UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE CHRISTOPHER SHAYS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 04-1597 (EGS) REPLY

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

STATUTES AND REGULATIONS:

ADMINISTRATIVE MATERIALS:

MISCELLANEOUS:

I. INTRODUCTION

Plaintiffs continue to try to have it both ways in this case, disclaiming interest in having this Court dictate the content of the section 527-specific regulation they want, yet clearly asking the Court to measure the Federal Election Commission's approach against a rule reflecting plaintiffs' own policy preferences. However, plaintiffs offer no persuasive legal or factual reason for this Court to alter its prior refusal to order the Commission to promulgate a rule based on the tax code in the absence of a congressional mandate, and plaintiffs fail to counter many of the Commission's other key points. Instead, plaintiffs' reply brief is based largely on speculation that the activity of section 527 organizations must be reined in and that a political committee regulation based on the tax code is the only way to do that. But plaintiffs do not dispute that even with such a regulation, the statutory standard and the Supreme Court's "major purpose" test would require a factual investigation of specific activity to determine whether an entity must register as a political committee. Proper enforcement requires respect for the relevant statutory framework and judicial precedent, not broad speculation and unsupported allegations. The Commission's new anti-circumvention regulations and its recent enforcement efforts show that its approach strikes a reasonable balance. And the Commission's Supplemental Explanation and Justification easily satisfies the deferential standard of review applicable to the only issue properly before this Court: whether the Commission has adequately explained its decision to continue its longstanding practice of enforcing the law in accord with congressional intent, Supreme Court precedent, and agency regulations.

ARGUMENT

II. SUMMARY JUDGMENT SHOULD BE GRANTED FOR THE COMMISSION

A. The Commission Enforces the Restrictions Applicable to Political Committees Through a Comprehensive Regulatory Framework that Respects Statutory and Judicial Limits

We have shown that the *content* of any possible regulation targeting section 527 organizations is not properly at issue here, but we have also explained that the Commission enforces the Federal Election Campaign Act's ("FECA" or "Act") restrictions on political committees in accord with the comprehensive regulatory framework already in place. *See* FEC Memorandum in Support of Its Second Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Further Relief ("FEC Br.") at 11, 14-32. In particular, because the Act's definition of "political committee" entails factual analysis of an organization's contributions and expenditures, and because the Supreme Court has narrowed that definition with the "major purpose" test, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), determinations of political committee status "must be applied and enforced by the Commission through a case-by-case analysis of a specific organization's conduct." Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007) ("Supplemental E&J") (Exh. 1 to FEC Br.).

As the Supplemental E&J explains, the Commission's comprehensive approach relies on a combination of regulatory vehicles in determining which organizations must register as "political committees" and in ensuring that federal funds are used to influence federal elections: the FECA's definitions of "political committee," "contribution," and "expenditure"; pre-2004 implementing regulations; the 2004 regulations; Supreme Court decisions; and case-by-case analyses (*e.g.*, enforcement matters and advisory opinions). *See* Supplemental E&J at 5596-5606. Without relying on the tax code, the Commission's approach has in fact yielded

significant results in recent enforcement matters and provided considerable guidance to the regulated community. *See* FEC Br. 17-21.

While the only issue before this Court is the adequacy of the Commission's explanation for its rulemaking decisions, plaintiffs continue to base their case on what they think an appropriate regulation governing political committees would look like.[1] Plaintiffs' arguments show little regard for the relevant statutory, judicial, and practical limits, and their policy preferences are based on speculation and assumptions that are both unsubstantiated and immaterial. For example, plaintiffs make vague claims about the past and future activity of section 527 groups. Plaintiffs seem to assume, without support, that all such activity is necessarily conducted for the purpose of influencing federal elections, and that little to none of it is currently subject to regulation. *See, e.g.*, Reply 1 ("During the 2006 campaign cycle ... section 527 groups spent over $200 million. [Citation omitted.] There is no indication that 2008 will be different."); *id*. at 9 (speculating that the Commission "has taken no action against *any* of the major 527 groups active in the 2006 elections, thus undermining its claims of effective case-by-case enforcement against the offending groups").[2] Of course, the Act provides a mechanism for

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[1] Plaintiffs now deny that they are asking the Court to order the Commission to promulgate rules with any specific content, and they attempt to distance themselves from the Toner-Thomas proposal (and the General Counsel's proposal) that they earlier in effect embraced. Plaintiffs' Reply Memorandum in Support of Motion for Further Relief and in Opposition to Defendant's Motion for Summary Judgment ("Reply") at 10. But plaintiffs clearly contend that, at the least, the Commission should promulgate a regulation that explicitly relies on a group's registering with the IRS as a section 527 organization and that sets out the supposed legal consequences of that registration. Reply 5.

[2] As we previously explained (FEC Br. 25-26), section 527 status under the tax code is based on a "different and broader set of criteria" than political committee status under the FECA. Supplemental E&J at 5598. Indeed, plaintiffs do not contest that there are many section 527 organizations that focus almost exclusively on non-federal elections, but that under plaintiffs' flawed approach, "if [such] a section 527 organization spent only a few dollars in connection with a federal candidate election, it would be deemed a political committee." FEC Br. 34.

those, including plaintiffs, who believe the Commission should take enforcement action in response to specific factual allegations. *See* 2 U.S.C. §§ 437g(a)(1), 437g(a)(8).

Plaintiffs fail to recognize that proper enforcement of federal law requires respect for congressional intent and Supreme Court precedent. In this case, Congress has taken a measured approach to its regulation of section 527 organizations, and it has not directed the Commission to promulgate the kind of regulation that plaintiffs seek. *See infra* pp. 10-11; FEC Br. 23-28; Supplemental E&J at 5599-5601. Similarly, the Supreme Court's "major purpose" test has narrowed the definition of "political committee" to avoid constitutional problems, *see* FEC Br. 2-3, and plaintiffs do not dispute our showing that this Supreme Court test is the *opposite* of a prophylactic rule because it narrows the statutory definition and adds significant nuance to it. *Id.* at 33-34. Thus, proper enforcement requires careful investigation of specific activity, not just allegations and assumptions that a wide swath of undifferentiated conduct is unlawful.

The Commission has shown (Br. 21-22) that, even if it were to adopt a regulation explicitly making section 527 status a factor in political committee determinations, those determinations would still require a factual inquiry that respects the limits discussed above and that follows the statutory enforcement procedures in 2 U.S.C. § 437g(a). *See* Supplemental E&J at 5602. Plaintiffs do not dispute this point. Instead, plaintiffs argue (Reply 4-6) that a "guidance-giving" new section 527 rule would be a helpful addition to such an inquiry, citing other areas in which the Commission promulgated "more specific regulations" to clarify the relevant standards. The Commission is not required, however, to address all issues with regulations at the same level of detail. The plaintiffs do not contest our argument that what "this dispute really boils down to is the level of generality that is appropriate at this point in the development of the definition of 'political committee' as applied to section 527 organizations"

(FEC Br. 36) — a decision plainly within the Commission's discretion. The Commission carefully considered the kind of specific regulation that plaintiffs seek, and it has permissibly concluded that the drawbacks outweigh the benefits at this time. *See* Supplemental E&J at 5596, 5601-02.[3] The Commission's approach to enforcing the Act's restrictions on political committees strikes a reasonable balance, deserves deference, and is more than adequately explained in the Supplemental E&J.

B. The Commission's Comprehensive Approach to the Regulation of Political Committees Is Entitled to Deference

Plaintiffs do not deny that the Commission is authorized to use a range of regulatory vehicles to effectuate its statutory mandate. *See, e.g., FEC v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1114 (9th Cir. 1988) ("[T]he Commission is provided with extensive rule making and adjudicative powers.") (citing *FEC v. Democratic Senatorial Campaign Comm. ("DSCC")*, 454 U.S. 27, 37 (1982)). In the absence of a congressional directive on which means to use to address an issue, the Commission exercises its discretion. *See SEC v. Chenery Corp.* ("*Chenery II*"), 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual … litigation is one that lies primarily in the informed discretion of the administrative agency."); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-95 (1974) (relying upon *Chenery II* in leaving up to the Board whether to proceed by rulemaking or adjudication)). Indeed, the Supreme Court has held that the FEC "is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37. *See* FEC Br. 12. As one administrative law scholar recently commented,

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[3] Plaintiffs also fail to dispute the Commission's observation that the kind of rule they seek could have unintended consequences in the fluid world of section 527 groups, potentially even reducing disclosure of section 527 group activity. *See* FEC Br. 27.

> if *Chenery II's* deference rule means anything, it must mean that those decisions [an agency's assessment of "functional appropriateness" and choice of regulatory vehicle, *e.g.*, adjudication or rulemaking] are for the agency to make, not the reviewing court. Under *Chenery II*, the only restrictions a court can legitimately impose on the agency's choice of [regulatory] vehicle are those that are compelled by due process…. Review for functional appropriateness is inappropriate.

William D. Araiza, *Limits on Agency Discretion to Choose Between Rulemaking and Adjudication*, 58 Admin. L. Rev. 899, 915 (2006). *See also* I Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.9, at 382 (4th ed. 2002) (discussing Supreme Court decisions citing *Chenery II*).

Indeed, two commenters have noted the adverse effects that would have occurred if *Chenery II* and its progeny had not concluded that agencies have discretion whether to proceed by rulemaking or adjudication:

> A holding requiring agencies to create advance rules might have forced agencies to commit themselves to specific rules with particular courses of action without knowing all the facts in advance. As a result, agencies would be forced to produce extremely detailed regulations anticipating and addressing every potential situation that might arise ….
>
> [R]equiring agencies to develop all rules legislatively would deprive the agency of the ability to make tailored decisions in incremental fashion.… If agencies could only issue rules legislatively, then they would always have to craft rules in a factual vacuum.

Russell L. Weaver and Linda D. Jellum, *Chenery II and the Development of Federal Administrative Law*, 58 Admin. L. Rev. 815, 825 (2006) (footnotes omitted). *See also, e.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 29 (1976) ("As the [Internal Revenue] Code does not define the term 'Charitable,' the status of each nonprofit hospital is determined on a case-by-case basis by the IRS."); *Chippewa & Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 359 (D.C. Cir. 2003) (upholding exercise of agency's discretion to define an "open-ended" statutory term through a series of case-by-case determinations).

C. The Commission's New Anti-Circumvention Regulations Have Had a Significant Impact and Provide Considerable Guidance to the Regulated Community

Although the Commission decided not to promulgate a regulation that relies on the tax code, as plaintiffs seek, the agency did adopt two broad anti-circumvention rules as part of the same rulemaking, 11 C.F.R. § 100.57 and § 106.6, that significantly affect the activities of section 527 groups. *See* FEC Br. 14-16. In particular, 11 C.F.R. § 100.57 "expands the regulatory definition of 'contribution' to capture funds solicited for the specific purpose of supporting or opposing the election of a Federal candidate," Supplemental E&J at 5602 — thus clarifying when organizations, including section 527 groups, meet the contribution criterion for political committee status in 2 U.S.C. § 431(4). The allocation rules at 11 C.F.R. § 106.6 effectively restrict the use of non-federal funds to finance activities with clear federal components by section 527 entities operating with affiliated political committees. As the Commission explained, the new regulations provide guidance, and they help guard against the raising and spending of non-federal funds for federal purposes while respecting the existing regulatory framework that Congress has created for section 527 organizations. *See* FEC Br. 16; Supplemental E&J at 5602.

Plaintiffs argue (Reply 1-3) that the new rules have had "little impact on soft-money spending," relying heavily on statements from a recent report suggesting that the impact would be limited for most section 527 groups. *See* Stephen R. Weissman & Kara D. Ryan, *Soft Money in the 2006 Election and the Outlook for 2008* (Campaign Finance Institute 2007) ("CFI Report"), at 3-4 (Exh. 8 to FEC Br.). At the outset, it is important to note that the CFI Report concludes that the new Commission regulations *will* have an impact on section 527 group activities, and plaintiffs do not contest that conclusion, particularly since they quote language to

that effect. *See* Pl. Reply 2. Nevertheless, this report suffers from some of the same flaws as plaintiffs' arguments here, such as the apparent assumptions that *all* section 527 activity is federal activity, and that section 527 groups in general must be "curbed." Pl. Reply 2 (quoting CFI Report at 3). However, broad assertions about the activities of "527 groups" can be misleading because all registered federal political committees are themselves 527 entities, and, conversely, because a good deal of section 527 group activity has nothing to do with federal elections.

The Commission's allocation rules have a powerful effect on the activities of organizations that act through associated political committees and unregistered section 527 entities. Unions and corporations that play significant roles in federal electoral activity maintain separate segregated funds ("SSFs") that are registered political committees, *see* 2 U.S.C. §§ 431(4)(B), 441b(b). Those organizations, like "nonconnected" political committees, may also maintain non-federal accounts that are unregistered section 527 organizations. 11 C.F.R. § 106.6 requires such political committees to finance election-related disbursements with a percentage of federal funds that fairly reflects the federal aspect of the disbursements. Thus, though plaintiffs rely (Reply 2) on a CFI Report passage suggesting that labor unions can evade the Act's restrictions by channeling treasury funds to their own section 527 entities, in fact 11 C.F.R. § 106.6 limits the ability of such unions (and corporations) with connected SSFs to use unregistered 527 accounts to finance activities in connection with federal elections. Plaintiffs also argue (Reply 2-3), relying again on the CFI Report, that groups can evade section 106.6 by deciding "not to share expenses between [the] PAC and 527." But if a group with an SSF and an unregistered 527 account elects not to allocate expenses, the group has thereby chosen to make its federal election-related disbursements through its SSF *entirely* with federal funds. Similarly,

although the CFI Report states that the allocation rules affect relatively few political committees, as the Commission noted in its original Explanation and Justification in this rulemaking, that is presumably because the remainder use *all federal funds* to finance activities in connection with federal elections. *See* Political Committee Status; Final Rule, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (AR 375, at 2839).[4] Thus, section 106.6 is carefully targeted to ensure that political committees that do not already use only federal funds for their election activities properly allocate certain expenses between federal and non-federal funds.[5]

Finally, while plaintiffs concede (Reply 2) that the CFI Report states that 11 C.F.R. § 100.57 could affect section 527 groups that use direct mail solicitations, plaintiffs try to minimize this concession by relying on the obvious fact that the rule would not apply to groups that do not make any solicitations. But this regulation is not the only means of identifying contributions, and contributions are not the only path to meeting the statutory criteria for political committee status under 2 U.S.C. § 431(4). For example, donors can express their interest in having their funds used to influence federal elections in the absence of a solicitation, and a section 527 group that makes "expenditures" can become subject to the Act's political committee restrictions without making solicitations. *See* Supplemental E&J at 5596-97, 5604. The

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[4] The "AR __" citation is to the administrative record filed by the Commission in 2005. The first number following "AR" is the tabbed index number where the document can be found. The pinpoint cite is to the page number in the Adobe document filed on CD-ROM.

[5] Although plaintiffs now claim that the new allocation rules in section 106.6 have little impact, plaintiffs were among the commenters in the 2004 political committee rulemaking who argued forcefully that this very reform of the allocation rules was, together with a section 527-specific regulation, a critically important measure to prevent the improper use of non-federal funds by groups other than political parties. *See* Comments of Senator John McCain et al. on NPRM on Political Committee Status, Apr. 9, 2004, at 3, available at http://www.fec.gov/pdf/nprm/political_comm_status/ pcs04_comm_attachments.shtml.

regulation is simply one part of a framework that implements the Act's definition of "political committee" and cannot be expected to capture all relevant activity by itself.[6]

D. The Commission's Approach Is Consistent with the Intent of Congress, Which Has Affirmatively Required Section 527 Groups to Report to the IRS, But Has Not Directed the Commission to Issue the Kind of Rule Plaintiffs Seek

The Commission has demonstrated that its approach to the regulation of section 527 groups is fully consistent with congressional intent as expressed in the overall statutory framework regulating political committees and section 527 groups. *See* FEC Br. 23-27; Supplemental E&J at 5597-5601. In particular, Congress has not even suggested that a regulation specifically mentioning or relying on section 527 status in the context of "political committee" determinations is required or desirable, and "a statutory mandate is a crucial component to a finding that an agency's reliance on adjudication was arbitrary and capricious." *Shays v. FEC*, 424 F.Supp.2d 100, 114 (2006) ("*Shays II*"). Plaintiffs do not dispute these important points.

Instead, plaintiffs claim (Reply 9-10) that "congressional inaction" on section 527 legislation "does not excuse" the Commission's decision not to issue a section 527-specific regulation, relying on cases in which the Supreme Court found congressional silence to be ambiguous or otherwise not determinative as a matter of statutory construction. But those cases did not involve the decision of a federal agency not to promulgate a certain regulation,[7] and

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[6] Plaintiffs also quote (Reply 2) a part of the CFI Report stating that section 100.57 will not affect entities that appeal to a "broad, issue-oriented" group of donors and avoid references to supporting or opposing "clearly identified candidates." However, plaintiffs fail to explain why a donation made by an "issue-oriented" donor in response to a solicitation that identifies no federal candidate should necessarily be considered a "contribution."

[7] One of plaintiffs' cases was a habeas corpus action challenging a conviction for grand larceny, *Wright v. West*, 505 U.S. 277 (1992), and the other was a Supremacy Clause challenge

plaintiffs' failure to supply any authority contradicting this Court's statement of the necessity of a "statutory mandate" in the relevant context is conspicuous. Plaintiffs also argue (Reply 10) that a recent congressional decision to continue requiring section 527 groups that are not registered political committees to report to the Internal Revenue Service is irrelevant to the issue of whether such groups should register with the FEC. However, the larger point is that Congress has focused closely on the regulation of section 527 groups in recent years, yet repeatedly elected not to give the Commission any relevant "statutory mandate," and instead chosen to continue requiring section 527 groups that are not registered with the Commission to file disclosure reports with the IRS. *See* FEC Br. 24-27. Although *some* section 527 groups are federal political committees, this fact does not show that Congress has instructed the Commission to issue a regulation singling out section 527 status as a key factor in political committee determinations. Rather, Congress's failure to require such a rule, while instead limiting section 527 reporting to the IRS, plainly indicates that such a rule is not required.

E. The Commission's Recent Enforcement Efforts Deter Violations of the Act and Provide Guidance to Affected Entities

The Commission also explained that its recent enforcement efforts demonstrate the merits of its approach to the regulation of political committees and provide considerable guidance to interested parties. *See* FEC Br. 17-21; Supplemental E&J at 5603-06. In particular, the Commission described a number of significant enforcement actions it has recently resolved against major section 527 groups and other organizations. The Commission also discussed the opportunity for additional guidance through judicial review of specific enforcement decisions, *see* 2 U.S.C. § 437g(a)(8), and through the advisory opinion process, *see* 2 U.S.C. § 437f.

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to one state's restrictions on trade with a foreign nation, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Plaintiffs' subjective and speculative complaints about the Commission's enforcement record are not a proper subject of judicial scrutiny in this case. Nevertheless, plaintiffs again try to dismiss (Reply 3-4, 9) the Commission's enforcement efforts as being too few in number and "belated" to provide "effective deterrence," arguing that the Commission has not yet resolved complaints pending since 2004 against two section 527 groups, that the agency has taken "no action against *any* of the major 527 groups active in the 2006 election," and that the activity of section 527 groups is likely to increase, based on speculation in the CFI Report and reported comments of a lawyer for one of the 2008 presidential candidates. Such complaints take no account of the legal and factual complexity of the matters in question, nor of the extensive enforcement process that the Commission must undertake to resolve alleged violations of the Act pursuant to 2 U.S.C. § 437g(a).[8]

Plaintiffs' flawed arguments about enforcement are the latest instance of a recurring pattern. As plaintiffs know, the enforcement process created by Congress requires confidentiality as to pending enforcement matters, 2 U.S.C. § 437g(a)(12), and no inference should be drawn that the Commission is not actively pursuing matters from recent election cycles. *See* FEC Br. 19 n.8. Yet plaintiffs continue to assume that the only actions the Commission is taking are ones that have been made public, despite both the Act's confidentiality provision and the Commission's demonstrated enforcement work in several significant

[8] Plaintiffs' claims (Reply 3) about the section 527 group America Coming Together ("ACT") are particularly ill-founded. ACT *is* a registered political committee, as the CFI Report itself indicates (at 4). Moreover, the 2004 administrative complaint about ACT (filed by, *inter alia*, some of plaintiffs' current counsel) alleges in its first count that the 527 group failed to conform to the allocation rules of 11 C.F.R. § 106.6 — the same allocation rules plaintiffs now claim are of little significance in the regulation of section 527 activities. *See* Complaint, June 22, 2004, available at http://www.campaignlegalcenter.org/attachments/1199.pdf; Press Release, June 22, 2004, available at http://www.campaignlegalcenter.org/press-1204.html.

conciliation agreements, including one concluded after the Supplemental E&J was issued. *See* FEC Br. 17-21.[9] In particular, plaintiffs ignore the obvious point that the 2006 general election occurred only seven months ago, and the Commission is well within the judicially acceptable time period for resolving any complaints connected with the 2006 campaigns.[10] *See* FEC Br. 39. In any event, as we explained (*id.* at 39-40), and as plaintiffs do not contest, the regulation plaintiffs seek would not speed the enforcement process.

Plaintiffs also argue (Reply 4) that Commission conciliation agreements provide inadequate guidance because they do not present a "coherent" statement of the Commission's view of how section 527 status affects the political committee determination and because the agreements are "affected" by other matters. However, such agreements clearly reflect the Commission's view of the relevant legal standards, and the related materials the Commission makes public provide guidance as to the facts that underlie that view, including numerous examples — just as the opinions of the federal judiciary reflect the views of the courts and provide guidance as to the meaning of statutes based on case-by-case review of relevant factual situations. *See* FEC Br. 17-20, 35-36. (Under plaintiffs' rigid view of how the law should

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[9] Plaintiffs have not complained that any of the Commission's legal conclusions in any of the recent conciliation agreements were mistaken.

[10] Plaintiffs' claim (Reply 3) that section 527 organizations will play a large, unlawful role in the 2008 elections rests on immaterial speculation. Particularly misleading is plaintiffs' reliance on predictions from an attorney for one of the presidential campaigns (Pl. Exh. 54) to bolster their claim that the Commission's approach is unreasonable. That attorney attributed the rise of "outside groups" to "the McCain-Feingold campaign-finance system," not to the Commission's approach to determining political committee status. In any event, speculation about future activities of unnamed third parties is no basis for judicial decision-making. Also, it has long been clear that some members of the political community will test the boundaries of regulation, and there is no reason to think that would change if the Commission were to promulgate a regulation that relies on section 527 status. *See McConnell v. FEC*, 540 U.S. 93, 144 (2003); *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 457 (2001).

operate, every jurisdiction must, for example, jettison its common law of torts and codify the relevant principles.) As the Commission noted in its Supplemental E&J (at 5604), the facts recited in the agreements and related documents provide concrete guidance to the public about the kinds of activities that trigger political committee status:

> The public documents available regarding the 527 settlements in particular provide more than mere clarification of legal principle; they provide numerous examples of actual fundraising solicitations, advertisements, and other communications that will trigger political committee status. These documents should guide organizations in the future as they formulate plans and evaluate their own conduct so they may determine whether they must register and report with the Commission as political committees.

Finally, plaintiffs do not quarrel with the Commission's point that significant civil penalties may well be as effective a deterrent as an abstract agency regulation, *see* FEC Br. 34-35, and the Commission has recently entered into high-profile conciliation agreements that require the payment of significant penalties. For example, the recent settlement with the Progress for America Voter Fund (a section 527 organization) for failing to register with the Commission as a political committee included the organization's agreement to pay a $750,000 civil penalty. FEC Press Release, *FEC to Collect $750,000 Civil Penalty From Progress for America Voter Fund* (Feb. 28, 2007) ("PFA-VF Press Release") (Exh. 3 to FEC Br.). Indeed, the Supreme Court has "recognized on numerous occasions that 'all civil penalties have some deterrent effect.'" *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185 (2000) (internal citation omitted). Moreover, the Commission's recent conciliation agreements include the equivalent of injunctive relief: the administrative respondents agreed to cease and desist from engaging in further actions that the Commission had found violated the FECA or implementing regulations. *See, e.g.*, PFA-VF Press Release; Exhs. 2, 4-7 to FEC Br. "'[I]njunctive processes are a means of effecting general compliance with national policy as

expressed by Congress.'" *Marshall v. Chala Enters., Inc.*, 645 F.2d 799, 804 (9th Cir. 1981) (quoting *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962)).[11]

F. The Commission's Supplemental E&J Explains the Agency's Approach to Enforcing the Political Committee Restrictions and Easily Satisfies the Deferential Standard of Review

The Commission's Supplemental E&J explains how the Commission evaluates factual situations in determining whether a particular entity is subject to the Act's restrictions on political committees, providing significant guidance to the regulated community. *See* FEC Br. 8-10, 17-20. Plaintiffs again attack (Reply 6-7) the Commission's analytical method, arguing that the Commission must first consider an entity's "major purpose," and only then whether the entity has actually met the $1,000 statutory threshold for "contributions" and "expenditures" that is the starting point for determining political committee status. *See* 2 U.S.C. § 431(4). However, as we have shown (Br. 40-43), there is no basis for the view that the Commission must begin with the Supreme Court's limiting construction of the reach of the political committee restrictions before it assesses the underlying statutory definition that construction limits. Plaintiffs argue (Reply 7) that the Commission's interpretation would require an entity to have engaged in express advocacy before it could become a political committee, but we showed why that is incorrect. We noted (Br. 42) that express advocacy is not the only way an entity can make "expenditures" triggering political committee status under the Act, and we cited a recent advisory opinion in which disbursements to be made with the goal of obtaining ballot access

[11] Plaintiffs suggest (Reply 3) that the Commission must show that its conciliation agreements "will deter" section 527 groups "in 2008 or beyond." They cite no authority for that proposition, and, as we noted, the Supreme Court has concluded that civil penalties have some deterrent effect. Moreover, requiring the Commission conclusively to prove a negative — that organizations will not violate the law because of the conciliation agreements — imposes an unreasonable burden. *See Elkins v. United States*, 364 U.S. 206, 218 (1960) ("Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled.").

were found to be "expenditures." *See* AO 2006-20. Moreover, an entity can also meet the statutory definition by accepting "contributions," without ever making expenditures. *See* Supplemental E&J at 5604-05.

In any event, as the Commission explained (Br. 42-43), this dispute over the correct step-by-step process for determining whether an organization is a political committee provides no basis for the relief plaintiffs request. Although the Supplemental E&J's discussion of this issue provides useful guidance for the regulated community, it was clearly not necessary to the Commission's decision not to promulgate the regulation plaintiffs seek. Plaintiffs' disagreement with the Commission's interpretation of this tangential legal issue, like their view that the Commission's enforcement of the political committee restrictions is not as "effective" as it should be, is irrelevant to the narrow question before this Court: whether the Commission has adequately explained its decision to continue enforcing these restrictions pursuant to the Act's requirements, Supreme Court precedent, and the agency's own regulations. That decision was based on several other factors, including the fact-intensive nature of the proper analysis and the inadvisability of attempting to use tax status as a basis for applying restrictions on political committees. The Commission explained its decision in an extensive statement that easily satisfies the deferential standard of review. *See* FEC Br. 8-9, 28-30, 42; Supplemental E&J at 5597-5601.

III. CONCLUSION

As this Court emphasized in holding that the Commission was not required to promulgate a regulation targeted specifically at section 527 organizations, "a statutory mandate is a crucial component to a finding that an agency's reliance on adjudication was arbitrary and capricious." *Shays II*, 424 F.Supp.2d at 114. Congress imposed no such statutory mandate regarding the definition of "political committee" in general or section 527 organizations in particular, and

Congress has made no "intervening change in the law" since the Commission issued the Supplemental E&J. *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). The Supplemental E&J provides a reasoned explanation of the Commission's decision, in the exercise of its discretion, to rely on multiple sources of law and fact-specific determinations in deciding whether an organization must register as a political committee. The Commission has, therefore, satisfied the requirements of the Administrative Procedure Act, *see* FEC Br. 12, 28, and the Court should grant the Commission's motion for summary judgment.

Respectfully submitted,

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