ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 14, 2012

CASE NOS. 12-5117 & 12-5118

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

Center for Individual Freedom,
Defendant-Appellant,
and
Hispanic Leadership Fund,
Defendant-Appellant,
v.

Chris Van Hollen,
Plaintiff-Appellee,
and
Federal Election Commission,
Defendant-Appellee.[1]

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF OF APPELLANT CENTER FOR INDIVIDUAL FREEDOM

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June 20, 2012

[1] The Federal Election Commission ("FEC" or "Commission") deadlocked on the question of whether to authorize an appeal to this Court.

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the Center for Individual Freedom ("CFIF") hereby submits this Certificate as to Parties, Rulings, and Related Cases.

Parties and Amici

CFIF, the Hispanic Leadership Fund ("HLF"), Chris Van Hollen, and the FEC are the parties that appeared before the district court as well as the parties in this Court. (CFIF and HLF were intervenors before the district court.) No *amicus curiae* briefs were filed with the district court, although it is anticipated that one or more *amici* will file such briefs in this Court.

Corporate Disclosure Statement Pursuant to FRAP 26.1

Pursuant to Circuit Rule 26.1, CFIF certifies that no publicly-held company owns ten percent or more of CFIF and that CFIF has no parent companies as defined in the Circuit Rule. CFIF is a non-partisan, non-profit § 501(c)(4) organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution.

Rulings Under Review

On March 30, 2012, the district court (Judge Amy Berman Jackson) issued Orders and a Memorandum Opinion, in Civil Action No. 11-0766, granting plaintiff Chris Van Hollen's motion for summary judgment, denying defendant FEC's cross motion for summary judgment, denying defendant HLF's motion to

dismiss, and denying defendant CFIF's cross motion for summary judgment. *See Van Hollen v. FEC*, --- F. Supp. 2d ----, No. 1:11-0766, 2012 WL 1066717 (D.D.C. Mar. 30, 2012). The decision is not yet available in a federal reporter. On April 27, 2012, the district court denied CFIF's and HLF's request for a stay pending appeal. On May 14, 2012, a divided panel of this Court expedited this appeal but denied a stay.

Related Cases

CFIF is not aware of any other "related case" as such term is defined in Circuit Rule 28. However, the Federal District Court for the Southern District of West Virginia issued an opinion concerning an analogous state law last year. *See Ctr. for Individual Freedom, Inc. v. Tenant*, --- F. Supp. 2d ----, No. 1:08-cv-00190, 2011 WL 2912735 (S.D.W.Va. July 18, 2011). This decision has been appealed.

STATEMENT REGARDING DEFERRED JOINT APPENDIX

Given the expedited schedule, the parties will not use a deferred joint appendix and appellants have, after consultation with opposing counsel, included a Joint Appendix along with this brief.

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GLOSSARY OF ABBREVIATED TERMS

BCRA	Bipartisan Campaign Reform Act of 2002, 116 Stat. 81
BCRA § 201	The electioneering communication disclosure provision at issue, codified at 2 U.S.C. § 434(f)(2)(F)
CFIF	Center for Individual Freedom
FEC or Commission	Federal Election Commission
FECA	Federal Election Campaign Act of 1971
HLF	Hispanic Leadership Fund
J.A.	Joint Appendix
March 30, 2012 Order	Judge Amy Berman Jackson's March 30, 2012 Order, as amended, that is the subject of this appeal
Mem.Op.	Judge Amy Berman Jackson's Memorandum Opinion accompanying the March 30, 2012 Orders
2007 Regulation	The disclosure regulation vacated by the district court, 11 C.F.R. § 104.20(c)(9)
2003 Regulation	The predecessor to the 2007 regulation, which can be found at 11 C.F.R. § 104.20(c)(8) (2003)

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Final judgment was entered on March 30, 2012. Appellant CFIF filed its Notice of Appeal on April 13, 2012.

STATEMENT OF ISSUES

1. Does BCRA § 201 unambiguously compel disclosure of all donations of $1,000 or more received by an ordinary corporation or labor union that engages in electioneering communications, regardless of the purpose of the donations?

2. Was the FEC's 2007 Regulation, 11 C.F.R. § 104.20(c)(9), a permissible implementation of the disclosure provision contained in BCRA § 201?

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum bound with this brief.

STATEMENT OF THE CASE

This is a direct appeal of a March 30, 2012, judgment entered by District Judge Amy Berman Jackson vacating the FEC's 2007 Regulation as contrary to law. J.A.133, 165. Plaintiff-appellee Congressman Chris Van Hollen filed his complaint on April 21, 2011. *Id.* at 9-22. He alleged the FEC's 2007 regulation violated and defeated the objectives of a statutory disclosure provision added to FECA by BCRA in 2002. *Id.* The complaint named several speakers, including

CFIF, that relied on the regulation. *Id.* at 19. CFIF intervened as a matter of right to defend the 2007 Regulation, as did HLF. *Id.* at 5. Their standing has not been questioned.

Van Hollen and the FEC stipulated this case would be decided on the administrative record. *Id.* at 23-24. After submission of that record, all parties filed dispositive motions that fully briefed the issues under Steps One and Two of *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). J.A.4-6. The district court ultimately vacated the 2007 Regulation under Step One, holding the regulation contrary to unambiguous statutory command. *Id.* at 133, 164-65. While not directly ruling on the Step Two challenge, the district court did not question that the regulation was "reasonable" in light of the agency's findings about speech burden. *Id.* at 135.[2]

Defendants CFIF and HLF appealed. *Id.* at 166-69. Due to a 3–3 partisan deadlock by the commissioners, the FEC did not appeal and is not participating.

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[2] At oral argument, the district court said the following:

> [THE COURT]: Well, I think the fundamental question . . . is the Chevron I question, because . . . once you get to Chevron II your burden is much higher because of the level of deference. So the Chevron I decision is close to being the outcome determinative decision, or it may very well be the outcome determinative decision."

J.A.132 (emphasis added).

Id. at 170. On May 14, 2012, a divided panel of this Court expedited this appeal but denied a stay. *Id.* at 178-182.[3]

STATEMENT OF THE FACTS

A. FECA and Its Purpose-Based Disclosure Requirements.

This case arises under FECA, which Congress amended in 2002 to include the disclosure provision at issue here. Many of FECA's original requirements turned on two closely related concepts, "contributions" and "expenditures." In parallel provisions, FECA defined both terms as transfers of value made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i) (emphasis added).

The Supreme Court's seminal decision on FECA focused on the purpose element, construing it narrowly. *See Buckley v. Valeo*, 424 U.S. 1, 40-45, 79-81 (1976). This narrow construction assured FECA's disclosure requirements, as applied to speech independent of candidates and campaigns, were not "impermissibly broad" but rather tailored to increasing "the fund of information concerning those who support candidates." *Id.* at 70-81. In 1976 and 1980, Congress incorporated these holdings into FECA by (a) narrowly defining "independent expenditures" to require speech that expressly advocated the election or defeat of clearly identified candidates (e.g., "vote for," "reject," etc.), and

[3] The Honorable Karen LeCraft Henderson would have granted a stay.

(b) requiring independent speakers to disclose "each person who made a contribution . . . for the purpose of furthering an independent expenditure." 2 U.S.C. §§ 431(17), 434(c)(2)(C) (emphasis added). *See also* 11 C.F.R. § 109.10(e)(1)(vi) (incorporating this same purpose element).

B. Congress Amends FECA in 2002 to Regulate "Electioneering Communications."

Buckley recognized speakers often could avoid using explicit words of express advocacy while their speech still functioned as advocacy for or against candidates. 424 U.S. at 45. The 2002 BCRA amendments to FECA expanded regulation to a new category of political speech – "electioneering communications" – defined in terms of the media used, timing with respect to elections, candidate identification, targeting to the electorate for the identified candidates, and lack of express advocacy. 2 U.S.C. § 434(f)(3). Importantly, speech containing express advocacy (i.e., an "independent expenditure") was excluded from the electioneering communication definition even if it met all other criteria. *See id.* § 434(f)(3)(B)(ii).

FECA already forbade corporations and labor unions from engaging in express advocacy. *See id.* § 441b(a). BCRA extended the ban to cover electioneering communications. *See id.* § 441b(a), (b)(2). In crafting BCRA's disclosure provision, Congress thus had no occasion to evaluate disclosure burdens

that would or should be imposed on ordinary corporations and labor unions if they were free to engage in electioneering communications.[4]

BCRA allowed individuals and unincorporated groups to engage in independent electioneering communications – just as they could engage in express advocacy under FECA – subject to disclosure requirements similar to those for independent expenditures. If such speakers knew in advance they would engage in electioneering communications and elected to establish a separate fund for that purpose, they could limit disclosure to contributors whose contributions went into that account. *See id.* § 434(f)(2)(E). Otherwise, they were required to disclose "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement [since] the first day of the preceding calendar year." *Id.* § 434(f)(2)(F). BCRA's disclosure provision became a part of FECA, which, as

[4] FECA permitted corporations and labor unions to organize political action committees that could engage in such advocacy under detailed restrictions and disclosure requirements not at issue here. A very narrow class of entities that were formally incorporated – but lacked the characteristics that led to special regulation of corporations – were exempted from certain of FECA's requirements in *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). When BCRA was enacted, however, the so-called "Wellstone Amendment" (i.e., BCRA § 204) "applied § 441b's expenditure ban to all nonprofit corporations" equally. *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010) (emphasis added); *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 803 (D.D.C. 2003), *aff'd in part*, 540 U.S. 93 (2003) (Leon, J.) (the Government "concede[s] that Section 204 does not contain an exemption for MCFL organizations"), *id.* at 373 (Henderson, J.) ("The Wellstone Amendment (BCRA section 204) prevents any [*MCFL*] corporation, from the ACLU to the NRA to MCFL itself, from making a disbursement for any electioneering communication."); 147 Cong. Rec. S3022, S3042 (Mar. 28, 2001) (Sen. Wellstone) (explaining his amendment directly challenged the rationale in *MCFL* and that the case's fundamental premise was now invalid).

noted above, defined "contribution" in terms of the giver's purpose to influence elections. *Id.* § 431(8)(A).

The electioneering communication disclosure provision was enacted as part of the "Snowe-Jeffords Amendment" to BCRA. Senator Snowe explained her amendment would not create "invasive disclosure rules that require the disclosure of entire membership lists." 144 Cong. Rec. S994, S998 (daily ed. Feb. 25, 1998). Instead, the provision was tailored to require only disclosure of "contributors who donated more than $500 toward the ad." *Id.* (emphasis added).[5] *See also* 148 Cong. Rec. S2095, S2154 (daily ed. Mar. 20, 2002) (Sen. Feinstein) (disclosure required of who is "actually paying" for ads); 147 Cong. Rec. S3005, S3034 (daily ed. Mar. 28, 2001) (Sen. Jeffords) (disclosure required of "who is sponsoring and paying for an electioneering communication"). Senator Snowe also introduced an academic's analysis explaining that her amendment only "requires disclosure of large contributions designated for such ads." 147 Cong. Rec. at 3038. During the debates, she also cited a statement by the Brennan Center for Justice that the amendment paralleled existing FECA disclosures by requiring disclosure of

[5] The version of the Snowe-Jeffords Amendment debated in 1998 is materially similar to the version enacted as part of BCRA in 2002, with the exception that the disclosure threshold for contributors in 1998 was $500 rather than $1,000. *Compare* Amendment No. 1647 to the Paycheck Protection Act, S. 1663, 105th Cong. (1998), *with* Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434(f)(2)(F).

"individuals who contributed . . . towards the ad." 144 Cong. Rec. S10143, S10152 (daily ed. Sept. 10, 1998) (emphasis added).

Senators McCain, Feingold, Snowe, and Jeffords, along with Representatives Shays and Meehan, concurred that BCRA's electioneering communication disclosure requirements were "just the types of rules that FECA has long imposed on 'independent expenditures' that 'expressly advocat[e].'"[6] They agreed that BCRA's new disclosure requirements were "modest," "equivalent to requirements the Supreme Court has previously upheld," and "merely impose the same type of disclosure obligations [as FECA's] well-established disclosure requirements for independent expenditures."[7] As explained above, FECA's independent expenditure (i.e., "express advocacy") provisions tie disclosure to the giver's purpose.

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[6] Defendant-Intervenors' Excerpts of Br. of Defs. at I-96, *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C.), *available at* http://www.campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/354.pdf. Several of the distinguished counsel representing Plaintiff Van Hollen in this case also represented BCRA's congressional co-sponsors in the *McConnell* litigation.

[7] Final Brief of BCRA Congressional Sponsors at I-84-95 & n.320, *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C.), *available at* http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7B127BB9C3-9D65-4A05-B74B-821EDC4382BC%7D.PDF (adopting Br. of Defs. at 174, *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C.), *available at* http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7B61EA29B5-66EE-459C-A964-EB55A54A316A%7D.PDF).

C. The FEC's 2003 Rulemaking.

The FEC has "extensive rulemaking . . . powers," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*"), and "broad rulemaking authority," *RNC v. FEC*, 76 F.3d 400, 404 (D.C. Cir. 1996), to "formulate general policy with respect to the administration" of federal campaign finance law, *DSCC*, 454 U.S. at 37; *see also* 2 U.S.C. §§ 437c(b)(1), 437d(a)(8). In response to BCRA, the FEC launched comprehensive rulemakings, including one specifically addressing the reporting provisions applicable to electioneering communications. *See Notice of Proposed Rulemaking: Electioneering Communications*, 67 Fed. Reg. 51131 (Aug. 7, 2002); *Notice of Proposed Rulemaking: Bipartisan Campaign Reform Act of 2002; Reporting*, 67 Fed. Reg. 64,555 (Oct. 21, 2002).

The BCRA disclosure provision was a small part of the overall project, and the FEC proposed to simply restate the statute's text with one tweak. *See* 67 Fed. Reg. at 64,560-61, 64,567. FECA's definition of "contribution" spoke of a purpose to support express advocacy, while BCRA's new disclosure provision dealt with support for electioneering communications, which cannot include express advocacy. To avoid confusion that could occur if the FECA definition was imported literally, the FEC replaced BCRA's statutory terms "contributors who contributed" with "donor[s] who donated." *Id.*

Only one comment directly professed a concern with burden, and it was a very unusual entity known as an *MCFL* corporation, whose right to engage in electioneering communications was unclear at best.[8] Noting the absence of any general concern with the proposed adjustment to the electioneering disclosure provision – undoubtedly because BCRA prohibited the vast majority of corporations and labor organizations from engaging in electioneering communications – the FEC chose not to address the issue of burden. *See BCRA Reporting; Coordinated and Independent Expenditures; Final Rules*, 68 Fed. Reg. 404, 413 (Jan. 3, 2003).

D. The Supreme Court's *McConnell* Decision.

The Supreme Court in *McConnell* held that BCRA's prohibition on corporate electioneering communications was not facially overbroad because (a) many electioneering communications were "the functional equivalent of express advocacy" that have the "purpose" to "influence the voters' decisions," and (b) precedent sustaining the existing ban on corporate express advocacy thus also logically justified banning such functionally equivalent speech. 540 U.S. at

[8] That corporation was the National Abortion and Reproductive Rights Action League, whose November 8, 2002, comment is available at http://www.fec.gov/pdf/nprm/consolidated_reporting/naral.pdf. (Without any elaboration, the Alliance for Justice joined these comments. *See* Comments, Alliance for Justice (Nov. 8, 2002), http://www.fec.gov/pdf/nprm/consolidated_reporting/alliance_for_justice.pdf.) *See* n.4, *supra*, for an explanation of why there is significant doubt the statute allowed *MCFL* corporations to make electioneering communications.

203-08. *McConnell* similarly relied on the Court's express advocacy precedents to uphold BCRA's electioneering communication disclosure provision. *See id.* at 196. Because corporations and labor unions were forbidden to engage in the type of speech that triggered such disclosure, *McConnell* had no occasion to consider potential disclosure burdens on such speakers or whether the disclosure provision would be adequately tailored and justified if applicable to such speakers.

E. *WRTL II* Triggers Rulemaking.

Four years later, the constitutional landscape began to change. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"), held that (a) BCRA's prohibition on corporate electioneering communications was justified only if the particular speech was the "functional equivalent" of express advocacy, and (b) many electioneering communications were not the functional equivalent. *Id.* at 469-70. Thus, *WRTL II* created significant room for previously banned corporate electioneering communications.

In response to *WRTL II*, the FEC published a Notice of Proposed Rulemaking ("NPRM"). *See* 72 Fed. Reg. 50,261 (Aug. 31, 2007). The NPRM expressed concern that the 2003 Regulation failed to consider how "a corporation or labor organization [would] determine which receipts qualify as" reportable. *Id.* at 50,271. It also sought comments on "concerns about . . . First Amendment rights." *Id.* at 50,262. The NPRM asked whether the FEC should "limit the

'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications." *Id.* at 50,271.

Comments said "the agency [was] writing on a blank slate," J.A.56-59, given the "unexpected situation" presented by *WRTL II*, *id.* at 70. "Congress's explicit design [was] that a union or a corporation acting in compliance with FECA would never have occasion to report an [electioneering communication] since it could never lawfully undertake one." *Id.* at 67 (emphasis in original). Thus, it was "unclear whether, and if so how, Congress would want to apply the reporting requirements with respect to the full range of corporations and labor organizations which may now pay for electioneering communications." *Id.* at 56-59. FEC Commissioner Ellen Weintraub – who described herself as a "big advocate of transparency and disclosures" – said "Congress may not have thought through what it was going to mean for [corporations and unions] to have disclosure because they were not anticipating that these entities would be able to make electioneering communications." *Id.* at 67.

The Commission was cautioned that unduly broad disclosures would violate "established First Amendment principles." *Id.* at 56-59. *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981), was quoted as saying the "[r]eporting of donors represents 'the very heart of the organism which the first amendment was intended to nurture and protect: political expression and

association.'" J.A.54. The Commission was reminded that "[t]he constitutionality of a statute that implicates First Amendment rights must be examined by considering both whether and to what extent it serves the actual governmental interests that underlay its enactment." *Id.* at 62 (emphasis in original). For many, broad donor disclosure requirements "present[ed] significant privacy concerns that [simply were] not outweighed by the government interests in disclosure." *Id.* at 51.

Commenters pointed out that many contributions bear "no meaningful relationship to [electioneering communication] spending." *Id.* at 61. Disclosing those would "mislead . . . the public since it would suggest a connection between the revenue sources and the ads when none in fact exists." *Id.* at 56-59. This is particularly true of "unrestricted grants and contributions[, which] may be used by the organization . . . without the permission or approval of the donor." *Id.* It "would be completely misleading" to link "donors of unrestricted funds to . . . electioneering communications with which they may not agree." *Id.*

Commenters said that the proposed disclosures would present "significant,"[9] "enormous,"[10] "especially great,"[11] and "tremendous"[12] accounting and reporting

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9 J.A.52.

10 *Id.* at 56-59.

11 *Id.* at 63.

12 *Id.* at 74.

burdens that "would far exceed all reporting requirements otherwise applicable to such organizations."[13] They described how the "daunting complexity" of "FEC reporting regulations would discourage and effectively prevent" certain nonprofits "from running issue ads during election periods," J.A.51, while other non-profits would "see their donor bases shrink, [or] donors refusing to give more than $1,000," *id.* at 54. Broad donor disclosure requirements "would likely prove difficult, if not impossible" for most organizations to implement. *Id.* at 49.

The Commission received eight sets of comments generally favoring broad disclosures.[14] Strikingly, not one of the eight sets of pro-disclosure comments argued that the statutory text precluded consideration of purpose.

The Commission ultimately adopted, on a bipartisan basis, a rule that required disclosure of sources of either (a) funds placed in a segregated bank account used to pay for electioneering communications, or (b) funds received "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(7)(ii), (9). The FEC said the purpose element would be satisfied by

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[13] *Id.* at 56-59.

[14] The eight sets of comments were submitted by: (1) Senators McCain, Feingold, and Snowe, along with Congressman Shays; (2) Common Cause, Public Citizen, and U.S. PIRG; (3) the Campaign Legal Center, Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters, and U.S. PIRG; (4) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee; (5) Public Campaign; (6) Professors Richard Briffault and Richard L. Hasen; (7) the State of Washington's Public Disclosure Commission; and (8) Bob Bauer and the Campaign Legal Center (as an additional joint comment). All are included in the administrative record filed by the FEC with the district court.

(i) "funds received in response to solicitations specifically requesting funds to pay for" electioneering communications; and (ii) "funds specifically designated for [electioneering communications] by the donor." Final Rule and Explanation and Justification on Electioneering Commc'ns, 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007). The required disclosure for electioneering communications thus paralleled the contribution disclosures that FECA had required – for over 25 years – from speakers engaging in express advocacy.

In the final analysis, the Commission explained that disclosure without regard to purpose "would be very costly and require an inordinate amount of effort" to exercise First Amendment rights. *Id.* at 72,901. The Commission said its "carefully designed reporting requirements" were "constitutional," "narrowly tailored to address many of the commenters' concerns regarding individual donor privacy," and did "not create unreasonable burdens on the privacy rights of donors to nonprofit organizations." *Id.* at 72,911. And the Commission's regulation would provide "the public with information about those persons who actually support the message conveyed by the [electioneering communications] without imposing on corporations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making" of electioneering communications. *Id.* (emphasis added).

F. The *Citizens United* Litigation.

Two years after the FEC's rulemaking, the Supreme Court in *Citizens United*, 130 S. Ct. 876, overruled precedent and held that corporations have a First Amendment right to make both independent electioneering communications and independent expenditures for express advocacy. As part of the same case, Citizens United also had challenged the BCRA disclosure provision at issue here. The three-judge district court upheld the disclosure provision as constitutional, explaining it only required disclosure of, *inter alia*, "the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (*per curiam*), *aff'd in relevant part*, 130 S. Ct. 876 (emphasis added).[15] The Supreme Court affirmed, saying that only "certain" contributors were subject to disclosure and this constituted an "effective disclosure" regime. *Citizens United*, 130 S. Ct. at 916.

G. Van Hollen Pushes the DISCLOSE Act.

From the FEC's 2007 rulemaking until shortly before the present suit was filed, Plaintiff Van Hollen, his allies in Congress, and his counsel never asserted

[15] As a procedural matter, the opinion directly appealed from was a short, unpublished statement by the district court referencing "the reasoning of our prior opinion" that it had written in ruling on Citizens United's motion for a preliminary injunction. *See Citizens United v. FEC*, Civ. A. No. 07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008). The Supreme Court made clear that the earlier preliminary injunction opinion was the decision that was substantively "affirmed." *See Citizens United*, 130 S. Ct. at 917; *see also id.* at 888 (quoting portions of the three-judge court's preliminary injunction ruling on disclosure).

that BCRA's disclosure provision had the sweeping meaning he now portrays as unambiguous. *See* Kenneth Doyle, *FEC Deadlocks on Disclosure Obligation for Political Ads Targeting 'White House'*, Bloomberg BNA Money & Politics Report, June 8, 2012 (noting that the "disclosure requirements for electioneering communications . . . have been relatively uncontroversial until this spring"). Instead, Van Hollen advocated the "DISCLOSE Act," a new law that would require those engaged in electioneering communications to make the same disclosures he now says BCRA always demanded. He heralded the bill as "landmark legislation [to] provide unprecedented disclosure." Press Release, Congressman Chris Van Hollen, Van Hollen Statement on Passage of the DISCLOSE Act (June 24, 2010).[16] *See also* Press Release, Congressman Chris Van Hollen, Van Hollen Statement on Senate Leaders' Commitment to Act on DISCLOSE (June 22, 2010) ("the most transparency and disclosure of political expenditures in the history of our elections.") (emphasis added);[17] Chris Van Hollen and Mike Castle, *The Disclose Act is a Matter of Campaign Honesty*,

[16] *Available at* http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=192278.

[17] *Available at* http://vanhollen.house.gov/News/DocumentPrint.aspx?DocumentID=191675.

Washington Post, June 17, 2010 ("an unprecedented amount of sunlight on campaign expenditures.") (emphasis added).[18]

Plaintiff Van Hollen and his allies did not claim to be restoring the intended effect of existing law. To the contrary, President Obama, Senator Schumer (chief sponsor of the DISCLOSE Act in the Senate), Senate Majority Leader Reid, and other Members of Congress used phrases to describe the bill like: "the toughest-ever disclosure requirements,"[19] "unprecedented transparency in campaign spending,"[20] "enhanced [and] unprecedented level of disclosure . . . , not only of an organization's spending, but also of its donors,"[21] "a series of new disclosure requirements that will create an unprecedented paper trail," [22] "rigorous new disclosure requirements" to "shed new light on spending,"[23] "new disclosure

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[18] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061604599.html.

[19] Press Release, President Barack Obama, Statement by the President on the DISCLOSE Act (Apr. 29, 2010), *available at* http://m.whitehouse.gov/the-press-office/statement-president-disclose-act (emphasis added).

[20] Press Release, President Barack Obama, Statement by the President on Passage of the DISCLOSE Act in the House of Representatives (June 24, 2010), *available at* http://m.whitehouse.gov/the-press-office/statement-president-passage-disclose-act-house-representatives (emphasis added).

[21] 156 Cong. Rec. S3015, S3029 (daily ed. May 3, 2010) (emphasis added).

[22] Press Conference, *Campaign Spending Rules*, Feb. 11, 2010, *available at* http://www.c-spanvideo.org/program/SpendingRu&start=204 (remarks of Senator Chuck Schumer) (emphasis added).

[23] Press Release, Senator Harry Reid, Reid Statement on House Administration Committee Passage of the DISCLOSE Act (May 21, 2010), *available at* http://democrats.senate.gov/2010/05/22/reid-statement-on-house-administration-committee-passage-of-the-disclose-act/) (emphasis added and omitted).

requirements [of] all . . . donors,"[24] and "unprecedented transparency and disclosure."[25] In short, supporters of the DISCLOSE Act, including Van Hollen, unambiguously asked Congress to impose new and unprecedented disclosure requirements.

The DISCLOSE Act failed to win Senate approval in 2010. *See* Library of Congress, Bill Summary & Status of H.R. 5175, 111th Cong. (2009-2010).[26] Only then did Plaintiff Van Hollen purport to discover that since 2002, BCRA had unambiguously mandated the same electioneering communication disclosures Congress had just rejected.

SUMMARY OF ARGUMENT

Four years ago, a three-judge district court in this circuit interpreted BCRA to require disclosure only of "the names and addresses of anyone who contributed $1,000 or more . . . for the purpose of furthering electioneering communications." *Citizens United*, 530 F. Supp. 2d at 280 (emphasis added). The court held that requirement was adequately tailored and justified to satisfy the First Amendment. *See id.* The Supreme Court affirmed, saying BCRA only required disclosure of

[24] 156 Cong. Rec. at S3031 (emphasis added).

[25] 156 Cong. Rec. H4781, H4789 (daily ed. June 24, 2010) (emphasis added).

[26] *Available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05175:@@@L&summ2=m&.

"certain" contributors and that this "effective disclosure" regime was constitutional. *Citizens United*, 130 S. Ct. at 916.

Now, at the urging of Plaintiff Van Hollen, the district court has held that BCRA unambiguously requires disclosure of every donor (above a threshold amount) to a corporation or labor union that engages in electioneering communications without regard for the donor's purpose. Thus, the FEC's 2007 Regulation requiring disclosure of contributions "for the purpose of furthering electioneering communications" was vacated under *Chevron* Step One as contrary to law, regardless of how reasonable it might have been on the rulemaking record.

The district court here is wrong. Read in light of *Chevron* Step One's traditional tools of statutory construction, BCRA's disclosure provision permits – and indeed requires – consideration of the giver's purpose in identifying contributions for disclosure:

1. **Precedent:** As just noted, BCRA's disclosure provision has been judicially construed to require a "purpose of furthering electioneering communications." That construction was material to a constitutional holding that the Supreme Court affirmed.

2. **Statutory Language and Structure:** The statutory language explaining who must be disclosed – "contributors who contributed" – calls for consideration of the giver's purpose. BCRA is part of FECA, which explicitly

defines "contribution" in terms of a purpose to further the recipient's electoral advocacy. Moreover, many standard dictionaries define contribution to mean giving for a common purpose. Since "contributors" are persons making a "contribution," the statutory language alone strongly supports a purpose element. Finally, the obvious statutory purpose – informing voters who is behind electioneering communications – is defeated if disclosures include givers who do not support the speech.

3. Avoiding Absurdity: Excluding consideration of purpose also produces a needless structural absurdity. Under FECA's explicit terms, a speaker that expressly advocates the election or defeat of an identified candidate is only required to disclose contributions for the purpose of supporting such express advocacy. But if express advocacy is omitted and the speech otherwise qualifies as an electioneering communication because it merely refers to a candidate in pre-election periods, the district court's ruling requires the speaker to disclose all of its donors, even if they had no purpose to support or even knowledge of the electioneering communication. It makes no sense to require greater disclosures for speech that merely mentions a candidate than for speech that expressly advocates the candidate's election or defeat. Nor is this incongruity necessary, since BCRA's disclosure provision easily can be understood to parallel FECA's provision for express advocacy.

4. Legislative History: The key sponsors of BCRA's disclosure provision stressed that new disclosures would be limited by the giver's purpose and would parallel FECA's express advocacy disclosures.

5. Constitutional Avoidance: Constitutional avoidance requires consideration of the giver's purpose. Even where Congress has the general power to burden speech, the First Amendment requires it to evaluate the particular burdens imposed and to tailor those burdens to the justifying interests.

At the time the BCRA disclosure provision was enacted, ordinary corporations and labor unions were not understood to have a First Amendment right to speech that might affect elections and, indeed, BCRA flatly forbade such speech. When the Supreme Court later overruled precedent and held that corporations and unions were constitutionally entitled to engage in independent electoral advocacy, the BCRA disclosure provision unexpectedly became applicable to speakers whose burdens Congress never evaluated. And when the FEC made such an evaluation during the 2007 rulemaking, it found that a purpose limitation was necessary to avoid unreasonable burden. If the FEC lacked the power to make and implement that judgment, then a serious First Amendment issue arises because significant, unevaluated, and untailored burdens are being imposed on core speech.

* * *

Together, the foregoing considerations demonstrate that the donor's purpose to support electioneering communications not only may, but must be considered. For purposes of reversing the district court's ruling, however, which rested exclusively on *Chevron* Step One, it is enough that the statute does not unambiguously preclude consideration of purpose. And each of the preceding points is also sufficient to open the door to the FEC's explicit and broad rulemaking power.

Van Hollen's alternative claim that the 2007 Regulation was unreasonable and an abuse of discretion fails as a matter of law. The district court did not explicitly rule on that fully briefed and argued claim but indicated that it was weak. The administrative record and the FEC's explanation and justification of the 2007 Regulation identified ample reasons for adopting a disclosure rule for electioneering communications that parallels the requirement for express advocacy. Van Hollen's attempted reliance on post-adoption data founders at the threshold because that data was not in the administrative record and Van Hollen never petitioned for a rulemaking or otherwise gave the FEC and other interested parties like CFIF a chance to evaluate and respond to it. Rather than prolonging speech-chilling uncertainty, this Court can and should resolve this issue as well and direct the entry of judgment sustaining the 2007 Regulation.

ARGUMENT

I. The Standard of Appellate Review.

This Court conducts *de novo* review of a district court's decision to grant or deny summary judgment. *See Gilbert v. Napolitano*, 670 F.3d 258 (D.C. Cir. 2012). The district court's ruling receives no deference. *See Fox v. Clinton*, No. 11-5010, 2012 WL 2094410, at *7 (D.C. Cir. June 12, 2012).

II. The *Chevron* Framework.

Judicial review of the FEC's 2007 Regulation is governed by the two-step *Chevron* framework. *Chevron* Step One employs all traditional tools of statutory construction to determine "whether Congress has directly spoken to the precise question at issue," 467 U.S. at 842, in a manner that "unambiguously forecloses the [agency's] interpretation," *Petit v. U.S. Dep't of Educ.*, 657 F.3d 769, 781 (D.C. Cir. 2012). Plaintiff bears the "heavy burden," *Ass'n of Private Sector Colls. and Univs. v. Duncan*, No. 11-5174, 2012 WL 1992003, at *11 (D.C. Cir. June 5, 2012), of showing the statute "is susceptible of 'only [one] possible interpretation,'" *Petit*, 657 F.3d at 781. At Step One, courts "giv[e] no deference to the agency's interpretation." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003) ("*AFL-CIO*").

If Step One does not establish that the regulation is contrary to unambiguous law, Step Two asks whether the regulation "is based on a permissible construction of the statute." *Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 811

(D.C. Cir. 2011). It does not matter "whether there may be other reasonable, or even more reasonable, views." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998). "[I]f the interpretation is reasonable," it is permissible. *Am. Fed'n of Gov't Emps., AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341, 355 (D.C. Cir. 2007); *see also Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008). *Chevron* Step Two also "overlaps with [the] inquiry under the [APA's] arbitrary and capricious standard. 'Whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable.'" *Id*. (quoting *Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000)).

The FEC is entitled to full *Chevron* deference. *See AFL-CIO*, 333 F.3d at 173. Congress delegated sweeping responsibility to the FEC to promulgate binding regulations to "ensure the appropriate implementation" of the complex federal election laws consistent with the First Amendment. 2 U.S.C. § 434(f)(3)(B)(iv). This is "precisely" the situation in "which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37. *Compare Becker v. FEC*, 230 F.3d 381, 394 (1st Cir. 2000) (explaining that Congress's delegation of "broad policymaking discretion" extends to the definition of "contribution").

Judicial review here is "limited to assessing the record that was actually before the agency." *Duncan*, 2012 WL 1992003, at *10; *see also Envtl. Def. Fund*

v. Costle, 657 F.2d 275, 284 (D.C. Cir. 1981) (this Court is "confined to the full administrative record before the agency at the time the decision was made"); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*). Indeed, Plaintiff Van Hollen so stipulated. *See* J.A.23.

III. Plaintiff's Challenge Fails Under Step One Of *Chevron*.

BCRA's disclosure provision requires disclosure of "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement." 2 U.S.C. § 434(f)(2)(F) (emphasis added). The FEC's 2007 Regulation requires reporting only of funds given "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). Precedent supports that reading of the statute, as do the statute's language, structure, history, and other traditional tools of construction. Because the statute does not unambiguously preclude consideration of purpose, the regulation survives Step One.

A. Precedent Supports the FEC's Construction.

This is not the first time courts have interpreted BCRA's disclosure provision. It was the target of an as-applied First Amendment challenge in *Citizens United*, 530 F. Supp. 2d at 280 (*per curiam*) (three-judge court), *aff'd in relevant part*, 130 S. Ct. 876. In evaluating whether the provision imposed "burdens that violate the First Amendment," the three-judge district court said the

provision required disclosure only of certain contributors who gave "for the purpose of furthering electioneering communications":

> Section 201 is a disclosure provision requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes – among other things – the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications. §§ 434(f)(1), (2)(F); 11 C.F.R. § 104.20(c)(9).

Id. (emphasis added). Citing *McConnell*, the three-judge court held that this provision did not "impose an unconstitutional burden." *Id.* at 281.

The Supreme Court "affirmed" that ruling. *Citizens United*, 130 S. Ct. at 917. It did not question the three-judge court's construction of the law and, indeed, said the disclosure provision required "any person who spends more than $10,000 on electioneering communications [to] identify . . . certain contributors. § 434(f)(2)." *Id.* at 914 (emphasis added).[27] The Court found that such disclosures were "effective" and informed the electorate "about the sources of election-related spending" without subjecting speakers to a burden that "would impose a chill on speech or expression." *Id.* at 914, 916.

[27] The Solicitor General had likewise advised the Supreme Court that disclosures were only required as to "the amount spent on the advertisement and any large contributions earmarked to underwrite it." Brief for Appellee at 30, 39, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), No. 08-205 (emphasis added).

In short, the district court here perceived an unambiguous statutory meaning that is squarely contrary to the reading adopted by the three-judge *Citizens United* court *en route* to a holding the Supreme Court affirmed. The district court here erred.

B. The Language of the Statute Permits – and Compels – Consideration of the Giver's Purpose.

The purpose-oriented statutory construction adopted in *Citizens United* flows directly from BCRA's text, which is where Step One analysis begins. *See Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010). BCRA's key terms are "contributors" and "contribute." The noun form of "contribute" is "contribution," which is a central concept in FECA and is defined to require the giving of funds "for the purpose of influencing any election for federal office." 2 U.S.C. § 431(8)(A)(i). Such a statutory definition is "something of an ace" in construing statutes. *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 407 (D.C. Cir. 1997).

Courts regularly give a similar meaning to noun and verb forms of the same term.[28] Indeed, a "textual difficulty" arises when a party proposes "to give

[28] *See, e.g., United States v. Granderson*, 511 U.S. 39, 46 (1994) ("'[I]t seems reasonable to give . . . a similar construction' to a word used as both a noun and a verb in a single statutory sentence") (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993)); *King v. District of Columbia*, 277 F. 562, 564-65 (D.C. Cir. 1922) (the verbs "licensed" and "registered" should be given the same meaning as "licensing" and "registration"—"their noun forms in the first part of the act"); *Advance Transp. Co. v. United States*, 884 F.2d 303, 304 & n.3 (7th Cir. 1989) (the noun form and verb form share a common definition); *In re Nuijten*, 500 F.3d

different constructions to [a] term used both as a noun and a verb in the same" statutory framework. *Id.* (internal quotation marks omitted).[29] Furthermore, the Supreme Court has consistently treated "contributors" and "contributions" under the statute as equivalent descriptors for purposeful support of a candidate or issue.[30]

Van Hollen and the district court say that, because FECA's definition poses a difficulty if imported wholesale, it should be entirely disregarded. The problem arises because FECA's definition speaks of the purpose of "influencing an election," and that phrase has been construed to require express advocacy. *See Buckley*, 424 U.S. 44 & n.52, 77-80 & n.108. Since electioneering

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1346, 1356 (Fed. Cir. 2007); *Mining Energy, Inc. v. Dir., Office of Workers' Comp. Programs*, 391 F.3d 571, 575 (4th Cir. 2004).

[29] *Student Loan Marketing Ass'n*, 104 F.3d at 407, used the existing definition of a noun included within the Higher Education Act, *see* 20 U.S.C. § 1085(i) (1990), to interpret a related verb incorporated by subsequent legislation into a separate section of the law, *see* Omnibus Budget Reconciliation Act of 1993, § 4104, 20 U.S.C. § 1087-2(h)(7).

[30] *Buckley* recognized that a "contribution" serves as the "contributor's support" for a particular "candidate and his views." 424 U.S. at 21. *McConnell* acknowledged that a "contributor's ability to engage in free communication" is impacted by "contribution limits." 540 U.S. at 134-35. Similarly, "contribution limits" restrict "the contributor's freedom of political association, namely, the contributor's ability to support a favored candidate." *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (internal quotations omitted). The concepts of "contributor" and "contribution" are thus inseparable—a "contributor" necessarily is someone who makes a "contribution" with the purpose of furthering an electoral message. *See also Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 501 (1998) (describing "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning").

communications do not contain express advocacy, *see* 2 U.S.C. § 434(f)(3)(B)(ii), a literal application of the definition is awkward.

But totally disregarding the statutory definition goes too far. Definitions are an important part of a statute and should not be lightly cast aside.[31] At minimum, these definitions indicate that forms of the word contribution should be understood to take into account the giver's relevant purpose.

That understanding is reinforced by other textual considerations. First, a litany of standard dictionaries define the verb "contribute" to include a purpose element:

- New Oxford Am. Dictionary 378 (3d. ed. 2010) (emphasis added): "contribute" means to "give (something, esp. money) in order to help achieve or provide something;"
- Am. Heritage Dictionary 399 (5th ed. 2011) (emphasis added): "contribute" means to "give or supply in common with others; give to a common fund or for a common purpose;"
- Microsoft Encarta College Dictionary 313 (2001) (emphasis added): "contribute" means to "give money to something, such as a fund or charity, for a specific purpose, especially along with others;" and
- Webster's Third New Int'l Dictionary 496 (2002) (emphasis added): "contribute" means to "give or grant in common with others (as to a

[31] "When a statute includes an explicit definition, [courts] must follow that definition." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (emphasis added); *see also* 2A Sutherland Statutory Construction § 47:7 ("[s]tatutory definitions . . . establish meaning where the terms appear in that same act," and any such "definition . . . is binding"). *See also Fox v. Standard Oil Co.*, 294 U.S. 87, 95-96 (1935); *United States v. Saenz-Mendoza*, 287 F.3d 1011, 1014 (10th Cir. 2002).

> common fund or for a common purpose): give (money or other aid) for a specified object."[32]

And federal courts apply these purpose-based definitions when interpreting the definition of "contribute" under FECA, *see United States v. O'Donnell*, 608 F.3d 546, 550 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1837 (2011), and when analyzing other federal statutes, *see, e.g.*, *Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011) (analyzing claim under the Resource Conservation and Recovery Act). Although other definitions also exist, it is important that an ordinary meaning of BCRA's term "contribution" is consistent with the thrust of the statutory definition.

Second, English is rich with words, and lawmakers easily could have selected language that would rule out a purpose requirement. For example, Congress could have required entities making electioneering communications to disclose "all receipts" in the same manner required of political parties and other committees by the subsection codified immediately before the electioneering communication disclosure requirements. *See* BCRA § 103 (codified as 2 U.S.C. § 434(e)). Lawmakers also could have used words such as "donation" or "transfer of funds," terms which were used elsewhere in BCRA and have a different

[32] Similar definitions exist in other dictionaries. *See* Webster's Unabridged Dictionary 442 (2d ed. 2001); Concise Oxford English Dictionary 311 (12th ed. 2011); Oxford English Dictionary, 2d edition (1989) (online version 2012).

meaning.[33] Congress's decision not to employ readily available broad terms "strongly suggests that Congress intended that provision to have a narrower scope," *O'Neill v. Dep't of Hous. and Urban Dev.*, 220 F.3d 1354, 1362 (Fed. Cir. 2000), and "argues forcefully" that Van Hollen's reading of § 434(f)(2)(F) was not the intention of Congress, *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987).

Van Hollen and the district court see a contrary indication in the statute's reference to "all contributors who contributed." (emphasis added.) But "all" simply requires the whole of the category to which it applies; it does not expand that category. *See Nat'l Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969).[34] The Supreme Court just rejected an attempt to give "any" a

[33] For example, BCRA pairs the words "contribution" and "donation" together in the disjunctive twelve times, *see* BCRA §§ 301, 303, 309, 312, 314, 318, and also uses the terms "contribution," "donation," and "transfer of funds" in tandem within the same clause, *see id.* § 101. Each of these terms has a separate meaning, *see, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings. . . ."); *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) (same), and rather than use terms that did not contain a purpose requirement, Congress specifically chose the one that did.

[34] *See also Ziegler v. HRB Mgmt, Inc.*, 182 F. App'x 405, 407 (6th Cir. 2006) (rejecting argument that "'all' must be interpreted to include any stock option that might have vested" because "'[a]ll' modifies 'would have vested'") (emphasis added); *see also Transtech Indus., Inc. v. A&Z Septic Clean*, 270 F. App'x 200, 210 (3d Cir. 2008) (finding that "'all' modifies 'claims made,'" so it cannot reach "claims which could have been made"); *GameTech Int'l, Inc. v. Trend Gaming Sys., L.L.C.*, No. CV-01-540, 2008 WL 4571424, at *10 (D. Ariz. Oct. 14, 2008) (where "the word 'all' is followed by a plural noun, 'proceedings[,]' '[a]ll' means the entire components of 'proceedings'"); *Eaton Corp. v. ZF Meritor LLC*, 504 F. Supp. 2d 217, 221 (E.D. Mich. 2007) ("prohibiting all dangerous downshifts is not the equivalent of prohibiting all shifts").

similar "transformative" meaning. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012). Such an adjective forbids exceptions but "never change[s] in the least, the clear meaning of the phrases selected by Congress." *Id.* The meaning of "contributor who contributes" turns on the meaning of "contribution," not on the word "all."

As a separate point, the district court ruled that the FEC's 2003 Regulation precludes the agency from ever again considering the giver's purpose. That ruling overreads what the FEC did, *see supra* at 8, and it also contradicts the principle that the agency "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances,'" *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (emphasis added), and to "unanticipated and undesirable fallout" from a change to the existing legal regime, *Nat'l Home Equity Mortg. Ass'n v. Office of Thrift Supervision*, 373 F.3d 1355 (D.C. Cir. 2004). But more fundamentally, at *Chevron* Step One, the agency's views receive no deference. *See AFL-CIO*, 333 F.3d at 173.

The bottom line is that the statutory language likely compels – and certainly permits – consideration of the giver's purpose. If Congress intended to extensively alter the basic structure of FECA's established disclosure regime, legislators had an obligation to clearly state so. *See Rosado v. Wyman*, 397 U.S. 397, 415 n.17 (1970). Nothing close to that occurred here, and courts do "not lightly assume that

Congress intended to infringe constitutionally protected liberties," *AFL-CIO*, 333 F.3d at 179 (internal quotation omitted), or "[invade] freedoms protected by the Bill of Rights," *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

C. The Provision's Structure Confirms That It Requires Consideration of a Giver's Purpose.

A "fundamental canon of statutory construction [requires] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 434 (2002). Here, three separate contextual and structural factors demonstrate why the statute must be read to include a purpose requirement.

1. The Interpretation Adopted by the District Court Needlessly Creates an Absurdity.

The district court's ruling needlessly creates an absurdity. FECA is explicit that, if an ad includes words expressly advocating the election or defeat of a candidate, the speaker is only required to disclose contributions given for the purpose of supporting that speech. *See* 2 U.S.C. § 434(c)(2)(C). Under the district court's ruling, however, deleting express advocacy dramatically expands the required disclosure to encompass all donors to the speaker, regardless of their purpose. Indeed, speakers that traditionally employed "issue ads" now are including words of express advocacy to avoid expanded disclosure burdens. In the

restrained words of one observer, that is an "odd effect." Eliza Newlin Carney, *Rules of the Game: Advocacy Groups Face New Ad Rules*, Roll Call, May 21, 2012. It also is an inexplicable content-based discrimination burdening core speech.

Plaintiff Van Hollen says the absurdity "was created by Congress, not the District Court." J.A.177. But "nothing is better settled than that statutes should receive a sensible construction" and will be read "if possible, so as to avoid . . . an absurd conclusion." *In re Chapman*, 166 U.S. 661, 667 (1897). Where statutory text permits a harmonious reading that avoids absurdity, it is preferred. *See Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 468 (D.C. Cir. 1996) (*per curiam*). Thus, the Seventh Circuit interpreted the word "property" to include "services" to avoid an incongruous interpretation under which misapplication of things purchased with government funds would be forbidden while misapplication of services paid for with such funds would be allowed. *United States v. Coleman*, 590 F.2d 228, 231 (7th Cir. 1978).

Here the statutory text not only permits, but actually calls for, a harmonious and sensible construction. All that is necessary is to read the phrase "contributors who contributed" to include the same purpose element that is explicitly required by the definition of contribution applicable to express advocacy and that is included in standard dictionary definitions.

2. The Legislative History Supports a Reading of "Contribute" That Includes a Purpose Requirement.

Where a statutory text is clear, "legislative history is unnecessary to interpret the statute." *United Transp. Union v. Lewis*, 711 F.2d 233, 245 (D.C. Cir. 1983). *See also United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) (internal quotation omitted). But if there were doubt here, the legislative history would resolve it.

As is detailed above (at 6-7), legislators who were instrumental in developing BCRA's electioneering communication disclosure provision assured fellow legislators that the provision would not permit "invasive disclosure rules." 144 Cong. Rec. at S998 (Statement of Sen. Snowe). The provision would only require disclosure "of contributors who donated more than $500 toward the ad." *Id.* (emphasis added). The requirements would mirror the existing reporting requirements for independent expenditures containing express advocacy, i.e., of funds given "for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(C); *see also* 11 C.F.R. § 109.10(e) (emphasis added). And Senator Snowe emphasized that the general approach "we are taking in [BCRA § 201] is to draw it as narrowly as possible so that we do not affect . . . first amendment rights." 144 Cong. Rec. S972-01, S973 (daily ed. Feb. 25, 1998).

In short, the legislative history supports a purpose element.

3. Constitutional Avoidance Favors Consideration of a Giver's Purpose.

Another traditional tool of statutory construction is the presumption that a statute should not create constitutional difficulties. *Duncan*, 2012 WL 1992003, at *23; *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995).[35] Subjecting core political speech to significant burdens that Congress never assessed, tailored, or determined to be justified violates this presumption, as does requiring disclosures so broad that the identity of speech supporters is obscured.

A law that conditions the right to free political speech on disclosure of the speaker's supporters or funding sources imposes significant burdens on that speech, regardless of whether those who are disclosed face retaliation. *See Citizens United*, 130 S. Ct. at 914, 916; *Buckley*, 424 U.S. at 64-71. Both the FEC regulation challenged by Plaintiff, 11 C.F.R. § 104.20(c)(9), and the statutory provision it implements, 2 U.S.C. § 434(f)(2)(F), place such burdens on political speech, a fact that is borne out by the absence of any "new spending for electioneering communications by any sponsor since . . . Judge Jackson's decision

[35] Because Congress is presumed to intend to respect the Constitution, the practice of construing statutes to avoid serious constitutional doubt is a traditional tool for determining statutory intent. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trade Council*, 485 U.S. 568, 575 (1988); *Grenada Cnty. Supervisors v. Brown*, 112 U.S. 261, 269 (1884). If application of the doctrine identifies a controlling statutory intent, it operates at the first step of the *Chevron* analysis; otherwise it may operate at the second step to show that the agency's view is unreasonable. *AFL-CIO v. FEC*, 333 F.3d 168, 175-79 (D.C. Cir. 2003) (applying the doctrine at Step Two but acknowledging it also may apply at Step One); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 709 (D.C. Cir. 2011) (considering possible avoidance at Step One).

was handed down." Kenneth Doyle, *D.C. Circuit Panel Set to Hear Arguments in Political Ad Disclosure Case on Sept. 14*, Bloomberg BNA Money and Politics Report, June 6, 2012. Before the government may impose such burdens, the First Amendment requires that it satisfy "exacting scrutiny" to assure the burdens are tailored to serve sufficiently important interests. *See Citizens United*, 130 S. Ct. at 914; *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion).[36]

Citing *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998), and BCRA's severability provision (§ 401), the district court found that the breadth of the statutory disclosure provision nevertheless meant that the law "can be applied in situations not expressly anticipated by Congress." *Id.* at 212. But this principle only applies where there "was no reason to believe that Congress . . . had given any thought whatsoever to the [statute's] coverage." *Hayden v. Pataki*, 449 F.3d 305, 324 (2d Cir. 2006) (en banc) (plurality opinion); *see also Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 129-30 (2d Cir. 2001). The present situation is "easily distinguishable," *Hayden*, 449 F.3d at 324, because Congress believed that ordinary corporations would be unable to fund

[36] The seriousness of the constitutional issue is underscored by *Center for Individual Freedom, Inc. v. Tennant*, Civ. A. No. 1:08-cv-00190, 2011 WL 2912735 (S.D.W.Va. July 18, 2011), where a federal court narrowly construed a similar state electioneering communication statute to require disclosure only of "those individuals who respond to a solicitation for electioneering communications or earmark their contributions for such use." *Id.* at *49.

electioneering communications. *See also Am. Scholastic TV Programming Foundation v. FCC*, 46 F.3d 1173, 1178-81 (D.C. Cir. 1995).[37]

Moreover, the legislation in *Yeskey* did not burden core speech in a way that triggered Congress's duty to actually evaluate and tailor the burden. There is a big difference between deferring to an actual congressional determination, on the one hand, and merely pretending such a judgment was made.[38] *Compare R.J. Reynolds Tobacco, Co. v. FDA*, 823 F. Supp. 2d 36, 52 (D.D.C. 2011) (enjoining speech restriction where "Congress did not specifically contemplate the First Amendment implications when formulating its statute"). Moreover, the pretense ignores that,

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[37] By contrast, in *Alexander v. Sandoval*, 532 U.S. 275, 287-88 (2001), the Court faced a situation where Congress was enacting laws and then relying "to a large extent on the courts to decide whether there should be a private right of action" to enforce them "rather than determining this question for itself." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (emphasis added and omitted). Here, Congress already decided the key question for itself by explicitly prohibiting corporations from making electioneering communications.

In a best-case scenario for Plaintiff Van Hollen, application of the *Yeskey* principle results in a finding that the statute is ambiguous and should be left to the agency's discretion at Step Two. When an alleged "problem" emerges "only years later" – here, after *WRTL II* – this "is at least some indication that Congress . . . did not directly address the precise question at issue," *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004) (internal quotation marks and brackets omitted), sufficient to justify resolution at Step One. *See also Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144, 1151 (D.C. Cir. 2000) (while the non-existence of a particular entity at the time of a law's enactment did "not foreclose the possibility that Congress enacted language directed at the precise issue at hand, it makes that possibility unlikely").

[38] Plaintiff Van Hollen himself appears to recognize the constitutional concerns inherent in mandating wide-ranging disclosure of an organization's donors. The DISCLOSE Act he recently introduced contains an option for corporations to create a separate account and to limit the disclosure only to those entities that contribute to that account. *See* H.R. 4010, 112th Cong. § 2(b) (2012). BCRA did not contain such an option for corporations.

when the FEC made an actual evaluation, it found that ignoring the giver's purpose created an unreasonable and unnecessary burden.

When Congress enacted BCRA's disclosure provision, federal law flatly prohibited corporations and unions from using general treasury funds to make electioneering communications or independent expenditures that expressly advocated the election or defeat of a candidate in federal elections. *See Citizens United*, 130 S. Ct. at 887; 2 U.S.C. § 441b(a), (b)(2) (criminalizing such speech).[39] Thus, Congress had no occasion to evaluate and tailor the disclosure provision with respect to such speech. And where the First Amendment requires an assessment and tailoring of burdens, that must actually occur. A fictional assessment of unforeseen consequences will not do.

* * *

BCRA intended to require speakers engaging in electioneering communications to make the same disclosure of financial supporters that was and is required of speakers engaging in express electoral advocacy. That intent is clearly shown in the provision's language, structure, and history, was understood and adopted in the *Citizens United* opinions, and minimizes constitutional

[39] As noted above, *see supra* n.4, there was one non-statutory exception for so-called *MCFL* corporations, although there is considerable doubt that Congress intended such exception to survive post-BCRA. And, in any event, "very few nonprofits ever qualify as *MCFL* organizations under [the FEC's] draconian rules." Brief for Family Research Council *et al.* as *Amicus Curiae* Supporting Appellee at 10, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (Nos. 06-969 & 06-970) (collecting and citing FEC data).

difficulties. Plaintiff's claim to have belatedly discovered a clear contrary meaning is untenable and must be rejected. The district court's Step One invalidation of the 2007 Regulation is itself contrary to law and must be reversed.

IV. The Regulation Was Reasonable and Should Be Sustained.

Van Hollen's *Chevron* Step Two challenge, which portrays the regulation as unreasonable and an abuse of discretion, rests primarily on post-promulgation reporting data that was not in the rulemaking record and that the FEC had been given no opportunity to address.[40] Because Van Hollen correctly stipulated that his challenge was limited to the administrative record, *see* J.A.23, that material was irrelevant. The district court certainly was not impressed. Its Memorandum Opinion said that the FEC's regulation "may have been reasonable," *id.* at 135, and at oral argument the district court observed that, in light of the "level of deference" owed the FEC, resolving the *Chevron* Step One issue "may very well be the outcome determinative decision." *Id.* at 132.

The Memorandum Opinion identifies two grounds on which the FEC based its 2007 Regulation:

[40] Post-enactment experience must be presented to the agency via a petition for rulemaking. *See supra* at 24-25. Plaintiff certainly is free to "apply for a rehearing before [the agency] or to institute new proceedings" to present new facts and legal theories. *See Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445 (1930). But this Court should refuse to consider new factual materials and be very skeptical of legal arguments that have not yet been presented to the FEC, particularly when such claims went unrecognized for nearly a decade.

- First, requiring disclosure of all contributions to a corporation, regardless of purpose, would identify contributors that "may not support the corporation's electioneering communications." *Id.* at 140. By limiting disclosure to contributors who support the corporation's speech, the regulation best informed the public of who was speaking and helped tailor the burdens of the statute to its justifying purpose. If the law required broader disclosure, the information disseminated would mislead and confuse citizens as to those actually sponsoring the ads by diluting the identities of those responsible with the names of many other persons.
- Second, because ordinary corporations and labor unions often have many sources of funding that are unrelated to electioneering communications, compelling disclosure of all contributions without regard to the giver's purpose "would impose a heavy burden on corporations and labor unions."

Moreover, in FECA, Congress already had provided that persons engaged in express advocacy should be required to disclose only contributions for the purpose of supporting such speech. *See* 2 U.S.C. § 434(c)(2)(C). The FEC was entitled to be guided by that judgment and to avoid distorting public discourse by creating a needless incentive to engage in express advocacy rather than issue speech. Furthermore, consistency between definitions in the electioneering communication

and independent expenditure reporting requirements aids the public by "establish[ing] a coherent means," *Common Cause v. FEC*, 842 F.2d 436, 443 (D.C. Cir. 1988), by which citizens may obtain the same information about speakers and their contributors regardless of the type of speech.

All parties, including the FEC, briefed the Step Two issues in the district court. Given the partisan deadlock precluding appellate briefs from the Commission here, CFIF urges the Court to exercise its authority under Fed. R. App. P. 2 to consider these earlier filings, which are included in the Joint Appendix, as well as the participating parties' briefing in this Court. At bottom, given the high level of deference the FEC's decision merits, the 2007 Regulation cannot be condemned as unreasonable or an abuse of discretion.

CONCLUSION

This Court should reverse the district court's ruling, immediately reinstate the 2007 Regulation, and direct entry of judgment dismissing the complaint with prejudice.

June 20, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the limitation of the Court's May 25, 2012, Order because this brief contains 9,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14-point type.

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Date: June 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 2012, I caused a copy of the foregoing OPENING BRIEF OF APPELLANT CENTER FOR INDIVIDUAL FREEDOM to be served on the following counsel through this Court's electronic filing system and/or by electronic mail:

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ADDENDUM OF STATUTES AND REGULATIONS

TABLE OF CONTENTS

2 U.S.C. § 431. Definitions

* * *

(8)(A) The term "contribution" includes--

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

* * *

(9)(A) The term "expenditure" includes--

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

* * *

(17) Independent expenditure

The term "independent expenditure" means an expenditure by a person--

> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

2 U.S.C. § 434. Reporting requirements

* * *

(c) Statements by other than political committees; filing; contents; indices of expenditures

* * *

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include--

* * *

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

* * *

(e) Political committees

(1) National and congressional political committees

The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

(2) Other political committees to which section 441i applies

(A) In general

In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 441i(b)(1) of this title applies shall report all receipts and disbursements made for activities described in section 431(20)(A) of this title, unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000.

(B) Specific disclosure by State and local parties of certain non-Federal amounts permitted to be spent on Federal election activity

Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 431(20)(A) of this title shall include a disclosure of all receipts and disbursements described in section 441i(b)(2)(A) and (B) of this title.

* * *

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

* * *

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

* * *

(3) Electioneering communication

For purposes of this subsection--

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which--

(I) refers to a clearly identified candidate for Federal office;

(II) is made within--

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

* * *

(B) Exceptions

The term "electioneering communication" does not include--

* * *

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

* * *

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons--

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 437c. Federal Election Commission

* * *

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

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

2 U.S.C. § 437d. Powers of Commission

(a) Specific authorities

The Commission has the power--

* * *

> (8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26; and

2 U.S.C. § 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) In general

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) Definitions; particular activities prohibited or allowed

* * *

(2) For purposes of this section and section 79l(h) of Title 15, the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor

organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

* * *

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

* * *

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 434(f)(3)(C) of this title.

11 C.F.R. § 104.20. Reporting electioneering communications

* * *

(c) Contents of statement. Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information:

* * *

(7)

* * *

(ii) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications permissible under 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

* * *

(9) If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made

a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

11 C.F.R. § 109.10. How do political committees and other persons report independent expenditures?

* * *

(e) Content of verified reports and statements and verification of reports and statements.

(1) Contents of verified reports and statement. If a signed report or statement is submitted, the report or statement shall include:

* * *

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.