] The Commission has not made public any enforcement decisions concerning any particular section 527 organization active in the 2004 or 2006 elections which would make the issue more concrete, and there has been no showing that plaintiffs face any particular hardship, let alone a new injury, as a result of the Commission's decision to make such determinations on a case-by-case basis. In contrast to actions that courts have recognized as imposing significant legal hardship under a ripeness analysis, the Commission's decision does not "command anyone to do anything or to refrain from doing anything," it does not "grant, withhold, or modify any formal legal license, power, or authority," and it "create[s] no legal rights or obligations." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). Moreover, as we have explained (FEC SJ Mem. at 23), plaintiffs have an adequate alternative judicial remedy under 2 U.S.C.

[4] BC '04 also suggests (Pl. SJ Opp. at 3 n.1) that the unpublished decision in Kean for Congress Committee v. FEC, No. 04-0007 (D.D.C. Jan. 25, 2005), resolves its standing problems. Of course, an unpublished district court opinion is not a precedent this Court is obliged to follow. In re Executive Office of the President, 215 F.3d 20, 24 (D.C. Cir. 2000). In any event, unlike BC '04, the plaintiff in Kean was a congressional campaign committee that was not publicly funded, had no legal impediment to being designated as the candidate's campaign committee for a future election or converting into a multicandidate committee in the following election cycle, and was subject to no legal barrier to raising private funds. See Kean, slip op. at 22-23.

[5] Plaintiffs take pains to distinguish the facts of National Park (Pl. SJ Opp. at 3-4), but do not dispute that it accurately states the applicable law of ripeness.

437g(a)(8), which allows parties whose administrative complaints are dismissed to seek judicial review of the Commission's action, and which is the "exclusive civil remedy" for a private party alleging a violation of the Act, 2 U.S.C. 437d(e). This not only makes plaintiffs' claims unripe, but the existence of an adequate statutory remedy in court forecloses jurisdiction under the APA, which is the only statutory basis for this court's jurisdiction alleged by the plaintiffs. See National Wrestling Coaches Ass'n v. Department of Education, 366 F.3d 930, 945 (D.C. Cir. 2004) ("Section 704 of the APA subjects to judicial review…'final agency action for which there is no other adequate remedy in a court'"), cert. denied, 125 S. Ct. 2537 (June 6, 2005).

Shays I does not help plaintiffs' ripeness deficiency. Shays I stressed that there was no reason to await the "crystallization" of agency policy because the Commission's promulgation of regulations had already provided a legal "safe harbor" on which respondents could rely in any subsequent enforcement proceeding, because of the protection from "any sanction" in 2 U.S.C. 438(e) for a party that complies with a Commission regulation. The court concluded that this provision would prevent the regulations from being subject to judicial review in any subsequent suit under 2 U.S.C. 437g(a)(8). See 414 F.3d at 95. But here there are no regulations, and thus no arguable legal barrier to judicial consideration of plaintiffs' claims in a suit under section 437g(a)(8), if the plaintiffs are dissatisfied with the Commission's action in any specific enforcement case. Although plaintiffs quote (Pl. SJ Opp. at 4) a statement by the district court in Shays I that plaintiffs there could be harmed by political competitors engaging in activities that "the FEC has deemed proper[,] but which plaintiffs claim are barred," in this case the FEC has not "deemed proper" anything, but merely decided to apply the Act case by case. See FEC SJ Mem. at 23. Thus, plaintiffs have failed to satisfy either prong of the ripeness analysis.

II. THE COMMISSION'S DECISION TO APPLY THE ACT CASE BY CASE, RATHER THAN PROMULGATE A BROAD GENERAL RULE, WAS WELL WITHIN ITS POLICY MAKING DISCRETION

Plaintiffs do not—and indeed cannot—challenge the longstanding precedent that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). The Supreme Court has concluded that an agency's decision to choose either rulemaking or case-by-case adjudication is entitled to "great weight" on judicial review and is subject to reversal only if the agency committed an "abuse of discretion or a violation of [law]." NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). Plaintiffs' argument is that "where, as here, there is a need to establish prospective rules of general applicability, rulemaking is the preferred option," Pl. SJ Opp. at 12.[6]

In fact, rulemaking is not always the "preferred" option, as plaintiffs erroneously imply (Pl. SJ Opp. at 12) ("rulemaking is the preferred option"), even to establish general, prospective rules. It is a "simple, but fundamental principle of administrative law [that] to make the administrative process effective, an agency must have the discretion to proceed either by general rule or by ad hoc litigation." TranPacific Freight Conf. v. Federal Maritime Commission, 650 F.2d 1235, 1244 (D.C. Cir. 1980). While courts have acknowledged in the abstract that there may be circumstances in which an agency's reliance on adjudication instead of rulemaking could amount to an "abuse of discretion," Pl. SJ Opp. at 6, plaintiffs have failed to cite a single case in

[6] Plaintiffs once again (Pl. SJ Opp. at 7 n.4) erroneously cite several cases for the counterintuitive proposition that the extensive record compiled during the Commission's rulemaking should reduce the deference afforded to the Commission's decision, to which we have already responded (FEC SJ Mem. at 38 & n.28). The cases cited by plaintiffs merely explain that a rulemaking record provides one basis on which the court can review an agency's decision not to adopt a rule, in contrast to an agency's refusal to initiate a rulemaking proceeding in the first place, and do not require a reduction of the substantial deference normally given under the APA to an agency's decision not to promulgate a rule.

which a court actually held an agency's choice of adjudication over rulemaking to be an abuse of discretion.[7]

The Supreme Court has long recognized that numerous circumstances may make rulemaking a less appropriate alternative than a case-by-case approach.

> [T]he agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.

Chenery, 332 U.S. at 202-03. The Commission's conclusion, based upon the rulemaking record, that there were too many uncertainties about how the regulatory proposals might affect a variety of nonprofit organizations engaged in advocacy, falls well within the scope of these long-recognized reasons for choosing adjudication over rulemaking. Where, as here, an agency concludes it needs more specific facts about the parties involved and their activities in order to properly apply a statutory provision, courts have readily recognized the reasonableness of proceeding case by case. See NLRB, 416 U.S. at 294 (noting the large number of employers that would have been affected by a general rule and concluding that the agency "thus has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character" of each company); Busse Broadcasting Corp. v. FCC, 87 F.3d 1456, 1463-64 (D.C. Cir. 1996) ("Given the fact-intensive nature of the Commission's role in these proceedings, it is surely within the agency's authority to proceed on a case-by-case basis rather than by rulemaking"). The Commission's regulations explicitly provide that "[t]he desirability

[7] Plaintiffs do cite one case (Pl. SJ Opp. at 6), AFL-CIO v. NLRB, 466 F.2d 380 (D.C. Cir. 1972), in which a court did not uphold the agency in full by declining to give retroactive effect to an agency rule adopted by adjudication because in that case the "actions … when undertaken, were squarely within explicitly articulated Board policy as sustained by the court." Id. at 388. "Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as 'unfair' conduct stamped 'fair' at the time a party acted, raises judicial hackles." Id. at 389 (internal citations omitted). Here, in contrast, there is no prior rule on which anyone could rely.

of proceeding on a case-by-case basis" is one factor the Commission considers when deciding whether a rulemaking is appropriate. 11 C.F.R. 200.5(c).[8]

Plaintiffs assert (Pl. SJ Opp. at 7 n.4) that the Commission "could have framed a 'generalized standard' of broad application to 527 groups," but the question for the Commission was not whether, in the abstract, a rule could have been written, but whether, on the record then before the agency, it was wiser policy to proceed case by case. Plaintiffs refuse to acknowledge that whether a group is a "political committee" under the Act has serious consequences for the manner in which it raises and spends money for public advocacy, and that the Commission has a fundamental obligation to proceed cautiously in regulating First Amendment activity.[9] See FEC SJ Mem. at 29. Moreover, the Commission has shown (id. at 31) why plaintiffs' over-simplified attempt (Pl. SJ Opp. at 16-17) to equate FECA's "major purpose" requirement with the tax code definition of a section 527 organization is erroneous.

Plaintiffs attempt to convince the Court that defining "political committee" and "major purpose" is an uncomplicated matter, but they do that by simply ignoring, or summarily dismissing without substantive response, all of the concerns detailed in the Commission's opening brief. For example, plaintiffs' solution of treating all section 527 organizations as having as their "major purpose" the influencing of federal elections unless they are devoted

[8] Plaintiffs' reliance elsewhere in their brief upon the five pending administrative complaints is inconsistent, since those complaints provide opportunities for the Commission to address the issues identified by plaintiffs on detailed factual records on a case-by-case basis. While arguing that what the Commission "needs to establish [is] how the FECA political committee rules apply generally" to section 527 organizations, Pl. SJ Opp. at 13, plaintiffs also ask the Court to rely upon specific facts about particular section 527 groups already under review by the FEC.

[9] When, as here, proposed regulations may impact protected First Amendment activities, the D.C. Circuit has been especially deferential in upholding an agency's decision not to promulgate regulations, even in favor of industry self-regulation rather than case-by-case enforcement. See Action for Children's Television v. FCC, 564 F.2d 458, 479 (D.C. Cir. 1977) ("the [FCC] has detailed the significant first amendment and policy problems that inhere in regulation of programming and advertising practices and militate against an immediate adoption of rules, such as urged by ACT, and we cannot say that it erred in concluding that they counseled a more cautious approach").

solely to non-electoral activities or state and local elections, see Pl. SJ Opp. at 16 n.10, ignores entirely the difficulty of applying the "major purpose" requirement to an organization with multiple purposes, some of which are covered by FECA and some of which are not, which was explained in our opening brief (FEC SJ Mem. at 32) and to which plaintiffs did not respond. The Commission also demonstrated (FEC SJ Mem. at 30) how the proposed "major purpose" rules might have affected non-profit groups in a manner that is "far-reaching and difficult to predict." See Explanation and Justification, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004); Administrative Record ("AR") 375 at 2842. Rather than responding to these concerns, plaintiffs summarily dismiss them as a "red herring" because the proposals the Commission did not adopt were "tailored only to section 527 groups." Pl. SJ Opp. at 15. But we have already explained (FEC SJ Mem. at 30) that section 527 organizations are themselves nonprofit groups engaged in political advocacy, and that the proposals the Commission voted on would have affected not only 527 groups, but other nonprofit groups as well, both directly and indirectly.

Finally, plaintiffs' assertion that the Commission's conclusions about congressional intent "miss[] the point" is itself mistaken. We showed in our opening brief (FEC SJ Mem. at 34-35) that the Commission did not conclude that Congress has deprived it of authority to adopt a rule construing the "major purpose" requirement, as plaintiffs claim (Pl. SJ Opp. at 17), but only that the Bipartisan Campaign Reform Act of 2002 ("BCRA") required no change to the agency's 30-year practice of applying this construct case by case without adopting a general rule. We described a number of factors that cast doubt on plaintiffs' claim that the interpretation of "political committee" they espouse was intended by Congress, including Congress's failure thus far to adopt any of the bills now pending before it that would incorporate plaintiffs' approach into the statute, and Congress's 30 years of acquiescence in the Commission's case-by-case approach to deciding when a group is a "political committee," FEC SJ Mem. at 34-35, all of which plaintiffs simply ignore. We identified evidence showing that Congress was well aware that section 527 organizations engaged in some federal political activity have been disclosing their finances to the Internal Revenue Service ("IRS") rather than the Commission, including a

letter submitted by more than 130 Members of Congress during the rulemaking stating that when they voted for BCRA they did not intend for the Commission to adopt a regulation aimed at section 527 organizations (FEC SJ Mem. at 35). We also pointed to Congress's enactment of legislation requiring 527 groups to report to the IRS instead of the FEC, in lieu of Senator Lieberman's 2000 bill that would have achieved plaintiffs' result (FEC SJ Mem. at 36 n.25).[10] Plaintiffs have not responded. Even BCRA itself suggests that Congress may not have intended for all section 527 organizations engaging in any federal activity to be required to register as political committees, which cannot accept soft money. Such a result would appear to make a nullity of a provision added by BCRA that restricts political parties and their agents from "raising large sums of soft money to launder through [section 527] tax-exempt organizations engaging in federal election activities." McConnell v. FEC, 540 U.S. 93, 108 (2003). Plaintiffs also do not address this either.[11] All of these factors support the Commission's conclusion that neither BCRA nor McConnell purported to require the Commission suddenly to adopt, after 30

[10] In 2002, Congress amended the IRS reporting requirements for section 527 organizations originally enacted in 2000 to provide that an organization engaged "solely" in state and local elections may cease publicly reporting its finances to the IRS if it is required to disclose the equivalent information to a state agency under state law and no federal candidate or officeholder solicits or directs its funds, or participates in directing the organization. See Pub. L. No. 107-276, 116 Stat. 1929 (2002). Congress's decision to relieve only section 527 organizations that are engaged "solely" in state and local races of the obligation to report to the IRS suggests that it was aware that there were then section 527 organizations engaged in federal electoral activities that were reporting to the IRS rather than to the Commission. Congress enacted BCRA that same year.

[11] Plaintiffs' argument (Pl. SJ Opp. at 17) that the Commission acted contrary to Supreme Court precedent is equally dubious, since plaintiffs do not dispute that McConnell added nothing to the 1976 Act's definition of "political committee," or to the Court's discussion of "major purpose" in Buckley v. Valeo, 424 U.S. 1 (1976), and FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986). Rather, plaintiffs rely entirely on the McConnell Court's observation that section 527 organizations are engaged in "partisan political activity." (Pl. SJ Opp. at 16-17). As we have already explained (FEC SJ Mem. at 30), and plaintiffs simply ignore, not all partisan activities are directed specifically to influencing the outcome of candidate elections. Thus, there is no legal basis for plaintiffs' claim that McConnell has changed the construction of FECA to require the Commission to adopt the rules they seek.

years of case-by-case application of the "major purpose" requirement, any general regulation on that topic, let alone the specific regulations that plaintiffs advocate.

A. An Agency Is Entitled to Change Its Intended Course of Action After a Rulemaking Proceeding

Plaintiffs and Amici argue at length that the Commission's past actions belie its published intention to apply the "major purpose" requirement to section 527 organizations and others case by case. (Pl. SJ Opp. at 7-9). Citing the pending administrative complaints concerning certain section 527 organizations, and the Commission's 2001 and 2004 rulemakings, plaintiffs allege that the Commission "has played a shell game, shifting back and forth from purported rulemaking to purported case-by-case enforcement, never choosing either approach, and in the end, never enforcing the law against 527 organizations that spend soft money in connection with federal elections." Pl. SJ Opp. at 7. Yet neither plaintiffs nor Amici cite a single case, and the Commission is likewise unaware of any decision, in which a court has looked beyond the administrative record to question the credibility of an agency's official public pronouncements in determining the propriety of a decision.

We have already explained (FEC SJ Mem. at 24-26) at length why plaintiffs' characterization of the Commission's actions as "doing nothing" is a false claim with regard both to the pending complaints and to the 2004 rulemaking, in which the Commission promulgated new regulations that will have a significant impact on section 527 organizations that seek to influence federal elections. These regulatory steps may leave plaintiffs unsatisfied, but "[r]egulations … are not arbitrary and capricious just because they fail to regulate everything that could be thought to pose any sort of problem." Personal Watercraft Indus. Assoc. v. Dept. of Commerce, 48 F.3d 540, 544 (D.C. Cir. 1995). Moreover, the Commission has a record of applying the Act's "political committee" provision to section 527 organizations that should have registered with the FEC, see FEC v. GOPAC, Inc., 917 F. Supp. 851 (D.D.C. 1996) and Advisory Opinion ("AO") 1988-22, 1 Fed. Election Camp. Fin Guide (CCH) ¶5932, 1988 WL 170417, as well as to non-section 527 organizations, see FEC v. Malenick, 310 F. Supp. 2d 230

(D.D.C. 2004), amended on reconsideration, 2005 WL 588222 (D.D.C. Mar. 7, 2005).[12] In fact, the only past enforcement case plaintiffs cite in their opposition in which the Commission did not find the administrative respondent to be a political committee is Matter Under Review ("MUR") 4982 (described in plaintiffs Shays and Meehan's Appendix A), and the decision in that case was not based on the organization's "major purpose." Instead, the group was found not to be a political committee because it did not make $1,000 in "expenditures" as required under the Act's "political committee" provision. 2 U.S.C. 431(4).[13]

Plaintiffs' assertion that the Commission has "switched" back and forth on the propriety of adopting a "major purpose" rule is wholly untenable.[14] To be sure, when the Commission started its rulemaking in early 2004, it fully anticipated adopting a regulation defining "major purpose" before the 2004 elections. That is, after all, why it unanimously voted sua sponte to initiate a rulemaking and adopted an expedited schedule for the proceeding.[15] Nonetheless, "[f]or federal agencies, as with mice and men, the best-laid plans often go awry." Midwest Ind. Transmission System Operator, Inc. v. FERC, 388 F.3d 903, 913 (D.C. Cir. 2004). As we described in our opening brief (FEC SJ Mem. at 9-16), after reviewing the thousands of comments that were submitted, listening to days of testimony from the commenters, studying the multiple legal questions involved, and considering the various proposals put forward, the

[12] Plaintiffs' description of Malenick as involving a 527 group (Pl. SJ Opp. at 11 n.6) is inaccurate—the group there was organized as a for-profit sole proprietorship and, later, as a corporation. See Malenick, 310 F. Supp. 2d at 232, n.1.

[13] In fact, Senator McCain's 2000 presidential campaign, the complainant in MUR 4982, did not even allege that the group at issue was a "political committee," and it chose not to file a lawsuit challenging the Commission's dismissal of its complaint under 2 U.S.C 437g(a)(8), as it could have.

[14] We have already explained why Advisory Opinion 2003-37, on which Amici rely, is irrelevant to this case. See FEC SJ Mem. at 39.

[15] The Commission's discussion of AO 2003-37, a dubious transcript of which Amici have submitted to this Court, occurred a month before it voted to open a rulemaking, also during the time when it expected that a regulation would be adopted.

Commission unanimously decided that the wiser course at that time was not to adopt a rule but to continue to apply the "major purpose" requirement case by case.

It is well settled that "[u]p to the point of announcement, agency decisions are freely changeable." Pan American World Airways, Inc. v. CAB, 684 F.2d 31, 37 n.12 (D.C. Cir. 1982). There is nothing unusual about an agency changing course after undertaking notice and comment rulemaking under the APA, for agencies are supposed to have a "flexible and open-minded attitude towards [their proposed] rules." Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (quoting Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978)). The APA requires outside participation in order to "enable the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." Nat'l Tour Brokers, 591 F.2d at 902 (internal quotation omitted). In this way, agencies are able "to benefit from the expertise and input of the parties who file comments with regard to the proposed rule." Id. Rather than knowing all the answers ahead of time, agencies are supposed to consider comments "with a mind that is open to persuasion." Advocates for Highway and Auto Safety v. Fed'l Highway Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994). The Commission's decision to adopt regulations on some, but not all, of the topics it outlined in its Notice of Proposed Rulemaking ("NPRM") is fully justified by the complexities disclosed during the subsequent rulemaking.[16]

One potential result of seeking comment on the advisability of a proposed rule is, of course, to decide that the wiser course is to issue a substantially different rule or no rule at all. After the Federal Railroad Administration proposed a rule extending its authority to all aspects of railroad safety, for example, it then concluded that "only part of its proposed rule should be

[16] Plaintiffs have apparently dropped their mistaken assertion, see Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, "Pl. SJ Mem." at 7, that the 2004 rulemaking was simply a continuation of the 2001 rulemaking in light of the Commission's incontrovertible public statement to the contrary in 2004. See Political Committee Status; Proposed Rule, 69 Fed. Reg. 11,736-60, 11737 (March 11, 2004) (AR 11 at 248); FEC SJ Mem. at 38-39.

adopted, leaving in place the status quo (OSHA standards) with respect to some aspects of bridge worker safety." Ass'n of Am. R.R. v. Dept. of Transp., 38 F.3d 582, 589 (D.C. Cir. 1994). The agency came to its conclusion "[a]fter receiving and analyzing comments expressing diverse viewpoints on this very point." Id. The court reasoned that "[i]t takes no great leap of logic or imagination to contemplate that the ultimate outcome of this rulemaking might be no rule, or only partial adoption of the proposed comprehensive rule." Id. Thus, rather than being an indication of arbitrariness, the fact that the Commission carefully considered defining political committee through a regulation before ultimately deciding to maintain its policy of implementing the law through case-by-case adjudication is "positive evidence of careful decisionmaking," Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 526 (D.C. Cir. 1983), rather than a suspect attempt to avoid enforcing the Act.[17]

B. There Is No Basis For Doubting the Commission's Statement That It Will Apply the "Major Purpose" Requirement to Section 527 Organizations Without a General Rule.

Finally, the Commission's choice of case-by-case adjudication over rulemaking will not impede the Commission's ability to enforce the law against any section 527 organization that meets the Act's definition of "political committee." (Pl. SJ Opp. at 7-9). The courts have been clear that "adoption of regulations is hardly necessary to the enforcement of" a particular provision of a statute. McDonald v. Piedmont Aviation, Inc., 625 F. Supp. 762, 766 (S.D.N.Y. 1986). Even without an interpretive regulation defining "major purpose," a section 527 organization that ignores the Act and judicial precedent "acts at its peril." Perot v. FEC, 97 F.3d 553, 560 (D.C. Cir. 1996) (holding that the Commission did not need to define the regulatory term "objective criteria"). Even "in the absence of the [regulation] there would be an adequate regulatory basis for enforcement action." Paralyzed Veterans of America v. D.C. Arena, 117

[17] As the Commission did here, the EPA in Small Refiner had "announced that it was considering a change in policy, and … it proposed a change. But the agency ultimately adhered to its longstanding position." Id. at 526 (emphasis in original).

F.3d 579, 588 (D.C. Cir. 1997) (internal quotation omitted). See also RNC v. FEC, 76 F.3d 400, 404-05 (D.C. Cir. 1996) (the Act's "best efforts" requirement, 2 U.S.C. 432(i), could have been interpreted "case-by-case").[18] Indeed, it does not appear that plaintiffs dispute this settled principle of law.[19]

Plaintiffs also argue (Pl. SJ Opp. at 9-11) that without a regulation it is impossible as a practical matter for the Commission to enforce the Act's "political committee" provision against section 527 organizations in a timely manner, but as plaintiffs ultimately concede, it is not the lack of a regulation, but the "elaborate statutory procedures" (id.) that the Commission is obligated to follow when acting on administrative complaints that make it "virtually impossible to complete [an enforcement action] in [the] relevant electoral time-frames" plaintiffs prefer (Pl. SJ Opp. at 11).[20] Plaintiffs fail to acknowledge that even if the Commission had adopted a

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[18] See also, e.g. Watts v. IRS, 925 F. Supp. 271, 277 (D.N.J. 1996) (statutes "[ha[ve] the force of law which Congress gave [them], with or without implementing regulations"); United States v. Stoecklin, 848 F. Supp. 1521, 1525 (M.D. Fla. 1994) ("Regulatory embellishment is unnecessary. . . . [Defendant's] argument that without regulations the statutes are not operative is without merit."); McDonald v. Piedmont Aviation, Inc., 625 F. Supp. 762, 766 (S.D.N.Y. 1986) (Congress's delegation of general rulemaking authority "does not diminish the right-giving force of the statutory language itself; nor could any such regulation dilute or repeal such rights, central as they are to the statutory scheme").

[19] Some of plaintiffs' counsel asserted this very point in a letter to the agency after the decision at issue here: "[T]he Commission's failure to promulgate new rules on the 'political committee' issue in no way relieves the agency of its obligation to enforce the laws as called for in our case-specific complaints. The statutory provisions and Supreme Court decisions applicable here establish that the 527 groups named in our complaint have been spending soft money in violation of the law, regardless of whether new regulations were or were not issued by the FEC." Letter to Lawrence H. Norton from, inter alia, Donald Simon and Fred Wertheimer (August 31, 2004), available at http://www.campaignlegalcenter.org/attachments/1245.pdf (visited August 25, 2005).

[20] Plaintiffs' underlying assumption – that the Commission is expected to take action "within an election cycle" (Pl. SJ Opp. at 10) – has been explicitly repudiated by the D.C. Circuit. See FEC v. Rose, 806 F.2d 1081, 1092 (D.C. Cir. 1986) ("Mr. Rose … contended that the Campaign Act required the Commission to act within 120 days or within an election cycle. We unequivocally rejected both contentions."). Cf. Perot v. FEC, 97 F.3d at 559 (recognizing that Congress knew what it was doing in imposing enforcement procedures that will not resolve cases before an election).

"major purpose" rule, the Commission still would have to enforce such a regulation through the same "elaborate statutory procedures" to which plaintiffs object here. See 11 C.F.R. 111.4. Moreover, adopting a new interpretive regulation would obviously have no effect at all on the Commission's application of the Act's "political committee" requirements with regard to any past illegal activity, such as that alleged in the five pending administrative complaints plaintiffs have discussed.

Plaintiffs also cite (Pl. SJ Opp. at 15) statements from several individual current and former Commissioners addressing specific enforcement matters from the 1996 election cycle involving entirely different legal issues, for the proposition that, despite its unanimous official public pronouncement to the contrary, the Commission will refuse to enforce the Act's "political committee" provision without an accompanying regulation.[21] However, the fact that Commissioners exercised their prosecutorial discretion not to pursue an enforcement matter because of lack of clarity about the legality of the particular activities at issue in those matters, see, e.g., General Electric Co. v EPA, 53 F.3d 1324, 1328 (D.C. Cir. 1995), is in no way inconsistent with the Commission's unanimous decision to pursue enforcement cases involving the legal issues involved in this case.[22]

[21] The Commission is not bound by the past or present opinions of individual Commissioners, especially those who are no longer members of the Commission. Because the Act "clearly requires that for any official Commission decision there must be at least a 4-2 majority," an opinion adopted by less than four Commissioners is not "binding legal precedent or authority for future cases." Common Cause v. FEC, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) (emphasis in original).

[22] Plaintiffs' descriptions of these statements are also fraught with error. For example, plaintiffs rely on Commissioner Thomas' statement of reasons in MUR 4994 (Pl. SJ Opp. at 14 and n.9), but contrary to plaintiffs' assertion, Commissioner Thomas in fact voted to find a violation of the Act and his statement demonstrates a willingness to develop the law through case-by-case adjudication. According to Commissioner Thomas, despite the absence of a regulation:

footnote continued on next page

At base, plaintiffs' argument (and Amici's) comes down to nothing more than the claim that the Commission cannot be taken at its word that it intends to apply the statute to section 527 organizations in the future. However, it is well established that the Commission is entitled to a presumption of good faith, and plaintiffs have provided no relevant evidence to overcome this presumption. See United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties") (internal citation omitted); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"). This presumption cannot be overcome by "sheer multiplication of innuendo," Louisiana Ass'n of Independent Producers v. FERC, 958 F.2d 1101, 1111 (D.C. Cir. 1992), which is all that plaintiffs and Amici offer this Court. Moreover, it is well established that "a court should reject a facial challenge [to a regulation], either as unripe or meritless, when the challenger's success turns on the assumption that the agency will exercise its discretion unlawfully . . . or will misapply the regulation." National Mining Assoc. v. Army Corps of Engineers, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (citing, inter alia, Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931, 941 (D.C. Cir. 1986); Union of Concerned Scientists v. Nuclear Regulatory Commission, 880 F.2d 552, 558-559 (D.C. Cir. 1989)). Cf. Sullivan v. Everhart, 494 U.S. 83, 94 (1990) ("The

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> I voted to approve such findings with the understanding that the best course of action thereafter would be to take no further action and close the file. This would have established henceforth the legal principle that ads like those at issue — clearly designed to influence a particular election — must count against the parties' coordinated expenditure limits if coordination is proven.

Statement of Reasons of Commissioner Scott E. Thomas in MUR 4994 (Dec. 19, 2001) (Plaintiffs' Exhibit 4 at 1). Plaintiffs also cite (Pl. SJ Opp. at 14-15 n.9) the statements of three Commissioners in MUR 4250, but fail to note that the D.C. Circuit later found the conclusions of those three Commissioners that the statue and then-current regulations did not apply to the activities at issue to be reasonable and entitled to deference. In re Sealed Case, 223 F.3d 775 (D.C. Cir. 2000).

Secretary might conceivably ensure that delay works to the Government's financial advantage by deliberately underpaying while keeping the netting period open, but since that is an obvious violation of the Act it is again not the stuff of which a facial challenge can be constructed") (emphasis in original).

The D.C. Circuit rejected allegations similar to those raised by plaintiffs and Amici in SBC Communications Inc. v. FCC, 138 F.3d 410 (D.C. Cir. 1998). After reiterating that "[i]nherent in an agency's ability to choose adjudication rather than rulemaking . . . is the option to make policy choices in small steps, and only as a case obligates it to," 138 F.3d at 421 (citing Chenery, 332 U.S. at 202), the court of appeals stated:

> These contentions boil down to the proposition that the Commission cannot be trusted to fairly implement the statute . . .. The Commission, to be sure, has on occasion engaged in unprincipled decisionmaking when its policy or political inclinations came into conflict with legal restraints . . ., and this has been so even in the telecommunications field . . .. Still, Congress quite clearly gave the Commission the primary responsibility to make delicate judgments under this statute and we may not presume that the Commission will perform that task in bad faith.

SBC Communications Corp., 138 F.3d at 421 (internal citations omitted). As we explained in our opening brief, (FEC SJ Mem. at 44), "[i]f Congress views [the agency] as 'unremittingly hostile'" to certain legal changes, "it is free to decrease the agency's discretion in administering [it] or remove [it] from the agency's purview entirely." North Broward Hospital District v. Shalala, 172 F.3d 90, 94 (D.C. Cir. 1999). Because Congress has done no such thing, this Court is still obligated to give the usual substantial deference to the Commission's choice between rulemaking and case-by-case development of the law.

CONCLUSION

For the reasons stated above and in our opening brief, the Commission respectfully requests the Court grant its motion for summary judgment and deny plaintiffs' motion for summary judgment.

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