ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 12, 2008

No. 08-5085

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

NATIONAL ASSOCIATION OF MANUFACTURERS,
Plaintiff-Appellant,

v.

TALYOR, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia,
Case No. 08-cv-00208-CKK

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CERTIFICATE OF COUNSEL FOR *AMICI CURIAE* CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN AS TO PARTIES, CORPORATE DISCLOSURE, RULINGS AND RELATED CASES

I. Parties and *Amici*

The plaintiff-appellant is the National Association of Manufacturers, and the defendants-appellees are United States Attorney Jeffrey Taylor, Secretary of the Senate Nancy Erickson, and Clerk of the House of Representatives Lorraine C. Miller. The Campaign Legal Center (CLC), Democracy 21 and Public Citizen filed an *amici curiae* brief in the district court supporting defendants-appellees, and are filing an *amici curiae* brief in support of defendants-appellees in this appeal. Wisconsin Manufacturers and Commerce, Inc., WMC Issues Mobilizations Council, the Iowa Association of Business and Industry, and the National Paint and Coatings Association have filed an *amici curiae* brief supporting plaintiff-appellant in this appeal. The Citizens for Responsibility and Ethics in Washington filed an *amicus curiae* brief supporting defendants in the district court.

II. Corporate Disclosure Statement

The CLC is a nonprofit, nonpartisan corporation. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC. Democracy 21 is a nonprofit, nonpartisan corporation. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21. Public Citizen, Inc. is a nonprofit corporation. Public Citizen has no parent corporation and no publicly held corporation has any form of ownership interest in it.

III. Ruling Under Review

The ruling under review is the opinion and order issued by District Judge Colleen Kollar-Kotelly on April 11, 2008, denying the National Association of Manufacturers' motion

for judgment on the pleadings and dismissing the complaint. *See National Association of Manufacturers v. Jeffrey Taylor, et al.*, No. 08-cv-00208 (D.D.C. Apr. 11, 2008).

IV. Related Cases

There are no related cases pending in this Court or in any other court.

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INTERESTS OF *AMICI CURIAE*

Amici curiae Campaign Legal Center, Democracy 21 and Public Citizen are nonprofit organizations that work to strengthen the laws governing campaign finance, congressional ethics and governmental integrity. *Amici* were active in the drafting of and debate over the Honest Leadership and Open Government Act ("HLOGA"), Pub. L. 110-81, 121 Stat. 735 (2007), including providing policy and legal memoranda and lobbying individual legislators. *Amici* have a longstanding, demonstrated interest in lobbying disclosure and this interest is directly implicated here.

SUMMARY OF ARGUMENT

In *U.S. v. Harriss*, 347 U.S. 612 (1954), the Supreme Court upheld the Federal Regulation of Lobbying Act of 1946, holding that it was justified by Congress' interests in gathering information about "those who for hire attempt to influence legislation" and in protecting the "integrity of a basic governmental process." *Id.* at 625. Since *Harriss*, federal and state courts have been almost unanimous in upholding lobbying disclosure statutes based on these two vital state interests. Following this consistent line of precedent, the U.S. District Court for the District of Columbia correctly dismissed the facial and as-applied challenge brought by the National Association of Manufacturers (the "NAM") to the constitutionality of Section 207 of HLOGA. *See* 121 Stat. at 747, *amending* 2 U.S.C. § 1603(b).

Section 207 strengthened the Lobbying Disclosure Act of 1995 ("LDA"), Pub. L. 104-65, 109 Stat. 691 (1995), by requiring lobbying coalitions to identify all member organizations that both finance and "actively participate" in their lobbying activities. As the district court noted, Section 207 "closes a loophole that has allowed so-called 'stealth coalitions,' often with innocuous-sounding names, to operate without identifying the interests engaged in the lobbying

Finally, Section 207 is not unconstitutionally vague and the NAM has not demonstrated otherwise. The provision gives a person of ordinary intelligence ample guidance as to what disclosure is required, and relies on terms that have been in effect since the enactment of the LDA in 1995.

ARGUMENT

I. Congress Enacted Section 207 to Prevent Circumvention of the LDA.

The objective of Section 207 is to provide Congress and the public with information about organizations that fund and participate in lobbying coalitions and associations. To this end, Section 207 amends the LDA to require disclosure of any member organizations of a lobbying coalition that contribute at least $5,000 in a quarterly period toward the coalition's "lobbying activities" and that "actively participate in the planning, supervision or control of such lobbying activities." 2 U.S.C. § 1603(b).

The passage of the LDA in 1995 marked the first congressional attempt to require the disclosure of members of lobbying coalitions and associations. Congress was concerned that organizations could evade disclosure under the Federal Regulation of Lobbying Act of 1946 ("1946 Act"), Pub. L. No. 79-601, §§ 301-311, 60 Stat. 812, 839-42 (1946), by the simple expedient of creating an umbrella coalition to shield their identities. *See* slip op. at 83, *citing* Testimony of Thomas M. Susman, Chair, ABA Admin. Law Section, S. Hrg. 102-609, at 83 (noting that "[c]orporations or other organizations occasionally hid their identities behind a coalition established or available for the purpose of preventing the public from learning of their efforts to influence congressional action" which "plainly circumvents" the lobbying law's "public disclosure goals"). To correct this weakness of the 1946 Act, the LDA required disclosure of those member organizations that contributed at least $10,000 to support the

coalition's "lobbying activities" in a semiannual period, and that "in whole or in major part plan[ned], supervise[d] or control[led]" such lobbying activities. 2 U.S.C. § 1603(b)(3)(1995).

This LDA provision was subsequently rendered ineffective, however, by a narrow interpretation that required registrants to identify only those members that controlled at least 20% or more of a coalition's lobbying activities. *See* Office of the Clerk of the House of Representatives and Office of the Senate Secretary, LDA Guidance (pre-HLOGA), *available at* http://www.senate.gov/legislative/common/briefing/lobby_disc_briefing.htm#3. Frequently, no single member of a lobbying coalition would meet this threshold, sometimes because of a deliberate strategy of dispersing power in the coalition. *See* Alison Mitchell, *Loophole Lets Lobbyists Hide Clients' Identity*, N.Y. TIMES, July 5, 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C02EFDB1031F936A35754C0A9649C8B63&sec=&spon=. As a result, only the umbrella coalition would be subject to disclosure, and the groups making up the coalition would remain anonymous. The public would receive information that an association named, for example, the "Policy & Taxation Group," was making expenditures to influence legislation, but remain in the dark about the key players who funded and operated the association. *Id.* (noting that Congressional Research Service in 2002 identified 135 lobbying coalitions in LDA reports for which there was only limited information or no information about membership available).

HLOGA was Congress' second attempt to provide meaningful disclosure about organizations that finance lobbying activities of associations and coalitions. Section 207 of HLOGA clarifies that coalition members that fund a coalition's lobbying activities and that "actively participate in the planning, supervision or control" of such activities should be identified in the lobbying registration. *See, e.g.*, 153 Cong. Rec. S10709 (daily ed. Aug. 2,

2007). Under HLOGA, any member organization that has an active role in a coalition's lobbying activities is thus subject to disclosure, not merely those organizations that exercise more than 20% control over the coalition's lobbying activities.

Section 207 thus represents a limited "fix" of the existing LDA provision on disclosure by lobbying coalitions. It did not create the disclosure obligation in the first instance. Nor did Section 207 change or expand the class of persons or groups who have to register as lobbyists; rather, it only requires lobbyists and lobbying coalitions that are already registered to disclose information about coalition membership. In addition, with large trade associations specifically in mind, Section 207 exempts a registered coalition or trade association from disclosing organizational members who would otherwise be subject to the disclosure, if the coalition or trade association publishes the names of those members on its Web page. 2 U.S.C. § 1603(b).

II. Lobbying Disclosure Requirements Are Not Subject to Strict Scrutiny.

Without determining what would be the appropriate standard of review, the district court applied strict scrutiny in its review of Section 207 because "[i]f a [statute] can withstand strict scrutiny there is no need to decide the issue." *See* slip op. at 27 (quoting *SEC v. Blount*, 61 F.3d 938, 943 (D.C. Cir. 1995)). Although the district court upheld Section 207 under strict scrutiny, application of this standard was not consistent with relevant Supreme Court precedent. Political disclosure requirements are subject to only an intermediate degree of scrutiny because they represent "the least restrictive means of curbing the evils of ... ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976); *see also McConnell v. FEC*, 540 U.S. 93, 196 (2003).

The Supreme Court in *Harriss* did not specify the level of scrutiny it applied to the 1946 Lobbying Act, and indeed the case predated the formalization of the different levels of constitutional scrutiny in the Court's First Amendment jurisprudence. The nature of the

Supreme Court's analysis in *Harriss*, however, indicated that the 1946 Act was held only to the equivalent of what would now be considered intermediate review. The Court did not evaluate whether the Act implicated a "compelling state interest," or whether it was narrowly tailored to serve the state interest. Instead the Court simply reviewed the purposes of the Act and concluded that the Act was "plainly within the area of congressional power and [] designed to safeguard a vital national interest." 347 U.S. at 626.

The Court of Appeals for the Eleventh Circuit has agreed that *Harriss* effectively declined to apply strict scrutiny to the 1946 Act. *See Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) ("It appears, however, that the [*Harriss*] Court did not subject the lobbying restrictions to the demands of strict scrutiny."). The Eleventh Circuit pointed out that the *Harriss* Court's analysis was limited to analyzing the governmental interests supporting the 1946 Act and weighing the constitutional injury alleged by the parties challenging the Act. *Id.* This interpretation of *Harriss* is also the prevailing view among lower courts, which have tended to apply intermediate scrutiny in their review of state lobbying disclosure laws. *See Comm. on Independent Colleges and Universities v. N.Y. Temporary State Lobbying Comm.*, 534 F. Supp. 489, 498 (N.D.N.Y. 1982) (observing that "lobby disclosure laws are traditionally subject to less scrutiny than laws that sanction pure speech") (internal citations omitted); *Kimbell v. Hooper*, 164 Vt. 80, 85, 665 A.2d 44, 47 (1995) (noting that lobbying disclosure laws "are not subject to the same strict scrutiny as laws that impinge on pure speech," but nevertheless are supported by "several compelling interests"). *But see Minnesota State Ethical Practices Board v. NRA*, 761 F.2d 509, 511 (8th Cir. 1985) (assuming without analysis that state lobbying disclosure law must serve a "compelling interest").

Unable to offer legal authority supporting the application of strict scrutiny to lobbying disclosure laws, the NAM turns to the Supreme Court decision in *Buckley v. Valeo*, which the NAM claims applied strict scrutiny in its review of the campaign finance disclosure provisions in the Federal Election Campaign Act ("FECA"). Brief of Plaintiff-Appellant (May 19, 2008) ("NAM Br.") at 25-26. While Supreme Court precedent on campaign finance disclosure is relevant to this Court's analysis of Section 207, the NAM's assertion that the *Buckley* Court reviewed FECA's disclosure requirements under strict scrutiny is incorrect.

The standard of review established by *Buckley* for the FECA disclosure provisions was whether there was a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." 424 U.S. at 64. Even a cursory reading of *Buckley* indicates that this "substantial relation" analysis bears no resemblance to strict scrutiny review. The *Buckley* Court did not consider whether the challenged disclosure requirements implicated a "compelling state interest," nor whether the requirements were "narrowly tailored" to meet that interest. As further confirmation, the Supreme Court's review of the "electioneering communications" disclosure provisions in the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002), also did not conform to strict scrutiny standards. *McConnell*, 540 U.S. at 194-202. The *McConnell* Court did not require a "compelling state interest," but rather upheld the disclosure requirements in BCRA as supported by merely "important state interests." *Id.* at 196. *See also* slip op. at 26 (acknowledging that "neither *Buckley* nor *McConnell* utilized the traditional language of the strict scrutiny standard").[1]

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[1] Although the district court acknowledges that *Buckley*'s analysis of the FECA disclosure requirements did not resemble strict scrutiny review, it finds significance in the *Buckley* Court's *invocation of "exacting scrutiny,"* observing that "in other contexts, the Supreme Court has indicated *that 'exacting' and 'strict'* scrutiny are one and the same." Slip op. at 26. However, the "undefined

The NAM's assertion also does not comport with the logic of *Buckley* and *McConnell*, which applied a "sliding scale" of scrutiny to the different types of campaign finance regulations at issue depending on how restrictive they were of First Amendment activities. On the spectrum of regulation, the Supreme Court recognizes that expenditure limits are the most burdensome because they bar individuals from "any significant use of the most effective modes of communication." *Buckley*, 424 U.S. at 19-20. Consequently, expenditure restrictions are subject to strict scrutiny. *Id.* at 44-45; *McConnell*, 540 U.S. at 205. Contribution limits are less burdensome of speech because they "permit[] the symbolic expression of support" for a candidate, and hence warrant "less rigorous" review. *McConnell*, 540 U.S. at 135, 137. On the lowest end of the spectrum are disclosure requirements, described as the "least restrictive" requirements because they "impose no ceiling on campaign-related activities." *Buckley*, 424 U.S at 64, 68; *see also McConnell*, 540 U.S. at 201 (observing that disclosure requirements "d[o] not prevent anyone from speaking") (internal quotations omitted). A disclosure requirement therefore need only meet the *Buckley* Court's "substantial relation" test. It is

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standard of 'exacting judicial scrutiny,'" *see McConnell v. FEC*, 251 F. Supp. 2d 176, 762 (D.D.C. 2003) (Leon, J., concurring in part), indicates merely that the law at issue warrants heightened scrutiny instead of the "rational basis" review typically accorded statutes. The term, by itself, does not specify which level of heightened scrutiny is appropriate, and has been used inconsistently by the Supreme Court to denominate different levels of scrutiny. *Compare Buckley*, 424 U.S. at 64 (applying "exacting scrutiny" by reviewing the challenged disclosure provisions for a "relevant correlation" or "substantial relation" to a "substantial" governmental interest) *with McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (applying "exacting scrutiny" to a state disclaimer requirement by reviewing whether the requirement was "narrowly tailored serve an overriding state interest") *and Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) (applying "exacting scrutiny" to ballot measure committee contribution limits by reviewing whether the law "advance[s] a *legitimate* governmental interest *significant* enough to justify its infringement of First Amendment rights") (emphasis added).

Given the indeterminate nature of the term "exacting scrutiny," it is therefore necessary to analyze the actual standard employed in the case at issue. As the district court found, the actual standard employed by the *Buckley* Court, *i.e.* the "substantial relation" test, "appears to be somewhat more lenient than the strict scrutiny standard." Slip op. at 43.

contrary to logic to argue, as the NAM does here, that the "least restrictive" regulation should be held to the most stringent standard of review.[2]

The conclusion of *Buckley* and *McConnell* that disclosure is the "least restrictive" method to ensure political integrity resonates in the context of lobbying disclosure as well. As the *Harriss* Court pointed out, Congress did not seek to prohibit "lobbying pressures" when it passed the 1946 Act, but merely asked that "a modicum of information" about such pressures be disclosed. 347 U.S. at 625; *see also N.Y. Temporary State Lobbying Commission*, 534 F. Supp. at 498 (noting that legislature had not sought to "prohibit any type of lobbying" or to "limit the amount of lobbying"). Section 207 similarly does not restrict the lobbying activities of the NAM, nor limit the sources of its funding. As the court below noted, lobbying disclosure imposes at most an "indirect burden" on the First Amendment rights of the NAM. Slip op. at 25.

The NAM has not alleged any burden specific to itself that would change this analysis. It claims that disclosure will chill the participation of its members, speculating that boycotts, shareholder suits and "other forms of harassment" will befall its members if their association with the NAM becomes known. NAM Br. at 14-15. But these claims are no more substantial than the "hypothetical" allegations of injury that the *Harriss* Court dismissed in considering the constitutionality of the 1946 Act. *See* 347 U.S. at 626. The NAM's complaint that the creation

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[2] Because disclosure requirements are less restrictive than contribution limits or expenditure limits, and therefore subject to a less rigorous level of review, the Supreme Court has frequently approved of disclosure requirements while simultaneously invalidating more restrictive regulations of political activity. *See, e.g., Citizens Against Rent Control*, 454 U.S. at 298-99 (striking down contribution limits governing ballot initiative committees but noting "there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under . . . the ordinance, which requires publication of lists of contributors in advance of the voting"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 n.32 (1978) (striking down prohibition on corporate expenditures on ballot initiatives but noting that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected").

of a compliance system to monitor the activities of its members would be "expensive and disruptive" is also unpersuasive. This alleged hardship is belied by the fact that the NAM has already complied with Section 207 to complete its first quarterly report in 2008, and even by the NAM's own account, the compliance process only took a matter of "days." NAM Br. at 16 n.8. As was the case with the political disclosure requirements in *Buckley* and *McConnell*, Section 207 represents a marginal burden on First Amendment rights, and consequently, does not warrant the application of strict scrutiny.

III. Section 207 Is Carefully Tailored to Serve the State Interests in Informing the Electorate and Maintaining the Integrity of Government.

A. The Governmental Interests Recognized by *Harriss* Apply in Full Force to Section 207.

Harriss made clear that lobbying disclosure was justified by "vital" informational and anti-corruption interests. *Harriss* articulated the informational purpose the Act served as follows:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.

347 U.S. at 625. The Court pointed out that the Act remedied this problem in a manner that avoided restrictions on anyone's speech:

> Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much.

Id. By providing this crucial information to legislators and assisting them in making legislative decisions, the 1946 Act amounted to an exercise by Congress of "the power of self-protection." *Id. See also* slip op. at 29 (recognizing that state informational interest is compelling).

Harris and its progeny also make clear that lobbying disclosure serves to prevent corruption of the legislative process. As the Court stated in *Harris*, such statutes aim to "maintain the integrity of a basic governmental process." *Id.* In *McIntyre*, a case concerning disclaimers on ballot measure literature, the Court underscored that anti-corruption rationale by distinguishing between the ballot initiative process and lobbying activities. It explained that the anti-corruption interest that justified the disclosure of lobbying activities in *Harriss* is not relevant to ballot initiatives because the latter have no nexus to candidates, political parties or officeholders. *McIntyre,* 514 U.S. at 656 n.20. The Court concluded that "the activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption." *Id. See also* slip op. at 29 (recognizing that the interest in "avoiding the appearance of corruption" is compelling).

Applying *Harriss*, lower courts have consistently held that the state interests in lobbying disclosure outweigh the associated burdens, regardless of the level of scrutiny applied. *See Fla. League of Prof'l Lobbyists,* 87 F.3d at 460 (applying intermediate scrutiny and holding that state lobbying disclosure statute is justified by legislators' interest in "self protection" in the "face of coordinated pressure campaigns," and the "correlative interest of voters" in "appraising the integrity and performance of officeholders and candidates"); *Minn. State Ethical Practices Board*, 761 F.2d at 512 (applying strict scrutiny but finding that "the State of Minnesota's interest in disclosure outweighs any infringement of the the NAMs' first amendment rights"); *N.Y. Temporary State Lobbying Commision*, 534 F. Supp. at 494-95 ("The

lobby law serves to apprise the public of the sources of pressure on government officials, thus better enabling the public to access their performance.").

In an attempt to undercut the precedential weight of *Harriss*, the NAM argues that the LDA and Section 207 require "vastly broader" disclosure than did the 1946 Act, and *Harriss* therefore "cannot be read to find a compelling interest" in the disclosure required by Section 207. NAM Br. at 32. Specifically, the NAM highlights that Section 207 applies to lobbying communications with a broader range of governmental officials, including "employees of Congress, plus a great many executive personnel," and relating to subjects "far distant from specific legislative proposals." NAM Br. at 33.[3] The NAM, however, does not explain why the distinctions it draws between the 1946 Act and the current LDA affect the applicability of *Harriss* to this case. The NAM's claim is not that Section 207 is unconstitutional as applied to lobbying activities involving the executive branch or executive actions, but rather that Section 207 is unconstitutional as applied to *all* lobbying activities – even those covered by the statute at issue in *Harriss*. That *Harriss* did not consider the compelled disclosure of executive lobbying is therefore immaterial.

Nor does the *Harriss* Court's alleged "draconian narrowing" of the 1946 Act undercut the relevance of *Harriss* here. NAM Br. at 32. The Court construed the 1946 Act to cover only "direct contacts with members of Congress," or contacts "through an artificially stimulated letter campaign." *Harriss*, 347 U.S. at 620. But it adopted this construction to cure vagueness, not overbreadth. This construction therefore does not signify that only "direct contacts with

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[3] The LDA requires disclosure of "lobbying contacts," defined as "any oral or written communication" to a "covered executive branch official or covered legislative branch official that is made on behalf of a client" with regard to Federal legislation, a Federal regulation, an Executive Order or a Federal program; or the administration of a Federal program or policy; or the nomination or confirmation of a person for a position subject to confirmation. 2 U.S.C. § 1602(8)(A).

Congress" or "artificially stimulated letter campaign" can constitutionally be subject to disclosure; instead, it was merely an attempt to ensure that the Act would "meet[] the constitutional requirement of definiteness." *Id.* at 624. There is thus no reason why the governmental interests in disclosure recognized by *Harriss* would not apply to a broader range of lobbying activities than those ultimately covered by the narrowly-construed 1946 Act, assuming that the broader range were adequately defined to avoid the vagueness problems that led to the *Harriss* Court's narrowing construction.[4]

Section 207 serves the core interests recognized by *Harriss*, namely in obtaining information about "who is being hired, who is putting up the money, and how much" and in "maintain[ing] the integrity of a basic governmental process." *Harriss*, 324 U.S. at 625. Section 207 is crucial to achieving these goals because it prevents organizations from circumventing disclosure requirements by creating a lobbying "front group" to conceal their identities. Because the government has recognized interests in lobbying disclosure, it follows that it has an interest in measures to prevent circumvention of lobbying disclosure. *See McConnell,* 540 U.S. at 144 (noting that Congress' interests in campaign finance regulation "have been sufficient to justify not only contribution limits themselves, but laws preventing the

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[4] It is not even true that the 1946 Act, as construed by *Harriss*, applies to a narrower scope of activity than Section 207, as the NAM claims. Even as construed, the 1946 Act swept far more broadly than the current LDA in that it required disclosure of both "direct contacts with members of Congress," and indirect lobbying in the form of "an artificially stimulated letter campaign." 347 U.S. at 615 n.1, 620. *See N.Y. Temporary State Lobbying Commission*, 534 F. Supp. at 496 (noting that *Harriss* "held that indirect lobbying, in the forms of campaigns to exhort the public to send letters and telegrams to public officials, could be included within the definition of lobbying activities"). Furthermore, the LDA is far more narrowly tailored than the 1946 Act, establishing minimum thresholds of lobbying activity before disclosure obligations are triggered, *see* 2 U.S.C. § 1603(a)(3)(A)(i) (lobbyist registration not required if income from lobbying activities for a particular client does not exceed $2,500 per quarter), as well as minimum time requirements before a person is deemed a "lobbyist," *see* § 1602(10) (registration not required if lobbying activities constitute less than 20% of a person's services for client). By contrast, the 1946 Act required registration upon commencement of *any* amount of lobbying activity. *Id.* at 617 n.2 (requiring registration for "[a]ny person who shall engage himself for pay or for *any* consideration" for the purpose of influencing the passage of legislation) (emphasis added).

circumvention of such limits"); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (holding that coordinated party spending limits were closely drawn to serve governmental interest in preventing corruption because they "minimize[d] circumvention of contribution limits"). *Harriss* established that there is a substantial need for comprehensive disclosure of the "myriad pressures to which [legislators] are regularly subjected," *see* 324 U.S. at 625, and hence the decision necessarily supports all reasonable steps to achieve disclosure of such pressures, including measures to prevent circumvention.

Section 207 is precisely such an anti-circumvention measure. Prior to amendment by HLOGA, the LDA required disclosure of those organizations in a coalition that funded the coalition's lobbying activities, and that "in whole or in major part plan[ned], supervise[d] or control[led]" such activities. 2 U.S.C. § 1603(b)(3)(1995). Frequently, however, no single coalition member would meet the "in whole or in major part" threshold, and consequently, members would not be subject to disclosure, even if they were substantially involved in the coalition's lobbying activities. Section 207 amended the LDA to close this loophole by requiring disclosure of any member organizations that fund a coalition's lobbying activities and that "actively participate in the planning, supervision or control of such lobbying activities." *See* Section I *supra*. Section 207 will thus effectively advance the government's informational and anticorruption interests by materially reducing circumvention of the LDA.

B. Section 207 is Carefully Tailored to Serve Vital Governmental Interests.

The NAM claims that Section 207 is underinclusive, complaining that it does not require disclosure from a "stealth coalition" that does not itself retain lobbyists but instead relies on the lobbying conducted by its members. NAM Br. at 11, 36. This argument makes no sense. If organizations do not establish a lobbying coalition and instead lobby individually,

there *is* no lobbying coalition for the purposes of the LDA. The law is not unconstitutionally underinclusive because it does not require lobbying disclosure from a coalition that does not engage in lobbying. Moreover, the individual organizations in this putative "lobbying coalition" that actually finance and carry out the lobbying will individually be subject to disclosure if they spend in excess of the LDA's financial thresholds to retain or employ a lobbyist. *See* slip op. at 35 (noting that if a coalition "lobbies through its members' lobbyists" the "organizations funding the lobbying activities will be disclosed as the lobbyists' clients").

Nor is Section 207 insufficiently tailored because it does not require the disclosure of individuals in a lobbying coalition and, instead, only requires disclosure of organizational members. 2 U.S.C. § 1603(b). This aspect of Section 207 serves as an additional safeguard for associational rights based on Congress' recognition that individuals are sometimes vulnerable to personal threats and harassment if their associational alliances are made public. Further, unlike the disclosure of organizations or corporations, the identification of private individuals is often of limited utility. *McIntyre*, 514 U.S. at 348-49 (finding that "in the case of [ballot initiative literature] written by a *private citizen* who is not known to the recipient, the name and address of the author add little, if anything to the reader's ability to evaluate the document's message") (emphasis added). Finally, as the court below noted, there is no evidence that "individuals contributing to lobbying coalitions or associations pose the same types of problems as organizational entities," *see* slip op. at 36, and hence Congress' decision to focus on organizational members of lobbying coalitions is appropriate. The Supreme Court in *Buckley* recognized that a statute is not underinclusive simply because Congress "address[es] itself to the phase of the problem which seems most acute to the legislative mind." 424 U.S. at 105 (internal citations omitted). "[R]eform may take one step at a time." *Id.*

Also unfounded is the NAM's argument that Section 208 is overinclusive because Congress intended to regulate only "short term, ad-hoc entities," and not more permanent associations. NAM Br. at 39. Congress at no time conditioned its interest in disclosure on the *duration* of a lobbying coalition. Both legislators and the public benefit from disclosure of the membership of permanent lobbying coalitions. Indeed, given the political clout and wealth of many long-standing lobbying associations, Congress and the public have an arguably greater interest in disclosure of their membership than in disclosure of temporary groups with limited influence. Established lobbying associations, such as the U.S. Chamber of Commerce and the Pharmaceutical Research and Manufacturers of America (PhRMA), were among the "biggest spenders on K Street" in the first quarter of 2008. Jeffrey Young, *K Street big spenders keep up the pace so far in 2008*, THE HILL, Apr. 28, 2008, *available at* http://thehill.com/business--lobby/k-street-big-spenders-keep-up-the-pace-so-far-in-2008-2008-04-28.html. It was only because of Section 207 that the Chamber of Commerce for the first time disclosed its affiliated member organizations in its 2008 quarterly lobbying report, as a review of its past LDA reporting demonstrates. *See* Chamber of Commerce of the U.S.A., Lobbying Report (1st Quarter 2008) at 99, at http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=bfcd41e3-89e3-468e-a2c2-204b42f619aa.

The law also need not exempt the NAM and other established associations because their names are supposedly more informative, or their interests better understood. NAM Br. at 37. Such a statutory exemption would not even be feasible, since "Congress certainly could not draw a 'bright line' rule based on some loose conception of whether an association or coalition's name accurately represented its constituencies." Slip op. at 39. Further, the title

"National Association of Manufacturers" hardly makes clear which companies fund or participate in the NAM's lobbying efforts, or the industries or regions they represent. The public also has no means to verify whether this title even correctly describes the NAM, because without disclosure, the NAM's membership will remain anonymous. The NAM is no less a "stealth coalition" than the "ad hoc entities" it claims were the exclusive focus of Section 207.

IV. Section 207 Is Not Void for Vagueness.

The NAM argues that Section 207 is vague on its face and as applied to the NAM, specifically its use of the terms "lobbying activities" and "actively participates." The district court correctly rejected this challenge, finding that Section 207 is "easily understood and objectively determinable," and provides regulated parties with "fair and clear notice of what [it] requires of them." Slip op. at 55 (internal citations omitted).

The Supreme Court has set a high bar for a plaintiff claiming a statute is void for vagueness. Even where First Amendment rights are implicated, a statute will only be struck down on its face if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). As the district court below concluded, the NAM fails to make this showing.

First, the definition of "lobbying activities" criticized by the NAM has been in effect since the enactment of the 1995 LDA. *See* 2 U.S.C. § 1602(7); *see also* slip op. at 13. Insofar as the NAM has registered and reported under the LDA for well over a decade, it has been able to operate under this definition despite its alleged unconstitutional infirmity.

The NAM attempts to avoid this inference by claiming that the NAM did not report under the original 1995 LDA provision governing lobbying coalitions because none of its

members had met the test of "in whole or in major part plan[ning], supervis[ing], or control[ling] [the NAM's] lobbying activities." NAM Br. at 45. Consequently, the NAM claims that it never previously had to "concern" itself with the meaning of the term "lobbying activities." *Id.* However, the NAM fails to mention that the term "lobbying activities" appeared throughout the 1995 LDA, and not only in the 1995 LDA provision on coalitions. *See* 2 U.S.C. § 1603(a)(3)(A) (establishing threshold of "lobbying activities" before registration required); § 1604(b) (requiring reporting on various aspects of "lobbying activities"); §§ 1602(2), (10) (defining "client," "lobbyist"). The NAM would have had to understand the term "lobbying activities" in order to comply with the basic requirements of the law. For instance, the LDA requires organizations that lobby on their own behalf to report "a good faith estimate of the total expenses that the registrant and its employees incurred in connection with *lobbying activities*." 2 U.S.C. § 1604(b)(4) (emphasis added). The NAM cannot credibly claim that the definition of "lobbying activities" is now incomprehensible after it has reported its expenses for "lobbying activities" on a semiannual basis for as many as 12 years.

Nor does the inclusion of an "intent" prong in the definition of "lobbying activities" render the definition unconstitutionally vague. "Lobbying activities" are defined as "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work *that is intended, at the time it is performed*, for use in contacts." 2 U.S.C. § 1602(7). The legislative history of this provision makes clear that the reference to intent was meant to limit the definition of "lobbying activities" to encompass only the background work that was contemporaneously intended to support lobbying contacts. *See* slip op. at 49. The provision exempts from disclosure any "effort that goes into preparing materials for purposes other than lobbying" even if the materials were "subsequently used in

the course of lobbying activities." H.R. Rep. No. 104-339, pt. 1, at 13-14. Thus, the "intent prong" is ancillary to the definition of "lobbying activities," and has little impact on the law's meaning, which without the intent language would provide that "lobbying activities" are "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work . . . for use in contacts." Indeed, questions of intent would only arise in those limited circumstances when an organization's background work was not immediately used to support lobbying contacts, but was used on some subsequent date, thus casting doubt on the original function of the work. It would defy reason to find the definition of "lobbying activities" unconstitutional based on an ancillary "intent prong" that serves to *narrow* the scope of "lobbying activities" and in turn, the breadth of the disclosure obligation in Section 207.[5]

FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007) does not compel a different result. There, the Supreme Court invalidated BCRA's prohibition on the use of corporate or union treasury funds to fund certain "electioneering communications," *see* 2 U.S.C. § 441b(b)(2), as applied to advertisements that were not express advocacy or its "functional equivalent." Contrary to the NAM's argument, the *WRTL* Court did not find that all intent-based standards in the First Amendment context were unconstitutionally vague. Instead, *WRTL* rejected an intent-based test for determining whether an ad was the functional equivalent of express advocacy because a "constitutional standard that turned on the subjective sincerity of a

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[5] The 1946 Act upheld in *Harriss*, as well as various state lobbying disclosure statutes, employ a "for the purpose of lobbying" standard that is effectively indistinguishable from the "intent prong" in the "lobbying activities" definition. The 1946 Act, for instance, required registration from "[a]ny person who shall engage himself for pay or for any consideration *for the purpose of*" attempting to "influence the passage or defeat of any legislation by the Congress." 347 U.S. at 617 n.2 (emphasis added). *See also Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005) (holding that state statute requiring lobbyists to report receipts "used for the purpose of lobbying" was not vague). This formulation – which has been approved by the Supreme Court – is no more definite or objective than the "intent" language in the "lobbying activities" definition.

speaker's message would likely be incapable of workable application." 127 S. Ct. at 2666 (citing FEC Brief for Appellee in *WRTL I*, O.T.2005, No. 04-1581). As the district court recognized, it was the subjective nature of an intent-based standard for assessing electioneering communications that gave the *WRTL* Court pause. Slip op. at 48. By contrast, an organization's intent regarding the use of background research is quickly and objectively determinable. The district court noted that, for instance, to "determine[e] whether a particular affiliate's activity was 'intended, at the time it [was] performed' for use in lobbying contacts, an LDA registrant can look to objective indicators such as contemporaneous descriptions of the work in question and how the work is put to immediate use." Slip op. at 50.

The language "*actively participates* in the planning, supervision, or control of such lobbying activities" in Section 207 also meets constitutional standards of clarity. Importantly, this language only applies to member organizations that contribute more than $5,000 in a quarter to fund the coalition's lobbying effort. NAM admits only some "hundreds" of its 11,000 total members meet this financial threshold. NAM Br. at 13. Because these member organizations are already substantially connected to the coalition's lobbying activities, the language in this context "provide[s] explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). *See also McConnell,* 540 U.S. at 170 n.64 (rejecting claim that BCRA provision regulating speech that "promotes, attacks, supports or opposes" a candidate is unconstitutionally vague, particularly as provision applies only to political party committees, whose speech is "presumed" to be "campaign related").

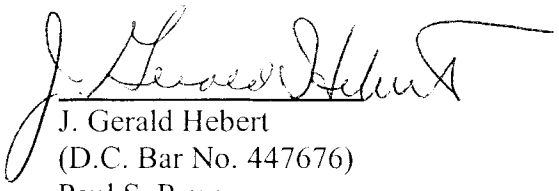
Further, Congress authorized the Senate Secretary and Clerk of the House to provide guidance on interpretation of Section 207 – and the guidance provided thus far is extensive. *See* 2 U.S.C. § 1605(a)(1); Office of the Clerk of the House of Representatives and Office of

the Senate Secretary, LDA Guidance (revised May 29, 2008) ("Guidance"), *available at* http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf. This Guidance sets forth a detailed definition of the language "actively participates," as well as examples of activities that do and do not meet this definition. Guidance at 5. The NAM's suggestion that the non-binding nature of the Guidance renders it irrelevant, as well as its allegation that the Department of Justice could apply contrary standards, NAM Br. at 48 n.29, ignores the substantial enforcement-related authority the LDA grants to the Secretary and the Clerk. The LDA directs the Secretary and the Clerk to review registration documents for "accuracy, completeness, and timeliness," to "notify any lobbying firm or lobbyist in writing that may be in noncompliance," 2 U.S.C. § 1605(a)(7), and ultimately, to report instances of noncompliance to DOJ if no remedial action has been taken by the noncompliant lobbying firm or lobbyist, *id.* at § 1605(a)(8). Even though DOJ has independent authority to bring enforcement actions, a referral from the Secretary and the Clerk is the mechanism through which DOJ learns about the majority of LDA violations. *See* Kenneth P. Doyle, *U.S. Attorney Has 900 Unresolved Referrals Of Possible Lobbying Violations, Official Says*, BUREAU OF NATIONAL AFFAIRS, Jan. 22, 2008 (noting that DOJ has received "thousands" of LDA referrals from Capitol Hill but has "never pursued court action against an LDA violator in the law's 12-year history"). Given the authority of the Clerk and the Secretary, their Guidance will effectively define the enforcement process and therefore will provide significant notice to the regulated community about the practical meaning of the law.

CONCLUSION

For the foregoing reasons, Section 207 of HLOGA is constitutional, both facially and as applied. Accordingly, this Court should affirm the decision of the district court.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7) AND CIR. R. 32(a)(2)

Pursuant to Fed. R. App. P. 29(c)(5) and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing *amicus* brief complies with the length requirements of Fed. R. App. P. 29(d), Fed. R. App. P. 28.1(e)(2)(A)(i) and Cir. R. 32(a)(2). I have relied on the word count feature of Microsoft Word 2000 to calculate that the brief contains 6882 words. I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionately spaced typeface using Microsoft Word 2000 in Times New Roman font size 12.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June 2008, I served a copy of the foregoing BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE on the following counsel of record, via email (where email addresses are available and known) and by United States mail, first-class postage prepaid:

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