ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 14, 2012

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12-5117 & 12-5118

CENTER FOR INDIVIDUAL FREEDOM,
Defendant-Appellant,
and

HISPANIC LEADERSHIP FUND,
Defendant-Appellant,
v.

CHRIS VAN HOLLEN,
Plaintiff-Appellee,
and

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.[1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT HISPANIC LEADERSHIP FUND

Dated: June 20, 2012

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[1]The Federal Election Commission's (FEC) vote on whether to appeal to this Court resulted in a three-to-three deadlock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellant Hispanic Leadership Fund submits this certificate as to parties, rulings, and related cases.

Parties

The parties are Appellants Hispanic Leadership Fund (HLF) and Center for Individual Freedom (CFIF), who were intervenor-defendants in the District Court. The Appellee is Chris Van Hollen, who was the plaintiff in the District Court. The Federal Election Commission (FEC) was the Defendant in the District Court and is not appealing the District Court Order.

Ruling under Review

The ruling under review is the March 30, 2012 Order by Judge Amy Berman Jackson of the District Court for the District of Columbia that granted plaintiff's motion for summary judgment, denied defendant's cross motion for summary judgment, denied intervenor-defendant HLF's motion to dismiss, and denied intervenor-defendant CFIF's cross motion for summary judgment.

Related Cases

This case has not been previously before this Court and there are no pending related cases.

RULE 26.1 DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1,Appellant Hispanic Leadership Fund (HLF) certifies the following:

HLF is an organization incorporated in Virginia and tax-exempt under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended. HLF has no parent, subsidiary, nor affiliate corporation. HLF is a non-partisan advocacy organization dedicated to strengthening working families by promoting common-sense public policy solutions rooted in free enterprise, limited government, and individual freedom. HLF made electioneering communications during the 2010 election cycle and intends to continue its issue advocacy activity, some of which will constitute electioneering communications, during this and subsequent election cycles.

STATEMENT REGARDING JOINT APPENDIX

Hispanic Leadership Fund hereby adopts the Joint Appendix submitted by Center for Individual Freedom and consented to by Representative Van Hollen.

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GLOSSARY

BCRA	Bipartisan Campaign Reform Act, 116 Stat. 81
CFIF	Center for Individual Freedom
FEC	Federal Election Commission ("Commission")
FECA	Federal Election Campaign Act of 1971
HLF	Hispanic Leadership Fund
JA	Joint Appendix
Mem. Op.	Judge Amy Berman Jackson's March 30, 2012 decision

STATEMENT OF JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331 over Representative Chris Van Hollen's challenge to Federal Elections Commission (FEC) regulation, 11 C.F.R. 104.20(c)(9). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 over Hispanic Leadership Fund's timely appeal, filed April 13, 2012 (JA 168), from the District Court's final judgment entered March 30, 2012.[1] *See Van Hollen v. FEC*, Case No. 11-0766, 2012 U.S. Dist. LEXIS 44342 (D.D.C. March 30, 2012) (JA 134).

ISSUES PRESENTED

I. Whether the district court erred in finding that Representative Van Hollen satisfiedArticle III standing merely by asserting his intent to run for elected office and alleging an injury that could not be remedied by the relief sought.

II. Whether the district court erred in denying *Chevron* deference to the FEC's regulatory determinations when the statute is ambiguous, Congress did not speak on the matter at issue, and post-enactment judicial action fundamentally altered the application of the statute by permitting that which Congress forbade.

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[1] "JA __" references are to the Joint Appendix filed with this brief.

III. Whether the FEC's 2007 regulation is reasonable and satisfies the second prong of the *Chevron* Test.

STATUTES AND REGULATIONS

All applicable statutes, regulations, and rules are contained in an Addendum to the Opening Brief of Center for Individual Freedom. Hispanic Leadership Fund hereby adopts the Addendum to the Opening Brief of Center for Individual Freedom.

STATEMENT OF THE CASE

Representative Van Hollen brought suit in the District Court for the District of Columbia under the Administrative Procedure Act (APA), 5 U.S.C. § 706, more than 4 years after the adoption of the regulations. JA 9. In doing so, Rep. Van Hollen alleged that 11 C.F.R. § 104.20(c)(9) is invalid because the FEC exceeded its statutory authority in enacting the regulation, and that the regulation is otherwise contrary to law under the APA. *Id*. The district court granted Rep. Van Hollen's motion for summary judgment, denied HLF's motion to dismiss, and denied the cross motions for summary judgment of HLF and CFIF. JA 134-65.

HLF and CFIF moved the district court to stay its ruling but were denied. JA 171-75. HLF and CFIF filed notices of appeal with this Court and submitted emergency motions for stay of the district court order. JA 178. A divided panel of

this Court denied the motions for stay. *Id*. In granting summary judgment to Rep. Van Hollen, the district court addressed the "novel issue" presented, but declined to find any ambiguity in the BCRA reporting statute that would require further analysis under step two of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). JA 135. Despite the fundamental departure from the statutory scheme adopted by Congress in 2002 in terms of whose speech was permitted and whose speech was prohibited resulting from the Supreme Court's decision in *WRTL II*, the district court held that Congress had spoken directly to the issue. *See id*.

HLF and CFIF continued to argue before this Court that the disclosure compelled by BCRA, resulting from setting aside 11 C.F.R. § 104.20(c)(9), infringes upon core First Amendment speech and chills their speech in the pending election cycle. The divided panel did not grant the expedited motions for stay of the district court order, but did order expedited briefing and oral argument in this case. JA 178-82.

STATEMENT OF THE FACTS

A. Background

As Congress and the Courts continue their complex conversation on the permissible boundaries of campaign finance laws, the Constitutional charge underlying their debate remains unchanged: that "Congress shall make no law . . .

abridging the freedom of speech." U.S. Const. amend. I. Congress twice enacted sweeping legislation to address identified concerns, and the Courts have invalidated or narrowed key provisions of both enactments.*See*Federal Election Campaign Act of 1971, ("FECA" or "Act") 2 U.S.C. §§ 431-55, amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.) ("BCRA").

Caught between these two speakers is the FEC, the federal agency tasked with administering the Act's evolving provisions. *See* 2 U.S.C. § 438(a)(8). This case arises from the FEC's good faith attempt to provide regulatory guidance following the partial invalidation of the speech prohibition imposed on corporations and labor unions in the context of "electioneering communications." *See FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, 551 U.S. 449 (2007).

Pursuant to the Act, the FEC is authorized to "make, amend, and repeal such rules … as are necessary to carry out the provisions of this Act . . ." 2 U.S.C. § 437d(a)(8). After the law was changed by*WRTL II*, 551 U.S. 449, the FEC acted to amend its "electioneering communications" regulations. *Explanation and Justification of Final Rule on Electioneering Communications*, 72 Fed. Reg. 72,899 (Dec. 26, 2007) (JA 75).

B. Judicial and Regulatory Response to FECA

The Supreme Court first addressed FECA's disclosure and reporting requirements in *Buckley v. Valeo*, 424 U.S. 1 (1976). There, the Court upheld these requirements, but only after adopting a narrowingconstruction "to avoid the shoals of vagueness," noting also "that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 72, 78.

For non-candidate and non-political committee speakers, the Court narrowly construed FECA's reporting provision and explained the circumstances in which such disclosure could be compelled:

> In summary, § 434(e) as construed, imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) *when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate*.
>
> … § 434 (e), as construed, bears a sufficient relationship to a substantial governmental interest. As narrowed, § 434 (e) … does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.

Id. at 108 (emphasis added).

By the early 2000's, Congress determined that regulation of independent speakers should be expanded to capture and prohibit speech that went beyond

expressly advocating the election or defeat of a clearly identified candidate. Thus, in 2002, Congress embraced the "electioneering communication" concept, and made restrictions on "electioneering communications" a key pillar of BCRA. *See* 2 U.S.C. § 434(f).

Congress made clear that its intent was to bar corporations and labor unions from financing electioneering communications with their general treasury funds, either directly or indirectly. 2 U.S.C. §§ 441b(a) and (b)(2). *See McConnell* v. *FEC*, 540 U.S. 93, 204 (2003) ("[U]nder BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications.").

C. Judicial and Regulatory Response to BCRA

BCRA's statutory electioneering communications provision "does not, on its face, exempt" any corporations "from its prohibition" on financing electioneering communications with general corporate treasury funds. *McConnell*, 540 U.S. at 211. However, the FEC's regulations implementing BCRA exempted "*MCFL* corporations" per the Supreme Court's ruling in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986). *See Final Rules; Electioneering Communications*, 67 Fed. Reg. 65,190 (Oct. 23, 2002) and *Final Rules; BCRA Reporting*, 68 Fed. Reg. 404 (Jan. 3, 2003). Thus, by regulation, the FEC declared that an *MCFL* corporation could in fact make an electioneering communication,

and that such electioneering communications were subject to various disclaimer and disclosure requirements. *See BCRA Reporting*, 68 Fed. Reg. at 413, 419.

The new reporting rule required reporting and disclosure of electioneering communications whether financed from general treasury funds or from a segregated account. *Id*. at 419. Notwithstanding the regulatory exemption for so-called "*MCFL* corporations," FEC regulations still prohibited *any* organization from using corporate or labor union funds to actually pay for an electioneering communication, even if the advertisement sponsor itself was an incorporated entity. *See Electioneering Communications*, 67 Fed. Reg. at 65,208.

The FEC's electioneering communication disclosure rules, 11 C.F.R. § 104.20(c)(7) and (8) (2003), required the disclosure of "the name and address of each donor who donated an amount aggregating $1,000 or more. . . ." *BCRA Reporting*, 68 Fed. Reg. at 419. BCRA, however, does not actually use the phrase "each donor who donated." Rather, BCRA referred to "each contributor who contributed." 2 U.S.C. § 434(f)(2)(E) and (F). "Contribution" is a longstanding term of art that refers to "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office."* 2 U.S.C. § 431(8)(A)(i) (emphasis added). The phrase "for the purpose of influencing" was construed in *Buckley* v. *Valeo* to refer

to (i) contributions made directly to a political committee, or (ii) expenditures made for "express advocacy" communications. *Buckley*, 424 U.S. at 76-81.

The Commission noted, however, that "political committees, by definition, do not make electioneering communications," and "electioneering communications" do not, by definition, contain express advocacy. *Notice of Proposed Rulemaking: BCRA; Reporting*, 67 Fed. Reg. 64,555, 64,560 (October 21, 2002). In an attempt to make sense of the language used in BCRA, the FEC replaced the statutory phrase "contributors who contributed" with "donors who donated," assuming that this is what Congress intended. *See BCRA Reporting*, 68 Fed. Reg. at 413 ("the final rules treat these funds as 'donations' and not as 'contributions'"). This resolution may or may not have been consistent with Congressional intent.

D. Adoption of the 'Functional Equivalence' Test

The Supreme Court first ruled on "electioneering communications" in the context of a facial challenge to BCRA in *McConnell v. FEC*, 540 U.S. 93 (2003). This decision came after the FEC adopted implementing regulations for most of BCRA's key provisions, including the electioneering communications provisions. The *McConnell* Court upheld BCRA'selectioneering communication provisions against a facial challenge. *McConnell*, 540 U.S. 93. The Court did notdiscuss with

any specificity what disclosure was required, or which "contributors" were required to be disclosed. *Id*. The majority opinion appears to have assumed that the required disclosures were analogous to the disclosures required of independent expenditures:

> The disclosure requirements that BCRA §201 added to FECA § 304 are actually somewhat less intrusive than the comparable requirementsthat have long applied to persons makingindependent expenditures. For example, theprevious version of § 304required groups makingindependent expenditures to identify donors who contributed more than $200.2 USC § 434(c)(2)(C). The comparable requirement in the amendments applies only to donors of $1,000 or more. 2 USC §§ 434(f)(2)(E), (F) (Supp. II).

Id. at 196 n.81.[2]

In upholding BCRA's electioneering communication funding restrictions, the Court upheld a regime in which corporations and labor unions could not make electioneering communications, and therefore, would never file disclosure reports for electioneering communications. *Id*. at 194-202. Thus, the reporting requirements upheld in *McConnell* only applied to the narrow class of persons actually permitted to make electioneering communications.

[2] The independent expenditure reporting provisions only require disclosure of persons whose contribution "was made for the purpose of furthering independent expenditures." 2 U.S.C. § 434(c)(2)(C); see also 11 C.F.R. § 109.10(e)(1)(vi) (requiring disclosure of contributions "made for the purpose of furthering the reported independent expenditure"). Thus, the Supreme Court appears to have assumed that electioneering communications reporting utilized the same "earmarking" concept.

In *WRTL II*, the Supreme Court held that BCRA's ban on corporate financing of electioneering communications was unconstitutional as applied to communications that were not the functional equivalent of express advocacy. *WRTL II*, 551 U.S. at 469-70. The Court did not address what disclosure requirements, if any, applied to the corporate-funded electioneering communications that were not permissible prior to *WRTL II*. *Id*.

Following *WRTL II*, the FEC acted to revise its regulations to now permit that which Congress had previously forbidden. In response to the Commission's 2007 Notice of Proposed Rule Making on Electioneering Communications, the FEC received over 25 written comments and held two days of public hearings, resulting in nearly 500 pages of transcript records. JA 34-64. The Commission voted to amend 11 C.F.R. § 104.20(c)(8) and promulgate 11 C.F.R. §104.20(c)(9) to provide the regulated community with guidance on reporting and disclosure for the category of now-permissible corporate- and labor organization-financed electioneering communications (*i.e*., broadcast advertisements that satisfied the statutory definition of "electioneering communication," but which were not the functional equivalent of express advocacy). JA 75.

11 C.F.R. §104.20(c)(8) was amended to read:

> If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by a corporation or labor organization pursuant to 11 C.F.R. §

> 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

New 11 C.F.R. §104.20(c)(9) provided corporations and labor unions with instructions regarding their donor disclosure obligations:

> If the disbursements were made by a corporation or labor organization pursuant to 11 C.F.R. § 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

The Commission addressed the concern, raised by several commenters, that entities receiving funds for reasons wholly unrelated to the financing of electioneering communications could be compelled to disclose supporters who had no intent of ever funding electioneering communications. *See Electioneering Communications*, 72 Fed. Reg. at 72,910 (JA 86). The Commission explained that it was:

> requiring corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering [electioneering communications] made by that corporation or labor organization pursuant to 11 CFR 114.15.

Id. at 72, 911 (JA 87).

E. Recent Developments

Since the date that the district court's order invalidating 11 C.F.R. § 104.20(c)(9) went into effect[3], not a single entity of any type has made an electioneering communication.[4] Not one entity has engaged in this form of speech despite the existence of numerous intervening "windows" for Presidential and Congressional elections.[5]

SUMMARY OF ARGUMENT

HLF maintains that Representative Van Hollen lacks standing to bring this lawsuit in the first instance. He lacks both informational and competitor standing necessary to bring this challenge and maintain Article III standing. As a result, this case should be dismissed.

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[3]Pursuant to Rule 62 of the Federal Rules of Civil Procedure, the district court's March 30, 2012 order was automatically stayed for 14 days. A report was filed with the FEC during this period on May 22, 2012, but it appears to be a misfiling due to the unusual coverage date indicated (May 21, 2012 through May 21, 2050), the lack of any dollar values, and the lack of any identified candidate.

[4]*See Electioneering Communications Reports*, Federal Election Commission, *available at* http://www.fec.gov/finance/disclosure/ec_table.shtml (accessed June 20, 2012).

[5] See *FEC, 2012 Presidential and Congressional Primary Dates in Chronological Order*, available at http://www.fec.gov/pubrec/fe2012/2012pdates.pdf (March 30, 2012).

If this Court determines that standing exists, then the specific novel legal question before this Courtis what happens when a court *explicitly permits* that which Congress *explicitly forbade* by invalidating a portion of a statute, excising that portion of the statute, while leaving in place a corollary provision specifically designed to work in conjunction with the invalidated and excised provision.[6]

The district court erred in itsapplication of *Chevron's* step one analysis because it reached two unsupported conclusions: (1) that Congress spoke directly to the specific novel legal question presented, and (2) that there is no ambiguity in BCRA's reporting provision that would compel further analysis under *Chevron's* step two.

This specific novel legal question should lead the court directly through step one of the *Chevron* analysis since Congress did speak to the issue at hand, but Congress' intent was judicially determined to be inconsistent with the commands of the U.S. Constitution. Upon reaching step two of the *Chevron* analysis, this Court should conclude that the FEC's actions were wholly reasonable interpretations of various uses of terms and concepts that are woven throughout the

[6] The Supreme Court appears to have a similar issue before it in *Florida v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom. National Federation of Independent Business v. Sebelius* 132 S. Ct. 603 (U.S. Nov. 14, 2011) (No. 11-393). The question of severability and the Court's role in potentially excising certain provisions and considering what to do with the remainder of the statutory scheme are at issue in those cases.

patchwork of statutes and case law outlining the right to free speech. Accordingly, this Court should dismiss the challenge to the now invalidated regulation or, alternatively, reverse the district court's grant of summary judgment.

STANDARD OF REVIEW

This Court reviews a district court's ruling on cross motions for summary judgment de novo. *Defenders of Wildlife v. Guitierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008). A party is entitled to summary judgment if, based on the all the documents in the record, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). This Court must view the evidence in the light most favorable to the nonmoving party in ruling upon a motion for summary judgment. *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENT

I. RepresentativeVan Hollen Lacks Standing to Challenge 11 C.F.R. § 104.20(c)(9).

The district court's conclusion that Rep. Van Hollen has "informational standing" to challenge 11 C.F.R. §104.20(c)(9) was based on his representation that "[i]f the FEC regulations do not faithfully implement these disclosure provisions, I will be deprived of information to which I am entitled under FECA

and BCRA." Mem. Op. (JA 145). The District Court did not provide a thorough review of HLF's arguments on the matter of standing, and summarily concluded that Appellee's rote declaration "made the necessary showing to support informational standing under *Shays III* and *Akins*." *Id*. at 11-12. Neither *Shays III* nor *Akin*, however, stand for the proposition that a simple assertion that one is "deprived of information to which I am entitled" is sufficient to satisfy Article III standing requirements. *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Shays v. FEC (Shays III)*, 528 F.3d 914, 923 (D.C. Cir. 2008).

A. *Informational standing is not established*

The district court mischaracterized Rep. Van Hollen's assertion of standing by omitting crucial material. Rep. Van Hollen claimed in his affidavit that the current reporting requirements inhibit his ability to campaign competitively because under the regulations, he is unable to "[d]raw attention to [the persons] who finance 'electioneering communications' about [him]. . . ." Decl. Rep. Van Hollen ¶ 4 (JA 93). Likewise, in his Complaint, Rep. Van Hollen claimed an interest in campaigning in untainted elections, and that the current regulation inhibits his ability to campaign effectively against those airing electioneering communications against him. Compl. ¶ 11 (JA 10-11).

These claims of standing focus almost exclusively on the competitor standing theory articulated in *Shays I*.[7] *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (*Shays I*) (Henderson, J., dissenting). The district court, however, did not reach the arguments regarding "competitor standing," basing its conclusion solely on a finding of "informational standing." Mem. Op. at 12 (JA 145). Rep. Van Hollen, however, made only the barest of assertions regarding "informational standing." *See* Compl. ¶ 11 ("Rep. Van Hollen, as a citizen and voter, also has an informational interest in disclosure of the persons whose donations are used to fund 'electioneering communications' by corporations and labor organizations.") (JA 10-11). If the district court's determination regarding informational standing is affirmed, it will have the effect of conveying standing to every single "citizen and voter" in the United States to sue the FEC for a perceived disclosure-based grievance. The established prudential requirement that a generalized grievance does not convey standing would be effectively erased in this class of cases. *See U.S. v. Richardson*, 418 U.S. 166, 176-77 (1974).

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[7]We note that Judge Henderson dissented from *Shays I* because she concluded the appellees failed to show the constitutional minimum of standing. Judge Henderson concluded that standing was not established by the appellees in *Shays* who merely "speculate that they *may* suffer vaguely described injuries at some future time" and "complain of the subjective indignity of campaigning in a purportedly tainted electoral environment." *Shays*, 414 F.3d at 115-116 (Henderson, J., dissenting)

In *FEC* v. *Akins*, the Supreme Court did not simply find that a group of "citizens and voters" had informational standing because the FEC had not required the disclosure of certain information. *See Akins*, 524 U.S. at 21. Rather, the case arose in the context of an enforcement action, and the "citizens and voters" who were found to have informational standing were the same citizens and voters who filed a complaint with the FEC pursuant to 2 U.S.C. § 437g, had their complaint dismissed by the FEC, and subsequently challenged the FEC's dismissal pursuant to statute. *See* 2 U.S.C. § 437g(a)(8)(A) (granting standing to any party aggrieved by the Commission's dismissal of that party's complaint).

This matter, of course, does not arise in the context of a 2 U.S.C. §437g enforcement matter. The Supreme Court's conclusion in *Akins* is inseparably linked to the statutory standing language of §437g. The Supreme Court wrote, "Given the language of the statute *and* the nature of the injury, we conclude that Congress . . . intended to authorize this kind of suit." *Akins*, 524 U.S. at 20 (emphasis added).

In the context of the informational standing doctrine, Rep. Van Hollen's claimed injury is not particularized, and is merely a generalized grievance regarding the scope of a regulation adopted by the FEC. Rep. Van Hollen has never filed a complaint with the FEC challenging any particular person's non-disclosure of allegedly required information. In the decade that the electioneering

communication rule has been in effect, no person has ever broadcast an "electioneering communication" containing even a single reference to him, meaning that no person has ever reported such an "electioneering communication" while omitting the donor information that Rep. Van Hollen seeks. He is, as a "citizen and voter," no differently situated than any other American of voting age. As the Supreme Court noted in *Akins*, "[w]hether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Id*. at 23.

However, even if Rep.Van Hollen's alleged injury is deemed "sufficiently concrete and specific" to overcome the fact that this alleged injury is "widely shared," *Akins* still does not support informational standing in this case. *Id*. at 25. The Supreme Court wrote:

> We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared *does not deprive Congress of constitutional power to authorize its vindication in the federal courts*.

Id. at 24-25 (emphasis added). Congress has not done so in this case. This lawsuit was not brought pursuant to any statutory grant of authority to sue, such as existed and provided the justification for standing in *Akins*.

B. *The relief sought is not available under the Act*

Even if the statutory grant of standing in *Akins* is disregarded as a material fact, *Shays III* still requires a showing of redressibility. *See Shays III*, 528 F.3d at 923 ("the injury would be redressed were this court to invalidate the rule"). The "redress" that Rep.Van Hollen claims would be provided by the invalidation of the FEC's regulation, however, does not actually exist under the statute. Appellee claims informational standing on the grounds that:

> The challenged regulation injures [Appellee] because it deprives him of information to which he is entitled under BCRA as a voter, leader and member of a political party, and candidate – the names of 'all contributors' whose money corporations and labor organizations use to fund 'electioneering communications' made both in his own district and nationwide.

Pl.'s Reply to Intervenors' Opp'n to Pl.'s Mot. For Summ. J. at 1 (JA 112).

If this Court affirms the lower court's opinion, on the grounds advanced by Rep. Van Hollen, the FEC would be forced to adopt a new regulation requiring the disclosure of a portion of certain organizations' membership/supporter lists, namely, simple listings of "all contributors who contributed an aggregate amount of $1,000 or more" to the organizations during a specified time period. 2 U.S.C. §

434(f)(2)(F). This disclosure would *not* provide Rep.Van Hollen with the information necessary to "draw attention to the person or persons who finance 'electioneering communications' about [him] and thereby put such 'electioneering communications' in their proper context for voters to consider." Decl. Rep. Van Hollen ¶ 4 (JA 93).

The relief Rep.Van Hollen seeks would provide him with a list of persons who may or may not have contributed funds over a specific dollar amount to an organization, which were subsequently used to finance an advertisement.[8] Rep. Van Hollen would obtain no information detailing the specific person or entities that financed any particular electioneering communication for the simple reason that the statute, as read by him, does not require this type of disclosure. The relief that Rep.Van Hollen ultimately seeks – the ability to draw attention to and respond to the funders of specific electioneering communications – is simply not available under the statute, and therefore, his claimed injury cannot be redressed by this Court.

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[8]An organization such as a labor union or large membership organization could segregate out donations from multiple members into a separate account such that no member contributed over $950. This would result in disclosure of no donors or members whatsoever if the organization financed an electioneering communication from this account.

Although cursorily dismissed by the lower court, the United States District Court for the Southern District of West Virginia recently analyzed a nearly identical state electioneering communications law in *Center For Individual Freedom, Inc. v. Tennant*, No. 1:08-cv-00190, 2011 U.S. Dist. LEXIS 78514, (S.D.W.Va. July 18, 2011). The district court there cited the FEC's 2007 Explanation and Justification and concluded:

> The practical effect of requiring such expansive disclosure is not only to compel a flood of information, but a flood of information that is not necessarily relevant to thepurpose the regulation purportedly serves: to provide the electorate withinformation as to who is speaking…. Not only may a large swath of general treasury contributors not support an organization's electioneering communications, they may not even be aware that the organization is engaging in electioneering communications…. In summary, W. Va. Code § 3-8-2b(b)(5) does not bear a sufficient relationship to the interest of providing the electorate with meaningful information as to who is speaking inelectioneering communications.

CFIF v. Tennant, 2011 U.S. Dist. LEXIS at *167-69.[9] The reasoning of that district court's opinion, while not binding on this court, is persuasive authority to demonstrate how the compelled disclosure Rep. Van Hollen seeks is not information that actually informs him as to "who is speaking."[10] Thus, Rep. Van

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[9] Appeal in this matter is currently before the United States Court of Appeals for the Fourth Circuit, under docket number11-1952. A decision is pending.

[10] In a brief hypothetical situation – a nonprofit organization that has an annual budget of $5,000,000, and a biennial budget of $10,000,000 spends precisely

Hollen failed to establish standing to challenge the 2007 regulation, 11 C.F.R. § 104.20(c)(9), and this Court should dismiss.

II. The District Court erred in denying *Chevron* deference to the FEC's regulatory determinations because the statute is ambiguous, Congress did not speak on the matter at issue, and post-enactment judicial action fundamentally altered the application of the statute by permitting that which Congress forbade.

In explaining the standard of review applicable under *Chevron U.S.A. Inc*. v. *Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), the district court wrote, "the fundamental inquiry at the first level of the *Chevron* analysis is to ascertain whether *Congress* has authorized the agency to make rules to fill in a gap." Mem. Op. at 13 (emphasis in original) (JA 146). The district court concluded that "there is no indication that Congress charged the FEC with clarifying anything, either explicitly or implicitly, and the text favors the plaintiff

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$10,001 on a single electioneering communication half way through the second year of its biennial budget cycle. This organization is required under Rep. Van Hollen's reading of the law to disclose the name and address of any "contributor who contributed" more than $1,000 since January 1 of the prior calendar year. This organization would be required to disclose the sources of $7,500,000 worth of revenue because they spent $10,001 (note that 501(c)(4) organizations are not required to aggregate for more than a single tax year.) The question presented by this hypothetical is, if such a communication mentioned or referred to Congressman Van Hollen, "who is speaking"?

at *Chevron* step one." *Id*. at 16. The standard applied by the district court to guide its *Chevron* Step One analysis is not what *Chevron* requires.[11]

In *Chevron*, the Supreme Court explained that the first part of its inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *see Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (U.S. 2011) ("We begin our analysis with the first step of the two-part framework announced in *Chevron*, *supra*, at 842-843, and ask whether Congress has 'directly addressed the precise question at issue.'").

A. *BCRA contains Congress's blanket prohibition of corporate-funded electioneering communications.*

There is no doubt that Congress spoke directly to the reporting requirements of those filers that were required to file reports at the time of BCRA's enactment. However, the precise question at issue in this case is what disclosure is required

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[11] The district court's conflation of the *Chevron* step one test with the question of whether Congress "authorized the agency to make rules to fill in a gap," appears to rest on a misapplication of language in *Nat'l Cable &Telecomms. Ass'n* v. *Brand X Internet Servs*., 545 U.S. 967 (2005). The full sentence from which the district court's quoted language derives reads, "The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 982-83.

when a corporation or labor union finances an electioneering communication from its general treasury funds. Congress could not possibly have spoken directly to the precise question at issue because the very plain intent of Congress was to ***completely*** prohibit any corporate and labor union financed electioneering communications such that neither organization of either type would ever file a disclosure report. Thus, with respect to the *specific issue before the Court*, i.e., reporting requirements for corporate-funded electioneering communications, Congress was either silent or ambiguous. In either case, "Congress has not spoken clearly, and a permissible agency interpretation of the statute merits judicial deference." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

The question of whether "Congress has explicitly left a gap for the agency to fill" is a separate and distinct question from "whether Congress has directly spoken to the precise question at issue." The district court treated these two questions as one and the same. We believe this is error. A finding that "Congress has explicitly left a gap for the agency to fill," simply serves as a signal to the reviewing court to consider the matter under step two of the *Chevron* analysis. It does not answer the question, however, of whether Congress has directly spoken to the precise question at issue.

The district court concluded, with the concession of Defendant FEC[12], that in BCRA "the disclosure rules did apply as written to at least *some* corporations." Mem. Op. at 18 (JA 151). Although the Supreme Court's disposition of *MCFL* prior to the enactment of BCRA may suggest that Congress was *required* to insert a specific exemption for *MCFL*-type organizations, Congress plainly did not satisfy this requirement. In fact, the legislative history shows quite clearly that Congress intended to challenge this requirement. *See generally* 147 Cong. Rec. S2882-90 (daily ed. March 26, 2001), S3022-3046 (daily ed. March 28, 2001), S3233-60 (April 2, 2001) (debating whether the *MCFL* organization exemption should be included in BCRA, and declining to do so).

This challenge was subsequently ignored by the Supreme Court, which read the *MCFL* exemption into BCRA for constitutional reasons. *McConnell*, 540 U.S. at 210-12. In *McConnell*, the Court explained:

> That FECA § 316(c)(6) does not, on its face, exempt *MCFL* organizations from its prohibition is not a sufficientreason to invalidate the entire section…. [W]e presume that the legislators who drafted § 316(c)(6) were fully aware that the provision could not

[12]HLF contends that it is not bound before this Court by all positions advanced by the FEC in the litigation underlying this appeal. HLF, as an intervening party is a "full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *see also Port of N.Y. Auth. v. Baker, Watts & Co.*, 392 F.2d 497, 498 (D.C. Cir. 1968) (holding that an intervening party may appeal an invalidated agency regulation where the agency did not pursue an appeal).

> validly apply to *MCFL*-type entities. . . . Indeed, the Government itself concedes that § 316(c)(6) does not apply to *MCFL* organizations. As so construed, the provision is plainly valid.

Id. BCRA's blanket corporate funding prohibition forced the Court to apply a canon of statutory construction in order to avoid Constitutional infirmities. *Id*. There is no suggestion in *McConnell* that Congress actually intended to include the *MCFL* exemption; rather, the Court imputed the exemption into the statutory language to save the statute's constitutionality.

Under the Court's constitutional avoidance theory, it had to engage in presumptions to stop short of invalidating the statute. *Id*. at 211. The legislative history reveals that legislators not only did not make this presumption, but actually intended precisely the opposite. As the Supreme Court itself acknowledged, "The parties and the judges on the District Court have assumed that amended FECA § 316(c)(6)completely *canceled the exemption for nonprofit corporations* set forth in § 316(c)(2). *McConnell v. FEC*, 251 F. Supp. 2d 176, 804 (D. D.C. 2003) (Leon, J.*)* ('Section 204 completely cancels out the exemption for all nonprofit corporations provided by Section 203')." *McConnell*, 540 U.S. at 209 n.90 (emphasis added).

This is a reference to the so-called Wellstone Amendment to BCRA, which makes clear the *intended* breadth of the corporate funding ban that Congress intended in enacting BCRA. *See generally*, 147 Cong. Rec. S2882-90 (daily ed.

March 26, 2001), S3022-3046 (daily ed. March 28, 2001), S3233-60 (daily ed. April 2, 2001). Despite the holding of *MCFL*, Congress adopted the Wellstone Amendment for the express purpose of eliminating the *MCFL* exemption from electioneering communications, thereby ensuring that no corporation could make any "electioneering communication." *Id*. As Senator Wellstone explained on the Senate floor, he believed that the Supreme Court would distinguish *MCFL* in the context of electioneering communications and uphold his amendment that was directly intended to include*MCFL* entities within the scope of the ban. *See* 147 Cong. Rec. S2845, S2848 (Mar. 26, 2001) (statement of Senator Wellstone).

The sponsor of the Wellstone Amendment did not "presume" that his legislation included the *MCFL* exemption. *Id*. The Wellstone Amendment was a challenge to the very notion that the electioneering communication provisions required the *MCFL* exemption. In fact, the Wellstone Amendment was opposed by the rest of BCRA's sponsors who feared that Senator Wellstone's challenge to *MCFL* could render the entire electioneering communication provision unconstitutional. As Senator John Edwards explained on the floor of the Senate, he believed that the Wellstone amendment was foreclosed by *MCFL*. *See* 147 Cong. Rec. at S2883 (statement of Senator Edwards).

Shortly thereafter, the Wellstone Amendment was approved by the Senate, by a vote of 51-46. *Id*. at S2884. As a result, the Wellstone Amendment became

part of the final legislation and all present fully understood that it applied to *all* corporations, for-profit and nonprofit, and that it was specifically designed to omit the *MCFL* exception – as the floor statements of Senator Wellstone and Senator Edwards make clear. While the lead sponsors of the McCain-Feingold legislation may have *preferred* a provision that included an exception for *MCFL*organizations, that is not what Congress adopted, nor was Congressional intent here unclear.

Subsequent claims that the electioneering communications provisions actually did include a *MCFL* exception were nothing more than tortured efforts to save the constitutionality of the provision. Senators McCain, Feingold, Snowe, and Jeffords, for example, submitted rulemaking comments to the FEC in which they advised, "in order for the provision to comply with the Supreme Court's ruling in the *MCFL* case, the prohibition should not apply to qualified nonprofit corporations as provided in 11 CFR § 114.10." *Electioneering Communications*, 67 Fed. Reg. 64,653 (Aug. 23, 2002) (comments of Senators McCain, Feingold, Snowe, and Jeffords). The FEC's subsequent adoption of a *MCFL* exemption in the electioneering communicationsprovisions was contrary to clearly expressed statutory language.

The first step of the analysis under *Chevron* asks if Congress has clearly spoken on the precise issue. *Chevron*, 467 U.S. at 842. Here, the legislative history and text of the statute as adopted makes plain that Congress has, in fact,

clearly spoken on the issue of whether it intended to permit any corporations to make electioneering communications. *See generally* 147 Cong. Rec. S2882-90, S3022-3046, S3233-60. Congress' answer was "no."

The Supreme Court did not draw any conclusions about what Congress' intent actually was when it adopted the Wellstone Amendment and BCRA as a whole. Rather, the Court applied a canon of construction that requires it to construe a statute in a way that saves its constitutionality, if possible. *See, e.g.*, *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

The *Chevron* analysis at step one is concerned with the plain language of a statute and the factual record, including, for example, the legislative history. *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). The Supreme Court applied a *legal* presumption which, by definition, does not necessarily reflect actual Congressional intent, although the Court has stressed "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (internal Supreme Court

quotation omitted). The practice of construing a statute to save its constitutionality may at times be a polite way of characterizing judicial revision of a statute.

The Court did not speak on the factual legislative history, and to the extent it examined the plain language of the statute, it acknowledged that the statute did not, "on its face" contain the *MCFL* exemption. *McConnell*, 540 U.S. at 211. A determination, for *Chevron* step one purposes, that Congress did not intend to include the *MCFL* exception as a factual matter, is not contrary to the Supreme Court's legal conclusion that the *MCFL* exception must be read into the statute to save its constitutionality in a facial challenge. Accordingly, this Court may conclude that Congress spoke clearly on the *MCFL* issue without disregarding any applicable Supreme Court precedent.

The district court noted, "[a]ccording to defendant, the rule it promulgated is appropriate, in part, because the Supreme Court took action that rendered the statute ambiguous." Mem. Op. at 13 (JA 146). That statement is not an accurate reflection of HLF's position: the Supreme Court's decision in *WRTL II* altered the legal landscape to the point where that which Congress had specifically prohibited was deemed constitutionally protected and permissible.[13] *WRTL II*, 551 U.S. 449.

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[13]To the extent that the FEC indicated that corporations and labor unions must file reports "as required by" the statute that statement was either incorrect or misconstrued by the Court. Mem. Op. at 15 (JA 148). The statute *as adopted by*

The district court indicated that this case is analogous to *Penn. Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) and *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). However, those cases involved questions of whether an agency had the authority to extend otherwise *valid* statutory language to situations that Congress had not contemplated at all. *Id*. While *Yeskey* may indeed stand for the proposition that "[t]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; it demonstrates breadth," this case has nothing to do with the flexibility and potential breadth of statutory language. *Id.* at 212. This case is about what happens when a court *explicitly permits* that which Congress has explicitly forbidden by invalidating a portion of a statute, excising that portion of the statute, while leaving in place a corollary provision specifically designed to work in conjunction with the invalidated and excised provision. And this is an inquiry that necessarily falls beyond step one of the *Chevron* analysis.

Congress did not require corporations and labor unions to file electioneering communications reports. Rather, it prohibited them from making electioneering communications altogether, meaning the disclosure provisions were wholly inapplicable and irrelevant to them.

B. *BCRA's statutory reporting language is ambiguous when taken in the context of the Act, FEC regulations and court decisions.*

The terms of art employed in the Act are sufficiently ambiguous to satisfy *Chevron's* step one analysis. It is not the mere existence of multiple definitions of terms that are critical to the Act that gives rise to its ambiguity, but rather, it is the statutory context of those terms. *See New York v. EPA*, 443 F.3d 880, 884 (D.C. Cir. 2006) ("[T]he sort of ambiguity giving rise to *Chevron* deference is a creature not of definitional possibilities, but of statutory context") (internal quotation marks and citations to the Supreme Court and the D.C. Circuit omitted).

HLF's arguments pertaining to the intended scope and application of BCRA's electioneering communication provisions are also relevant to the Court's conclusions regarding the use of the term "person."[14] As demonstrated above, and as originally enacted, the intention behind Section 203 of BCRA was to prohibit *all* corporations, including *MCFL* corporations, and labor organizations from making electioneering communications with corporate or union general treasury funds.

Thus, no corporation or labor union would ever file an electioneering communication report because no corporation or labor union could ever make an

[14]"Person" is defined by 2 U.S.C. § 431(11) as including "an individual, partnership , committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government."

electioneering communication. Although Congress used the term "person" to define the scope of the electioneering communication disclosure provision, it very clearly did not intend for that term to ever have any impact on corporations or labor organizations.

In fact, BCRA's electioneering communications provision uses the term "person" in two very different ways. *Compare* 2 U.S.C. § 434(f)(1) *with* 2 U.S.C. § 434(f)(3)(C). 2 U.S.C. § 434(f)(1) refers to a "*person* who makes a disbursement for the direct costs of producing and airing electioneering communications . . ."[15] At 2 U.S.C. § 434(f)(3)(C), however, Congress provided that:

> a communication which refers to a clearly identified candidate or Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more *persons* – (i) in the district the candidate seeks to represent, in the case of a candidate for Representative in . . . the Congress; or (ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

The latter use of "persons" most likely refers only to individuals. Congress used the term "person" flexibly and not necessarily as a term of art. Within the same statutory provision, it was used in one instance to refer to individuals; in another instance, Congress intended that it not have any application to corporations and

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[15] As noted, *supra*, the use of the term "person" in §434(f)(1) could not be the same "person" defined at 2 U.S.C. § 431(a)(11)(A) or the provision as originally drafted would conflict with Section 203 of BCRA (although Section 203 is unconstitutional following the Supreme Court's decision in *Citizens United v. FEC*, 588 U.S. --, 130 S. Ct. 876, 913-16 (2010).

labor unions prohibited from engaging in the activity described. The language in another section of the Act defines "person" in yet a third way. *See* 2 U.S.C. § 434(a)(11)(A) ("The Commission shall promulgate a regulation under which a person required to file a designation, statement, or report under this Act . . .").

In 2002, when the FEC first considered its electioneering communications regulations, the agency acknowledged being flummoxed by this inconsistent use (and apparent misuse) of what had previously been a defined term of art: "It is not clear from the legislative history of BCRA whether the term 'person' in new 2 U.S.C. § 434(f)(3)(c) is intended to be restricted to only individuals, households, U.S. citizens, voters, those within the voting age population, or any other category of 'person.'" *Notice of Proposed Rulemaking on Electioneering Communications*, 67 Fed. Reg. 51,131, 51,133 (Aug. 7, 2002).

The ambiguity evident in BCRA is made even clearer by the events that have taken place following the district court's decision in this case. The Federal Election Commission lacked four votes to appeal this matter.[16] The

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[16]The Commissioners opposing appeal, proposed repealing the regulatory language invalidated by the district court in January 2011. *See* Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporate and Labor Organizations, Draft A at 74-78, Agenda Doc. No. 11-02 for Meeting of Jan. 20, 2011,*available at*http://sers.nictusa.com/fosers/showpdf.htm?docid=68481 (visited June 20, 2012).

Commissioners who sought to pursue an appeal in this matter raised a series of questions regarding the district court's order, with a heavy focus on what the statutory phrase "contributors who contributes" actually means.[17] The district court indicated that "an individual's status as a 'contributor' is not dependent on his or her purpose in transferring the funds." Mem. Op. (JA 148-160). This is not how FECA defines the obviously related term "contribution," which is limited to transfers of money or other things of value "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).[18] Rep. Van Hollen agrees,

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[17]Statement on *Van Hollen v. FEC* of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew F. Petersen, (accessed June 20, 2012), *available at* http://fec.gov/law/litigation/van_hollen.shtml.

[18] Communications that are "for the purpose of influencing an election" are by definition express advocacy communications that are excluded from the definition of "electioneering communications." Again, a hypothetical may assist the Court. An advertisement by HLF that says only "Call Congressman Smith and tell him to support the balanced budget amendment" aired within an electioneering communications window and targeted to the relevant electorate is subject to the electioneering communications disclosure, disclaimer and reporting requirements. Outside an electioneering communications window, this advertisement would not require any disclosure, disclaimer or reporting requirements. If the advertisement by HLF said instead, "Vote for Congressman Smith because he supports the balanced budget amendment," then this advertisement would be "for the purpose of influencing a federal election" as a result of the express advocacy content, and would constitute an independent expenditure no matter when in time it aired. Under no circumstances would this second advertisement ever be an electioneering communication.

but maintains that even though the relevant statutory language requires certain disclosures of "all contributors who contributed," the definition of "contribution" cannot be used to inform the meaning of "all contributors who contributed" because it "would not make sense." Opposition (JA at 176).[19]

The three FEC Commissioners who voted to appeal this matter note that in 2003, the FEC substituted "each donor who donated" for "all contributors who contributed," on the grounds that "donor" had a different connotation than "contributor."[20] The Commissioners noted, "if BCRA's electioneering communications reporting provision was clear on its face, then it is unclear why it is appropriate for the Commission's now-revived 2003 regulation to substitute different terminology with a more 'clear connotation' than what was used in the statute." *Id* at 3.

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[19] The FEC previously acknowledged that the statutory language used did "not make sense." In its electioneering communications reporting regulation, the FEC replaced the statutory phrase "contributors who contributed" with "donors who donated," which effectively eliminated the problems of attaching the "for the purpose of influencing" concept to electioneering communications, which by definition do not include express advocacy. *See BCRA Reporting*, 68 Fed. Reg. at 413.

[20] Statement on *Van Hollen v. FEC* of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew F. Petersen, (accessed June 20, 2012), *available at* http://fec.gov/law/litigation/van_hollen.shtml.

BCRA's ambiguity is further evident in an Advisory Opinion request heard by the FEC in the time since the district court decision. *See* AOR 2012-20 (Mullin May 30, 2012). On May 30, 2012, the FEC voted on Advisory Opinion Request 2012-20 (Mullin) submitted on behalf of Markwayne Mullin. *Id*. Mr. Mullin is a candidate for the Republican nomination for Congress in Oklahoma's Second Congressional District. *Id*. He is also the President and CEO of Mullin Plumbing, Inc. *Id*. For the past decade, he has "engaged in branding his family's name onto his company" through efforts that include his personal appearance in all of Mullin Plumbing's television advertisements and some of its radio advertisements.*Id*.

Mr. Mullin sought the FEC's determination on whether his advertisements were electioneering communications under the Act so that he could properly comply with the Act's reporting requirements, and if the plumbing company advertisements were deemed to be electioneering communications whether Mullin Plumbing would be required to disclose all customers who paid Mullin Plumbing more than $1,000 since January 1 of last year. *Id*. However, the FEC failed to agree on any draft opinion and ultimately could not issue an Advisory Opinion, leaving businesses throughout the country without resolution on whether their customers are subject to disclosure if the company engages in an electioneering communication. *Id*.

The inability of the FEC, the expert arbiter of campaign finance regulation, to issue a determination on whether a communication is an electioneering communication of what constitutes a "contributor who contributed" under the electioneering communications disclosure rules clearly evinces the ambiguity present in the Act.

C. *Severability*

The Commission did not remove the reporting requirements of BCRA, nor did it refuse to apply the reporting requirements of BCRA. Rather, it looked to the world of communications that required reporting at the time of BCRA's enactment and determined that amendments to reporting regulations were necessary to provide the regulated community with clarity (and First Amendment protections) that did not exist in the plain language of BCRA post *WRTL II*.

The Circuit Court cited BCRA's severability clause as evidence that Congress was aware that provisions of BCRA could be held unconstitutional. JA 180-82. Here, the Panel stated, "In light of the severability clause, nothing in the plain text of section 201 suggests Congress did not mean what it said – that section 201's disclosure requirement applies to all contributors regardless of their subjective purpose in contributing." *Id*. at 180-81. However, as one commenter noted in the 2007 rulemaking, "the question is not whether BCRA § 201 may still be enforced as a constitutional matter, but whether the electioneering

communications reporting requirements should be applied to a type of broadcast advertisement that was not even recognized under the original statute." Notice of Proposed Rulemaking, *Comment of Alliance for Justice* (JA 55-59).

The Court's analysis in *Chevron* step one is to assess the clarity, or lack thereof, of Congress's reporting requirements for electioneering communications under BCRA. *Chevron*, 467 U.S. 837. Similarly, the FEC's analysis, following *WRTL II*, was to determine how Congress intended the Commission to *carry out its core function* of requiring filers to report under BCRA. The Commission was faced with BCRA's constitutionally upheld reporting requirements in *McConnell* and the practical changes in the types of communications that would now be reported under *WRTL II*.

Finding that the plain text of BCRA provided no clarity to the regulated community as to what would now be required in reports to the FEC, the Commission exercised its discretion, in compliance with the APA and to prevent infringement of First Amendment rights, by amending 11 C.F.R. § 104.20(c)(8) and adding § 104.20(c)(9). Without this regulatory action, any who exercised their right to free speech by making permissible electioneering communications with corporate and labor organization financing would not be able to clearly discern the extent to which the FEC would require reporting.

There is no doubt that BCRA's severability clause evinces Congress's intent to carry out the Act's reporting requirement as modified regardless of judicial invalidation. However, it does not in any way reflect impropriety in the FEC's rulemaking under the APA to carry out that same intent. This is precisely what the FEC did in promulgating § 104.20(c)(9) in order to carry out the reporting requirements of the Act. Thus, the severability clause of BCRA has no impact upon the Court's *Chevron* analysis.

III. The FEC's 2007 Regulation is Reasonable and Satisfies the Requirements of Step Two of the *Chevron* Test.

The FEC's 2007 regulation was the product of extensive discussion and deliberation by the agency. As noted, supra, following *WRTL II*, the FEC undertook a comprehensive rulemaking to address the electioneering communication reporting provisions. *Notice of Proposed Rulemaking: Electioneering Communications*, 72 Fed. Reg. 50,261 (Aug. 31, 2007) (JA 34). During this process, the FEC considered more than 25 written comments and heard two days of testimony from groups from across the political spectrum. JA 34-64. In addition to hearing from BCRA's primary co-sponsors, the FEC received and considered comments from the regulated community and other interested parties. *Id*.

Against this backdrop, commenters raised – and the FEC responded to – three problems inherent in the broad-based and invasive disclosures that Rep. Van Hollen seeks to impose here. *First*, in light of the record before it, the FEC "recognized that it could be costly and a significant administrative challenge for the large and diverse entities covered by the regulation to report every person that paid them $1,000 or more in a year." FEC S.J. Mem. at 33 (JA 101).[21] Accordingly, the Commission reasonably concluded that the "cost[]" and "inordinate amount of effort" associated with imposing a non-purpose-based disclosure requirement was unjustified. *Final Rule: Electioneering Communications*, 72 Fed. Reg. at 72,911 (JA 87).

Second, the Commission explained that its regulation would provide "the public with information about those persons who *actually* support the message conveyed by the [electioneering communications] without imposing on corporations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making" of electioneering communications. *Id.* (emphasis

[21] For example, one comment detailed how compliance with a complex scheme of disclosure rules for non-profits would be "a challenge for staff, who are not typically legal experts." FEC S.J. Mem. at 33-34 (JA 101-02). Another commenter explained how the "daunting complexity" of "following complicated FEC reporting regulations" would "effectively prevent" certain nonprofits from "running issue ads during election periods." [Comment by Independent Sector, VH0365].

added). In the Commission's view, adopting an alternative approach "would be misleading" as it would "compel a flood of information . . . that is not necessarily relevant to the purpose the regulation purportedly serves. FEC S.J. Mem. at 35 (quoting *CFIF v. Tennant*, No. 08-190, 2011 WL 2912735, at *49 (S.D.W.Va. July 18, 2011) (JA 103).

Third, the FEC said that its "carefully designed reporting requirements" were "constitutional," "narrowly tailored to address . . . concerns regarding individual donor privacy," and did "not create unreasonable burdens on the privacy rights of donors to nonprofit organizations." 72 Fed. Reg. at 72,911 (JA 87). Given the FEC's past record of failing "to tailor its disclosure policy to avoid unnecessarily infringing upon First Amendment rights," *American Federation of Labor and Congress of Indus. Organizations v. Federal Election Comm'n*, 333 F.3d 168 (D.C. Cir. 2003), there was good reason for the agency to adopt a regulation that took the First Amendment's protections seriously. *See also Chamber of Commerce of U.S. v. Federal Election Comm'n*, 76 F.3d 1234, 1235 (D.C. Cir. 1996) (perceiving "serious constitutional problems with the Commission's interpretation").

Fourth, compared to the District Court's order, the 2007 rule is clear about who must be disclosed. The district court's order restoring the 2003 regulation creates additional confusing by re-introducing the term "donor" without additional

definition. As illustrated by the FEC's recent failure to respond to AOR 2012-20 (Mullin) (discussed *supra*), the FEC was unable to inform the requestor about whether customers of his business would be required to be disclosed if his company in fact engaged in an electioneering communication.

While the FEC's unapproved draft opinions A and C concluded that the advertisements were electioneering communications in the first place concluded that customers were not donors for the purposes of the 2003 regulations, they did so by citing to language in the district court's opinion from a sentence punctuated with a series of question marks. *See* AOR 2012-20 at Draft A and Draft C. The FEC was unable to adopt any opinion in this matter, leaving significant doubt about whether a for-profit corporation that airs an electioneering communication could be responsible for publicly disclosing all customers who paid more than $1,000 to the corporation. This AOR helps to illustrate the clarity brought to this sensitive area through the FEC's reasonable 2007 rulemaking.

The FEC's 2007 rulemaking was a reasonable interpretation of a statute containing terms that are undefined and vague in the context of the application of the statute to an entire category of potential speakers that Congress intended to prohibit from engaging in such communications in the first instance. The FEC's 2007 interpretation of the statute through the regulation invalidated by the district court was wholly reasonable, and should be reinstated.

CONCLUSION

For the above reasons regarding standing, this case should be dismissed in its entirety. In the alternative, the decision of the lower should be reversed with respect to its application of the *Chevron* test.

Because this oral argument is scheduled to take place just 53 days before the November 2012 election, and 7 days after the opening of the "electioneering communications" window with respect to all federal candidates nationwide, we respectfully ask this court to rule as quickly as possible.

Dated: June 20, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH D.C. CIRCUIT RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief contains 9,884 words, excluding the parts exempted by the rules, and has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point typeface.

Dated: June 20, 2012

Respectfully submitted,

___/s/ Jason Torchinsky___

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2012, I electronically filed the foregoing Brief of Hispanic Leadership Fund, with the Clerk of the Circuit Court for the District of Columbia using the CM/ECF system.

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Respectfully submitted,

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