ORAL ARGUMENT HELD MAY 12, 2005

No. 04-5352

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS and MARTIN MEEHAN,

Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

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

PETITION FOR REHEARING EN BANC BY THE FEDERAL ELECTION COMMISSION

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INTRODUCTION

The Federal Election Commission ("Commission" or "FEC") seeks rehearing en banc of the July 15, 2005, judgment of a panel of this Court affirming, 2-1, the summary judgment of the district court in this facial challenge to regulations promulgated by the Commission to implement the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), which amended the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), 2 U.S.C. 431-455. The panel majority concluded that the appellees' status as candidates in itself establishes their Article III standing to challenge the validity of any regulation implementing BCRA, without their having to demonstrate any specific injury to themselves from each of the regulations at issue. This decision conflicts with McConnell v. FEC, 540 U.S. 93, 226-28 (2003), which found that candidates lacked Article III standing to challenge the constitutionality of a provision of BCRA that did not restrict the candidates' own activities. The majority's rationale for its decision also conflicts with this Court's decisions on procedural rights standing, including Florida Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996) (en banc). Consideration by the full Court is therefore necessary to secure and maintain uniformity of this Court's decisions and to conform to Supreme Court precedent.

Rehearing en banc is also warranted because the panel's decision involves issues of exceptional importance. First, as Judge Henderson stated in her dissent, the decision creates a "novel" theory of standing — what the majority opinion calls "illegal structuring of a competitive environment" — by "stretch[ing]" procedural rights and competitor standing doctrines "past their breaking points." Addendum ("Add.") A31. "[N]either the Supreme Court nor … [this Court] ha[s] ever before applied [such a theory] in a similar context." Id. By permitting any candidate to challenge nearly all Commission regulations without demonstrating any personal harm from, or causal connection to, any particular regulation, the majority's extension of standing would create uncertainty and instability in the law affecting constitution-

ally protected advocacy during the relatively short congressional election cycles. Second, the majority failed to accord the deference required by FEC v. Democratic Senatorial Campaign Comm. ("DSCC"), 454 U.S. 27, 37 (1981), and its progeny to the FEC's exercise of its judgment in balancing the conflicting policies and First Amendment interests underlying this complex statute. By requiring the FEC to regulate political activities more heavily than the Commission found necessary, the majority's decision runs contrary to this Court's previous admonitions that, in promulgating regulations, the Commission must "avoid unnecessarily infringing on First Amendment interests." AFL-CIO v. FEC, 333 F.3d 168, 179 (D.C. Cir. 2003).

BACKGROUND

Appellees Christopher Shays and Martin Meehan — incumbent Congressmen from Connecticut and Massachusetts — claimed that numerous regulations implementing BCRA are invalid because they do not regulate the political activities of other people strictly enough. The panel majority (Tatel, J., and Edwards, J.) held that appellees have standing and the regulations are ripe for direct facial review under the Administrative Procedure Act ("APA"). Add. A4-A14. On the merits, the majority concluded that the five provisions at issue on appeal are invalid because they fail to satisfy either "Chevron step one," see Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), or the arbitrary-and-capricious standard of the APA, 5 U.S.C. 706(2)(A). See Add. A15-A30. Judge Henderson dissented, finding that appellees had failed to establish their standing under Article III. See Add. A30-36.

ARGUMENT

I. THE PANEL MAJORITY'S NOVEL THEORY OF STANDING AND USE OF PRECEDENT WARRANT EN BANC CONSIDERATION

The decision of the panel majority that the appellees' status as candidates by itself suffices to establish Article III standing to contest the validity of any regulation implementing

BCRA cannot be reconciled with McConnell. The Supreme Court held that certain plaintiffs who were also federal candidates ("Adams plaintiffs") lacked Article III standing to contest the validity of a provision of BCRA that, like the regulations at issue here, was alleged to be unlawfully permissive. McConnell, 540 U.S. at 226-28. The Court found that those candidates lacked Article III standing even though they would be competing in elections regulated by the new provision because they were unable to make the additional showing, traditionally required to establish standing, that the provision caused a specific injury to their own campaigns. The holding of the panel in this case that candidate status is enough to establish standing to challenge any provision regulating the conduct of election campaigns, even without this additional showing of specific personal injury, thus conflicts with the Supreme Court's holding in McConnell.[1]

Shays and Meehan failed to meet their burden to provide a "factual showing of perceptible harm" to their own reelection campaigns from the regulations they challenge. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992). To demonstrate standing, they submitted only their pro forma, virtually identical declarations, but these contain primarily speculative and conclusory assertions instead of facts within appellees' "personal knowledge" that "would be admissible in evidence," as required by Fed. R. Civ. P. 56(e).[2] As Judge Henderson found, these conclusory declarations, hypothesizing that activities permitted by the regulations could be used by others in connection with appellees' own elections, "fall far short of the injury showing required for Article III standing." Add. A30-31 (citing Allen v. Wright, 468 U.S. 737, 751 (1984) ("'injury alleged must be ... distinct and palpable, and not abstract or

[1] The majority attempted to distinguish McConnell on the ground that the competitive standing claim of the Adams plaintiffs did not rest upon any legally cognizable right (Add. A9), but the majority provided no basis for its conclusion that BCRA "specifically protects [an] interest in fair election contests," id., and therefore gives appellees such a right. See infra pp. 6-8. The majority also provided no adequate basis for distinguishing the holding in McConnell that the Adams plaintiffs themselves, not the challenged provision, caused their alleged competitive injury. See infra pp. 9-10.

[2] For the Court's convenience, we have attached these declarations at Add. C1 - C6.

conjectural or hypothetical'") (internal quotations omitted)). See also, e.g., United Transp. Union v. ICC, 891 F.2d 908, 912 (D.C. Cir. 1989) (distinguishing, for purposes of standing, "allegations of facts, either historical or otherwise demonstrable, from allegations that are really predictions"); DEK Energy Co. v. FERC, 248 F.3d 1192, 1195 (D.C. Cir. 2001).

The majority justified treating appellees' abstract and speculative assertions as sufficient demonstrations of personal injury by establishing a presumption "that regulated parties will seize opportunities created by the challenged rules and thus taint contests through which Shays and Meehan seek reelection" (Add. A11).[3] Such an assumption, however, would eviscerate the constitutional requirement that a plaintiff make a factual showing of concrete, particular, and imminent injury to himself, for it is easy to presume that any statutory or regulatory provision may be exploited by someone to the detriment of any plaintiff whose activities are also regulated. Thus, just as environmental plaintiffs must show that the practices they challenge affect a particular geographic area that they personally use or own, appellees had to show more than the abstract possibility that activities permitted by the regulations at issue here may be engaged in by someone in some election in the United States at some time.[4] For example, although the majority found it "obvious that party organizations fighting Shays and Meehan's reelection will employ" an option permitted by one of the challenged regulations "to finance certain salaries with soft money," public records suggest that the opposing party organizations in appellees'

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[3] The majority took a generalization in McConnell, 540 U.S. at 165, about the "hard lesson of circumvention" out of context and unjustifiably established a presumption that regulated third parties who oppose the reelection of Shays and Meehan will "almost surely cause" them harm by engaging in activities permitted by the regulations. Add. A11. The Supreme Court's remark did not concern Article III standing — the topic at issue here. Instead, the Court was providing historical background to support deference to the legislative judgment that BCRA was necessary. See FEC v. National Right to Work Comm., 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

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

states did not employ that option in 2004.[5]

Instead of following McConnell as the controlling authority, the majority relied upon two supposedly analogous standing doctrines — procedural rights standing and economic competitor standing — to create a new theory of standing it called "illegal structuring of a competitive environment" (Add. A6). However, as Judge Henderson explained, this new theory "stretches both doctrines past their breaking points" (Id. at A31).

Procedural rights standing. Procedural rights cases are simply inapplicable here. As the panel majority acknowledged (Add. A7), the procedural rights precedents apply a relaxed standing test for challenges to procedures used for decision making by agencies. See, e.g., Florida Audubon Soc'y, 94 F.3d at 664. But the regulations challenged here do not eliminate or otherwise concern any required procedural steps in proceedings before the FEC. Instead, they concern substantive restrictions on the campaign activity of private citizens, candidates, and groups. We know of no prior case in which the procedural rights doctrine has been applied to regulations governing private activities rather than agency procedures, let alone a supposed "procedure" as expansive as the federal election process.

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[5] The principal state party committees in Massachusetts and Connecticut have been paying for almost all of their employees' salaries and benefits with federal funds. In 2004, the Massachusetts Republican Party — appellee Meehan is a Democrat — spent more than $700,000 in federal funds on payroll and less than $60,000 in nonfederal funds, while the Connecticut Democratic Party — appellee Shays is a Republican — spent nearly $330,000 in federal funds and less than $20,000 in nonfederal funds. See http://query.nictusa.com/cgi-bin/fecimg/?C00042622 (links to disclosure reports for the Massachusetts Republican Party's federal account); http://www.efs2.cpf.state.ma.us/EFSprod/servlet /WelcomeServlet (link to searchable database of Massachusetts political expenditures); http://query. nictusa.com/cgi-bin/fecimg/?C00167320 (links to disclosure reports for the Connecticut Democratic Party's federal account); http://www.efilingcabinet.com/ sots/FindDoc.asp (searchable database of Connecticut political disclosure reports). No one disputes that party employees working exclusively on nonfederal elections may be paid entirely with soft money, and this would appear to account for the small amount of soft money used for payroll by these party committees. The data certainly provide no basis for the majority's assumption that the competition Shays and Meehan might face would be noticeably less "intense" if the regulations had required the party committees to allocate a small portion of the salaries of their employees who spend less than 25% of their time on federal elections to federal funds.

Nonetheless, the majority insisted that, by analogy, Electric Power Supply Ass'n v. FERC, 391 F.3d 1255, 1262 (D.C. Cir. 2004), and other procedural rights precedent support standing here: "True, the forum here is an election, not agency rulemaking or adjudication, but … the challenged FEC campaign finance rules structure candidates' regulated opportunities to persuade the electorate." Add. A7. This expansive notion of procedural rights, however, would allow virtually any substantive challenge to regulations to reinvent itself as a procedural attack. Gone are the requirements that the forum be the government agency, that the agency itself must follow a particular procedure, and that the agency be the party whose decision could harm the plaintiff. Under the majority's reasoning, any statutory or regulatory system can be described as "structuring" the "environment" and directing "how" an entity governed by the rules may engage in the regulated activities. Such an expansion of standing doctrine would cause uncertainty and instability in the law — a particularly chilling result regarding sensitive First Amendment activity. The majority's "unprecedented reliance on a right independent of any agency proceeding turns the procedural rights doctrine on its head and creates a wholly new and insupportable theory of standing." Id. at A32 (Henderson, J., dissenting).

Even if the procedural rights cases were applicable, the Supreme Court has made clear that procedural plaintiffs, like all other plaintiffs, must meet the concrete injury requirement, even where Congress has created a special cause of action for procedural violations. Lujan, 504 U.S. at 571-78. "[A] plaintiff may have standing to challenge the failure of an agency to abide by a procedural requirement only if that requirement was 'designed to protect some threatened concrete interest' of the plaintiff." Florida Audubon Soc'y, 94 F.3d at 664 (quoting Lujan, 504 U.S. at 573 n.8). But what "concrete interest" of appellees was any particular BCRA provision "designed" to protect? Appellees' vague declarations supply no answer. As Judge Henderson explained (Add. A32-33), any of BCRA's provisions that could be viewed as

procedural "were designed to protect only the rights of voters generally to be informed about candidates and to exercise their franchise in an electoral system untainted (or less tainted) by corruption. They were not designed to benefit or protect candidates running for office."[6]

The majority dismissed as irrelevant statements by the Supreme Court in Buckley v. Valeo, 424 U.S. 1, 26-27 (1976), and McConnell, 540 U.S. at 120, that Congress intended FECA and BCRA to protect the general public interest in the integrity of the nation's democratic government. See Add. A32 (Henderson, J., dissenting). Unlike provisions such as ballot-access rules that directly give or deny candidates certain rights, the BCRA provisions at issue here were not designed to bestow a personal, enforceable right on candidates to fight corruption.[7] Shays and Meehan themselves argued to the Supreme Court in McConnell that BCRA does not bestow a right on candidates to be "protected" from the zealous advocacy of their opponents. See Supreme Court Brief for Intervenor-Defendants, 2003 WL 21999280 at *60 n.48 (["A challenger of BCRA] argues at length that Congress's purpose in enacting Title II was not, as in Title I, to prevent corruption and circumvention, but to protect incumbents from public attack. That is

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[6] In summarily concluding that BCRA grants candidates an enforceable right to campaign in contests not "tainted by BCRA-banned practices" (Add. A7), the majority apparently assumed (Add. A9), contrary to governing precedent, that a plaintiff who satisfies the zone-of-interests test for prudential standing also satisfies the injury-in-fact requirement of Article III. See, e.g., Bennett v. Spear, 520 U.S. 154, 162 (1997) (distinguishing prudential zone-of-interests test from "the immutable requirements of Article III"); Animal Legal Defense Fund, Inc. v. Espy, 29 F.3d 720, 723 (D.C. Cir. 1994) (same); Add. A33 n.1 (Henderson, J.). Unlike standing under Article III, the zone-of-interests standing test is "not meant to be especially demanding." Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987). A plaintiff need only show that his claim falls "arguably within the zone of interests to be protected or regulated by the statute … in question," National Credit Union Admin. v. First Nat'l Bank & Trust Co. ("NCUA"), 522 U.S. 479, 488 (1998) (Court's emphasis), and "there need be no indication of congressional purpose to benefit the would-be plaintiff." Clarke, 479 U.S. at 399-400. See also NCUA, 522 U.S. at 498.

[7] Although, as the panel majority noted (Add. A5), candidates like Shays and Meehan are subject to regulation under BCRA, they do not challenge the application of any of these regulations to their own activities. Indeed, some of the provisions they challenge do not regulate their activities. See, e.g., 11 C.F.R. 300.33(c)(2) (state and local party committees may use nonfederal funds to pay their employees who spend 25% or less of their compensated time on federal election activities); 11 C.F.R. 300.32(c)(4) (de minimis exemption for low levels of state and local parties' federal election activity).

incorrect.").[8] In any event, the Supreme Court's dismissal of the claims of the Adams plaintiffs and of Senator McConnell's challenge to BCRA § 305 (McConnell, 540 U.S. at 225-26) shows that "injury does not arise automatically from the simple fact of [the plaintiff's] being subject to regulation under a particular regime." Add. A36 (Henderson, J., dissenting).

Competitor standing. The other analogy invoked by the majority — economic competitor standing — is also inapposite. First, as this Court stated in Gottlieb v. FEC, 143 F.3d 618, 620 (D.C. Cir. 1998), the Court has not decided whether the competitive standing doctrine used in the economic sphere even applies to the political context. As Judge Henderson noted (Add. A34 n.4), the majority seizes upon equivocal dicta and speculation in Gottlieb and other cases to break new ground and fully embrace political competitor standing. Second, as both Judge Henderson and the district court concluded, Shays and Meehan did not even allege a specific competitive injury in their declarations or elsewhere. Id. at A36. Third, the panel majority dispensed with the requirement of an evidentiary showing of specific injury to the plaintiff in order to prove competitive standing.[9] The majority concluded that Shays and Meehan would make unspecified adjustments to their campaigns to account for the mere possibility that their opponents might undertake activities permitted by the regulations, but appellees did not allege this in their declarations, much less identify any actual adjustments.[10]

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[8] See also Bipartisan Campaign Reform Act of 2002: Hearing on H.R. 2356 before the House Committee on Administration, 107th Cong., 1st Sess. 208 (2001) (BCRA was intended to address "corruption in politics…. It is a debate about corporate treasury and union dues money drowning out the voice of individual Americans.") (testimony of Rep. Shays).

[9] See, e.g., KERM, Inc. v. FCC, 353 F.3d 57, 61 (D.C. Cir. 2004) ("KERM might have satisfied the requirements of competitor standing if it had introduced evidence that KAYH's broadcast of the disputed announcements resulted in lost advertising revenues for KERM or otherwise adversely affected KERM's financial interests.").

[10] In business competitor cases, "[a]llegations founded on economic principles …, while perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation." United Transp. Union, 891 F.2d at 913 n.7. In contrast, "[t]he endless number of diverse factors potentially contributing to the outcome of … elections … forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event." Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir. 1980).

Fourth, under this Court's and the Supreme Court's precedents, the competitor standing doctrine applies to "agency action that itself imposes a competitive injury, i.e., that provides benefits to an existing competitor or expands the number of entrants in the petitioner's market." New World Radio, Inc. v. FCC, 294 F.3d 164, 172 (D.C. Cir. 2002). See also, e.g., Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). The panel majority acknowledged that the provisions challenged here do not meet those conditions. Add. A7. Any benefits the regulations allow are as available to Shays and Meehan and their supporters as to their electoral opponents and their supporters. The majority opinion cites no cases finding economic competitor standing where the challenged agency decision applied equally to all and did not benefit the plaintiff's competitor to the plaintiff's actual disadvantage.

In McConnell, the Supreme Court held that the Adams plaintiffs did not suffer a competitive injury from BCRA's allegedly unconstitutional increase in the statutory contribution limits because those candidates' "alleged inability to compete stems not from the operation of … [the allegedly unlawful BCRA provision], but from their own personal 'wish' not to solicit or accept large contributions, i.e., their personal choice." 540 U.S. at 228. "Here, too, any competitive injury the appellees may suffer stems not from the FEC's regulations but from … [appellees'] own refusal to take advantage of them." Add. A35 (Henderson, J., dissenting). The majority's holding (Add. A10) that appellees faced an injurious "predicament" in having to choose between taking advantage of regulatory safe harbors or suffering a possible competitive disadvantage is contrary to the Supreme Court's decision in McConnell (540 U.S. at 228) that such a choice is not "an injury in fact that is 'fairly traceable'" to the challenged provision.

Finally, the panel majority relied upon a new kind of competitive injury it called "intensified competition." Add. A7 (emphasis in original). But the majority cited no authority recognizing "intensified competition" as a basis for injury in fact under Article III, particularly in

the novel, specific context of political competitor standing. Indeed, this Court has already rejected a nearly identical, incremental standing theory in Center for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1161 (D.C. Cir. 2005) (emphasis added by Court; citations omitted):

> Outside of increased exposure to environmental harms, hypothesized "increased risk" has never been deemed sufficient "injury." And even if "risk" were sufficient injury for standing in the non-environmental context, [the plaintiff] would have to show that the challenged conduct has created a "demonstrably increased risk" that "actually threatens the plaintiff's particular interests."

Moreover, contrary to the majority's assertion, the challenged regulations do not require appellees to "'respond to a broader range of competitive tactics'" or to "'account for additional practices.'" Add. A35 (emphasis by Henderson, J., quoting majority at Add. A7). They "simply permit more of these same activities than the appellees believe BCRA authorizes." Id. The majority cited no instance when the regulatory "safe harbors" were exploited to appellees' detriment in the 2004 election campaigns. Id. See supra pp. 4-5 and n.5.

Ripeness. Because the Act does not authorize direct judicial review of regulations, this case was filed under the APA. "[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until … [the] factual components [of the controversy have been] fleshed out … by some concrete action applying the regulation to the claimant's situation." National Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (internal quotation marks and citation omitted). Shays and Meehan provided no evidence of such a "concrete action." In concluding that the fitness and hardship tests for ripeness have been met, the majority misread 2 U.S.C. 438(e), a good-faith reliance exception. Section 438(e) does not preclude an enforcement action against anyone who acted in good-faith reliance on an FEC regulation; it limits only the remedy, protecting such a party from sanctions, but not from a nonpunitive declaratory judgment or a prospective injunctive remedy. See United States Dep't of Energy v. Ohio, 503 U.S. 607, 613-14, 622-23 (1992) (distinguishing among remedies).

In addition, a plaintiff who has another "adequate remedy in court" is foreclosed from seeking review under the APA. See 5 U.S.C. 704; National Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 945 (D.C. Cir. 2004), cert. denied, 125 S.Ct. 2537 (2005). Shays and Meehan have such a remedy: 2 U.S.C. 437g(a)(8) provides for judicial review if the Commission dismisses an administrative complaint on the basis of a regulation the court finds to be "contrary to law." The majority's assertion (Add. A15) that the alleged wrongdoer's good-faith reliance on the regulation would preclude a court from finding that the dismissal was "contrary to law" is inconsistent with Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986). This Court clearly stated in Orloski that the FEC's dismissal of an administrative complaint would be "contrary to law" if the dismissal resulted from "an impermissible interpretation of the Act." Contrary to the majority's assertion (Add. A15), Orloski cannot be distinguished on the basis that the challenged interpretation there was embodied in advisory opinions, not regulations; the FEC's advisory opinions, like its regulations, are the subject of a good-faith reliance provision. See 2 U.S.C. 437f(c)(2) and 438(e).

II. EN BANC CONSIDERATION IS NECESSARY BECAUSE THE PANEL MAJORITY FAILED TO ACCORD DUE DEFERENCE TO THE COMMISSION'S EXPERTISE

Congress granted the Commission exclusive jurisdiction over the administration and interpretation of the FECA, empowered the agency to "formulate policy" with respect to the Act, 2 U.S.C. 437c(b)(1), and authorized the Commission "to make, amend, and repeal such rules … as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8), 438(d). See also BCRA §§ 214(c), 402(c); 2 U.S.C. 434(f)(3)(B)(iv). In part because of this broad discretionary authority, the Supreme Court has stated that the FEC "is precisely the type of agency to which deference should presumptively be afforded." DSCC, 454 U.S. at 37. See also

Common Cause v. FEC, 842 F.2d 436, 448 (D.C. Cir. 1988) ("Deference is particularly appropriate in the context of the FECA.").

In exercising these broad powers in drafting the regulations, the Commission took into account the cautionary instructions by this and other courts that it should be sensitive to the First Amendment interests of the individuals and groups it regulates, for the FEC is "[u]nique among federal administrative agencies" since "its sole purpose [is] the regulation of core constitutionally protected activity." AFL-CIO, 333 F.3d at 170.[11] In deciding how to draft the regulations construing BCRA to avoid unnecessarily interfering with constitutionally protected political association and advocacy, the Commission balanced competing policy considerations.[12] "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." Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965, 971 (D.C. Cir. 1999). Moreover, the Commission exercised its judgment as to the likelihood of the risk of abuse of those interpretive regulations. "[A]n agency's predictive judgment regarding a matter within its sphere of expertise is entitled to 'particularly deferential' review." Id. (quoting Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1478 (D.C. Cir. 1998)).

Although the majority noted (Add. A19, quoting AFL-CIO, 333 F.3d at 179) the Commission's "obligation to 'attempt to avoid unnecessarily infringing on First Amendment interests,'" it gave short shrift in its analysis to these concerns that figured so largely in the

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[11] See, e.g., In re Carter-Mondale Reelection Comm., 642 F.2d 538, 545 (D.C. Cir. 1980) ("The Commission has been vested with a wide discretion … to not overstep its authority by interfering unduly in the conduct of elections."); FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 394 (D.C. Cir. 1981) (In this "delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique inferences of Congressional intent"); Common Cause, 842 F.2d at 445 ("the Supreme Court has favored narrow interpretations of FECA requirements that implicate first amendment political speech").

[12] As the result of numerous legislative compromises, BCRA not only restricts certain political activities but also "promotes important first amendment values, promotes enhanced citizen participation in our democracy, is workable, and is carefully crafted to steer clear of asserted constitutional pitfalls." 148 Cong. Rec. S2138 (Mar. 20, 2002) (Sen. McCain).

agency's interpretation of BCRA. As a result, the opinion gives inadequate weight to the need, when regulating political advocacy, for clear rules, including bright-line rules where possible. See Orloski, 795 F.2d at 165. In addition, the opinion holds the FEC to the extraordinarily high standard of eliminating almost all possibility of abuse of the new regulations, regardless of the cost to other policy considerations and the impracticability of gathering the kind of evidence the majority suggested is necessary, particularly under the tight statutory deadlines for promulgating these regulations, BCRA § 402(c). For example, regarding the 120-day criterion that is part of the FEC's content standard for coordinated communications, the majority suggested that the Commission erred by not determining whether "candidates and collaborators aiming to influence elections [would] simply shift coordinated spending outside that period." Add. A20. But since it was impossible to amass hard evidence of the likelihood of such a widespread shift before the new regulation went into effect, this was precisely the sort of expert predictive judgment for which the FEC should have been afforded substantial deference.

In Orloski, this Court sustained a narrow Commission interpretation even though it

> carries with it a greater potential for abuse than does the interpretation advocated by Orloski. Indeed, it can be argued that this interpretation is at the outer bounds of permissible choice. But because it is still a reasonable choice within a gap left open by Congress … [Orloski's] challenge must fail.… Any complaints about the wisdom of that interpretation are properly directed to the legislature, not this court.

Id. at 167 (internal quotation marks omitted). Here, however, the majority's treatment, for example, of 11 C.F.R. 300.33(c)(2) — the regulation allowing state and local parties to use nonfederal funds to pay the salaries of workers who spend 25% or less of their time on federal election activity — shows that it judged the BCRA regulations against a much more stringent standard. Although the majority properly concluded that Chevron step one was satisfied, it held that the regulation violated the APA and warned that if the Commission were to repromulgate its current rule, it would need "substantial support" to show that the regulation would not create the

potential for abuse. Add. A28. Rather than accept the Commission's common sense explanation that there is no evidence that state and local party committees are likely to abuse this provision, the majority substituted its own factually unsupported speculation that it is "quite plausible that wealthy donors would swallow costs for increased state and local campaigning" to be able to fund "an army of workers devoting more than a day a week to federal elections." Id.[13]

The majority's treatment of the companion regulations defining "solicit" and "direct," 11 C.F.R. 300.2(m) & (n), did not even reach Chevron step two, as it should have. The Act does not define these terms, and the Commission interpreted them using "to ask" as the operative term. "Ask" is the prevalent definition that dictionaries provide for "solicit." See, e.g., 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2940 (1993). "Solicit" also has other meanings, making it ambiguous. Indeed, this Court has found "solicit" in FECA to be an "inherent[ly] vague[]" term that can "mean a variety of things." Martin Tractor Co. v. FEC, 627 F.2d 375, 383-84 (D.C. Cir. 1980). "Direct," too, has numerous meanings. Nonetheless, unlike the district court, see Shays v. FEC, 337 F.Supp.2d 28, 75-76 (D.D.C. 2004), the panel majority concluded under Chevron step one that the Commission's definitions conflicted with the statute. Add. A22-A23.[14] This holding was especially unwarranted because McConnell relied in part on the narrowness of this very regulation. See 540 U.S. at 160 (rejecting argument that "hinge[d] on an unnaturally broad reading of the terms "spend," "receive," direct," and "solicit": "FEC's current

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[13] It makes no economic sense for a state or local party committee to dole out small monthly assignments of federal election activity to a large number of employees solely to avoid using hard money for a small part of their salaries. The committee would have to come up with funds to pay each full-time employee for another 120 hours that the employee worked on nonfederal activities that month. Similarly doubtful is the supposition that wealthy donors interested in a federal election would find getting less than 25% worth on each dollar an efficient use of their money.

[14] The majority's reliance upon a supposed overarching congressional goal to "shut down the soft-money system," Add.A22, "unduly elevate[s] the rhetoric of purpose above the specifics of text, ignoring in the process the enormous subtleties and complexities inherent in the 'FECA's first-amendment-sensitive regime,'" Common Cause, 842 F.2d at 445 (citation omitted). See, e.g., 2 U.S.C. 441i(e)(1)(B) (permitting federal candidates to solicit soft money from individuals in limited amounts).

definitions of § 323(a)'s terms are consistent with th[e] view" that § 323(a) "permits a wide range of joint planning and electioneering activity").

CONCLUSION

The Federal Election Commission respectfully requests the Court to grant the petition for rehearing en banc.

Respectfully submitted,

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