ORAL ARGUMENT NOT YET SCHEDULED

Nos. 07-5360, 07-5361

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS,

Appellee and Cross-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellant and Cross-Appellee.

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

RESPONSE AND REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

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March 7, 2008

AMENDED RULE 28(a)(1) CERTIFICATE

(A) *Amici*. Although Senator John McCain and Senator Feingold jointly moved to participate as amici curiae in this Court (*see* D.C. Cir. docket entry for 12/31/07), Senator McCain apparently is no longer acting as an amicus. His name is not on the amicus brief that Senator Feingold filed.

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GLOSSARY

AO	=	Advisory Opinion
A.R.	=	Administrative Record
BCRA	=	Bipartisan Campaign Reform Act of 2002
CCP	=	Center for Competitive Politics
CMAG	=	TNS Media Intelligence/CMAG
DNC	=	Democratic National Committee
E&J	=	Explanation and Justification
FECA	=	Federal Election Campaign Act
GOTV	=	Get Out The Vote
J.A.	=	Joint Appendix
MUR	=	Matter Under Review
NPRM	=	Notice of Proposed Rulemaking
S.J.A.	=	Supplemental Joint Appendix
SOR	=	Statement of Reasons

Oral Argument Not Yet Scheduled

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ISSUE RAISED BY SHAYS' CROSS-APPEAL

In addition to the issues raised by the Commission's appeal (FEC Br. 1-2), the cross-appeal by Shays raises the following issue: Whether 11 C.F.R. 300.64(b), permitting federal officeholders and candidates to attend and speak at state, district, and local political party fundraising events "without restriction or regulation," is lawful. *See infra* pp. 38-44.

STATUTES AND REGULATIONS RELEVANT TO THE CROSS-APPEAL

The Addendum to this brief includes 11 C.F.R. 300.64(b) and other relevant provisions.

STATEMENT OF FACTS RELEVANT TO THE CROSS-APPEAL

The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), regulates solicitations by federal candidates and officeholders. *See* 2 U.S.C. 441i(e).

The first part of paragraph (1) of that section "[i]n general" prohibits those individuals from, *inter alia*, soliciting funds "in connection with an election for Federal office, including funds for any Federal election activity" unless the funds are federal funds. 2 U.S.C. 441i(e)(1)(A).[1] The second part of paragraph (1) permits federal candidates and officeholders to solicit *non*federal funds in connection with any election for a nonfederal office in amounts that may be contributed to federal candidates and political committees and are not from sources the Act prohibits. 2 U.S.C. 441i(e)(1)(B). Paragraph (e)(3), entitled "Fundraising events," states that, "[n]otwithstanding paragraph (1) and [2 U.S.C. 441i](b)(2)(C)," a federal candidate or officeholder "may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." 2 U.S.C. 441i(e)(3).

Commission regulation 11 C.F.R. 300.64 implements paragraph (e)(3) and specifies that a "fundraising event … includ[es] but [is] not limited to a fundraising event at which Levin funds are raised, or at which non-Federal funds are raised."[2] Section 300.64(b) states that "[c]andidates and individuals holding Federal office may speak at such [fundraising] events [by and for state, district, or local party committees] without restriction or regulation."

In *Shays v. FEC (Shays I)*, 337 F.Supp.2d 28, 88, 91-92 (D.D.C. 2004), the district court concluded that 11 C.F.R. § 300.64(b) passes *Chevron* review. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court also concluded, however, that, "[i]n the absence of any further explanation," 337 F.Supp.2d at 93, the Commission's Explanation and Justification ("E&J") failed to provide a "reasoned analysis" in

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[1] "Federal funds" are funds subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 11 C.F.R. 300.2(g).

[2] "Levin funds" may be raised and spent 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).

support of the regulation, in violation of the Administrative Procedure Act ("APA"). The Commission did not appeal that ruling. To comply with the district court's decision, the Commission on remand issued a Notice of Proposed Rulemaking ("NPRM") (J.A. 276-79) seeking comment on proposed revisions to the E&J or, in the alternative, on proposed revisions to the regulation to bar federal candidates and officeholders from soliciting or directing nonfederal funds when attending or speaking at state, district, and local party fundraising events. (J.A. 278-79.) After considering the comments it received (A.R. Vol. II, Docs. 7-19), both written and oral, and "carefully weighing the relevant factors" (J.A. 286), the Commission decided to retain the original rule and issued Supplementary Information and a revised E&J (J.A. 285-90).

In its revised E&J, the Commission explained that its construction of the underlying statutory provision rested on the need to harmonize that provision with 2 U.S.C. 441i(e)(1)(B); Congress's inclusion of the "notwithstanding paragraph (1)" phrase in section 441i(e)(3); and Congress's choice — not the Commission's choice — to single out attendance and speech by federal officeholders and candidates at state, district, and local party fundraisers. (J.A. 287.) In addition, the Commission described the relationship between state political parties and federal officeholders and candidates as "unique" (*id.*) and explained that First Amendment and practical concerns also supported treating attendance and speech by those individuals at state fundraisers as a special case. (J.A. 287-89.) Finally, the Commission explained that the regulation is "carefully circumscribed," has not led to corruption or abuse, and further restrictions would provide "little, if any, anti-circumvention protection." (J.A. 289-90).

Shays again challenged the regulation. (Compl. ¶¶ 61-66, J.A. 44-46.) In response, the district court reaffirmed its earlier determination that the regulation passes *Chevron* analysis

(J.A. 105) and concluded that, with the revised E&J, the regulation also satisfies APA requirements. The court found that the revised E&J "provides a detailed explanation of the factors that the Commission believes justifies its regulation …, and Plaintiff does not meaningfully respond to [the Commission's] concerns." (J.A. 108). In reaching this conclusion, the court emphasized the following considerations: the challenged regulation permissibly harmonizes 2 U.S.C. 441i(e)(1)(B) and 441i(e)(3) (J.A. 106); the Commission justified its treating state party fundraisers differently from state candidate fundraisers (J.A. 106-08), especially since "Congress opted to treat" the different kinds of fundraisers differently (J.A. 109); and the Commission adequately explained why its regulation does not create a risk of abuse or actual corruption — an explanation, the court noted (J.A. 108), that Shays did not even attempt to rebut.

On October 23, 2007, Shays filed a cross-appeal of the district court's judgment upholding the regulation. (J.A. 120.)

SUMMARY OF ARGUMENT

1. The Commission's regulation defining the "content" of what constitutes a "coordinated communication" satisfies both *Chevron* and APA review. Congress gave the Commission broad discretion, and the Commission's rule governs more speech than the minimum congressional requirement that coordinated "express advocacy" and "electioneering communications" be treated as coordinated communications. The legislative history supports the Commission's interpretation, and Shays misleadingly relies on Senate floor statements that concerned the "conduct" aspect of coordination, not a communication's content.

The content provision regulates more speech than the Commission's pre-BCRA approach. In the 90/120-day pre-election periods when virtually all election ads are run,

communications directed toward voters in the relevant jurisdictions will meet the new content standard simply by containing a reference to a federal candidate or political party. Before BCRA, the standard was less clear and comprehensive.

The district court correctly found that there is no factual basis for concluding that the content regulation has led to actual abuse since it has been in effect or that it otherwise unduly compromises the Federal Election Campaign Act ("Act" or "FECA"), 2 U.S.C. 431-455. During the rulemaking, no one presented evidence that coordinated spending has shifted to the pre-election windows, and the Commission's predictive judgment is entitled to deference. Shays relies on hypothetical and unrepresentative examples, many of which are unlikely to be repeated because of intervening changes in the law. The Commission properly relied on comprehensive data similar to what the Supreme Court relied on in *McConnell*. Those data suffer from no systematic flaws or biases and amply support the Commission's line drawing.

The district court erred when it held that Congress's limited regulatory mandate is relevant only to *Chevron* review and not the APA question regarding the rule's ability to rationally separate election-related advocacy from other activity. Shays does not, however, dispute that this mandate is integral to both legal questions. Because the Commission regulated beyond the minimum congressional mandate and relied upon sound data in its regulatory line-drawing, its coordination content regulation satisfies both *Chevron* and APA review.

2. The revised coordination "conduct" standards for common vendors and former employees pass *Chevron* and APA review. In exercising its policymaking authority, the Commission reasonably focused on the 120-day period after a vendor or former employee provides services to a candidate's campaign or a political party. Contrary to Shays' and the district court's assumption, by the end of that period a candidate's or party's campaign

information has little or no remaining "shelf life" or has become public, available for others to tap. Also, the 120-day period does not unnecessarily inhibit the use of vendors and former employees to produce electoral communications for "outside" spenders — an activity advancing First Amendment interests.

3. The Commission promulgated its firewall safe harbor provision to prevent improper coordination without infringing the statutory and constitutional right of political committees and others to make both coordinated and independent expenditures. Under *Chevron* and the APA, the Commission is owed broad deference in selecting the level of generality of its regulations. Because the design and effectiveness of a firewall depend on the particular facts about an entity, the Commission reasonably chose to promulgate a general regulation, to be augmented by advisory opinions and the Act's enforcement process. To come within the firewall safe harbor an entity must provide reliable information about the distribution and implementation of its firewall policy.

4. The Commission legitimately interpreted the undefined statutory terms "get-out-the-vote activity" and "voter registration activity" to exclude mere encouragement to vote or register to vote and required that such activity "assist" persons with "individualized means." Contrary to Shays' assertion, these regulatory definitions are not unlawfully narrow. Shays, like the district court, ignores the deference to which the Commission is entitled in framing its regulations and assumes — misreading one fact-specific Commission advisory opinion and belittling the examples in the regulations' E&J — that the definitions open up loopholes in the Act. However, the Commission has not yet had the opportunity to illustrate further its interpretation of those regulatory definitions through additional advisory opinions and enforcement matters.

5. The district court correctly held that the regulation permitting federal officeholders and candidates to speak and appear at state, district, and local fundraising events "without restriction or regulation" is lawful under *Chevron* and the APA. The regulation reasonably reconciles two provisions of the Act, and the unique relationship between those individuals and state and local parties supports that harmonizing construction. Failing to differentiate between the requirements for appearances at state and local fundraisers and the requirements for appearances at other fundraisers would nullify Congress's singling out the party fundraisers. Furthermore, additional restrictions on the federal officeholders and candidates would provide little, if any, anti-circumvention protection.

ARGUMENT

I. THE COORDINATION "CONTENT" STANDARD IS LAWFUL

Shays repeatedly argues or assumes that when Congress enacted BCRA it directed the Commission to regulate more speech or promulgate stricter regulations than Congress actually required. In fact, Congress gave the Commission wide discretion to resolve the questions addressed by the regulation at issue, 11 C.F.R. 109.21(c)(4), and that regulation's revised content standard goes far beyond the minimum statutory requirements. The Commission properly based its decisions on the available evidence, an accommodation of the competing policy interests the Commission is entrusted to implement, and its regulatory experience and expert judgment. The Commission's interpretation is entitled to deference under *Chevron* and its progeny, and its predictive judgments about the behavior of those it regulates are entitled to "particularly deferential" review. *In re Core Communications, Inc.*, 455 F.3d 267, 282 (D.C. Cir. 2006). *See also* FEC Br. 10-11, 18-19. The ultimate issue is whether the Commission's coordination regulation is within the "permissible range of interpretations" of its delegated

authority. *Bolden v. Blue Cross & Blue Shield Ass'n, Inc.*, 848 F.2d 201, 205 (D.C. Cir. 1988). It is.

A. The New Content Regulation Goes Beyond the Minimum Congressional Requirements

As we have shown (Br. 20-25), the revised content standard (11 C.F.R. 109.21(c)(4)) goes far beyond BCRA's minimum requirements, and Shays does not dispute our showing that Congress expressly delegated broad authority for the Commission to determine what constitutes a coordinated expenditure and did not require any particular outcome.[3] Shays' arguments are based largely on the erroneous premise that BCRA requires the Commission's coordination regulation to cover more content overall than it did before BCRA. *Cf. Gray Panther Advisory Comm. v. Sullivan*, 936 F.2d 1284, 1287-88 (D.C. Cir. 1991) (reviewing rulemaking under statute requiring new regulation to be "at least as strict" as old one). However, Shays has not identified any statutory language or applicable legislative history that would require that result.

1. The New Provision Regulates More Speech than Coordinated Express Advocacy and Electioneering Communications

As previously explained (FEC Br. 13-14, 24), compared to the "electioneering communication" definition, the revised content regulation covers longer pre-election time periods (90/120 days); can be met by a reference to a political party (not just a federal candidate); applies to any type of public communication (not just radio and television); and does not require the "targeted" audience to be 50,000 or more people (*compare* 2 U.S.C. 434(f)(3)(C)). The regulation is also supported by the Supreme Court's finding that "almost all"

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[3] *See* FEC Br. 10-13, 18-19; 147 Cong. Rec. S3184-3185 (Mar. 30, 2001) (statement of Sen. Feingold) ("There is one thing I want to make very clear and reiterate: While this amendment instructs the FEC to consider certain issues in the new rule-making, it doesn't require the FEC to come out any certain way or come to any definite conclusion one way or another.").

broadcast election ads the Court considered were disseminated within 60 days of the general election. *McConnell*, 540 U.S. at 127.[4]

The content standard thus regulates far beyond the only content *requirement* that Congress added in BCRA § 202: A disbursement made for a coordinated electioneering communication must be treated as a contribution. Shays has not pointed to a single word or phrase in BCRA suggesting that the Commission was required to go further.[5] Indeed, the very fact that Congress believed it necessary to specify that coordinated electioneering communications 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. In particular, Shays does not refute our showing (Br. 20-22) that BCRA's legislative history and language demonstrate a deliberate congressional choice *not* to require the Commission to define the *content* of a coordinated communications more broadly than coordinated express advocacy and electioneering communications.

Shays emphasizes (Br. 28) floor statements by Senators McCain and Feingold, but those statements, when read in context, clearly address only the collaborative *conduct* necessary to rise to the level of coordination, not the *content* of what coordinated communications must include.

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[4] The 90/120-day periods are consistent with congressional judgments underlying the statutory provision and congressional rules on use of the franking privilege during a member's campaign for re-election. *See* 39 U.S.C. 3210(a)(6)(A); Standing Rules of the Senate, Rule XL(1) (60-day rule); Rules of the House of Representatives, Rule XXIV(8) (90-day rule). The legislative history for these provisions shows that they were prophylactic measures "to avoid any trace of abuse" of the franking privilege for campaign purposes. S. Rep No. 93-461, 1973 WL 12675, at *2909 (1973). Thus, Congress, like the Commission, concluded that communications within the few months before an election are much more likely to be for electoral purposes.

[5] *See Puerto Rico Dep't. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("unenacted approvals, beliefs, and desires are not laws"); *International Union v. Donovan*, 746 F.2d 855, 860-61 (D.C. Cir. 1984) ("issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through … the enactment of legislation").

The Senators were addressing BCRA § 214, which repealed a regulation — 11 C.F.R. 100.23(c)(2) (2001) — that had been inspired in part by *FEC v. Christian Coalition*, 52 F.Supp.2d 45 (D.D.C. 1999). *See generally* S.J.A. 509-10; *McConnell v. FEC*, 251 F.Supp.2d 176, 254-58 (D.D.C. 2003) (per curiam) (summarizing coordination issues and the impact of *Christian Coalition*). In turn, the main coordination dispute in that lawsuit had been the extent to which a spender had to collaborate and consult with a candidate (or political party) before the activity would be deemed "coordinated," not whether the content of the communication had been sufficiently election-related to be a coordinated "expenditure." *See* 52 F.Supp.2d at 89-97.

In particular, the quotations upon which Shays relies (Br. 28) are misleading. Senator McCain actually said (S.J.A. 507; emphasis added), "we expect the FEC to cover 'coordination' whenever it occurs, *not simply when there has been an agreement or formal collaboration*," but Shays' brief omits the second, crucial clause. Moreover, in the sentence immediately preceding the one just quoted, Senator McCain talked about behavior, not content: "Informal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration." *Id.* Likewise, when Senator Feingold spoke just before Senator McCain, he stated his view (S.J.A. 507) that

> [t]he FEC's narrowly defined standard of requiring collaboration or agreement sets too high a bar to the finding of "coordination." This standard would miss many cases of coordination that result from de facto understandings. Accordingly, Section 214 states that the Commission's new regulations "shall not require agreement or formal collaboration to establish coordination."

Again, Shays quotes (Br. 28) only isolated phrases from these sentences, omitting the language that makes it clear that the crux of the Senator's concern was the level of collaboration necessary to establish coordination. None of these remarks about collaborative conduct is relevant to the *content* prong of the regulation, the provision at issue here.

2. The Revised Coordination Regulation Covers More Content than the Commission's Pre-BCRA Approach and Provides a More Objective and Easily Enforceable Test

As we have explained (Br. 12, 20-22; *supra* pp. 9-10), aside from the new requirement that coordinated electioneering communications be treated as contributions, Congress did not require or forbid any *content* change from the prior regulation. Despite the new regulation's clear compliance with this congressional directive, Shays devotes considerable space (Br. 25-27) to explaining his view of the Commission's historical interpretation of what constitutes a coordinated expenditure. Because the Commission's pre-BCRA approach is not the issue before this Court, and the statute does not purport to restrict the Commission's discretion to alter that approach, most of Shays' historical argument is simply irrelevant. Even if it were relevant, however, the important point, which Shays overlooks, is that the Commission's new regulation defines *more* speech as "coordinated communications" than the Commission's previous approach — and with none of the uncertainty about the test that hampered earlier enforcement efforts.

The record in *McConnell* and the comprehensive data analyzed by the Commission in this rulemaking conclusively demonstrate that the overwhelming majority of campaign ads are run in the two months before an election. *See* J.A. 375-407. Under the Commission's new content standard, any ad that merely refers to a federal candidate or political party is regulable as a coordinated expenditure if its meets the other criteria for coordination. Consequently, virtually all ads run within the 90/120 day pre-election periods that are even remotely connected with the election will be regulable because the rule requires absolutely *no* parsing of any other content of the ad: no analysis is needed about whether the ad contains a lobbying message or an electioneering message, whether it promotes or attacks a candidate, whether it exhorts the

audience to vote for or against a candidate, or whether its election advocacy is sufficiently explicit. Thus, this part of the regulation alone will cover the vast majority of coordinated campaign advertising.

In the years leading up to BCRA, however, things were not so simple. There was great confusion about the content requirement for coordinated expenditures, and no one could seriously argue that, under the earlier regime, during the 90/120-periods leading up to an election all that mattered in terms of content was whether the ad contained a reference to a candidate or political party. Indeed, the amicus briefs in this case demonstrate this confusion; each presents plausible arguments for contradictory views of the test the Commission was applying. *See* Feingold Br. 3-9; CCP Br. 2-7. The Court need not, however, resolve their dispute to distill the only two points that are important here: The earlier regime (1) employed some sort of content standard far more demanding than a mere reference to a clearly identified candidate or political party, and (2) created so much uncertainty that it ultimately undermined the Commission's ability to enforce the statute effectively.

In a series of advisory opinions addressing coordinated expenditures by political parties, the test articulated by the Commission for whether coordinated spending constituted a coordinated expenditure turned on whether there was an "electioneering message" — *in addition to* the requirement of clearly identifying a candidate. In Advisory Opinion ("AO") 1990-5, [Transfer Binder] Fed. Election Camp. Guide (CCH) ¶ 5982 (April 27, 1990) (Exh. 7 to FEC Summary Judgment Motion), for example, the Commission addressed whether newsletters published by a company owned by the candidate might result in such contributions. The Commission's opinion rested on a content criterion that clearly demanded more than just a reference to the federal candidate. *See id.* at 6-7. *See also, e.g.*, AO 1984-15, [Transfer Binder]

Fed. Election Camp. Guide (CCH) ¶ 5766 (May 31, 1984) (Exh. 10 to FEC Summary Judgment Motion); AO 1985-14, [Transfer Binder] Fed. Election Camp. Guide (CCH) ¶ 5819 (May 24, 1985) (Exh. 11 to FEC Summary Judgment Motion). Thus, the Tenth Circuit explained in *FEC v. Colorado Republican Federal Camp. Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995) (emphasis added), *vacated on other grounds, Colorado Republican Federal Camp. Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604 (1996):

> Giving deference to the FEC's interpretation, we hold that § 441a(d)(3) applies to coordinated spending that involves a clearly identified candidate *and* an electioneering message, without regard to whether that message constitutes express advocacy.

By the late 1990s, however, a consensus emerged among the Commissioners that there was no clear standard for assessing whether a coordinated communication had been made "for the purpose of influencing" an election. In 1999, in the context of audits of the Clinton and Dole campaign committees, four of the Commissioners "express[ed their] disagreement with the use of 'electioneering message' as a test to determine whether communications are 'for the purpose of influencing' elections and, therefore, constitute expenditures or contributions under the [FECA]." Statement of Reasons ("SOR") of Commissioners Wold, Elliott, Mason, and Sandstrom in Audits of Dole and Clinton Campaign Committees (June 24, 1999) at 2 (Exh. 8 to McCain Amicus Br. (district court)). *See also* SOR of Commissioner McDonald in MUR 4553 *et al.*, at 3 (J.A. 139); SOR of Commissioners Mason and Smith in MUR 4538 (May 23, 2002) (summarizing the various Commissioners' "differing but largely individually consistent positions with respect to the threshold for finding a communication to be coordinated contribution"), at 1 (Exh. 6 to McCain Amicus Br. (district court)).

Thus, while there was no clear consensus among the Commissioners during the years immediately leading up to BCRA about the content requirement for coordinated

communications, it is indisputable that the Commission required more than a reference to a clearly identified candidate or political party, even within 90 or 120 days of an election. In this regard, the new content standard captures vastly more speech than the previous standard. Shays' determined focus exclusively on the time *outside* the 90/120-day pre-election periods causes him to lose sight of this critically important, wider breadth of the new regulation during the period that matters most — the months leading up to the election when the overwhelming majority of campaign advertising occurs.

Moreover, Shays does not dispute our showing (Br. 27-28) that the new content standard serves fundamental First Amendment interests by eliminating vagueness.[6] In contrast to the historical difficulty in applying a consistent coordinated expenditure content standard, the new regulation's clarity serves the Act's purposes by drastically reducing the possibility that the Commission will ever have to dismiss an administrative complaint because of uncertainty about the definitional scope of "coordinated communication." This helps ensure that the new regulation's full breadth will be enforceable — another reason why it does not create a potential for abuse. *See Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986) ("Administrative exigencies mandate 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 the rapid, decisive enforcement action that is called for in the highly-charged political arena."); *Buckley v. Valeo*, 424 U.S. 1, 41 (1976) ("'[p]recision of regulation … must be the touchstone in an area so closely touching our most precious freedoms'") (internal citation omitted).

[6] *See Hill v. Colorado*, 530 U.S. 703, 729 (2000) ("A bright-line prophylactic rule may be the best way…, by offering clear guidance and avoiding subjectivity, to protect speech itself.").

Finally, Shays emphasizes (Br. 26-27) the Commission's litigating position in *Christian Coalition*, but that position does not undermine the Commission's new regulation or current arguments before this Court. In briefing that case, the Commission certainly refuted the defendant's arguments that express advocacy was a statutory or constitutional prerequisite for treating a disbursement as a coordinated expenditure, and the new regulation's breadth in the 90/120-day pre-election periods shows that the Commission's position on that question has not changed. To demonstrate that the disbursements in *Christian Coalition* were coordinated expenditures in that pre-BCRA case, the Commission argued that there was sufficient collaboration and sharing of information to constitute "coordination," and that the disbursements met the statutory definition of "expenditure" — 2 U.S.C. 431(9)(A)(i) ("for the purpose of influencing any election for Federal office") — regardless of whether they contained express advocacy. *See, e.g.*, J.A. 130-31.[7]

B. The New Content Regulation Satisfies Both Steps of *Chevron* Review

This Court previously held that "[r]egarding *Chevron* step one, we agree that Congress has not spoken directly to the issue" addressed by the new content regulation. *Shays v. FEC* ("*Shays I Appeal*"), 414 F.3d 76, 98 (D.C. Cir. 2005). Shays does not challenge this holding. Similarly, Shays does not challenge the district court's conclusion (J.A. 93) that the court

> lack[ed] a factual predicate on which to conclude either that *actual* abuse of BCRA has occurred as a result of the Commission's previous content standard, or that the revised content standard "*unduly* compromises" the Act or "create[s] the potential for *gross* abuse." *Orloski*, 795 F.2d at 164. 165. As a result, based on this record, the Court must conclude that the revised content standard survives *Chevron* step two analysis.

[7] To the extent the Commission's argument in *Christian Coalition* involved coordinated spending on equipment or other expenses that were not communications (*see* J.A. 130-31), the Commission was making the obvious point that an express advocacy test makes no sense in that context because such spending involves no expression at all. Non-communicative coordinated expenditures are addressed in 11 C.F.R. 109.20, not by the regulation now before this Court.

As explained below, Shays cannot point to any evidence in the rulemaking record that the content regulation has led to any circumvention or abuse, let alone "gross" abuse. Instead, Shays continues to rely on examples that the district court found unpersuasive in its *Chevron* analysis.

This Court previously agreed with the Commission that it has an "obligation to 'attempt to avoid unnecessarily infringing on First Amendment interests.'" *Shays I Appeal*, 414 F.3d at 101 (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003)). Shays essentially wants the Commission to ignore this obligation and regulate any communication that could conceivably have even a tiny electoral effect, but this Court required no such rule.[8]

1. Shays Does Not Challenge the District Court's Finding That There Is No Evidence of Abuse of the Commission's Regulation, and the Commission's Predictive Judgment Is Entitled to Deference

The district court correctly stated (J.A. 92):

> [T]he Court notes that neither Plaintiff nor any of the written comments submitted during the coordinated communications rulemaking adduced evidence of actual coordination outside of the pre-election windows while the FEC's 2002 coordination rules were in effect *See* Def.'s Br. at 40 (citing [J.A. 425-26]). Indeed, when the Joint Commenters were specifically asked during the public hearing about the ads described in the *National Journal* articles, they "acknowledged that there was no evidence that any of these

[8] Shays is mistaken when he argues (Br. 29 n.16) that the "Commission's First Amendment avoidance argument waives its claim to *Chevron* deference." An agency "does not have jurisdiction to declare statutes unconstitutional" but it "may be influenced by constitutional considerations in the way it interprets or applies statutes." *Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987). During the rulemaking, the Commission did not claim that the decision it reached was *required* by the First Amendment or that the statute would be unconstitutional if construed more broadly, but simply that, as required under *AFL-CIO*, its construction was designed in part to avoid unnecessarily infringing on First Amendment interests. J.A. 426. In *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988), the court deferred to a narrow FEC construction of the statute that accommodated the "countervailing consideration[]" of "allow[ing] the maximum of first amendment freedom of expression in political campaigns commensurate with Congress' regulatory aims." The cases relied on by Shays involved statutory interpretations necessary to avoid constitutional conflicts or a court's refusal to defer to an agency's construction of prior judicial precedent. Neither of those situations is present here.

> advertisements had been coordinated with a candidate or a political party committee." *Id.* (citing [J.A. 426]); [J.A. 361-63].

Shays does not challenge the district court's finding that no one has presented any evidence of circumvention or abuse of the Commission's coordination regulation since it has been in effect; instead, Shays rests his case on his fear that this is a hypothetical possibility (*see, e.g.*, Br. 7). The future is uncertain, but it is the Commission, not Shays, that is entitled to deference for such predictive judgments; Shays does not refute this important legal principle.

> When an agency must balance a number of potentially conflicting objectives…, judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking process was regular.… [A]n agency's predictive judgment regarding a matter within its sphere of expertise is entitled to "particularly deferential" review.

Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965, 971 (D.C. Cir. 1999) (quoting *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1478 (D.C. Cir. 1998)). *Accord Hutchins v. District of Columbia*, 188 F.3d 531, 542 (D.C. Cir. 1999) (en banc).

Lacking evidence that the content regulation has led to any real abuse, Shays attempts (Br. 25 & n.11) to excuse his inability to cite any such evidence by arguing *both* that the Commission's regulation legalizes certain coordinated activity *and* that such coordinated activity would be "secret." This argument is factually flawed: If certain activity is indeed lawful under the Commission's regulation, there would be no reason for anyone to hide it. This argument is also without legal support: Shays relies (*id.*) upon *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1264 (D.C. Cir. 2004), a case that involved an *ex parte* regulation that was "absurd" because it required affected parties to guess when secret communications had taken place. However, because Shays worries about activity that the Commission has supposedly deregulated, the activity is not inherently secret and *Electric Power Supply* is inapposite.

Next, Shays falsely characterizes (Br. 22-23) the Commission's line drawing here as the kind of *de minimis* exception that this Court rejected regarding allocation of certain kinds of

spending with "Levin funds." *Shays I Appeal*, 414 F.3d at 112-115. But that analogy is not apt. The Commission's regulation does not affirmatively authorize identifiable spending that a literal reading of BCRA prohibits. Instead, the Commission has drawn a rational line to separate, in an inherently gray area concerning First Amendment activity, spending that is likely to be for the purpose of influencing an election from spending that is not. Rather than creating an exception to a "rigid regime," 414 F.3d at 114, in which Congress has specified exactly what kinds of funds have to be allocated for specific types of activity, the Commission here has simply adopted a rational construction of the comparatively elastic term "expenditure" in the context of coordinated expenditures.

The dispositive precedent on this point is *Orloski*, which Shays attempts (Br. 29-30) to diminish by emphasizing the irrelevant fact that the case involved, *inter alia*, a donation of food. Shays makes no attempt, however, to rebut our argument (Br. 25-26) that the coordination regulation involves the same sort of line drawing, and is entitled to the same deference, as in *Orloski*. Both here and in *Orloski*, the Commission was not creating a *de minimis* exception but filling "a large gap between the obviously impermissible and the obviously permissible." *Orloski*, 795 F.2d at 164. In both situations, the Commission drew a line that distinguished campaign spending from non-campaign spending and gave breathing space for First Amendment activity, and in both cases there is admittedly an area of potential overlap. As the court noted in *Orloski*, "*any* corporate funding of congressional events indirectly influences the election." *Id.* at 163 (emphasis added). The Commission's line drawing in *Orloski* did not depend upon the size of the corporate funding but instead articulated a general principle to distinguish electoral from non-electoral spending and relied in part upon the express advocacy standard — the same partial reliance to which Shays objects so strongly here. Finally, while the district court found that the *National Journal* articles upon which Shays relies show that some early campaign advertising

exists, the court, citing *Orloski*, correctly found (J.A. 93) that the content standard does not unduly compromise the Act and therefore held that the standard "survives *Chevron* step two analysis." Shays does not demonstrate why, in his view, that conclusion was wrong.

As the Supreme Court explained in *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003), when it upheld a narrow regulatory definition of "disability" that relied on an "effective and efficient administrative proxy" for determining a person's ability to work:

> To generalize is to be imprecise. Virtually *every* legal (or other) rule has imperfect applications in particular circumstances…. The proper *Chevron* inquiry is not whether the agency construction can give rise to undesirable results in some instances (as here *both* constructions can), but rather whether, in light of the alternatives, the agency construction is reasonable.

Under this standard, the Commission's content regulation is reasonable.

2. The Anecdotes Upon Which Shays Relies Are Unpersuasive

Despite the district court's conclusion (J.A. 92) that "BCRA has dramatically changed the legal landscape in which federal candidates and outside spenders interact," Shays continues to rely (Br. 14-15) on the advertising campaign allegedly coordinated between President Clinton's campaign and the Democratic National Committee ("DNC") in 1995 and 1996. But this advertising campaign is irrelevant to the regulation at issue now that BCRA is on the books. Even if everything the press reported about this episode is true, the simple fact is that Title I of BCRA now prevents the DNC from receiving or spending a dollar of soft money. Thus, to the extent that the DNC used large amounts of soft money to do what the Clinton campaign could not have done itself, BCRA's ban on soft money has plugged that "loophole" and the Commission's coordination regulation need not plug it again. With only hard money in its coffers, the DNC can use those funds for express advocacy or any other lawful purpose; it thus

has no incentive to find ways to influence federal elections with soft money that it can no longer have.

Moreover, Shays ignores another key development since the DNC's advertising took place: the Supreme Court's decision in *Colorado I*. That decision was handed down on June 26, 1996, after the "early" DNC ads had come to an end. Before that case was decided, the Commission had a regulation providing that national political parties were incapable of making independent expenditures in support of their own candidates, *see Colorado I*, 518 U.S. at 619-23, so the parties were limited for such spending by the coordinated expenditure limits in 2 U.S.C. 441a(d). Thus, at the time of the 1995-96 DNC ads, there was a much greater incentive (from the parties' perspective) to find ways around the FECA's restrictions, because the section 441a(d) limits were assumed to be an absolute cap on hard money expenditures in support of the parties' own candidates. *Colorado I* completely changed that dynamic by opening the door for political parties to make unlimited independent expenditures to support their own candidates, and no similar program has been undertaken by any political party since then. This is yet another reason why the DNC episode is unlikely to recur, and the Commission's coordination regulation need not, by itself, carry the burden of preventing another similar episode.[9]

Shays also relies (Br. 15) on an anecdote about early spending by Steve Forbes in the 2000 presidential election, but it makes no sense to extrapolate from the spending pattern of an extraordinarily wealthy individual — with virtually unlimited money to spend on his own campaign at any time — to predict coordinated spending by others. Since *Buckley*, 424 U.S.

[9] Later, BCRA § 307 substantially raised the limits on contributions of federal funds to national party committees. The parties' ability to accept more federal funds enhances the likelihood that they will use independent expenditures to communicate whatever message they like and lowers the incentive for them to search for ways to avoid the Act's restrictions.

at 51-53, candidates have been free to spend as much of their personal fortunes as they like in support of their own campaigns. This holding about the First Amendment right of individuals to spend their personal wealth on their own campaigns is a matter of constitutional law, not an indication that a "loophole" needs to be plugged based on a tenuous extrapolation to the context of coordinated expenditures.

Although Shays devotes several pages to describing various non-coordinated ads run outside the revised pre-election windows during several election cycles, he does not challenge the district court's holding (J.A. 94) that he "present[ed] no evidence of the statistical significance of the advertisements described in the *National Journal* articles, and in light of the limited evidentiary value of the alleged Clinton-DNC coordination, the Court lacks a basis on which to conclude that this evidence actually undermines" the Commission's line drawing at 90 and 120 days before election day. Similarly, although Shays accuses (Br. 21) the Commission of comparing apples to oranges when we compared (Br. 19) 236 discrete early ads with more than 500,000 airings of ads, so did the district court (J.A. 94 n.23) — and for good reason: Shays did not present evidence of how often any of these ads were *actually* aired. And because Shays provided only a select group of examples, not a comprehensive methodology that looked both inside and outside the revised pre-election windows, we have no way of knowing whether the ads Shays chose to highlight represent 1% or .01% of all the election ads run during the election cycle. Courts have long recognized that the probative value of statistical evidence varies with sample size. *See Connecticut v. Teal*, 457 U.S. 440, 463 n.7 (1982) (citing *Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)). Shays' limited examples do not undermine the Commission's comprehensive data or reasonable conclusions.

C. The New Content Regulation Satisfies APA Review

1. The District Court's APA Analysis Failed to Consider Congress's Limited Regulatory Mandate

As previously explained (FEC Br. 22-23), although the district court acknowledged (J.A. 98) that the Commission "regulated more broadly" than Congress required, the court erred by holding that Congress's limited regulatory mandate is relevant only to *Chevron* review and not the APA question regarding the rule's ability to "'rationally separat[e] election-related advocacy from other activity.'" J.A. 98 (citing *Shays I Appeal*, 414 F.3d at 102).[10] Shays offers no response to our argument that this limited mandate is highly relevant to the Court's APA review. Specifically, Shays does not dispute our reliance (Br. 22-23) on this Court's prior holding in *Shays I Appeal* and in several other cases that both *Chevron* and APA review require the courts to determine whether the Commission has "'rationally considered the factors deemed relevant by the Act.'" 414 F.3d at 96-97 (quoting *Gen. Am. Transp. Co. v. ICC*, 872 F.2d 1048, 1053 (D.C. Cir. 1989)). Again (*see supra* pp. 9-10), since Congress only required that the Commission treat coordinated express advocacy and electioneering communications as coordinated communications, Congress itself explicitly deemed those factors relevant, and its limited mandate is highly relevant in evaluating the rationality of the Commission's decision-making under the APA. Indeed, this limited mandate directly indicates Congress's own approach to "separat[ing] election-related advocacy from other activity." *Shays I Appeal*,

[10] The district court also erred (J.A. 98) when it treated the Commission's argument about Congress's limited regulatory mandate as a *post hoc* rationalization. The regulation's content leaves no doubt that the Commission relied on that mandate when it modeled the regulation on the criteria that define "electioneering communications" and used the express advocacy standard. The argument in our briefs is thus the "same rationale the [Commission] implicitly adopted" in its rule and was "not offered as an alternative or supplemental explanation for an agency action . . . previously justified on other grounds." *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998)

414 F.3d at 102. Thus, the Commission's regulation — which follows Congress's general approach but expands upon it — is reasonable on its own terms and evinces a rational consideration of the factors deemed relevant by Congress.

2. The CMAG Data Are Comprehensive and Reliable, and Demonstrate that the Commission's Line Drawing Was Reasonable

Shays misconstrues the guidance from this Court regarding the data relevant to this regulation. The Commission merely has to establish that "its rule *rationally* separates election-related advocacy from other activity falling outside FECA's expenditure definition." *Shays I Appeal*, 414 F.3d at 102 (emphasis added). When this Court ruled previously, it did not have the comprehensive data and analysis that are now before it, but as the record now demonstrates (*see* J.A. 361-64, 373-407, 419-30), the revised rule does "not permit *substantial* coordinated expenditure." 414 F.3d at 102 (emphasis added).

As previously discussed (Br. 13-19), the Commission explained how it reasonably relied on the CMAG data when it determined that the overwhelming majority of candidates' campaign advertising took place during the 90- and 120-day periods defined in the coordination rule. The district court noted (J.A. 80) that Shays did not challenge the "validity of the CMAG data itself" and that similar data were relied upon by the district court and the Supreme Court in the *McConnell* litigation.[11] As the district court found (J.A. 80), because the parties "agree that

[11] In *McConnell*, Shays championed the use of CMAG data to support the bright-line electioneering communication provisions in BCRA. For example, Shays described "the CMAG data [as] represent[ing] the most comprehensive body of research on political television advertising ever conducted." Br. of Reps. Shays and Meehan at 66, *McConnell v. FEC*, No. 02-1674 (2003). Since 2000, CMAG has added 26 major markets to its coverage, so the data in this rulemaking are far more complete than what the Supreme Court relied on in *McConnell*. The CMAG data now cover "more than 560 stations in 101 major markets …. The monitored stations constitute the principal stations in each market, typically including the network affiliates and major independents." Vol. III, Doc. 54, A.R. 2187 (from DVD open "CMAG_Read_Me" file); *see* Vol. III, Doc. 55, A.R. 2204-05 (listing 101 major markets). Previously, CMAG only

CMAG is a leading provider of political advertising tracking as well as media analysis services to a wide variety of clients, including national media organizations, foundations, academics, and Fortune 100 companies," the CMAG data set comprises the most comprehensive and complete available data, and the Commission is entitled to rely upon it. *See American Public Communications Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) ("agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information"); *Industrial Union Dep't., AFL-CIO v. Hodgson*, 499 F.2d 467, 475 n.18 (D.C. Cir. 1974); *American Coke and Coal Chemicals Institute v. EPA*, 452 F.3d 930, 942-43 (D.C. Cir. 2006)).

Nevertheless, Shays relies on the limitations inherent in the CMAG data as if these limitations were somehow unique to this rulemaking or created by the Commission. Shays fails to provide his own analysis of the data or to point to other comparably systematic data that would undermine the Commission's analysis. If a different analysis would have supported Shays' position in this case, it is reasonable to assume that he would have presented it to the Court. *Cf. Overnight Transp. v. NLRB*, 140 F.3d 259, 267 (D.C. Cir. 1998) (adverse inference rule is based on theory that "a party will of his own volition introduce the strongest evidence available to prove his case"). The district court properly rejected each of Shays' attacks on the Commission's data analysis.

First, the court found (J.A. 81) that the CMAG data's use of television ads but not radio ads was acceptable because Shays "offer[ed] no evidence that the pattern of electoral advocacy differs on television and radio." Second, the court similarly found (*id.*) that the data's use of ads

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monitored stations "in the top 75 media markets, containing more than 80 percent of U.S. residents." *McConnell*, 251 F.Supp.2d at 720 (CKK).

run by candidates was satisfactory because Shays also failed to offer any evidence that the "pattern of electoral advocacy by non-candidates differs from that of candidates themselves." Shays does not challenge either of those findings on appeal.

Third, the district court properly rejected (J.A. 81-82) Shays' argument, which he repeats here (Br. 31-32), that the Commission's analysis of presidential races was flawed because it focused on certain battleground states.[12] Despite the fact that all presidential data captured by CMAG (not limited to battleground states) are part of the administrative record, Shays chose not to perform any analysis of his own with the presidential data.[13] In addition, as the district court recognized, the Commission's focus on battleground states in presidential races "may actually have been 'statistically conservative' because battleground states 'would be presumed to have the most advertising, even if they are not representative of the entire nation,' such that the relative percentages of early advertising might drop if non-battleground states were included." J.A. 81 (citations omitted).

In particular, Shays relies heavily (Br. 12-13, 31-32) on Iowa and New Hampshire in the presidential race, and argues that the Commission's analysis is flawed because it did not include

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[12] It is unclear whether the Court has jurisdiction to rule on Shays' challenge to the portion of the regulation governing the presidential election because he has never been, or stated any intention to be, a candidate for president. Although the Commission has not challenged Shays' standing, the Court has its own obligation to determine that it has jurisdiction over each of his claims. "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (internal quotation marks, alteration, and citation omitted).

[13] As the district court correctly noted (J.A. 82), the Commission's battleground analysis was based on 23 media markets fully contained within 11 states in order to ensure that "all presidential primary advertisements within such media markets would relate to the relevant battleground state." *See also* J.A. 381-87, 424 & n.21. The complete data sets, as delivered to the Commission by CMAG, are part of the administrative record. *See* Administrative Record filed on October 31, 2006.

data from New Hampshire. However, none of the media markets CMAG monitors is in New Hampshire. *See* J.A. 82 & n.13. Thus, the Commission simply had no data to include from that state, and its analysis did not ignore any data in its possession. (As noted *supra* p. 23 & n.11, both Shays and the courts relied on CMAG data in *McConnell*, even though that data included no information from New Hampshire.) A number of other states also could not be included in the Commission's analysis, but Iowa — the other very early caucus or primary state for the presidential race — was included. Overall, Shays presents no evidence that such early states are systemically underrepresented, and what matters statistically is whether there is any reason to believe that the data are unrepresentative or skewed. In other words, Shays has presented no evidence to suggest that if additional data had been captured, the overall pattern of spending would have looked any different in a way that would undercut the Commission's conclusions. *See Segar v. Smith*, 738 F.2d 1249, 1276-77 (D.C. Cir. 1984) (where there was no reason to believe that among experienced personnel one racial group was more likely to possess certain prior work experience, it did not matter that a statistical analysis failed to control for that qualification).

Moreover, while it is true that there was a comparatively large amount of early advertising in Iowa, the Commission is not required to design its regulation to account for each state's particular characteristics. To the contrary, when the Supreme Court in *Buckley* upheld the Act's contribution limits, it explained that the "provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns[.] Congress' failure to engage in such fine tuning does not invalidate the legislation." 424 U.S. at 30. It was similarly reasonable for the Commission to assess the overall pattern of

campaign advertising and draw lines that would apply nationwide regardless of when particular states choose to hold their primaries.

Fourth, Shays misses the point when he argues (Br. 30) that "House and Senate data sets for some unexplained reason omit all 2003 data with respect to ads broadcast in connection with the 2004 campaign." No such ads appear in the data sets because *no such early ads were run* in the media outlets that CMAG captures. The Commission omitted nothing from the data sets, which included all candidate-sponsored ads from stations CMAG monitored for all federal races — House, Senatorial, and Presidential — from November 6, 2002, through November 2, 2004. Vol. III, Doc. 54, A.R. 2187 (from DVD open "CMAG_Read_Me" file). Although Shays relies on *National Journal* articles and cites a few examples of ads from 2003, these are not ads that CMAG would have been expected to capture: Most were radio ads (CMAG only monitors television) or were on small local cable channels (CMAG monitors approximately the top 40 cable channels). *Id.* The district court reviewed the ads described in the *National Journal* articles and stated (J.A. 82-83) that it "cannot conclude that they reveal an actual discrepancy in the CMAG data…. In sum, the Court lacks a basis for concluding that the CMAG data omit relevant advertisements or are unreliable as a result."

Contrary to Shays' rhetoric (Br. 31), the House and Senate data sets are not "worthless." Rather, they reflect advertising that actually aired in major television markets, as observed by an independent, reputable organization. The paucity of early advertising in the CMAG data supports the Commission's line drawing, not any problems in the Commission's methodology. Shays does not even attempt to explain any basis for overturning the district court's finding (J.A. 83) that "Plaintiff has provided no evidence demonstrating that the FEC's analysis of the CMAG data is generally skewed or unrepresentative." In the absence of such evidence, it is

Shays' anecdotes that are "worthless" in understanding the relative frequency and distribution of campaign advertising.

> [U]nquantified, speculative, and theoretical objections to the proffered statistics are properly given little weight by the trial court:
>
> > When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendant may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant … must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims.

Trout v. Lehman, 702 F.2d 1094, 1102 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984) (quoting *Segar v. Civiletti*, 508 F. Supp. 690, 712 (D.D.C. 1981)). Here, Shays has done nothing to "rework" the CMAG data nor presented any other proof that contradicts it.

Because the Commission relied on what is indisputably the most comprehensive data available — data that measured actual airings of advertisements, not predictions — Shays' reliance (Br. 32) on *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914 (D.C. Cir. 1998), is misplaced. In that case, EPA used a model that predicted results "orders of magnitude" less than the concentration of certain chemicals actually measured in practice. *Id.* at 922 (quotation marks and citation omitted). Here, in contrast, the only real data issue is whether the small percentage of broadcasts that CMAG does not capture systemically skews the data in a manner that would undermine the Commission's findings, and Shays has not presented any evidence of such a problem, let alone one that suggests there is a data skew that involves multiple orders of magnitude. *See Oceana Inc. v. Evans*, 384 F.Supp.2d 203, 221 (D.D.C. 2005) (refusing to apply the rule from *Columbia Falls Aluminum* despite "flawed or limited" data that included a number of "uncertainties").

Shays' reliance (Br. 32) on *Randall v. Sorrell*, 126 S.Ct. 2479 (2006), is also misplaced. That case evaluated whether certain contribution limits were so low as to prevent effective

campaigning, and in that context the Court was concerned about the limits' effect on the most competitive races. Here, the Commission was balancing the competing concerns of preventing corruption and leaving breathing space for protected First Amendment activity, while at the same time drawing a bright line defining the content of speech subject to regulation on a nationwide basis. In *McConnell*, when the Supreme Court analyzed whether the electioneering communication provision was overbroad, it did not question whether the provision would be more or less overbroad depending upon whether the ads were being run in competitive or uncontested elections. That same level of analysis is appropriate in this facial challenge. In any event, as explained *supra* pp. 25-26, by focusing on battleground states for the presidential general election, the Commission took a statistically conservative approach because such states would be presumed to have the earliest and most advertising, even if they are not representative of the entire nation.

Finally, Shays makes no attempt to dispute our showing (Br. 27-28) that bright-line rules can satisfy APA review even if they are underinclusive to some extent. All told, the Commission acted well within its discretion by choosing to rely upon the best available data to promulgate a regulation that demonstrably serves the goals of the Act while avoiding unnecessary infringement on speech. This is more than enough to satisfy "arbitrary and capricious" review, and the coordination content regulation should therefore be upheld.

II. THE COORDINATION "CONDUCT" STANDARDS AND THE FIREWALL SAFE HARBOR PASS *CHEVRON* AND APA REVIEW

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

Shays does not dispute that the Commission's revised coordination "conduct" standards for common vendors and former employees, 11 C.F.R. 109.21(d)(4) and (d)(5), satisfy *Chevron* step one. Contrary to his assertion (Br. 34-35), the standards also pass *Chevron* step two and

APA review. *See* FEC Br. 29-31. In adopting the 120-day provision, the Commission protected against circumvention of the Act without ignoring the practicalities of modern American campaigns.

In its E&J, the Commission noted (J.A. 433) that "[m]any commenters suggested that including the entire election cycle … was overinclusive, especially with regard to six-year Senate election cycles." Only after considering these and other comments, which "reflect[ed] experience in the recent election cycles under these [2003] rules," did the Commission conclude that a "current election cycle" limit was "overly broad and unnecessary to the effective implementation of the coordination provisions." (*Id.*) Shays does not strongly dispute that a revision of the election cycle temporal limit was justifiable. For example, he offers no serious rebuttal of the Commission's reasons (J.A. 434) for changing the "current election cycle" timeframe in the Senate context. Moreover, he does not challenge the Commission's adopting a "bright line" temporal rule.

Shays instead focuses on the Commission's particular temporal "bright line"; he prefers a longer period than 120 days. *See, e.g.*, Br. 37 ("[W]hy not use that [180 days] as the benchmark?").[14] Because the Commission adequately explained why the limit it chose is reasonable, however, the possibility that a different temporal limit may also be reasonable

[14] Shays erroneously asserts that the Commission "affirmatively *authorizes*" candidate campaign committees and political party committees to coordinate advertisements with outside spenders beyond the 120-day window. Br. 34; emphasis in original. Shays has leaped from the premise that a regulation does not prohibit certain conduct to the illegitimate conclusion that the regulation therefore authorizes that conduct. *Cf. Flagg Bros. v. Brooks*, 436 U.S. 149, 164-65 (1978) (rejecting argument that constitutional restraints can be applied to "private action by the simple device of characterizing the [government's] inaction as 'authorization' or 'encouragement.'").

provides no basis for overturning the Commission's decision. *See, e.g.*, *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 423 n. 20 (D.C. Cir. 1986).

Expert political commenters told the Commission that campaign information has a limited useful life. *See* J.A. 433-34. The Commission used polling data as an example supporting those general statements. Although Shays criticizes the Commission's reference to the useful life span of political polls (Br. 37), he overlooks the relevance of that life span on actual campaign tactics. Because polling information retains only 5% of its value between 60 and 180 days after the polling and after that drops to zero, *see* 11 C.F.R. 106.4(g), campaigns using polls and other information like it are unlikely to rely upon them after the 120-day period specified in the revised regulation.

By ignoring the ways that "material" campaign information becomes public during the course of a campaign, Shays greatly exaggerates the regulation's potential for abuse. The coordination conduct standards for common vendors and former campaign employees clearly state that those standards are not satisfied if those persons obtain material information "from a publicly available source." 11 C.F.R. 109.21(d)(4)(iii), (d)(5)(ii). *See* J.A. 434 (E&J). Thus, if a common vendor or former employee draws on information that has become public during the course of a campaign, the coordination conduct standard will not be met. So, for example, once candidates or their agents themselves publicly reveal the candidates' campaign themes through campaign materials, debates, speeches, and published interviews, common vendors or former employees can create, produce, or distribute a payor's communication — even one that trumpets the same themes a candidate emphasizes — without meeting the coordination conduct standards. Similarly, a common vendor or former employee may draw on news stories about a campaign's

tactics and strategy, without meeting the coordination conduct standards.[15] In an age of "horse race" political journalism and Internet blogs, the odds are heavily against a campaign's keeping its tactics and strategy secret for very long. Like the district court, Shays fails to give due weight to modern conditions and instead merely assumes that campaign information stays "material" beyond the 120-day period.

Although the earlier version of the conduct standards did not explicitly bar employment for an entire election cycle, the Commission explained that "many commenters" had noted that the election cycle temporal limit "operated in practice as a 'period of disqualification.'" (J.A. 433.) The concerns of common vendors and former employees are inextricably bound with the need to avoid a time limit so restrictive that it could inhibit the production of electoral communications — an activity advancing First Amendment interests. *See* FEC Br. 31. In revising the temporal limits, the Commission sought to serve BCRA's broad goals while also addressing these concerns. Shays wrongly minimizes their importance.

In sum, political actors must meet changing circumstances, and in four months circumstances can greatly change. Shays and the district court overestimate the "shelf life" of campaign information and fail to defer to the Commission's predictive policy judgment that the revised conduct standards for common vendors and former employees will not encourage evasion of the Act's coordination rules. They also fail to recognize that unnecessarily restricting the opportunities of common vendors and former employees to work for political parties,

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[15] In addition, publicly available historical data on election results and post-election expert analyses show where a particular political party and its candidates are strong or weak. An outside spender can tap that public information to make an educated prediction of the strategy a party or candidate is likely to adopt. The spender can learn of a campaign's media buying strategies from the publicly available inspection files kept by television stations. (J.A. 434.)

candidates, and "outside" payors ultimately harms First Amendment interests. The revised standards pass *Chevron* analysis and meet APA requirements.

B. The Firewall Safe Harbor

In arguing that the firewall safe harbor regulation, 11 C.F.R. 109.21(h), is unlawful, Shays ignores key portions of the Commission's discussion (Br. 31-38) that anticipate and rebut his arguments. His objections rest ultimately on policy disagreements with the Commission. Those disagreements cannot, however, overcome the broad deference owed the Commission.

Shays fails, most notably, to address directly the Commission's showing (Br. 34) that case law applying *Chevron* requires courts to accord agencies "very broad deference in selecting the level of generality at which they will articulate rules." *American Trucking Ass'n v. Dep't of Transportation,* 166 F.3d 374, 379 (D.C. Cir. 1999).[16] The APA similarly does not demand a particular level of specificity in a rule. *See* FEC Br. 34-35. The Commission reasonably chose to promulgate a general regulation, to be augmented by advisory opinions and the statutory enforcement process, because the design and effectiveness of a firewall depend on the particular facts about a covered entity's organization, clients, and personnel. (*See* FEC Br. 33-35; J.A. 435.) As the Commission stated (Br. 33), "one size does not fit all when it comes to firewalls" — a proposition that even Shays acknowledges "may be true" (Shays Br. 38). The E&J gives an example of a kind of firewall that, according to commenters, some entities have used to avoid the possibility of coordination: "[E]mployees are placed on separate teams (or 'silos') within the organization, so that information does not pass between the employees who

[16] Shays barely touches on this important principle. He merely attempts in a footnote (Br. 39 n.21) to distinguish factually one of the cases the Commission cited. He does not deny the broad proposition that an agency has discretion how generally to frame its regulations.

work on independent expenditures and the employees who work with candidates and their agents." (J.A. 435.)

Shays also disregards the Commission's explanation (FEC Br. 39) of the context for the E&J's statement that "common leadership or overlapping administrative personnel does not defeat the use of a firewall" (J.A. 436). The E&J neither states nor implies that a firewall would be effective "where the *same person* is orchestrating independent and coordinated expenditures." Shays Br. 39 (emphasis in original). Indeed, as the E&J notes (J.A. 436), 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).

Shays largely ignores the Commission's explanation (Br. 37) of the differences between the 2003 rulemaking and the 2006 rulemaking. As the Commission established in its opening brief (*id.*), the Commission did not, as Shays asserts (Br. 40), "'change its course'"; rather, it provided a "'reasoned analysis'" for its decision to adopt a firewall safe harbor. In 2003, the Commission focused on confidentiality agreements, not a firewall safe harbor, and it suggested, in the context of former employees, that a firewall might be acceptable. S.J.A. 524, 526.

Shays also overlooks (Br. 38 n.20) the Commission's clearly stated interpretation of its regulation that a person cannot come within the firewall safe harbor simply by alleging the existence of an internal firewall. As the E&J explained (J.A. 436; emphases added), someone seeking to use the safe harbor "should 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*."

Finally, Shays omits the full story of why First Amendment concerns suitably played a key role in the Commission's promulgation of the firewall safe harbor provision. Contrary to Shays' assertion, the Commission did not issue that rule to "'benefit political consultants or lobbyists.'" Shays Br. 39 (citation omitted). The Commission aimed (J.A. 435) to prevent improper coordination without infringing the right to make both coordinated and independent expenditures that the Act and Supreme Court precedent protect. *See* FEC Br. 31-32. In the Commission's reasonable judgment, the safe harbor provision achieves that purpose.

III. THE DEFINITIONS OF "GET-OUT-THE-VOTE ACTIVITY" AND "VOTER REGISTRATION ACTIVITY" ARE LAWFUL

As previously explained (FEC Br. 38-39, 43-44), the Commission legitimately interpreted "get-out-the-vote activity" ("GOTV activity") and "voter registration activity" — two types of "federal election activity" — to exclude mere encouragement to vote or register to vote. The Commission therefore retained the "assist" and the "individualized means" requirements in the scope of the definitions. (J.A. 367-68.) *See* 11 C.F.R. 100.24(a)(2), (3). Shays apparently now agrees with the Commission that routine or spontaneous exhortations encouraging people to vote or register to vote are "innocuous" and may be excluded, consistent with the Act, from regulatory definitions of "GOTV activity" and "voter registration activity." Shays Br. 45 & n.26. *But see id.* at 41, 42 n.24.[17]

Shays complains, however, that the definitions the Commission has promulgated are too narrow. He asserts (Br. 45) that broader definitions "could surely be crafted" that would exempt routine encouragement, but he offers no suggestions for definitions that could achieve that goal

[17] Even the district court, which held the definitional regulations unlawful, rejected Shays' contention, repeated in this Court (Br. 41-42), that the Commission's definitions fail because they are inconsistent with common usage, which allegedly includes the notion of encouragement. *See* J.A. 112 n.35; *Shays I*, 337 F.Supp.2d at 98-99.

without including the terms "assist" or "individualized means." In any event, a "court need not conclude that the agency construction was the only one it permissibly could have adopted …, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. *Accord, e.g., Covad Communications Co. v. FCC*, 450 F.3d 528, 537 (D.C. Cir. 2006).

To support his claim that the definitions are unlawfully narrow, Shays relies (Br. 42-45) on one FEC advisory opinion ("AO") and the alleged need for the Commission to have included additional examples in its E&J. But neither provides the necessary support for his argument. In relying on AO 2006-19, Shays dismisses (Br. 43-44) the Commission's emphatic caution that the opinion is fact-dependent and depends on the combination of factors the opinion lists. (J.A. 410-11.) *See also* FEC Br. 40-41.[18] Instead, Shays and his amicus overgeneralize from the AO and assume that the Commission would find that no mass communications constitute "federal election activity" subject to the Act's special financing rules for that activity. They also overlook the Commission's explicit statement that certain telephone bank operations *would* constitute GOTV, s*ee* FEC Br. 43, and fail to consider the legal significance of the factual differences between their hypothetical scenarios and AO 2006-19. For example, Shays hypothesizes (Br. 43; emphasis added) "large-scale efforts encouraging potential supporters to register to vote *and directing them how they may do so*." Not only is the hypothetical situation factually thin, unlike

[18] Contrary to Shays' assertion, the Commission's principal brief does not conflict with AO 2006-19. For example, Shays wrongfully describes (Br. 45) the brief as a "*post hoc* assurance that … [the] regulations apply without time limitation." In the pertinent passage (FEC Br. 39), our brief referred to the Commission's own deletion of the phrase "within 72 hours of an election" that had been included in the earlier version of the GOTV definition. *See* J.A. 369 (E&J) ("No such time limitation exists, and the removal of the 72-hour reference will clarify that this has always been the case.").

the situation in AO 2006-19, but the communications in that AO did not direct the recipients how to register to vote. Shays thus has no basis for assuming that the Commission would conclude that his hypothetical communications — if made concrete with additional facts — are not "voter registration activities."[19]

In addition, Shays and Senator Feingold ignore the possibility that a communication may fall within one of the other categories of "federal election activity" and thus be regulated for independent reasons. *See* FEC Br. 42-43. For example, Senator Feingold's hypothetical communication, which urges recipients to "get-out-and-vote Democratic/Republican!" (Br. 15), not only differs markedly from the communications in AO 2006-19, but would fall within the "generic campaign activity" category of "federal election activity." 2 U.S.C. 431(2)(A)(ii); 11 C.F.R. 100.25.

Echoing the district court, Shays characterizes the E&J's examples as "'straw men'" that only illustrate the obvious. Br. 45. But state and local party committees include thousands of legally unsophisticated political activists. *See, e.g.*, J.A. 367; FEC Br. 46. Shays has adduced no evidence that the examples are unhelpful to those individuals. In any event, the proposition that an agency's regulation is faulty because some of the examples in its E&J are straightforward makes no sense.

Shays also finds fault with the Commission's lack of examples covering so-called "gray areas." Although Shays denies (Br. 45 n.26) that he is objecting to a lack of additional detail in

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[19] Shays does not counter the Commission's characterization (FEC Br. 40-41) of his primary hypothetical communication (*see* J.A. 115) as sketchy and unlikely. The same characterization applies to another hypothetical situation Shays posits (Br. 43), where state parties "blanket the state with automated telephone calls by celebrities identifying the date of the election and exhorting recipients to get out the vote." Shays does not explain why a state party committee would be likely to finance the dissemination of a message that does not tout any individual candidates, slate of candidates, or even the party itself.

the regulation and the E&J's examples, his criticism amounts to little more. As a result, he — like his amicus and the district court — has rushed to judgment and has condemned the regulatory definitions before the Commission has had the opportunity to illustrate further its interpretation of those regulations through additional fact-specific advisory opinions and enforcement matters. As the Commission explained (Br. 34-35), it enjoys broad deference in choosing the level of detail to include in a regulation.

IV. AS THE DISTRICT COURT HELD, THE REGULATION GOVERNING APPEARANCES AND SPEECH BY FEDERAL OFFICEHOLDERS AND CANDIDATES AT STATE PARTY FUNDRAISERS IS LAWFUL

The regulation governing appearances and speech by federal officeholders and candidates at state and local fundraising events, 11 C.F.R. 300.64(b), permits those individuals to attend and speak "without restriction or regulation." As the district court concluded in *Shays I* and reaffirmed in this case (J.A. 105), section 300.64(b) satisfies *Chevron* review.[20] Furthermore, as the district court also found (J.A. 106-09), the Commission's revised and expanded E&J presents a reasonable explanation for the regulation and thus meets APA requirements. Shays presents no arguments that undermine these conclusions.

Section 300.64(b) implements 2 U.S.C. 441i(e)(3), in which Congress stated that "[n]otwithstanding" section 441i(e)(1), federal officeholders and candidates "may attend, speak, or be a featured guest" at a state, district, or local political party fundraising event. The provision to which section 441i(e)(3) refers, section 441i(e)(1), generally prohibits federal officeholders and candidates from soliciting nonfederal funds unless the amounts do not exceed the

[20] The provision is "ambiguous," the court found, and thus passes *Chevron* step one. (J.A. 105, citing *Shays I*, 337 F.Supp.2d at 88). It also passes *Chevron* step two, the court concluded, because it does not represent an "impermissible construction" of the Act and does not "unduly compromise[ ] the Act's purposes." (*Id.*)

permissible contribution limits for federal funds.[21]

The revised E&J explains (J.A. 287) that the Commission's regulation reconciles section 441i(e)(3), which singles out speech at state and local fundraisers, with section 441i(e)(1)(B).

> In contrast to assertions by commenters that without section 441i(e)(3) candidates would not be able to attend, appear, or speak at State party events where soft money is raised, the Commission has determined that under section 441i(e)(1)(B) alone, Federal officeholders and candidates would be permitted to speak and solicit funds at a State party fundraiser for the non-Federal account of the State party in amounts permitted by FECA and not from prohibited sources. *See* Advisory Opinions 2003-03, 2003-05 and 2003-36.

Interpreting section 441i(e)(3) merely to allow federal candidates and officeholders to attend or speak at a state, district, or local fundraiser but not to solicit funds without restriction fails to harmonize the two statutory provisions because the covered individuals "may already solicit up to $10,000 per year in non-Federal funds from non-prohibited sources for State parties under section 441i(e)(1)(B)" (J.A. 287).[22] Worse, this alternative interpretation would make section 441i(e)(3) "largely superfluous" (J.A. 287), a result that the Commission's regulation properly avoids. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (It is "a cardinal principle of statutory construction … that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal

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[21] *See also, e.g.*, 2 U.S.C. 441i(e)(4)(A) (permitting federal candidates or officeholders to make general solicitations for certain section 501(c) organizations); 2 U.S.C. 441i(e)(4)(B) (permitting federal candidates or officeholders to solicit funds for certain section 501(c) organizations of up to $20,000 from individuals for some types of "federal election activity"). These provisions and section 441i(e)(1)(B) establish that Congress did not intend to eliminate all solicitation of nonfederal funds by federal officeholders and candidates.

[22] Even opponents of the current regulation have agreed that 2 U.S.C. § 441i(e)(1)(B) allows federal officeholders and candidates to solicit nonfederal funds subject to federal limits and source prohibitions at state and local party fundraisers. As the district court noted (J.A. 106), "Plaintiff [Shays] has not offered an alternative reading of Section 441i(e)(1)(B) … and appears to endorse the Commission's interpretation." *See also, e.g.*, Feingold Amicus Br. 19; Doc. 18, A.R. 553 (Lawrence Noble), A.R. 608-09 (Donald Simon). (A.R. citations in this part of the memorandum are to Volume II of the Record on DVD.)

quotation marks and citations omitted); *Donnelly v. F.A.A.*, 411 F.3d 267, 271 (D.C. Cir. 2005) (same).

Congress's inclusion of the "notwithstanding paragraph (1)" phrase in section 441i(e)(3) further supports this reading. As the Commission's revised E&J notes (J.A. 287), the Supreme Court has observed that "the Courts of Appeals generally have 'interpreted similar "notwithstanding" language … to super[s]ede all other laws, stating that a clearer statement is difficult to imagine.'" *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1983).

Shays (Br. 48) and amicus Feingold (Br. 18) argue that "speak" is not the same as "solicit" and that Congress used "solicit" or "solicitation" in other provisions of section 441i(e). But under the same logic, Congress knows how to ban activity it decides to prohibit. The district court properly held that, "'if Congress had wanted to adopt a provision allowing Federal officeholders and candidates to attend, speak, and be featured guests at state party fundraisers but denying them permission to speak about soliciting funds, Congress could have easily done so'" (J.A. 287 (E&J), quoting *Shays I*, 337 F.Supp.2d at 89, which in turn quoted the Commission). Even if the interpretation favored by Shays and Feingold were reasonable, under *Chevron* the Commission's reasonable reading must be upheld.

In sum, Congress — not the Commission — singled out speech and attendance by federal officeholders and candidates at state or local party fundraising events. In the regulation Shays challenges, the Commission has permissibly construed that special statutory provision to harmonize it with another provision in the same subsection.

In addition to discussing the Commission's construction of the statute, the revised E&J explains (J.A. 287-89) that regulating federal officeholders' and candidates' speech at state and local fundraising events raises particularly vexing constitutional concerns. The regulation avoids

these constitutional problems and "effectuates the careful balance Congress struck between the appearance of corruption engendered by soliciting sizable amounts of soft money, and preserving the legitimate and appropriate role Federal officeholders and candidates play" at the state and local level (J.A. 287).

As the E&J explains, the relationship between federal officeholders and candidates and state, district, and local parties is "unique" (J.A. 287-88), and the testimony before the Commission supports that conclusion. Representatives of both major political parties commented that these state and local party fundraising events are essential to engage volunteers in the political process and to motivate them. *See, e.g.*, Vol. II, Doc. 18, A.R. 523-26; A.R. 675. The E&J notes (J.A. 287) that "party fundraising events … energize grass roots volunteers vital to the political process." The relationship between federal officeholders or candidates and state and local party committees is ongoing and rests on a long-term affinity of interests. *See* J.A. 288 (federal officeholders' and candidates' "special identification with" those party committees). Unlike a state or local candidate, whose relationship with federal officeholders or candidates is individualized and often short-lived, state and local parties are institutions with long histories and futures. Their existence and vitality do not depend on any one individual, and federal officeholders and candidates have an interest in supporting their continued health and development. *See FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 449 (2001) ("There is no question about the closeness of candidates to parties."). Moreover, unlike state and local candidates, state party committees generally have a role in selecting federal candidates. *See, e.g., Colorado I,* 518 U.S. at 613-14. In these circumstances, a speech by a federal officeholder or candidate at a fundraising event for a state party committee will be

understood as reflecting the close, unique relationship between that speaker and the party committee.

Consequently, as the Commission found (J.A. 288), that relationship makes "parsing speech" at state fundraising events "more difficult than in other [fundraising] contexts," especially given the Commission's broadened definitions of "solicit" and "direct," which encompass even indirect solicitations, as determined by objective criteria such as context, and not by the speaker's intent. *See Shays I*, 337 F.Supp.2d at 73-80 and *Shays I Appeal*, 414 F.3d at 102-07; 71 Fed. Reg. 13,926 (March 20, 2006); 11 C.F.R. 300.2(m), (n). Especially given the statute's explicit recognition that the candidate or officeholder may serve as the "featured guest" at an event whose central purpose is fundraising, *all* of their speech will necessarily be understood in that context. Commenters on the 2005 NPRM were therefore understandably concerned about the possible "chilling effect" of a broader notion of "solicit" at those events. *See, e.g.*, Doc. 15, A.R. 505, 509; Doc. 18, A.R. 526-27, 585-87, 608; Doc. 23, A.R. 675.

Thus, contrary to Shays' assertion (Br. 49), the appearance and speech by federal officeholders and candidates at state and local party fundraisers is indeed different from their appearance and speech at state or local *candidate* fundraisers. If the permissible scope of a federal officeholder's activities were the same for *all* state and local fundraising, as Shays suggests, that would amount to removing Congress's limiting phrase ("State, district, or local committee") from section 441i(e)(3). As noted *supra* pp. 39-40, "read[ing a] term … out of the statute" is "a result contrary to basic principles of statutory interpretation." *Senior Resources v. Jackson*, 412 F.3d 112, 117-18 (D.C. Cir. 2005). "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United*

States, 508 U.S. 200, 208 (1993) (internal quotation marks and citation omitted).[23]

The Commission also concluded that additional restrictions would provide little, if any, anti-circumvention protection. Commenters explained that, in their experience, "the ask [for funds] has already been made" before a fundraising event, and those present have already made their contribution before arriving. J.A. 289; Doc. 18, A.R. 525, 605. Thus, a state or local party often receives contributions *before* a fundraising event. J.A. 289-90. Indeed, the cost of admission to the event often serves as the contribution (J.A. 289). In these circumstances, it is not the role of the speaker who is a federal candidate or officeholder actively to solicit contributions, but he or she may well thank the attendees for their support. *See, e.g.*, Doc. 15, A.R. 506. Several commenters also noted that local party fundraisers in particular typically raise their contributions from individuals and not from corporations or other entities and in low-dollar amounts, usually $100 or less, well within federal limits (J.A. 290; Doc. 18, A.R. 523, 559). In sum, the record indicates that the challenged provision does not present a significant opportunity for corruption or the appearance of corruption. *See* J.A. 289-90.[24]

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[23] As the district court observed, "the fact [that] Section 441i(e)(3) singled out state, district, and local party fundraisers for special treatment undercuts any suggestion that the Commission is *required* to treat them in the same manner it treats other fundraising events." (J.A. 108 n.32 (emphasis in original).)

[24] The E&J observes (J.A. 289) that none of the commenters could cite any evidence that this provision had undermined BCRA in the last election cycle. *See also, e.g.*, Doc. 18, A.R. 542, 545, 596; Doc. 6 (2005 NPRM), A.R. 467 (seeking public comment on whether any potential for abuse). The E&J also notes (J.A. 289) that the "safe harbor" provided by the regulation "only extends to what Federal candidates and officeholders say at the State party fundraising events themselves" (J.A. 289.), and "in no way applies to what … [those individuals] do outside of State party fundraising events" (*id.*). *See also id.* at 289 ("[T]he regulation does not affect the prohibition on Federal candidates and officeholders from soliciting non-Federal funds for State parties in fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event."); 67 Fed. Reg. 49065, 49108 (July 29, 2002) (original E&J for final rule) (same).

Shays argues (Br. 49-50), and amicus Feingold concurs (Br. 21), that the Commission should have included a disclaimer requirement in its regulation similar to the disclaimer that several AOs suggest federal officeholders and candidates should provide at other fundraising events, including fundraisers for state and local candidates. (Shays and Feingold do not question the legality of the disclaimers recommended in those AOs.) Their argument fails. As discussed above, Congress expressly singled out state, district, and local party fundraising events for an exemption from the generally applicable prohibition of 2 U.S.C. 441i(e)(1); if federal officeholders and candidates were subject to the same requirements at those party fundraisers as at other fundraisers that Congress excluded from the exception, then Congress's special treatment of those party events would be nullified.

As the district court stated, "[w]hile it is quite clear that Plaintiff disagrees with the Commission's fundraising regulation, 'at bottom,' his 'arbitrary-and-capricious challenge boils down to a policy disagreement.'" (J.A. 109; citation omitted.) Thus, in accordance with *Chevron* deference and APA requirements, this Court should affirm judgment of the district court upholding the state and local fundraiser regulation.

CONCLUSION

This Court's task is to "ask whether the Commission made choices reasonably within the pale of statutory possibility." *AT&T Corp. v. FCC*, 349 F.3d 692, 699 (D.C. Cir. 2003) (citation and quotation marks omitted). The Commission has shown that its choices are reasonable, sufficiently explained, and do not contradict the statute as reasonably construed. The Court should, therefore, reverse the district court's summary judgment for Shays on 11 C.F.R. 109.21(c)(4), (d)(4)-(d)(5), (h), and 100.24(a)(2)-(3), grant the Commission summary judgment

on those provisions, and affirm the summary judgment for the Commission on 11 C.F.R. 300.64(b).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

As required by Fed.R.App.P. 32(a)(7)(C)(i), I hereby certify that the foregoing brief complies with the length requirements of Fed.R.App.P. 32(a)(7)(B). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 13,950 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.

_____/s_____
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March 7, 2008

ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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2 U.S.C. § 441i. Soft money of political parties

(a) *National committees.*

(1) *In general.* A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Applicability.* The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

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

(1) *In general.* Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(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.

(c) *Fundraising costs.* An amount spent by a person described in subsection (a) or (b) to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(d) *Tax-exempt organizations.* A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State,

district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to—

(1) an organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

(2) an organization described in section 527 of such Code (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(e) *Federal candidates.*

(1) *In general.* A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 315(a) (2 U.S.C. § 441a(a)); and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) *State law.* Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

(3) *Fundraising events.* Notwithstanding paragraph (1) or subsection (b)(2)(C), a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) *Permitting certain solicitations.*

(A) *General solicitations.* Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 301(20)(A)) (2 U.S.C. § 431(20)(A)) where such solicitation does not specify how the funds will or should be spent.

(B) *Certain specific solicitations.* In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 301(20)(A) (2 U.S.C. § 431(20)(A)), or for an entity whose principal purpose is to conduct such activities, if—

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

(f) *State candidates.*

(1) *In general.* A candidate for State or local offi ce, individual holding State or local offi ce, or an agent of such a candidate or individual may not spend any funds for a communication described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Exception for certain communications.* Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.

11 C.F.R. § 300.64 Exemption for attending, speaking, or appearing as a featured guest at fundraising events (2 U.S.C. 441i(e)(3)).

Notwithstanding the provisions of 11 CFR 100.24, 300.61 and 300.62, a Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including but not limited to a fundraising event at which Levin funds are raised, or at which non-Federal funds are raised. In light of the foregoing:

(a) State, district, or local committees of a political party may advertise, announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications; and

(b) Candidates and individuals holding Federal office may speak at such events without restriction or regulation.

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2008, I caused to be served by hand-delivery two copies of the Federal Election Commission's Response and Reply Brief on the following counsel for Christopher Shays:

Donald J. Simon
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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 the same document on the following additional counsel for Shays:

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Michelle M. Umberger
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March 7, 2008

/s
_____
Vivien Clair
Attorney

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