ORAL ARGUMENT SCHEDULED FOR JULY, __ 2008

No. 08-5085

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

NATIONAL ASSOCIATION OF MANUFACTURERS,

Plaintiff-Appellant,

v.

HONORABLE JEFFREY A. TAYLOR, *et al.*,

Defendants-Appellees.

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

BRIEF FOR PLAINTIFF-APPELLANT THE NATIONAL ASSOCIATION OF MANUFACTURERS

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May 19, 2008

CERTIFICATE AS TO PARTIES, RULINGS AND RELATES CASES

The undersigned attorney of record, in accordance with Circuit Rule 28(a)(1), hereby certifies as follows:

(A)(i) Parties Before This Court

- Appellant: The National Association of Manufacturers.

- Appellees: The Honorable Jeffrey A. Taylor, U.S. Attorney for the District of Columbia; The Honorable Nancy Erickson, Secretary of the United States Senate; The Honorable Lorraine C. Miller, Clerk of the House of Representatives of the United States.

(A)(ii) Parties and Amici Before the District Court

- Plaintiff: The National Association of Manufacturers.

- Defendants: The Honorable Jeffrey A. Taylor, U.S. Attorney for the District of Columbia; The Honorable Nancy Erickson, Secretary of the United States Senate; The Honorable Lorraine C. Miller, Clerk of the House of Representatives of the United States.

- Amici: Campaign Legal Center; Democracy 21; Public Citizen; Citizens for Responsibility and Ethics in Washington.

(A)(iii) Corporate Disclosure Statement

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is a non-profit organization headquartered in Washington, D.C., with 10 additional offices across the country. Its membership list is confidential. It has no parent corporation and no publicly traded stock.

(B) Ruling Under Review

On April 11, 2008, the district court (Judge Colleen Kollar-Kotelly) issued an Order and Memorandum Opinion on April 11, 2008, dismissing with prejudice, which can be found in the Appendix at 64. No official citation exists.

(C) Related Cases

Undersigned counsel are aware of no related cases.

Thomas W. Kirby

STATEMENT REGARDING DEFERRED JOINT APPENDIX

Given the expedited schedule, the plaintiff-appellant does not intend to use a deferred joint appendix and has, after consultation with opposing counsel, included an appendix with its brief.

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FEDERAL CASES

Pursuant to Circuit Rule 28(a)(2), authorities upon which we chiefly rely are marked with asterisks.

STATE CASES

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GLOSSARY OF ABBREVIATED TERMS

App.	Appendix
HLOGA	Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735
LDA	Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691
Legislative Defendants	Clerk of the House of Representatives and Secretary of the Senate
NAM	National Association of Manufacturers
Section 207 or **§207**	Section 207 of the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735
U.S. Attorney	United States Attorney for the District of Columbia

STATEMENT OF JURISDICTION

This court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294. The U.S. District Court for the District of Columbia had jurisdiction of this action asserting First Amendment rights pursuant to 28 U.S.C. §§ 2201, 2202, and 1331. It entered a final judgment on the merits on April 11, 2008. Appellant filed its Notice of Appeal with the district court on April 16, 2008.

STATEMENT OF ISSUES

1. Whether §207 violates the First Amendment, facially and as applied to the NAM and similar membership organizations.

2. Whether the stringent review demanded by the First Amendment is satisfied where, as here, the challenged provision:

   a. Does not serve its intended purpose of forcing so-called "stealth coalitions" to disclose the interests they represent.

   b. Is not tailored to serve its stated purpose.

   c. Is vague.

STATUTES AND REGULATIONS

The statutes pertinent to the appeal are set forth in the addendum bound with this brief.

INTRODUCTORY STATEMENT

Following the 2006 elections, and in the wake of the Abramoff and Cunningham scandals, Congress decided it had to "do something." Various proposals that had languished for years suddenly were cobbled together into the Honest Leadership and Open Government Act of 2007. With amendments made on the fly and without any committee reports, HLOGA was swiftly enacted. One provision of HLOGA, §207, was described by its sponsors and every other Member who addressed the point as a measure to force disclosure of the interests represented by so-called "stealth coalitions," ad-hoc groups that lobby under names that do not reveal, and may obscure, their membership. That was the only purpose stated for §207.

Unfortunately, haste makes waste. As incredible as it may seem, §207 does not, in fact, compel greater disclosures concerning stealth coalitions than were already required under the LDA. In particular, it does not compel disclosures under the active participation standard. Instead, its substantial new burdens fall heavily on long-established and well-known membership organizations like the NAM. Nothing in the legislative history or the record before the district court showed any need for additional information concerning such groups, much less the peculiar patchwork demanded by §207. Nevertheless, under threat of enhanced civil and criminal penalties, §207 requires the NAM and similar organizations to

use vague and undefined standards to evaluate the intents and degrees of activity of their corporate members and then to publicly disclose certain members' confidential association activities.

The NAM makes no secret that it represents the interests of America's manufacturers, sometimes on highly controversial matters. It proclaims that in its name, and Congress often seeks testimony from the NAM when the perspective of manufacturers is desired. But the membership of the NAM long has been kept confidential as has internal information about member participation – a policy maintained to encourage participation by members who fear that public disclosure of their roles may have adverse repercussions.

The disclosures demanded by §207 will lead the NAM and its members to self-censor, reducing core First Amendment speech, petitioning, and expressive association. That is doubly so because the statute's vagueness and enhanced penalties will force them to steer clear of conduct that, if §207 could be understood with confidence, would not be disclosable. Yet the burdens of §207 cannot be justified, whether under the stringent demands of strict scrutiny applied by the district court or any other First Amendment standard. There is no compelling need for the disclosure of members of groups, like the NAM, that are widely-known. Even if one assumes – without support – a compelling need for disclosure concerning stealth coalitions, §207 does not effectively serve that purpose.

Moreover, it is radically untailored, needlessly burdening long-standing groups when its target is the short-term secrecy of ad-hoc coalitions. Finally, its requirements employ vague and undefined standards – e.g. "active" and "intent" – that are not permitted where core First Amendment rights are at stake.

STATEMENT OF THE CASE

Plaintiff-Appellant NAM filed suit on February 6, 2008, asserting that §207 of HLOGA violated the First Amendment facially and as applied to the NAM and other similar associations. App.1. The NAM simultaneously moved for a preliminary injunction and submitted a supporting Declaration of Jan Sarah Amundson. App.16, 49.

By agreement of the parties, the district court bypassed the preliminary injunction issue and decided the merits on the basis of written submissions by the parties. The only evidence was the NAM's declaration describing it and the burdens §207 would impose on the core First Amendment activities of the NAM and its members. Defendants chose to proffer no evidence. Without dispute, the district court found that the NAM had standing and that its First Amendment claims were ripe. App.82, 85 n.8.

The district court accepted that §207 imposed "substantial[] burdens [on] the core First Amendment rights of the NAM and its members, albeit indirectly." App.88. Accordingly, it purported to subject §207 to strict judicial scrutiny.

App.90. Based largely on speculation, it then concluded that §207 satisfied strict scrutiny and was not vague. Accordingly, it dismissed the Complaint with prejudice. Because the merits are subject to *de novo* review by this court, *see infra* at 21, the district court's analysis is not set out here, but will be noted in the course of the argument.

The NAM immediately moved for an injunction pending appeal. Those motions were denied, but this Court then granted a motion to expedite the appeal.

STATEMENT OF FACTS

This appeal challenges §207 of the HLOGA because of the burdens it imposes upon First Amendment protected speech, petitioning, and expressive association by member-driven groups like the NAM that regularly engage the federal legislative and executive branches on public policy issues.

Parties

Plaintiff-Appellant NAM is a member-driven group. Since 1895, it has been representing American manufacturers in dealing with the federal government. Congress regularly invites it to present manufacturer views. The NAM does not disclose its membership list or internal member activities. This longstanding policy is important to the continued participation of many members and their participation is essential to the NAM's activities.

Defendants-Appellees are federal officers charged with implementing and enforcing §207. The Legislative Defendants receive and publicly disseminate the reports at issue here, review them for compliance, and refer violations to the U.S. Attorney for enforcement, including large civil fines or possible criminal convictions. 2 U.S.C. §§ 1605, 1606.[1]

The Challenged Law

Since 1995, the LDA has required organizations that employ lobbyists to register and make certain public disclosures in filings with the Legislative Defendants. In theory the required disclosures included groups that planned, supervised, or controlled "lobbying activities" of the registrant "in whole or major part." § 1603(b)(3) (1995). However, the term "major part" was understood to exclude situations in which several entities planned, supervised, or controlled App.94-95. Therefore, the requirement had no practical significance for membership organizations in which multiple members participated. *Id.*

Section 207 did not change the groups required to report by the LDA, but it added a requirement that they disclose each quarter any organization (but not any private individual) that "actively participates in the planning, supervision, or control of . . . lobbying activities" and contributes at least $5,000 in funding. §§ 1603(b)(3), 1604(b). The term "actively participates" is not defined at all.

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[1] All citations in the form "§ ___" are to Title 2.

Moreover, it interacts with the term "lobbying activities," which retained the sweeping meaning it was given in the LDA. § 1602(7). "Lobbying activities" includes "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, and coordination with the lobbying activities of others." *Id.* A "lobbying contact" means communicating with Members and employees of the Senate or House of Representatives, § 1602(4), or with thousands of high-level employees or officers of the Executive Branch, § 1602(3), on virtually any subject relating to the government, § 1602(8)(A)(i)-(iv). Thus, §207 directly targets and burdens speech about how we are governed, including specifically speech that petitions the Government for redress of grievances.

Interestingly, §207 required disclosure only of groups that actively participated, not individuals. §§ 1602(13)-(14), 1603(b). Thus, the massively wealthy individuals that are playing an increasing role in national politics may lobby under misleading names with no risk of disclosure. But associations like the NAM, whose members are corporations, are directly targeted.

To determine if a corporate member has actively participated in lobbying activities and must be disclosed, the NAM must evaluate "inten[t] at the time [each activity] is performed." § 1602(7). The law does not say whose intent controls,

nor does it say how that intent is to be determined (e.g., that of the NAM as a whole, of a particular NAM committee, of the individuals involved, or of their corporate employers). The U.S. Attorney asserted below that the relevant intent is that of the corporation whose employee is participating in association activities, and the district court seemed to accept that view. App.113. If so, the statute requires a registrant like the NAM to report the intent, not of itself or even of the individuals with whom it directly interacts, but of the various organizations that employ those individuals. And this must be done with respect to any association activity that may be thought to prepare, plan, or conduct research or other background work for virtually any contact with the federal government, with certain exceptions for testimony, on-the-record rulemakings, and the like. § 1602(8)(B).

Differing perceptions of the intent and activity level of a member can have serious consequences. The new legislation greatly increased the potential penalties. A violation of §207 now can lead to civil penalties of up to $200,000 per violation, as well as a possible criminal conviction. § 1606.

The Purpose of §207

In most respects, the legislative history concerning §207 was remarkably scanty – "pale[]" in the words of the district court. App.96. Still, one thing was crystal clear: §207 was intended to force disclosure of participants in so-called

"stealth coalitions." As Senator Lieberman noted in his remarks describing the original version of what would become HLOGA, the purpose of the disclosure provision was to:

> remove the cloak obscuring so-called stealth lobbying campaigns which occur when a group of individuals, companies, unions, or associations ban [*sic*] together to form a lobbying coalition. These coalitions frequently have innocent-sounding names that give the impression they are promoting positive mom-and-pop, apple pie goals. But, in fact, they lobby on a range of issues that could never be identified by the name of the coalition.

153 Cong. Rec. S260 (daily ed. Jan. 9, 2007).

Similarly, written analysis regarding the final version of HLOGA "endorsed by [its] three principal Senate authors" – Senators Feinstein, Lieberman, and Reid – said that §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 activities.

Id. at S10709 (daily ed. Aug. 2, 2007). The district court collected additional examples, noting that they "abounded throughout the floor debate." App.77-78. No other purpose for §207 was mentioned.

Nowhere in the legislative history is there any congressional judgment that more disclosure is needed by long-established groups like the NAM. Nor is there any judgment that lobbying by such groups tends to corrupt congressional and

executive personnel. Nor is there any demonstrated basis for requiring disclosure as to active groups, but not individuals.

The legislative history contains no discussion of tailoring §207 to its stated purpose. For much of its course through Congress, §207 excluded certain 501(c) groups, but that clause vanished without explanation before enactment.[2] One unanswered question is why §207 should apply to long-standing groups like the NAM. The legislative history does not claim, much less show, that particular stealth coalitions operate or successfully conceal the interests they represent over extended periods. To the contrary, one piece of legislative history emphasized by the district court (at App.73) described stealth coalitions as "ad hoc" groups. Thus, in targeting stealth coalitions, Congress was targeting short-term phenomena.

The Operation of §207

Remarkably, nowhere in the legislative history was any attempt made to explain how §207 would force disclosure of the entities that actively participate in stealth coalitions. Nor is such an explanation possible. To the contrary, §207 continues prior law under which groups must make disclosures only if they employ lobbyists.[3] Thus, coalitions that wish to remain stealth coalitions easily can do so

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[2] *See* H.R. 2316, 110th Cong. § 206 (2007) (as passed by the House). There is no explanation why that less restrictive alternative would not suffice. If 501(c) status is not a suitable discriminator of stealth coalitions, the legislative history does not explain why, much less show, that other tailoring cannot work.

[3] Interestingly, the most commonly-cited example of "stealth lobbying" is the Health Insurance Association of America, which sponsored the "Harry and Louise"

by not employing lobbyists of their own but, instead, relying on lobbyists employed by one or a few coalition members for the direct lobbying contacts. Such a coalition will have absolutely no duty to report or disclose even its own existence, much less the identities of members who fund, "actively participate" in, or even control, its lobbying. App.97-98.

The members whose lobbyists handle the actual contacts will have to report, but they will provide no disclosures concerning the coalition that would not already have been provided under prior law. Those reports will not mention the coalition, its members, or their activities or contributions. They will merely include somewhere in a list of topics lobbied a general reference to the issue of concern to the coalition.[4]

In fact, all the disclosures required under §207 have a patchwork quality:

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ads. *See, e.g.*, Press Release, Office of House Speaker Nancy Pelosi, *Honest Leadership, Open Government, available at*: http://www.speaker.gov/legislation?id=0072 ("Disclosure of stealth lobbying: [§207 c]loses a loophole in current law that permits coalitions – such as the one that funded the extensive 'Harry and Louise' ad campaign that targeted health care legislation in 1993-94 – to avoid disclosing their clients.") (emphasis omitted). But that was not a lobbying group dealing with officials able to ask who it represented. Instead, that group relied on advertising, a one-way form of communication that avoids questions about identity and is not regulated by the challenged provision. Significantly, the interests represented by this group soon became known.

[4] Indeed, it is doubtful that a coalition retaining a lobbyist would be forced to disclose which of its members had actively participated. Where a lobbyist is not an employee, the duty to report lies only on the lobbyist, not the client. § 1603. Nothing in §207 requires a client to make disclosures to its lobbyist. Nor does it appear that a lobbyist could be punished for knowingly failing to report information it could not obtain. § 1606.

- If an association lists ten thousand members and contributors on a web page, the association's report will not inform Congress which of the listed organizations funded or actively participated in the reporting association's lobbying activities, much less which supported which particular initiative. § 1603(b)(3).

- If a single, unidentified association member contributes 100% of the funding for a massive lobbying activity to be carried out by the association's lobbyists but does not "actively participate," Congress will not learn of that member or its funding.

- Similarly, if an association member is extremely active in an association's lobbying effort but does not fund that effort, Congress will not know of that member.

- Indeed, if an association member works intensively for three quarters to plan every detail of an impending lobbying campaign, then funds it in a following calendar quarter while taking no other role that quarter, Congress will not learn of that member. (The same is true if the member provides full funding in Quarter 1 and then works extensively to implement the lobbying project in Quarters 2-4.)

- If one or several wealthy individuals simultaneously fund and actively control a massive lobbying campaign conducted under a misleading name, Congress will not learn about them.

- And, as discussed above, if "stealth coalitions" operate through the lobbyists of one or more members, Congress will not know about the coalition, its membership, or its activities.

Burdens on First Amendment Rights

Although §207 will not compel stealth coalitions to disclose their members, its language is directed to and will directly and substantially burden established membership groups like the NAM as they try to go about their ordinary and wholly legitimate association business. As is explained by the uncontroverted declaration of the NAM's Senior Vice-President and General Counsel, the more than 11,000 corporate members of NAM, whose interests are allied with America's manufacturing sector, participate in a wide range of committees and related activities to advance the NAM's goals. These members are involved in approximately 100 meetings per month and engage in numerous other contacts and activities, including telephone calls, emails, and mailings. Hundreds of the NAM's corporate members make annual contributions that meet the financial prong of the amended Act's disclosure obligations. Some of these members have dozens of

employees who participate in different ways in multiple NAM committees and other activities. App.51-52.

Many of the NAM's activities involve communicating with the federal government to advance and protect member interests and fall within §207's sweeping definition of "lobbying contacts." The NAM has approximately 35 employees that regularly engage in such contacts and the NAM has identified them in filings since adoption of the LDA in 1995. App.52.

As a matter of longstanding policy, the NAM does not make its membership list public, much less publicly identify the list of members active on particular issues (although individual members may elect to publicize their position). Members of the NAM have made clear that this protection is important to their decision to support the NAM financially and through employee activities. The NAM has received many concerned inquiries from members seeking guidance as to which activities will and will not lead to §207 disclosures.[5]

The NAM regularly lobbies on a variety of hot-button issues, including global warming and nuclear power, that may lead to adverse consequences for

[5] App.54. As a result of the district court's ruling, the NAM was forced to disclose 65 member companies in its first report under §207, making its best guess as to who the provision covers. Many of those companies have informed the NAM of their disappointment and concern at being identified. Similar issues will arise as the second quarter reporting deadline, July 21, approaches.

members publicly identified as "actively participat[ing]" in such efforts.[6] The evidence is undisputed that taking policy positions that are unpopular with some groups may lead to boycotts, shareholder suits, demands for political contributions or support, and other forms of harassment.[7]

In addition, experience has shown that publicly linking an NAM member to the association's lobbying activities often results in legislators and other policy-influencing groups making burdensome demands for contributions and other support from individual members. The NAM frequently receives requests from legislators and others to identify its membership, and it always refuses. App.54.

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[6] App.53-54. For example, there has been mob violence directed at firms targeted by anti-globalization forces and the more extreme advocates of global warming. *See, e.g.*, David Rising, *Clashes Break Out Ahead of Summit*, Associated Press, June 3, 2007. Prominence on labor issues can have well-understood repercussions. *See e.g.*, *IBEW, Local 1547 v. Alaska Util. Constr., Inc.*, 976 P.2d 852, 859 (Alaska 1999) (describing "ongoing acts of intimidation, violence, [and] destruction of property" by union members in labor dispute). Firms that are identified as actively lobbying on issues related to on-going litigation risk becoming litigation targets. *See, e.g.*, Peter Geier, *Sea Change in Asbestos Torts is Here; New Strategies, New Defendants Seen*, National Law Journal, Oct. 31, 2005.

[7] App.53-54. *See, e.g.*, Robert Pear, *Doctors in Antitrust Fight Boycott Merck Products*, New York Times, May 23, 2000 (corporation forced to "distanc[e] itself from a coalition that opposes [antitrust] legislation" after the company was "'inadvertently listed' as a member of the coalition"); Harry Stoffer, *Toyota Joins Detroit 3 in CAFE Fight*, Automotive News, July 30, 2007 (noting environmental groups' criticism of Toyota for supporting lobbying efforts of automobile manufacturing coalition); Jim Lobe, *ExxonMobil Takes Heat on Global Warming*, Inter Press Service News Agency, July 12, 2005, *available at* http://www.ipsnews.net/print.asp?idnews=29469 (last visited Feb. 4, 2008) (describing boycott of corporation's products for "undermining efforts to combat global warming and lobbying Congress to open the Artic National Wildlife Refuge . . . to drilling").

The NAM has no established systems for monitoring and analyzing the information demanded by §207, and attempting to create those systems will be both expensive and disruptive and will divert resources from core First Amendment activities.[8] Moreover, no matter how careful the NAM tries to be, the vagueness of §207 and the complex circumstances to which those vague terms must be applied, mean that §207 disclosures inevitably will be misleading. Members of the NAM are not always of one mind. For example, a member's employees may have participated in a committee in an unsuccessful attempt to move the NAM's lobbying in a different direction. Disclosing the names of members who sought to give a different shape to the NAM's lobbying efforts is unfair to these members and could actually mislead legislators, executive branch officials, and the general public. *Id.*

Because §207 is so vague and broad, the NAM is not able to provide clear, advance guidance to its members as to what activities will or will not lead to public disclosure. App.54-55. Since a violation of the new law may have serious consequences to the NAM, there is strong pressure for the NAM to over-report, thus increasing the risk to participating members of being the target for a wide range of adverse actions, as described above. The only way that the NAM's

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[8] App.60. Of course, the NAM did its best in the initial compliance effort made necessary by the district court's ruling. But that took days of effort by senior NAM personnel.

members confidently can protect themselves is to avoid any activities that, on the broadest possible reading, might be thought to require disclosure. In short, they must hedge, trim, and steer clear of possible risk, foregoing the full exercise of their First Amendment rights and impairing those of the NAM.

At the same time, the NAM finds itself competing at a disadvantage against so-called stealth coalitions that, because they rely on their participating members' lobbyists rather than hiring their own, are not required to register and file disclosure reports. App.58-59. Similarly, a coalition funded by wealthy individuals is not required to disclose the identities of its donors and decision-makers, even though such a coalition may expend millions of dollars attempting to influence public policy.[9] Requiring the NAM to disclose its active members – while imposing no such obligation on competing groups – puts its First Amendment activities at a needless disadvantage.

SUMMARY OF ARGUMENT

Section 207 directly targets and burdens three core First Amendment rights: (i) speech among NAM members and to government officers and employees about how we are governed, (ii) petitioning the government, and (iii) associating for purposes of effective speech and petitioning. The burdens it imposes are

[9] *See, e.g.*, William Luneberg and Thomas Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. Legis. 32, 47 (2006) (noting $760,000 campaign by "stealth coalition" funded by individuals seeking tax breaks).

substantial. Thus, the First Amendment command that Congress must make "no law" impairing these rights squarely applies to §207.

Defendants argued, and the district court held, that the First Amendment's command is outweighed by necessity. To sustain such a claim, Defendants must satisfy strict judicial scrutiny. They cannot satisfy strict scrutiny, or any other First Amendment standard, for each of the following reasons:

- **Section 207 does not effectively advance any compelling interest.** No legislative judgment or record evidence shows any need to regulate long-standing organizations like the NAM. Instead, the stated purpose of §207 was to force disclosures by stealth coalitions. Even if forcing disclosure concerning "stealth coalitions" is a compelling interest – a doubtful proposition at best – the provision simply does not serve this purpose. Like prior law, §207 requires disclosures only from entities that actually hire lobbyists. Thus, stealth coalitions can avoid any reporting by the simple and common expedient of relying on the lobbyists of one or two members to make actual lobbying contacts. As under prior law, those members must file reports, but they will not disclose anything more than prior law already required. Although groups like the NAM will provide some more disclosure concerning their own confidential associational

activities, Congress never claimed a need for that information. And there is no compelling reason for Congress to demand that only associations funded by corporations or other organizations open their membership lists to disclose active members.

- **Section 207 is not tailored.** Stealth coalitions exist and preserve their stealthiness for only a short time. No evidence or legislative history shows such groups can conceal the interests they represent through even one term of Congress, much less indefinitely. Nor is there any showing that limiting the new burdens of §207 to relatively new groups, e.g., those that have not been registered lobbyists for the last two or three years, would not satisfy Congress' concerns. The district court's unsupported (and implausible) speculation that stealth coalitions might usurp the identities of established groups does not meet the Defendants' heavy burden of proof.
- **Section 207 is vague.** When a statute threatens punishment for excessive engagement in core First Amendment rights, precise legal standards are necessary to prevent self-censorship and arbitrary enforcement. Section 207 does not provide such precise standards. For example, membership groups now must evaluate, on pain of serious penalty, both the subjective "intent" and "activeness" level of

> corporate members whose employees participate in a wide range of association activities (e.g., research) that may be thought to relate to possible contacts with congressional and executive personnel. Similarly, members of the NAM who do not want to be disclosed must avoid any activities that might, cumulatively, lead the NAM to decide that they have met the vague intent and activeness standards of §207. Precedent recognizes that intent is too vague a standard to be put to such use, and nothing justifies a different conclusion here. Contrary to the district court's speculation, assessing the intent of member corporations is not a uniquely easy and objective exercise. Whether conduct is "active" poses similar vagueness problems, and the Supreme Court has approved such a test only where abundant clarification was available. These judgments cannot be made with the confidence necessary to prevent hedging and trimming to avoid risk.

The district court suggested that, because §207 was one part of a complex bill, it somehow is insulated from stringent First Amendment scrutiny. App.96. To the contrary, the likelihood that a provision burdening core First Amendment rights may not have received detailed legislative analysis requires that review be even more demanding. The district court further suggested that deference was owed to a "thoughtful and careful effort . . . over a lengthy course of time." *Id.*

(internal quotation omitted). Here, however, we have more than a decade with no legislation, followed by a hasty enactment of a cobbled-together bill revised on the fly. Moreover, the First Amendment calls on the court to assure that passing political currents and passions do not erode our foundational liberties. Section 207 is not justified and must be struck down facially and as-applied to established membership organizations like the NAM.

ARGUMENT

I. REVIEW IS *DE NOVO.*

The district court resolved no disputed evidentiary issues and ruled on the dispositive First Amendment issues as a matter of law. This Court reviews *de novo* all rulings of law, and that principle is applied broadly in First Amendment matters. *See United States v. Popa*, 187 F.3d 672, 674-75 (D.C. Cir. 1999); *United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992). Review of First Amendment rulings is searching and extends to all aspects: the Court is "obliged in the end to *review* the government's policy – both the judgment of law that the policy is constitutional and the findings of fact that underlie it. . . . While [courts] do not ignore Congress' [findings], it is ultimately the judiciary's task . . . to decide whether Congress has violated the Constitution." *Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992) (emphasis in original) (internal quotations omitted).

Here, since Congress stated no findings of fact, review turns on the facts proved in the record below.

II. DEFENDANTS BEAR A HEAVY BURDEN OF JUSTIFICATION, AS THE DISTRICT COURT CORRECTLY RECOGNIZED.

"Defendants do not dispute the NAM's claim that § 207 implicates the First Amendment rights of the NAM and its members . . . ." App.85. Nor do they dispute that, as a result, §207 is subjected to heightened scrutiny. Although Defendants suggested some lesser standard, the district court was correct to apply strict scrutiny. App.89-90.

A. CORE FIRST AMENDMENT RIGHTS ARE AT STAKE.

The district court recognized that "at least three First Amendment freedoms – speech, petition, and association – are implicated by § 207 . . . ." App.88. When exercised in a way that triggers §207, each of those rights lies at the very core of the First Amendment's intended protection.

"[A] major purpose of [the First] Amendment is to protect the free discussion of governmental affairs." App.87 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978)). Section 207 directly regulates speech to legislative and high executive officials about governmental policy. §§ 1602, 1603. It also burdens internal discussion of whether, when, and how to address such topics and officials. *Id.* That is core speech.

Speech asking the government for action is a direct exercise of the specific First Amendment right to "petition the Government." "[E]very person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition." *Liberty Lobby, Inc. v. Person,* 390 F.2d 489, 491 (D.C. Cir. 1968). The First Amendment's specific protection of this particular activity – not just the speech aspect but everything encompassed in petitioning – demonstrates that it lies at the Amendment's core.[10] Section 207 expressly targets and burdens petitioning of a wide range of executive as well as legislative officers and employees on a broad range of subjects that encompasses virtually all petitioning.

The First Amendment also centrally protects "expressive association," i.e., "associat[ing] for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances . . . ." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). When any of these rights are exercised for public policy purposes, the First Amendment's protection is "at its

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[10] In *Regan v. Taxation With Representation of Washington*, the Court assumed an organization had a First Amendment right to lobby, and the three-justice concurrence expressly stated that "lobbying is protected by the First Amendment." 461 U.S. 540, 552 (1983) (Blackmun, J., concurring). *See also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) (lobbying "activities . . . enjoy First Amendment protection"); *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1056 n.5 (9th Cir. 2000) (the First Amendment protects "lobbying by corporations") (collecting authority). In *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, an association of hospitals had a First Amendment right to associate for purposes of exercising the rights of speech and petition – "expressive association." No. 05-2164, 2007 WL 852521, at *2 (D. Kan. Mar. 16, 2007).

zenith." *Barker v. Wis. Ethics Bd.*, 841 F. Supp. 255, 258 (W.D. Wis. 1993) (internal citations and quotations omitted) (collecting authority). The active participation of NAM members in association matters relating to core speech and petitioning §207 targets is expressive association in a pure form.

These core rights protect both individuals and "groups with common interests," including groups of business corporations, who associate "to advocate their causes and points of view respecting resolution of their business and economic interests . . . ." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (protecting rights of a group of trucking interests). *See also Bellotti*, 435 U.S. at 776-77 (the First Amendment protects corporate speech on public policy issues); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (construing antitrust laws narrowly to preserve the right of an association of railroads to petition the government).[11]

Strikingly, although Congress gave the First Amendment no apparent weight in enacting §207, the LDA that §207 amended explicitly recognized that disclosure concerning lobbying threatens First Amendment rights. § 1607. The district court was correct to recognize that core First Amendment rights are at stake here.

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[11] In other contexts, courts have acknowledged that the impairment of a lobbying association's privacy interests in a way that would have "a chilling effect on members" infringes upon the First Amendment and can only be overcome by a tailored showing of necessity. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 460-64 (1958); *FEC v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389-90 (D.C. Cir. 1981); *Heartland Surgical Specialty Hosp.*, 2007 WL 852521, at *4, *6.

B. BECAUSE §207 IMPOSES SUBSTANTIAL BURDENS ON THOSE CORE RIGHTS, STRICT JUDICIAL SCRUTINY APPLIES.

Core First Amendment rights are protected "against both heavy-handed frontal attacks [and] from being stifled by more subtle governmental interference . . . ." *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 367 n.5 (1988) (internal quotation omitted). Where a burden on core rights is either direct or substantial, the legislation is invalid unless the demands of strict scrutiny are met. *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) ("*WRTL II*") ("Because [the challenged statute] burdens political speech, it is subject to strict scrutiny")[12]; *ACLU of N. J. v. N. J. Election Law Enforcement Comm'n*, 509 F. Supp. 1123, 1129 (D.N.J. 1981) (statute requiring lobbying groups' disclosures must be justified by a "compelling" interest and employ the "least restrictive means"); *Citizens Energy Coalition of Ind., Inc. v. Sendak*, 459 F. Supp. 248, 258 (D. Ind. 1978) ("Substantial infringements of the right to lobby must be justified by a compelling state interest and said intent must be effectuated in that manner which least restricts lobbying.").[13] The burdens here are both substantial and direct.

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[12] All citations herein are to the controlling opinion of Chief Justice Roberts and Justice Alito, which functions as the opinion of the Court. *See Marks v. United States*, 430 U.S. 188, 192-93 (1977).

[13] Strict scrutiny also is required because §207 is a content-based restriction on speech. Only speech on certain topics to certain listeners constitutes "lobbying contacts" and, hence, triggers disclosure obligations. *See* § 1602(8). Because this

The district court correctly deemed itself compelled to accept that §207 "substantially burdens the core First Amendment rights of the NAM and its members . . . ." App.88. Indeed, the NAM's uncontested evidence demonstrates that the disclosures mandated by §207 will discourage and deter speech, petitioning, and expressive association. App.54-55, 59-62.

Compelled disclosure of otherwise private information concerning the exercise of core First Amendment rights that has the potential to discourage or deter their exercise is a substantial burden. *AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003); *Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986). This was made crystal clear in *Buckley v. Valeo*, which held that mandatory disclosure of contributions and expenditures substantially burdened core rights and required strict and exacting scrutiny. 424 U.S. 1, 64-68 (1976). No Defendant below attempted to show that the burdens here were less substantial than those that triggered strict scrutiny in *Buckley*.

No evidence of specific and dramatic injury is necessary to show that compelled disclosure constitutes a substantial burden. As this court has explained,

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content distinction limits core speech, there is no need to also show viewpoint discrimination. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1995) (finding that a campaign-related disclaimer statement "was a direct regulation of the content of speech" even though it "applies evenhandedly to advocates of differing viewpoints"). But if there were, since the statute selectively burdens corporations but not individuals – who need not be disclosed no matter how much they spend and how much they support lobbying – viewpoint discrimination exists.

Buckley applied strict scrutiny based on general burdens of disclosure, and then said that proof of specific and concrete injury still might block the application of a facially valid statute. *See AFL-CIO*, 333 F.3d at 176. Similarly, the Eighth and Ninth Circuits have applied strict scrutiny based on the general burden of disclosure.[14] It may be that, where a disclosure regime only incidentally and occasionally affects core First Amendment rights, a showing of specific threats is important to an as-applied challenge. But where, as here, core First Amendment activity is the target of disclosure, the burden is substantial.

Moreover, contrary to the district court's view (at App.88), the burden here is direct. This is not a case in which regulations aimed at unprotected conduct have a secondary effect on core rights. To the contrary, §207 is explicit in targeting internal association activity and core speech and petitioning of the government.[15] For this reason as well, strict scrutiny applies.

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[14] *See Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005) (applying strict scrutiny to a lobbying-related disclosure statute notwithstanding a lack of "extreme hardship"); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (applying strict scrutiny to a campaign finance disclosure statute because "the Court has repeatedly held that any regulation severely burdening political speech must be narrowly tailored to advance a compelling state interest") (collecting authority).

[15] Section 207 also directly attacks the First Amendment right of anonymous speech. *See McIntyre,* 514 U.S. at 342-43. The district court questioned whether this right extends to corporations, suggesting they lacked the necessary privacy interests, but concluded the question did not need to be decided since the other substantial burdens already were sufficient to demand strict scrutiny. *See* App.88 n.9 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). However, "the right to privacy (or anonymity) in the dissemination of ideas . . . arguably extends to dissemination by associations . . . as well as by individuals." *Block*, 793 F.2d at 1317.

C. EXACTING SCRUTINY IS STRICT SCRUTINY.

Defendants argued below that some precedent spoke of "exacting" scrutiny of the disclosure requirements at issue, and that such a standard was less demanding than strict scrutiny. App.85-86.[16] However, as the district court recognized and as the words suggest, the Supreme Court has held that "exacting" and "strict" judicial review "are one and the same" in the context of burdens on core First Amendment rights. App.89 (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)). Under "exacting scrutiny" a restriction must be narrowly tailored to serve an overriding or compelling state interest. *See McIntyre*, 514 U.S. at 347 (citing *Bellotti*, 435 U.S. at 786) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."). *See also Buckley*, 424 U.S. at 64-68; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005) ("compelled disclosure" of non-commercial speech is "subject to exacting First Amendment scrutiny" and requires the government "to advance a compelling state interest" and show narrow tailoring) (internal citations and quotation omitted).

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[16] The U.S. Attorney asserted that *United States v. Harriss*, 347 U.S. 612 (1954) set a different and lower standard. App.86. As the district court correctly observed, however, *Harriss* does not even mention or discuss the applicable standard of review. App.87.

D. STRICT SCRUTINY IS EXTREMELY DEMANDING.

To overcome the presumption of invalidity that attaches to a statute analyzed under the strict scrutiny test, the Government must prove that the answer is "yes" to each of the following questions:

> (1) whether the interests the government proffers in support of [§207] are properly characterized as 'compelling'; (2) whether [§207] effectively advances those interests, i.e., whether [Defendants have] shown that the ills [they claim §207] addresses in fact exist and [§207] will materially reduce them; and (3) whether [§207] is narrowly tailored to advance the compelling interests asserted, i.e., whether less restrictive alternatives to [§207] would accomplish the government's goals equally or almost equally effectively . . . .

App.90 (quoting *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995)).

As these factors illustrate, strict scrutiny reverses the normal presumption of validity, placing the "heavy burden of justification" on the government rather than the complainant. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). *See also WRTL II*, 127 S. Ct. at 2664 ("the *Government* must prove" strict scrutiny is satisfied) (emphasis in original); *Doe*, 968 F.2d at 90 (the government bears the burden in a First Amendment challenge). This burden must be met both as to the statute on its face and as to its application in the particular case. *WRTL II*, 127 S. Ct. at 2664.[17]

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[17] Indeed, even where a lesser standard of scrutiny applies, the trenchant language of the First Amendment places on the Government the burden of persuasively justifying any burden on the rights it protects. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (under the limited protection given purely commercial speech, "[t]he burden is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a

When core First Amendment rights are burdened, the "precision" with which the legislature must fashion its laws also is much higher than is generally demanded by due process, and that is particularly true where, as here, civil and criminal punishments are threatened. *See Buckley*, 424 U.S. at 40-41. Ordinary due process is satisfied by providing reasonable persons fair notice of a legal rule, so they can steer clear. *Trans Union Corp. v. FTC*, 245 F.3d 809, 817 (D.C. Cir. 2001). But core First Amendment rights are too precious to diminish them by the need to hedge, trim, and steer clear of possible legal risk. *Buckley*, 424 U.S. at 41-43 (internal citations and quotations omitted); *WRTL II*, 127 S. Ct. at 2665-66. Moreover, they cannot be subjected to possible arbitrary construction by enforcement authorities. *See Reno v. ACLU*, 521 U.S. 844, 870-72 (1997). An objective, bright line is required. *WRTL II*, 127 S. Ct. at 2666-67.

In sum, when the Government relies on a claim of necessity to justify enacting a law that contravenes both the text and the core purposes of the First Amendment, it must carry an extremely heavy and stringent burden.

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restriction . . . must demonstrate that the harms it recites are real and that its restriction will, in fact, alleviate them to a material degree") (internal quotations omitted).

III. SECTION 207 IS INVALID.

Although the district court paid lip service to strict scrutiny, it did not insist on the exacting showing that standard demands. For multiple reasons, §207 fails strict scrutiny and, indeed, any standard of First Amendment review.

A. THE JUSTIFYING INTERESTS IDENTIFIED BY THE DISTRICT COURT LACK SUPPORT AND ARE DOUBTFUL AT BEST.

Congress made no findings of a compelling need to regulate stealth coalitions, let alone common trade associations.[18] All the legislative record contains are mere conclusory assertions of Members. That, of course, will not do. Congress "must base its conclusions upon substantial evidence" when First Amendment rights are at stake. *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180, 196 (1997) (emphasis added). "[C]onclusory statements during the debates" will not suffice where the congressional record "contains no evidence as to how effective or ineffective" existing law may be. *Sable Commc'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 128-30 (1989) (emphasis in original). But ultimately that

[18] In enacting §207, the 110th Congress did not set out any "findings of fact" justifying the need for the increased disclosures as it had done in 1995. *See* LDA, § 2 (codified at § 1601(2)) ("find[ing] that . . . existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose"). In another case involving core First Amendment speech, *McConnell v. FEC*, a massive evidentiary record was offered to defend the facial validity of the provisions challenged there. 540 U.S. 93, 129-132 (2003) (citing "a six-volume report summarizing the results of an extensive investigation"). The court stressed the importance of that record. *Id.* at 132. By contrast, no such evidence is offered here.

issue is moot since, as shown below (at 35), §207 does nothing to meet such an interest even if it exists and is compelling.

Unable to find that §207 effectively achieves its stated purpose of forcing disclosures by stealth coalitions, the district court reasoned (at App.92-93) that (a) §207 will produce at least some additional disclosure as to who has a role in lobbying by established groups like the NAM, and (b) a "vital national interest" in such disclosures was recognized by *Harriss*, 347 U.S. at 625-26. But *Harriss* was decided very narrowly and cannot be read to find a compelling interest (or any interest) in the very different disclosures mandated by §207.

Harriss began with a draconian narrowing of the disclosure provisions Congress had enacted. Applying ordinary "due process" vagueness standards, it limited the entire statute to funding for "direct communication with members of Congress on pending or proposed legislation." *Id.* at 617, 620. It further limited the Act to persons who actually "solicited, collected, or received contributions" to finance such direct communications. *Id.* at 623. Explaining that "individual members of Congress cannot be expected to explore" their contacts, *Harriss* concluded that Congress could require disclosure of "who is being hired, who is putting up the money, and how much." *Id.* at 625. Thus, "within the bounds" imposed, *Harriss* concluded the statute was "restricted to its appropriate end," and was a permissible way to "safeguard a vital national interest." *Id.* at 625-26.

By contrast, §207 applies to communications with a vastly broader array of persons, including virtually all employees of Congress, plus a great many executive personnel. § 1602(3)-(4). In addition, §207 applies to communications on a wide range of subjects far distant from specific legislative proposals. § 1602(8)(A)(ii)-(iv). Finally, the disclosures demanded by §207 reach far beyond sources of money to include, on a patchwork basis, information on the activity levels of some association members on projects with some relation to a broadly defined "lobbying contact." § 1603(b)(3). The narrowly written *Harriss* decision does not justify these demands, and *Harriss* must be applied with caution since, as the district court recognized, it was decided before present First Amendment standards of review developed. App.87.

Moreover, as noted above, §207 calls for a peculiar patchwork of overinclusive and underinclusive disclosures. This cuts strongly against the notion that Congress perceived a compelling need for additional general disclosure concerning all lobbying groups.

The district court said that the need for disclosure from stealth coalitions was compelling because there was a "loophole" in the LDA that gave rise to an "appearance of corruption." App.97. Significantly, *WRTL II* discounts such an interest outside the context of candidate elections. 127 S. Ct. at 2672-73 ("there is a vast difference between lobbying . . . on the one hand, and political campaigns

for election to public office on the other"), 2672 ("a prophylaxis-upon-prophylaxis approach to regulating expression is inconsistent with strict scrutiny") (internal quotation omitted).[19] Congress made no findings that lobbying is or appears corruptive, nor is such a finding plausible outside the campaign finance context.

Moreover, the need to avoid "loopholes" in the LDA cannot be more compelling than the need for the LDA. No court ever has found a compelling need for the LDA, nor was such a showing made here. Certainly, the fact that Congress enacted the LDA to regulate lobbying does not, in itself, establish a compelling interest. Congress is the body the First Amendment most urgently seeks to restrain. In contrast to most of the Bill of Rights, which merely proclaim protected interests, the First Amendment specifies that "Congress shall make no law." The mere fact that Congress enacted the LDA burdening First Amendment rights is a prima facie basis for striking it down, not a basis for finding it necessary to serve a compelling purpose.

The district court suggested that the absence of a judicial challenge to the LDA shows it met a compelling need. App.96. However, the district court

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[19] The district court even goes so far as to suggest that once Congress chooses to regulate lobbying by establishing a system of disclosure requirements, it is not bound by any particular standards and can impose new disclosure obligations – over a decade later – without any independent justification. *See* App.96-97. But that is not the way the demanding standards of the First Amendment are applied. If Congress wants to impose new constraints on core First Amendment rights, it may do so only by independently demonstrating a vital need for the new restrictions.

otherwise recognized that the LDA did not force disclosures by stealth coalitions, and that other membership associations incurred limited burdens. App.97-101, 104. Congress cannot bootstrap itself past strict scrutiny by enacting a law that has limited practical effect, waiting a decade, and then enacting onerous "loophole closing" provisions.

In this case, the NAM did not seek to overturn *Harriss*. But *Harriss* merely allowed Congress power to require limited disclosures about direct lobbying of Members concerning proposed legislation. *Harriss* does not establish, or even suggest, a compelling need for any broader disclosure. Certainly *Harriss* does not establish a compelling need for more disclosure than the LDA mandated. Since the asserted need to go beyond the LDA to compel disclosures about stealth coalitions is not supported by substantial evidence, either in the legislative history of §207 or in the record of this case, the existence of any compelling interest here is doubtful at best.

B. THERE IS NO SHOWING THAT §207 EFFECTIVELY ADVANCES ITS SUPPOSED JUSTIFYING INTERESTS.

"Even when a compelling interest exists, if the statute protects that interest by a needless infringement of First Amendment rights, it must be struck down." *United States v. Boyle*, 482 F.2d 755, 763 (D.C. Cir. 1973). In addition to proving a compelling interest, the government also must prove that imposing new burdens "effectively advances" that interest. *Blount,* 61 F.3d at 944 (collecting authority).

See Shaw v. Hunt, 517 U.S. 899, 915 (1996) (the burdening legislation must "substantially address, if not achieve, the avowed purpose"); *ACLU v. Ashcroft,* 322 F.3d 240, 265 (3d Cir. 2003) ("the benefit gained must outweigh the loss of constitutionally protected rights") (internal quotation omitted), *aff'd* 542 U.S. 656 (2004). No such showing has been or could be made here.

The simple fact is that §207 compels no greater disclosure with respect to active participation or stealth coalitions than was already required by the LDA. As previously discussed (at 11), a coalition that wishes to lobby on a stealth basis easily can do so simply by relying on lobbyists employed by one or two members to make the actual lobbying contacts. Under §207, as was true under the LDA, those members will not be required to disclose anything about the existence or membership of the stealth coalition. The employers will have to include a reference to the issue in its list of lobbied subjects, but that already was required under the 1995 LDA.[20]

Defendants did not question this basic point, nor could they. Nor did the district court. Instead, it said that the reports required by §207 would (a) provide some additional general information about the internal activities of non-stealth groups, (b) prevent stealth coalitions from circumventing the law by usurping the

[20] The district court suggested that this disclosure would substantially alleviate concern over any "stealth." App.98. If so, then the additional burdens flowing from identifying those who "actively participated" cannot be justified.

identities of established groups like the NAM, and (c) reduce a perception of corruption. App.97, 102-104. This will not do.

As discussed above, there is no evidence of any need for more information about ordinary, non-stealth lobbying groups like the NAM. Certainly there is nothing to suggest a congressional need for more knowledge as to how active particular members are within established membership associations. Unless the sponsors of §207 were engaged in a massive campaign of disinformation – and there is no reason to believe that – the need they perceived was to compel disclosures by stealth coalitions. The provision simply fails to advance that interest.

The district court's theory that §207 prevents stealth coalitions from circumventing the law via usurpation of the identity of established groups is untenable. Because neither the LDA nor §207 compels stealth coalitions to make disclosures, they have no need to circumvent. Moreover, there is no evidence of a problem with stealth coalitions usurping the identities of established organizations, nor does the legislative history reveal even conclusory assertions that such a problem might exist.[21] This is mere speculation, and implausible at that, since there is no indication that established groups will acquiesce in such a usurpation.

[21] Note that, for types of review more stringent than rational basis, a court may not "supplant the precise interests put forward by the [government] with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

Moreover, there is no evidence that §207 will effectively reduce any perception of corruption – even if such a perception existed and the need to abate it were compelling in this context. This is not a campaign finance matter in which vulnerable candidates may be seen as seeking a corrupt *quid pro quo*. If anything, enacting and retaining a provision for the proclaimed purpose of compelling disclosures by stealth coalitions when, in fact, it will have no such effect is more likely to create than eliminate a perception of corruption.

Finally, even if compelling interests exist in the abstract – a doubtful proposition and certainly not one that has been established – and even if §207 did a little bit to serve those interests, this would not suffice. The government must prove that §207 substantially and effectively alleviates the problem. No such showing has been made. Thus, its burdens on core First Amendment rights are not justified, and it must be struck down.

C. THE GOVERNMENT HAS NOT SHOWN THAT §207 IS TAILORED.

A statute that does not effectively serve its supposed justifying interest can hardly be deemed narrowly tailored. But §207 is untailored for another reason as well: the Government has failed to negate plausible less restrictive alternatives. Importantly, this is the Government's burden of proof. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) ("the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute"); *United States v.*

Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered, . . . it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

Nothing in the legislative history or the record suggests that stealth coalitions remain stealthy over the long term. In fact, such a finding would be contrary to common experience. Once a group takes an active lobbying role, it develops opponents and an interested press. Soon the basic interests represented are known, even if a full list of members is not. Indeed, the district court stressed legislative history making explicit that stealth coalitions are "ad hoc lobbying coalitions." App.73 (quoting H.R. Rep. No. 104-339, pt. 1, at 18 (1995)).[22]

This raises an obvious question – why burden groups that have been registered as lobbyists for years in an effort to force disclosures from short term, ad-hoc entities? Is it really impossible to target stealth coalitions more precisely? For example, what evidence is there that a statute applicable only to groups that have not been registered as lobbyists in the last two or three years would not be sufficient?

Neither the legislative history nor the record answers these questions. As noted above, (at 37), the district court speculated (at App.102) that a requirement directed at newer entities might permit stealth coalitions to circumvent disclosure

[22] This actually is legislative history of the 1995 LDA. But nothing suggests stealth coalitions lost their ad-hoc character after 1995.

via the usurpation of the identities of established groups, but (a) stealth coalitions are not compelled to disclose, and (b) speculation will not do. Moreover, it is implausible to think that established groups would allow such usurpation.

The Government's failure to prove that less restrictive alternatives are not available is another independent reason §207 is invalid.[23]

IV. SECTION 207 IS VAGUE.

Section 207 requires the NAM, on pain of serious punishment, to predict whether future enforcers will judge that a member corporation "actively" participated, based on conduct that was "intended," at the time, to support lobbying contacts. When core First Amendment rights may be chilled or deterred, such vague statements will not do.

A. THE FIRST AMENDMENT DEMANDS MUCH GREATER PRECISION THAN DOES THE DUE PROCESS "ORDINARY INTELLIGENCE" TEST.

Due process ordinarily is satisfied if a statute provides fair notice to reasonable persons of a potential risk they should avoid. *Trans Union Corp.*, 245

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[23] As an afterthought, in denying an injunction pending appeal, the district court suggested that the NAM itself may be a stealth coalition because its detailed membership is not known. App.130. There is no support, however, for giving such a strained reading to the term "stealth coalition." The legislative history spoke of "ad hoc" groups created for specific purposes. App.73. No Defendant asserted below that the NAM or other long-established groups are "stealth coalitions." A search of Westlaw's ALLNEWS database shows that, over the last 10 years, the NAM has been referenced more than 10,000 times, but the terms "stealth coalition" or "stealth association" have never been applied to it. Moreover, the patchwork quality of the information sought by §207 refutes any idea that Congress needs to know a group's specific membership.

F.3d at 817. At the outset of its discussion on vagueness, the district court correctly acknowledged a point it later forgot – that "an even greater degree of specificity is required" where "First Amendment rights are involved." App.110 (internal citations and quotations omitted). *See also NAACP v. Button*, 371 U.S. 415, 432 (1963) (collecting authority); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) ("These standards are especially stringent and an even greater degree of specificity is required, where . . . the exercise of First Amendment rights may be chilled by a law of uncertain meaning."). This increased level of precision is particularly important where the exercise of First Amendment rights may lead to punishment. *See* § 1606 (providing for criminal and civil penalties under the LDA); *Buckley*, 424 U.S. at 40-41.

The necessary degree of precision is demonstrated by the Supreme Court's analysis in *Buckley*, which imposed an "express advocacy" construction to save an otherwise vague statute. 424 U.S. at 43-46. The Court stressed that society cannot afford to have speakers hedge, trim, and steer clear of protected core First Amendment activity. *Id.* at 41 n.48, 43 (internal quotations omitted). Thus *Buckley* rejected half-measures. It said that the D.C. Circuit had moved in the right direction by narrowing the statute to apply only to speech "advocating the election or defeat" of a candidate, but held that standard still did not cure the vagueness because it turned on judgments as to which there could be disagreement. *Id.* at 42.

Instead, *Buckley* demanded an objective, bright line. *Id.* at 42-44 ("explicit" words such as "vote for" or similar examples that "expressly advocate" the election or defeat of a clearly identified candidate). *See also Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (noting that *Buckley* and *McConnell* require "precise" standards that do not "render[] the scope of the statute uncertain"). Because §207 threatens serious punishment for those engaged in core First Amendment rights, it too must provide an objective and precise standard that will eliminate any need to hedge, trim, and steer clear.

B. "INTENT" IS VAGUE.

Of course, intent is an element in many ordinary statutes.[24] But the Supreme Court has stressed that intent is too vague a concept to employ where core First Amendment rights may be deterred. *Buckley*, 424 U.S. at 43-44; *WRTL II*, 127 S. Ct. at 2665-66.[25] As *Buckley* explained:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the

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[24] *See, e.g., Ward v. Utah*, 398 F.3d 1239, 1249-54 (10th Cir. 2005) (statute "aimed at conduct unprotected by the First Amendment" required a disorderly person to act "with the intent to intimidate").

[25] Although *Harriss* used "purpose" as an element, it did so to satisfy basic due process, seeking to make the statute there as clear as ordinary criminal laws. 347 U.S. at 617-18. The Court did not address the heightened clarity that current law demands of First Amendment regulation.

> speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). That point recently was reiterated:

> A test turning on the intent of the speaker does not remotely fit the bill. . . .
>
> An intent-based standard blankets with uncertainty whatever may be said, and offers no security for free discussion. . . . [A]t a minimum, it would invite costly, fact-dependent litigation. . . .
>
> [An intent test] would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

WRTL II, 127 S. Ct. 2652, 2665-66 (emphasis added) (internal quotations omitted). Significantly, the precision of "intent" was not a close question turning on specific details but rather it did "not remotely fit" the First Amendment's demands. *Id.*

The intent standard here is further clouded because §207 does not even make clear whose intent controls – that of the NAM, a working committee, the involved individuals, or each individual's employer. The U.S. Attorney and the district court asserted, but hardly proved, that "the relevant intent is that of the affiliate." App.113. If that is so, then the NAM must correctly assess, not its own intent, but that of a large number of other organizations. Such organizational intent is a particularly elusive concept. *See, e.g., Perry v. Bartlett*, 231 F.3d 155, 161 (4th Cir. 2000) ("discerning the 'intent' of an organization . . . can be problematic, even

if some in the organization 'admit' their intent"); *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 485 (3d Cir. 1987) ("intentions are always difficult to discern, especially when we deal not with the intentions of individuals but of organizations"). Moreover, the NAM must assess the employer's intent at a specific moment – when each act by each employer is taken.

The district court sought to distinguish *WRTL II*, saying that the NAM and similar organizations would have more objective evidence of member intent in participating in association activities than a political speaker would have of its intent in creating and running an ad. App.111-113. But why is that so? One who creates a political ad will have solicited funds, created and revised drafts, exchanged memos, and perhaps even employed focus groups, generating a host of records. Moreover, the ad often will be disseminated at a particular time and to a particular group of potential voters. The point of *Buckley* and *WRTL II* was not that objective evidence would be lacking. Instead, their point was that inferring intent from such evidence is an uncertain process in which enforcers may take differing views. This same problem applies to the NAM where, as discussed above, members may participate in activities for all sorts of reasons. *See supra* at 16.

The district court also asserted that, because "the NAM and other registrants have been forced to grapple with the definition's reference to intent for the past

twelve years" without any constitutional challenge being brought, the statutory language is not vague. App.115-16. However, under the 1995 version of the LDA, reporting associations were required to disclose only those members that "in whole or in major part plan[ned], supervise[d] or control[led]" such "lobbying activities." § 1603(b)(3) (1995) (emphasis added). As long as several members were involved, no single member would meet the threshold and, therefore, member groups like the NAM did not have to concern themselves with assessing the underlying intent. App.95. The NAM's decision not to incur the burden of constitutional litigation over a clause that did not burden it hardly proves the statute is not vague.[26]

C. "ACTIVELY PARTICIPATES" IS VAGUE.

Section 207 demands that the NAM predict whether conduct intended at the time to support lobbying contacts amounts to "active" participation. In dismissing the NAM's claims that the definition of "actively participates" is unconstitutionally vague, the district court (at App.117-18) simply ignored the Supreme Court's opinion in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). In *Letter Carriers*, the Supreme Court upheld the Hatch Act against a vagueness challenge, but only after first explicitly

[26] Moreover, "the mere existence of a statute for over sixty years [did] not provide immunity from constitutional attack." *Jordan v. De George*, 341 U.S. 223, 230 n.14 (1951).

incorporating into the phrase "active part" a set of standards that had been developed by the Civil Service Commission over a period of five decades, largely through the process of over 3,000 written adjudicatory opinions. 413 U.S. at 576; *Biller v. U.S. Merit Sys. Protection Bd.*, 863 F.2d 1079, 1085 (2d Cir. 1988) (in order "to define the [Hatch] Act's terms, Congress incorporated . . . the 3000 pre-Act Commission determinations"). The Civil Service Commission then used these opinions to compile a detailed set of guidance that "fleshed out the meaning of [the prohibition on active participation] and so developed a body of law with respect to what partisan conduct by federal employees was forbidden by" that restriction. *Letter Carriers*, 413 U.S. at 572. It was only after linking the statutory prohibition back to the body of work produced by the Civil Service Commission that the Supreme Court found that the "active part[icipation]" language avoided vagueness concerns:

> It is to these regulations purporting to construe [the statute containing the phrase "active part"] as actually applied in practice, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad. . . . [T]he plain import of the 1940 amendment to the Hatch Act is that the proscription against taking an active part in the proscribed activities is not open-ended but is limited to those rules and proscriptions that had been developed under Civil Service Rule I up to the date of the passage of the 1940 Act.

Id. at 575-76 (emphasis added).[27] *See also Legislative Proscription of Partisan Political Activity of Civil Employees*, 87 Harv. L. Rev. 141, 143-44 (1973) (noting that "[t]he *Letter Carriers* Court did not challenge the assertion that, standing alone, the 'active part' formulation fails to provide unambiguous guidance . . . to refute the allegation of vagueness").

Here, in sharp contrast to the thousands of decisions and other interpretive statements defining the contours of "active part[icipation]," the district court pointed only to a single, generic statement in the legislative history that merely confirms that "active" and "passive" are antonyms: "entities that have only a passive role" are not "actively participating" in lobbying activities. App.117

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[27] The Supreme Court's reliance on the wealth of opinions and rules interpreting an otherwise nebulous statute is particularly important in light of its decision to overrule the three-judge district court's conclusion that the Hatch Act's restrictions on "active part[icipation]" were "unconstitutional [and] impermissibly vague." *Nat'l Ass'n of Letter Carriers v. U.S. Civil Serv. Comm'n*, 346 F. Supp. 578, 585 (D.D.C. 1972), *rev'd on appeal*, 413 U.S. 548 (1973). Specifically, the district court had held that, by using the phrase "active part," the restrictions enacted by Congress were:

> [W]orded in generalities that lack precision. There is no standard. No one can read the [Hatch] Act and ascertain what it prohibits. . . .
>
> Ours is not a form of government that will prosper if citizens . . . must live by the mottoes "better be safe than sorry" and "don't stick your neck out." . . .
>
> This is a classic case of a statute which in its application has a "chilling effect" unacceptable under the First Amendment. . . .
>
> If the Congress undertakes to circumscribe speech, it cannot pass an act which, like this one, talks in riddles, prohibiting in one breath what it may be argued to have allowed in another, leaving the citizen unguided but at hazard.

Id. at 582-585.

(quoting 153 Cong. Rec. S10709 (daily ed. Aug. 2, 2007)). The two examples of passive participation provided in the legislative record – "mere donors [and] mere recipients of information and reports," *id.* – likewise fall woefully short of the *Letter Carriers* standard, particularly where associations like the NAM and their members engage in a wide range of policy-related activities on a daily basis. Far from a "significant gloss," this legislative history provides insufficient notice to those entities seeking to comply with §207's disclosure requirements.[28]

This lack of statutory or regulatory guidance is particularly glaring where, as here, there is no record of adjudicatory proceedings or other binding restatements of the law on which the NAM may rely in the absence of clear, definitive guidance in the statute. In fact, the phrase "actively participates" first was introduced into the lobbying reform bill on July 31, 2007, three days before the legislation was approved by Congress. *Compare* S.1, 110th Cong. § 217 (2007) (as introduced in the Senate) *with* 153 Cong. Rec. S10393 (daily ed. July 31, 2007) (introducing §207).[29]

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[28] These factors are particularly important where, unlike in *Letter Carriers*, the lobbying statute does not itself contain "various exclusions" to the definition of "actively participates." 413 U.S. at 575.

[29] Although both the district court and the Legislative Defendants rely on the Legislative Defendants' *Lobbying Disclosure Act Guidance* document to cure the vagueness problems, *see* App.117-18 n.19, the U.S. Attorney was curiously silent on whether this *Guidance* will be binding on federal prosecutors. Our understanding is that the Department of Justice believes it would violate separation of powers to give legal effect to the *Guidance*. *See, e.g.*, 16 Op. Off. Legal Counsel 77, 84 n.10 (1992) (guidance materials issued by "an agent of Congress[] are of course not binding on the executive branch"). In any event, the *Guidance*

* * *

Importantly, the "intent" and "active" elements are not independent. Instead, to determine if participation is sufficiently "active," the NAM must identify and focus on conduct done with the necessary "intent." Thus, the two uncertainties must be multiplied by one another. Moreover, this is not a situation in which a few future acts can be planned for and carefully evaluated in advance. Associational activity consists of hundreds of ongoing events. Because the standards are not clear, the only safe course will be to refrain from a broad range of actions that later might cumulatively be thought to show sufficient intentional activity. That loss of core First Amendment rights is exactly the injury the enhanced vagueness standard exists to prevent.

D. THE "KNOWING" STANDARD IS NO CURE.

The district court said that the risk of punishment "may" be mitigated because punishment applies only to "knowing" violations. App.114-15. Actually, a "knowing" standard is of little help since "[t]he Supreme Court has made clear that the knowledge requisite to [a] knowing violation of a statute is factual knowledge as distinguished from knowledge of the law . . . ." *United States v.*

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explicitly denies that it may safely be relied upon, saying that the document "does not have the force of law, nor does it have any binding effect on the United States Attorney for the District of Columbia or any other part of the executive branch." Clerk of the House of Representatives and Secretary of the Senate, *Lobbying Disclosure Act Guidance*, 1 (revised Jan. 25, 2008) *at* http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf. Moreover, there is no showing that this would eliminate the vagueness.

Barnes, 295 F.3d 1354, 1367 (D.C. Cir. 2002) (quoting *Bryan v. United States*, 524 U.S. 184, 192 (1998)). The key vagueness problem is that the NAM and others cannot confidently assess even known facts because the legal standard is unclear. *See Planned Parenthood Cincinnati Region v. Taft*, 459 F. Supp. 2d 626, 633, 638 (S.D. Ohio 2006) (noting that a law that "implicates the exercise of constitutionally protected rights" could not be saved from a vagueness challenge because a "scienter requirement applied to an element that is itself vague does not cure the provision's overall vagueness").[30]

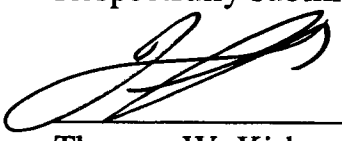
CONCLUSION

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." As the Supreme Court recently admonished, although this seemingly flat prohibition does not receive an "absolutist interpretation[,] . . . it is worth recalling the language we are applying." *WRTL II*, 127 S. Ct. at 2674. Here Congress has made a law that

[30] Moreover, even a directly relevant scienter requirement does "not cure all defects for all purposes," particularly when constitutionally-protected rights are at stake. *United States v. Loy*, 237 F.3d 251, 265 (3d Cir. 2001) (citing *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 286 (1961), which struck down a loyalty oath notwithstanding the fact that the "oath-taker was required only to affirm that he or she had never 'knowingly'" engaged in certain conduct). This understanding "is necessary if the void-for-vagueness doctrine is to have any teeth at all. Indeed, a contrary view would suggest that a legislature may avoid vagueness challenges altogether by simply including a scienter requirement in every enactment." *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 498 (E.D. Va. 1999) (collecting authority) (internal citations omitted).

directly targets and substantially burdens core First Amendment rights. Yet the law has not been shown to effectively address a compelling problem, to be tailored to that purpose, or to provide precise guidance. For each of these reasons, §207 is invalid and must be struck down.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 29(c)(5), 29(d), and 32(a), the undersigned counsel of record certifies that this brief was prepared in 14-point, proportionally spaced, serif font (Times New Roman), using Microsoft Office Word 2003 and that the brief contains 12,611 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2). Accordingly, the brief complies with the requirements of Fed. R. App. P. 32(a)(7).

Thomas W. Kirby

STATUTES AND REGULATIONS

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First Amendment

Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 1601

The Congress finds that—

(1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government;

(2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and

(3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.

2 U.S.C. § 1602

* * *

(3) COVERED EXECUTIVE BRANCH OFFICIAL.—The term "covered executive branch official" means—

(A) the President;

(B) the Vice President;

(C) any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;

(D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;

(E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of Title 37; and

(F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of Title 5.

(4) COVERED LEGISLATIVE BRANCH OFFICIAL.—The term "covered legislative branch official" means—

(A) a Member of Congress;

(B) an elected officer of either House of Congress;

(C) any employee of, or any other individual functioning in the capacity of an employee of—

(i) a Member of Congress;

(ii) a committee of either House of Congress;

(iii) the leadership staff of the House of Representatives or the leadership staff of the Senate;

(iv) a joint committee of Congress; and

(v) a working group or caucus organized to provide legislative services or other assistance to Members of Congress; and

(D) any other legislative branch employee serving in a position described under section 109(13) of the Ethics in Government Act of 1978.

* * *

(7) LOBBYING ACTIVITIES.—The term "lobbying activities" means 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, and coordination with the lobbying activities of others.

(8) LOBBYING CONTACT.—

(A) DEFINITION.—The term "lobbying contact" means any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);

(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;

(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or

(iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

(B) EXCEPTIONS.—The term "lobbying contact" does not include a communication that is—

(i) made by a public official acting in the public official's official capacity;

(ii) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

(iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;

(iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.);

(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;

(vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;

(vii) testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force;

(viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license;

(x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;

(xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

(xii) made to an official in an agency with regard to—

(I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or

(II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis,

if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing;

(xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of Title 5 or substantially similar provisions;

(xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding;

(xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures;

(xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with—

(I) a covered executive branch official, or

(II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision),

with respect to the formulation, modification, or adoption of private legislation for the relief of that individual;

(xvii) a disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989 under the Inspector General Act of 1978 or under another provision of law;

(xviii) made by—

(I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of Title 26, or

(II) a religious order that is exempt from filing a Federal income tax return under paragraph (2)(A)(iii) of such section 6033(a); and

(xix) between—

(I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act) that is registered with or established by the Securities and Exchange Commission as required by that Act or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act; and

(II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively;

relating to the regulatory responsibilities of such organization under that Act.

* * *

(13) ORGANIZATION.—The term "organization" means a person or entity other than an individual.

(14) PERSON OR ENTITY.—The term "person or entity" means any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or State or local government.

* * *

2 U.S.C. § 1603

(a) REGISTRATION.—

(1) GENERAL RULE.—No later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, or on the first business day after such 45th day if the 45th day is not a business day, such lobbyist (or, as provided under paragraph (2), the organization employing such lobbyist), shall register with the Secretary of the Senate and the Clerk of the House of Representatives.

(2) EMPLOYER FILING.—Any organization that has 1 or more employees who are lobbyists shall file a single registration under this section on behalf of such employees for each client on whose behalf the employees act as lobbyists.

* * *

(b) CONTENTS OF REGISTRATION.— Each registration under this section shall contain—

* * *

(3) the name, address, and principal place of business of any organization, other than the client, that—

(A) contributes more than $5,000 to the registrant or the client in the quarterly period to fund the lobbying activities of the registrant; and

(B) actively participates in the planning, supervision, or control of such lobbying activities;

* * *

(5) a statement of—

(A) the general issue areas in which the registrant expects to engage in lobbying activities on behalf of the client; and

(B) to the extent practicable, specific issues that have (as of the date of the registration) already been addressed or are likely to be addressed in lobbying activities;

* * *

No disclosure is required under paragraph (3)(B) if the organization that would be identified as affiliated with the client is listed on the client's publicly accessible Internet website as being a member of or contributor to the client, unless the organization in whole or in major part plans, supervises, or controls such lobbying activities. If a registrant relies upon the preceding sentence, the registrant must disclose the specific Internet address of the web page containing the information relied upon. Nothing in paragraph (3)(B) shall be construed to require the disclosure of any information about individuals who are members of, or donors to, an entity treated as a client by this chapter or an organization identified under that paragraph.

* * *

2 U.S.C. § 1604

(a) QUARTERLY REPORT.— No later than 20 days after the end of the quarterly period beginning on the first day of January, April, July, and October of each year in which a registrant is registered under section 4, or on the first business day after such 20th day if the 20th day is not a business day, each registrant shall file a report with the Secretary of the Senate and the Clerk of the House of Representatives on its lobbying activities during such quarterly period.

* * *

(b) CONTENTS OF REPORT.— Each quarterly report filed under subsection (a) shall contain—

(1) the name of the registrant, the name of the client, and any changes or updates to the information provided in the initial registration, including information under section 4(b)(3);

(2) for each general issue area in which the registrant engaged in lobbying activities on behalf of the client during the quarterly period—

(A) a list of the specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities, including, to the maximum extent practicable, a list of bill numbers and references to specific executive branch actions; [and]

(B) a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client[.]

* * *

2 U.S.C. § 1605

(a) IN GENERAL.— The Secretary of the Senate and the Clerk of the House of Representatives shall—

(1) provide guidance and assistance on the registration and reporting requirements of this chapter and develop common standards, rules, and procedures for compliance with this chapter;

(2) review, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registration and reports;

(3) develop filing, coding, and cross-indexing systems to carry out the purpose of this chapter, including—

(A) a publicly available list of all registered lobbyists, lobbying firms, and their clients; and

(B) computerized systems designed to minimize the burden of filing and maximize public access to materials filed under this chapter;

(4) make available for public inspection and copying at reasonable times the registrations and reports filed under this chapter and, in the case of a report filed in electronic form under section 1604(e) of this

title, make such report available for public inspection over the Internet as soon as technically practicable after the report is so filed;

(5) retain registrations for a period of at least 6 years after they are terminated and reports for a period of at least 6 years after they are filed;

(6) compile and summarize, with respect to each quarterly period, the information contained in registrations and reports filed with respect to such period in a clear and complete manner;

(7) notify any lobbyist or lobbying firm in writing that may be in noncompliance with this chapter;

(8) notify the United States Attorney for the District of Columbia that a lobbyist or lobbying firm may be in noncompliance with this chapter, if the registrant has been notified in writing and has failed to provide an appropriate response within 60 days after notice was given under paragraph (7);

(9) maintain all registrations and reports filed under this chapter, and make them available to the public over the Internet, without a fee or other access charge, in a searchable, sortable, and downloadable manner, to the extent technically practicable, that—

(A) includes the information contained in the registrations and reports;

(B) is searchable and sortable to the maximum extent practicable, including searchable and sortable by each of the categories of information described in section 1603(b) or 1604(b) of this title; and

(C) provides electronic links or other appropriate mechanisms to allow users to obtain relevant information in the database of the Federal Election Commission;

(10) retain the information contained in a registration or report filed under this chapter for a period of 6 years after the registration or report (as the case may be) is filed; and

(11) make publicly available, on a semiannual basis, the aggregate number of registrants referred to the United States Attorney for the District of Columbia for noncompliance as required by paragraph (8).

* * *

2 U.S.C. § 1606

(a) CIVIL PENALTY.—Whoever knowingly fails to—

(1) remedy a defective filing within 60 days after notice of such a defect by the Secretary of the Senate or the Clerk of the House of Representatives; or

(2) comply with any other provision of this chapter;

shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $200,000, depending on the extent and gravity of the violation.

(b) CRIMINAL PENALTY.— Whoever knowingly and corruptly fails to comply with any provision of this chapter shall be imprisoned for not more than 5 years or fined under Title 18, or both.

2 U.S.C. § 1607

(a) CONSTITUTIONAL RIGHTS.—Nothing in this chapter shall be construed to prohibit or interfere with—

(1) the right to petition the Government for the redress of grievances;

(2) the right to express a personal opinion; or

(3) the right of association,

protected by the first amendment to the Constitution.

(b) PROHIBITION OF ACTIVITIES.—Nothing in this chapter shall be construed to prohibit, or to authorize any court to prohibit, lobbying

activities or lobbying contacts by any person or entity, regardless of whether such person or entity is in compliance with the requirements of this chapter.

(c) AUDIT AND INVESTIGATIONS.—Nothing in this chapter shall be construed to grant general audit or investigative authority to the Secretary of the Senate or the Clerk of the House of Representatives.