UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN,	)	Civil Action No. 1:11-cv-00766 (ABJ)
Plaintiff,	)	
v.	)	MEMORANDUM
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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The Federal Election Commission ("Commission" or "FEC") adopted a reasonable rule that reconciles the Federal Election Campaign Act with recent Supreme Court precedent and requires rigorous disclosure by corporations and labor unions that make "electioneering communications." The Supreme Court's decision in *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), fundamentally changed the regulatory landscape by holding that corporations have a constitutional right to make certain electioneering communications, notwithstanding the pre-existing ban in the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). The Commission conducted a comprehensive rulemaking, rejected a proposal that would have exempted the newly permissible communications from all disclosure, and required disclosure of critical information, including the identities of those who make electioneering communications and of persons who provide funds for that purpose. Under the highly deferential standard of review, this regulation satisfies the Administrative Procedure Act ("APA") and the two-step analysis of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Congress had not spoken to the precise issue of the appropriate disclosures required of corporations and unions that make electioneering communications; prior to *WRTL*, these organizations were barred from financing such communications. Moreover, the most relevant statutory language at 2 U.S.C. § 434(f)(2)(F) is ambiguous. The Court must therefore analyze under *Chevron* step two whether the Commission's regulation is reasonable. Because the rule is grounded in the administrative record and properly balances the interest in disclosure with the potential First Amendment burden on corporations and unions — as well as on their funders who may have nothing to do with the spenders' electioneering — the Court should grant summary judgment to the Commission.

BACKGROUND

I. THE PARTIES

Plaintiff Chris Van Hollen is a Member of the United States House of Representatives. (Declaration of Rep. Chris Van Hollen ¶ 1 (Doc. #20-1).)

Defendant Federal Election Commission is the independent agency of the United States empowered with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-57 ("FECA" or "the Act"). *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. The Act imposes contribution restrictions and disclosure requirements in connection with campaigns for federal office. *See*, *e.g.*, 2 U.S.C. §§ 434, 441a. FECA also authorizes the Commission to "formulate policy with respect to" the Act, 2 U.S.C. § 437c(b)(1), as well as to promulgate "such rules . . . as are necessary to carry out the provisions" of the Act, 2 U.S.C. § 437d(a)(8).

II. STATUTORY AND REGULATORY PROVISIONS RELEVANT TO 11 C.F.R. § 104.20(c)(9)

A. The Origin of "Electioneering Communications"

FECA places limits on the amount individuals can contribute to candidates, their campaigns, and other political committees and parties. *See* 2 U.S.C. § 441a(a). In addition, FECA prohibits corporations and labor organizations from making contributions, except through their separate segregated funds (also known as political action committees or PACs). *Id.* §§ 441b(a), (b)(2)(C). FECA defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Similarly, FECA by its terms prohibits corporations and unions from making any "expenditures," defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made . . . for the purpose of

influencing any election for Federal office." *Id.* § 431(9)(A)(i); *see id.* § 441b(a). FECA also requires periodic disclosure of contributions and certain expenditures and disbursements to the FEC, which then makes the information available to the public. *See id.* § 434.[1]

In 1976, the Supreme Court generally upheld FECA's contribution limits and disclosure requirements against a facial challenge, but the Court struck down limits on expenditures by individuals and candidates. *See Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). When the Court construed FECA's then-$1,000 limit on expenditures by any person "relative to" a federal candidate, to avoid invalidating the provision on vagueness grounds the Court construed "expenditure" narrowly to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44 (footnote omitted). Following *Buckley*, Congress amended the Act to provide that an "independent expenditure" is "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate." *See* FECA Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 2 U.S.C. § 431(17)). The Act requires that all independent expenditures above $250 be timely reported to the Commission for disclosure to the public. 2 U.S.C. § 434(c)(1). However, a separate FECA provision prohibited corporations and labor organizations from making independent expenditures using their general treasury funds. 2 U.S.C. § 441b.

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the Supreme Court held that incorporated advocacy organizations possessing certain characteristics cannot constitutionally be barred from using general treasury funds to make independent expenditures. This holding applied to corporations that were formed for the sole purpose of

[1] For a brief history of campaign finance legislation, see *McConnell v. FEC,* 540 U.S. 93, 115-133 (2003); 251 F. Supp. 2d 176, 188-201 (D.D.C. 2003).

promoting political ideas, that did not engage in business activities, and that did not accept contributions from for-profit corporations or unions. *Id.* at 263-64. Organizations with those characteristics became known as "*MCFL* corporations."

Following the Supreme Court's narrowing construction of independent "expenditure," all corporations and unions could use their general treasury funds to finance independent communications that discuss candidates as long as they stopped short of express advocacy. By the end of the 1990s, independent groups had begun to spend millions of dollars on so-called "issue ads" — ads that avoided express advocacy but, under the guise of advocating for or against an issue, actually supported or opposed the election of federal candidates. *See McConnell*, 540 U.S. at 126-128. Congress determined that because the express advocacy standard was easy to evade, entities were funding broadcast ads designed to influence federal elections "while concealing their identities from the public." *Id.* at 196-97. To address this and other developments in federal campaign finance, Congress in 2002 enacted the Bipartisan Campaign Reform Act ("BCRA"). In particular, in response to what Congress identified as "sham issue ads" and the use of large amounts of "soft money" (funds not subject to FECA's source and amount restrictions and reporting requirements) in federal elections, Congress imposed new financing and disclosure requirements on those making "electioneering communications" ("ECs"). BCRA §§ 201, 203, 204. *See McConnell*, 540 U.S. at 126. Under BCRA, an "electioneering communication" is any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office, is publicly distributed within 60 days before a general election or 30 days before a primary election, and is targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3)(A). BCRA prohibited the financing of electioneering

communications with corporate or union general treasury funds. 2 U.S.C. §§ 434(f)(3)(A)(i); 441b(a), (b)(2).

Congress also required disclosure concerning electioneering communications. Those making disbursements aggregating more than $10,000 per year for electioneering communications must file a report with the Commission that contains, *inter alia*, the "identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement." 2 U.S.C. §§ 434(f)(1), (2)(A). BCRA also requires disclosure of certain information about the funds used to finance electioneering communications, and provides two options:

> (E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence . . . directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.
>
> (F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

2 U.S.C. §§ 434(f)(2)(E) & (F).

B. Regulations Implementing BCRA

Shortly after Congress enacted BCRA, the Commission promulgated in 2002 and early 2003 new regulations implementing the electioneering communications provision.[2] The original

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[2] 67 Fed. Reg. 65,190 (Oct. 23, 2002); 68 Fed. Reg. 404 (Jan. 3, 2003).

regulation provided two options for reporting the sources of funds used to make electioneering communications:

> (7) If the disbursements were paid exclusively from a segregated bank account consisting of funds provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; and
>
> (8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section, 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.

11 C.F.R. § 104.20(c) (effective Feb. 3, 2003, to Dec. 25, 2007); 68 Fed. Reg. 404, 419 (Jan. 3, 2003). Because BCRA prohibited corporations from making electioneering communications unless they met the strict criteria of "*MCFL* corporations," the new regulation applied to very few corporations (and no unions). *See MCFL*, 479 U.S. at 263-64; *McConnell*, 540 U.S. at 209-12 (construing BCRA not to apply the electioneering communication financing requirements to *MCFL* corporations).[3]

When BCRA's electioneering communication amendments were challenged as facially unconstitutional, the Supreme Court initially upheld the provisions at 2 U.S.C. §§ 434(f), 441b and 441d. *See McConnell*, 540 U.S. at 194, 201-02, 207-08. The Court held that the prohibition on the use of general treasury funds by corporations and labor organizations to pay for electioneering communications was not facially overbroad, because the "vast majority" of

[3] Commission regulations refer to *MCFL* corporations as "qualified nonprofit corporations" or "QNCs." *See* 11 C.F.R. § 114.10. The Commission explained that "the legislative history indicates that the intent of BCRA was to treat electioneering communications in a similar manner as independent expenditures. Part of that treatment is the application of *MCFL* to electioneering communications made by the QNC's." 67 Fed. Reg. at 65,204.

communications that met the definition of electioneering communication were "intended to influence [] voters' decisions" and were "the functional equivalent of express advocacy." *Id.* at 206. The Court also upheld the electioneering communication disclosure requirements, noting that they did not suppress speech and that important state interests support the requirements. *See id*. at 196-99, 201.

C. The Supreme Court's Partial Invalidation of BCRA's Prohibition on the Use of Corporate and Union Funds to Finance Electioneering Communications

Four years after *McConnell*, in *WRTL*, the Supreme Court partially invalidated BCRA's general prohibition on the financing of electioneering communications with corporate and union treasury funds. The controlling opinion held that BCRA's ban on corporate spending was unconstitutional as applied to a corporation's advertisements that did not constitute express advocacy or "the functional equivalent of express advocacy." *Id.* at 476, 478-79. Before *WRTL*, only *MCFL* corporations could make electioneering communications, but *WRTL* permitted *all* corporations and unions to make electioneering communications as long as they did not contain express advocacy or the functional equivalent ("*WRTL* ads"). *See id.* at 480-81. Plaintiff WRTL had not challenged BCRA's disclosure requirements and consequently the Supreme Court did not address them.

D. Regulations Implementing *WRTL*

Shortly after the decision in *WRTL*, the Commission received a request for rulemaking from the James Madison Center for Free Speech, asking the FEC to create an exemption for *WRTL* ads. (Administrative Record ("AR") Tab 2 (Doc. #17-2).) In July 2007, the Commission announced that it intended to conduct a rulemaking to implement the *WRTL* decision,[4] and the following month the Commission issued a Notice of Proposed Rulemaking ("NPRM"). 72 Fed.

[4] Available at http://www.fec.gov/press/press2007/20070719rule.shtml.

Reg. 50,261 (Aug. 31, 2007); AR Tab 6. The NPRM sought comment on *WRTL*'s overall impact and on a variety of issues implicated by the decision, including the disclosure requirements for electioneering communications. The Commission received more than 25 comments and held two days of hearings in October 2007, with 15 witnesses testifying. AR Tabs 5, 7-30, 34-38, 40-42, 52.

BCRA specifically authorizes the Commission to promulgate regulations exempting communications entirely from the definition of electioneering communication as long as they do not promote, support, attack or oppose a candidate, *see* 2 U.S.C. § 434(f)(3)(B)(iv), *citing* 2 U.S.C. § 431(20)(A)(iii); such exempt communications are subject to neither the financing nor the disclosure requirements for electioneering communications. In the NPRM, the Commission proposed two basic alternatives. Alternative 1 would not have exempted the newly-permitted *WRTL* ads from the definition of electioneering communication, but it would have allowed corporations and unions to finance certain electioneering communications with general treasury funds; any such spending would still have had to comply with the disclosure requirements. Alternative 2 would have entirely exempted the ads from the definition of electioneering communication in 11 C.F.R. § 100.29 and would thus have eliminated both the disclosure requirements and financing restrictions for *WRTL* ads. *See* Final Rule and Explanation and Justification on Electioneering Communications, 11 C.F.R. Part 104, 114, 72 Fed. Reg. 72,899, 72,900 (Dec. 26, 2007); AR Tab 54.

Rulemaking commenters disagreed. Generally, those who supported Alternative 1 noted that the plaintiffs in *WRTL* had not challenged the disclosure requirements, that the Supreme Court had not addressed the constitutionality of those requirements, and that the reporting requirements had been upheld by the Court in *McConnell*. *See* 72 Fed. Reg. at 72,900.

Commenters that supported Alternative 2 generally argued that *WRTL* meant that such electioneering communications were protected from any FEC regulation, including disclosure rules, and that compliance with disclosure requirements would be too burdensome and would chill speech by some nonprofit organizations. *See id*. at 72,900-01. In the hearings, commenters observed that *WRTL* had placed the Commission in the difficult position of regulating conduct that Congress had not intended to be lawful. One noted:

> Basically the court has left you in a position where they have created a new category of speech which was not before Congress when it wrote its reporting requirements. That's the fact. We don't know and it's really impossible to know for us how Congress would have decided this question.

Trister, Alliance for Justice, Hearing Comments, Tab 36, VH0813. *See id*. at VH0846 ("I think you are between a rock and a hard place."); Gold, AFL-CIO, Hearing Comments, Tab 35, VH0642-43 ("you obviously are acting in an unexpected situation.").

In its final rule, the Commission adopted a revised version of Alternative 1. 72 Fed. Reg. at 72,899. The Commission explained that it agreed with commenters who argued that *WRTL*'s holding that the financing restrictions are unconstitutional as applied to certain advertisements does not extend to the disclosure requirements. 72 Fed. Reg. at 72,901. The Commission rejected the contention that BCRA did not contemplate any reporting by corporations and labor organizations, even though BCRA did not generally permit corporations and labor organizations to finance electioneering communications. The Commission noted that the statute requires every "person" that finances electioneering communications to file disclosure reports. *See id.;* 2 U.S.C. § 431(11). Finally, the Commission explained that "while understanding that some nonprofit organizations and their donors have privacy interests and that some donors request to remain anonymous, the Commission disagrees with the commenters who argue the only

constitutional way to protect those interests is to . . . allow[] all ECs that qualify for the [*WRTL*] exemption to be run without any disclaimers or reporting." 72 Fed. Reg. at 72,901.

The Commission thus decided: "[L]ike all persons making ECs that cost, in aggregate, more than $10,000, corporations and labor organizations must also disclose their identities as the persons making the ECs, the costs of the ECs, the clearly identified candidates appearing in the communications and the elections in which the candidates are participating, and the disclosure dates." 72 Fed. Reg. at 72,911. In addition, these electioneering communications would have to contain a clear and conspicuous disclaimer, s*ee* 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a)(4), providing the full name, permanent street address, and telephone number, or World Wide Web address, of the person who paid for the communication, as well as a statement that the communication was not authorized by any candidate or candidate's committee. S*ee* 11 C.F.R. §§ 110.11(b)(3), 110.11(c)(1), and (c)(4)(i)-(iii); 72 Fed. Reg. at 72,910 n.20.

The Commission explained that it was also promulgating a new regulation, 11 C.F.R. § 104.20(c)(9), to cover disclosure of the sources of funds used to finance the electioneering communications now permitted by *WRTL* (those that did not include express advocacy or its functional equivalent). 72 Fed. Reg. at 72,911. The regulation provides:

> If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

11 C.F.R. § 104.20(c)(9). The Commission explained that it had added this new section to apply specifically to corporations and labor organizations and that it had added the phrase "for the purpose of furthering electioneering communications" to ensure that disclosure of the newly-permitted electioneering communications would be narrowly tailored, mindful of the concerns

many commenters had expressed during the rulemaking about the potential burdens on the variety of organizations that could now make certain electioneering communications. *Id.* The Commission explained that the phrase was rooted in the reporting requirements that apply to independent expenditures made by persons other than political committees. *See* 2 U.S.C. § 434(c)(2)(C), 11 C.F.R. § 109.10(e)(1)(vi); 72 Fed. Reg. at 72,911 n.22. As the Commission had noted in the rulemaking that led to the 2003 disclosure regulations, *see supra* pp. 5-6, the legislative history of BCRA indicated that Congress intended electioneering communications to be treated similarly to independent expenditures. And during the 2007 rulemaking, commenters had pointed to the independent expenditure provisions as a model for the electioneering communication requirements. (*See* Gold, AFL-CIO, Hearing Comments, Tab 35, VH0643; Trister, Alliance for Justice, Hearing Comments, Tab 36, VH0840-42.)[5]

During the hearings, some commenters emphasized that in many cases it would make little sense to require a corporation or union to disclose all those whose funds ended up in its general treasury simply because it decided to make a limited number of electioneering communications that were *not* the functional equivalent of express advocacy. *See* Gold, AFL-CIO, Hearing Comments, Tab 35, VH0660 ("There is no public policy value whatsoever in requiring any organization to reveal its members just because they engage in a single electioneering communication . . . ."); *see also* Sullivan, SEIU, Hearing Comments, Tab 36, VH0924 ("And it would be, if not counterproductive, at least serving no particular purpose to report or disclose the names of people who did in fact not contribute to the financing of a particular electioneering communication."). One commenter suggested specifically that union

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[5] After the decision in *WRTL*, the Commission divided 11 C.F.R. § 104.20(c)(7) into two sections, added paragraphs (c)(7)(ii) and (c)(9), and slightly revised paragraphs (c)(7)(i) and (c)(8), to implement *WRTL*. *See* 72 Fed. Reg. at 72,902 .

dues, membership dues, investment income, or other commercial or business income should be excluded from reportable donations. 72 Fed. Reg. at 72,911. Another proposal argued that disclosure should be limited to funds that are designated for electioneering communications or received in response to a solicitation specifically requesting donations to make such communications. *Id*. at 72,910. And another commenter suggested that disclosure should be limited to the amounts listed on an organization's IRS Form 990, line 1, which includes contributions, gifts, grants, and similar amounts received by a tax exempt organization. *Id*.

When it adopted the final rule, the Commission explained that 11 C.F.R. § 104.20(c)(9) balances important interests in the new regulatory environment: on the one hand, disclosing key information about electioneering communications, and on the other hand, limiting the potential burden on corporations and unions and protecting the interests of those who provide funds to those entities but who may not support their electioneering communications. "In the Commission's judgment, requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering ECs appropriately provides the public with information about those persons who actually support the message conveyed by the ECs without imposing on corporations and labor organizations 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 ECs." 72 Fed. Reg. at 72,911.

> A corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission. These investors, customers, and donors do not necessarily support the corporation's electioneering communications. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications.

Id. With regard to the potential burden on entities making newly-permitted electioneering communications, the FEC noted testimony that compliance would be "very costly and require an inordinate amount of effort." *Id.* "Indeed, one witness noted that labor organizations would have to disclose more persons to the Commission under the ECs rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act." *Id.*

E. The Supreme Court's Complete Invalidation of BCRA's Prohibition on the Use of Corporate and Union Treasury Funds to Finance Electioneering Communications

In 2010, the Supreme Court struck down the longstanding prohibition on corporations and unions using general treasury funds to finance independent expenditures and electioneering communications. *Citizens United v. FEC*, 588 U.S. ___, 130 S. Ct. 876, 913-16 (2010). However, the Supreme Court upheld BCRA's electioneering communication disclosure requirements. *Id.* at 915-16. The Commission is considering changes to regulations implicated by *Citizens United*, including those that govern electioneering communication disclosure.[6]

ARGUMENT

I. THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL

A. Review of Agency Action Under the APA and *Chevron* Is Highly Deferential

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). However, in an action challenging agency action under the APA, the "district court sits as an

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[6] *See* FEC Notice of Availability, Rulemaking Petition: Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 Fed. Reg. 36,001 (June 21, 2011); FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC*, Feb. 5, 2010, http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

appellate tribunal" and the "entire case on review is a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993). The Court has the limited role of reviewing the Commission's decision-making based on the administrative record, so the Court's review must be based upon the record that was before the agency during its rulemaking. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Under the APA, the Court may set aside 11 C.F.R. § 104.20(c)(9) only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. §§ 706(2)(A) & (C).

The standard for judicial review in an APA challenge is "highly deferential," *Sierra Club v. EPA*, 353 F.3d 976, 978 (D.C. Cir. 2004), and so the scope of review is narrow, s*ee Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In fact, the arbitrary and capricious standard "presumes the validity of agency action." *Volpe*, 401 U.S. at 415; *see Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004); *Nat'l Ass'n of Mortgage Brokers v. Board of Governors of the Fed. Res.Sys.*, No. 11-00506, 2011 WL 1158432, at *12 (D.D.C. March 30, 2011). The Court is "not to substitute its judgment for that of the agency," but instead is to satisfy itself that the agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation and internal quotation marks omitted). Where the empowering provision of a statute authorizes the agency to "make . . . such rules [. . .] as are necessary to carry out the provisions of this Act," as FECA does in 2 U.S.C. § 437d(a)(8), the "validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation omitted). And when, as here, an

agency has made a determination that falls within its area of special expertise, deference is at its zenith. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

Because Van Hollen challenges a regulation that interprets a statute the Commission administers, the Court reviews the regulation not only under the APA but also under the familiar two-step *Chevron* framework. Under *Chevron*, the Court looks first to determine "whether Congress has directly spoken to the precise question at issue," and if it has, "the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. In this step one analysis, "the term 'precise question at issue' [is] to be interpreted tightly." *See Central States Motor Freight Bureau v. ICC*, 924 F.2d 1099, 1104 (D.C. Cir. 1991). Only if "an accepted canon of construction illustrates that Congress had a *specific* intent on the issue in question" can the case "be disposed of under the first prong of *Chevron*." *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir. 1989) (emphasis in original).

If Congress has not "directly spoken to the precise question at issue," the Court proceeds to the second step of *Chevron* analysis and it "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 842, 844. This step overlaps with the arbitrary and capricious standard of the APA, *Chamber of Commerce of the U.S. v. FEC*, 76 F.3d 1234, 1235 (D.C. Cir. 1996), because the question of whether an agency's interpretation of a statute is unreasonable is "close analytically to the issue whether an agency's actions under a statute are unreasonable," *Gen. Instrument Corp. v. FCC.*, 213 F.3d 724, 732 (D.C. Cir. 2000). At *Chevron* step two, the Court is to "defer to the agency's interpretation as long as it is 'based on a permissible construction of

the statute.'" *Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004) (quoting *Chevron*, 467 U.S. at 843.)

At *Chevron* step two, whether a competing interpretation of the statute might also be reasonable is irrelevant. The "interpretation need not be the best or most natural one by grammatical or other standards . . . . Rather[, it] need be only reasonable to warrant deference." *Pauley v BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (citations omitted). "[U]nder *Chevron*, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." *FEC v. National Rifle Ass'n of Am.*, 254 F.3d 173, 187 (D.C. Cir. 2001) (quoting *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)). Indeed, there is no requirement that an agency's interpretation comport with one a court would have adopted; a "permissible" construction means only "a construction that is 'rational and consistent with the statute.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. Food & Commercial Workers,* 484 U.S. 112, 123 (1987)). If "the statute is ambiguous, then *Chevron* step two implicitly precludes courts picking and choosing among various canons of construction to reject reasonable *agency* interpretations." *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997) (citation and internal quotation marks omitted; emphasis in original).

B. The Commission's Interpretation of FECA Should Be Accorded Particular Deference

The Supreme Court has explained that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Judicial deference to agency decision-making is based upon Congress's decision to delegate discretion to an agency to implement a statute. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). Such deference is appropriate when

"Congress has expressly delegated to [an agency] the authority to prescribe regulations containing such classifications, differentiations, or other provisions as, in the judgment of the [agency], are necessary or proper to effectuate the purposes of [the authorizing statute], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *Household Credit Servs., Inc. v. Pfennig,* 541 U.S. 232, 238-39, 242 (2004) (internal quotation marks omitted). And "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common Cause v. Schmitt*, 512 F. Supp. 489, 502 (D.D.C. 1980) (three-judge court), *aff'd mem.*, 455 U.S. 129 (1982). Indeed, the Commission's "express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language,'" and so "'the FEC's interpretation of the Act should be accorded considerable deference.'" *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (citation omitted). The Supreme Court explained the importance of this division of responsibilities in our balanced system of government:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 866 (citation omitted).

The Commission's decisions are particularly appropriate for judicial deference because the FEC is "[u]nique among federal administrative agencies" in that "its sole purpose [is] the regulation of core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d

380, 387 (D.C. Cir. 1981)). "The [Federal Election] Commission has been vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 545 (D.C. Cir. 1980). "Deference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988).

II. CONGRESS DID NOT SPEAK DIRECTLY TO THE DISCLOSURE ISSUE ADDRESSED IN THE CHALLENGED REGULATION

Under the first step of *Chevron* analysis, "the court examines whether the statute speaks 'directly … to the precise question at issue.'" *Kanchanalak,* 192 F.3d at 1047 (citation omitted). If so, the court must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842. However, as here, "[i]f the statute 'has not directly addressed the precise question at issue,' then the agency's construction, if reasonable, should be honored." *Kanchanalak,* 192 F.3d at 1047 (citation omitted); *see generally supra* pp. 15-16.

A. Congress Could Not Have Spoken Directly to the Precise Issue Here Because BCRA Originally Prohibited Corporations and Unions from Making Electioneering Communications from Their General Treasuries

Congress could not possibly have spoken to the precise issue plaintiff raises in his challenge to 11 C.F.R. § 104.20(c)(9) because BCRA prohibited all unions and virtually all corporations from making any electioneering communications at all (the sole exception being the small group of *MCFL* corporations). *See* 2 U.S.C. § 441b(b)(2). The precise issue here — the required disclosures for corporate and union electioneering communications that BCRA banned — was never contemplated by Congress. As explained *supra* p. 7, corporations and unions only gained the ability to make certain electioneering communications with general treasury funds in 2007, five years after BCRA was passed, as a result of the Supreme Court's holding in *WRTL.*

551 U.S. at 469-70. Commenters in the FEC's rulemaking from across the ideological spectrum agreed that *WRTL* was a fundamental change that Congress could not have foreseen.[7]

B. BCRA's Language as to Electioneering Communication Disclosure Is Ambiguous

The Court should stop its inquiry at the first step of *Chevron* analysis only if Congress's intent was "unambiguously expressed." *Chevron*, 467 U.S. at 843. Here, even if BCRA's disclosure requirements for electioneering communications are applied to corporations and unions in a way never foreseen by Congress, the relevant statutory language is ambiguous. The primary provision upon which plaintiff relies, 2 U.S.C. § 434(f)(2)(F), requires disclosure of certain persons who provide funds to those who make electioneering communications, but this provision employs the undefined terms "contributors" and "contributed." As explained below, these terms are susceptible of multiple meanings in different contexts.

Under BCRA as enacted in 2002, persons making electioneering communications out of a non-segregated bank account must disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement …." 2 U.S.C. § 434(f)(2)(F). In the 2003 rulemaking that led to the Commission's original electioneering communication disclosure regulation, the Commission noted that, although Congress defined the term "contribution" long ago in FECA, neither "contributor" nor

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[7] *See, e.g.,* Gold, AFL-CIO, Hearing Comments, Tab 35, VH0642-43 ("You obviously are acting in an unexpected situation. Congress did not foresee a class of electioneering communications that unions and corporations couldn't undertake and what the consequence of that would be."); Trister, Alliance for Justice, Hearing Comments, Tab 36, VH0813 ("Basically the court has left you in a position where they have created a new category of speech which was not before Congress when it wrote its reporting requirements.… We don't know and it's really impossible to know for us how Congress would have decided this question."); Hoersting, Center for Competitive Politics**,** Hearing Comments, Tab 36, VH0966 ("At the end of the day do I think Congress foresaw the snafu that would happen in *WRTL*? No."); Bopp, James Madison Center for Free Speech, Hearing Comments, Tab 35, VH0505 ("[P]eople need to recognize that we have a radical change in approach from the *McConnell* decision to the [*WRTL*] decision.").

"contributed" was defined in the statute. *See* 68 Fed. Reg. at 413; *compare* 2 U.S.C. § 431(8) (defining "contribution") *with* 2 U.S.C. § 434(f)(2) (using "contributor" and "contributed"). Of course, "contributor" and "contributed" share the same root as the defined term "contribution." Under FECA, a "contribution" is a transfer of something of value made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A). Yet as the Commission noted, 68 Fed. Reg. at 413, it did not seem appropriate to interpret "contributor" in this context precisely as one who has made a "contribution" as defined by FECA because the definition of "electioneering communication" could include speech *not* made for the purpose of influencing an election: The mere reference to a clearly identified candidate in a targeted broadcast communication suffices to bring an ad within the statutory definition. *See* 2 U.S.C. § 434(f)(3)(A)(i)(I). Thus, from the start — and well before the *WRTL* decision — the terms "contributors" and "contributed" were ambiguous in this context.

To resolve the statutory ambiguity, the Commission chose not to use the terms "contributor" or "contributed" in its original 2003 regulation, which did not apply to corporations or unions. The Commission instead required the disclosure of the "name and address of each *donor* who *donated* an amount aggregating $1,000 or more to the person making the disbursement … ." 11 C.F.R. § 104.20(c)(8) (emphasis added). The Commission had notified the public during the rulemaking comment period of its plan to use the broader terms "donor" and "donations." 68 Fed. Reg. at 413. No commenters objected to this approach, nor did any suggest that this was the only possible interpretation of the statutory language.

After the 2007 *WRTL* decision, the appropriate interpretation of "contributor" and "contributed" in this context became even more ambiguous. As discussed previously, the question of what constituted "all contributors" to a corporation or union had not before been

contemplated because of the general prohibition on corporations and unions using general treasury funds for electioneering communications. But in the 2007 rulemaking, the Commission had to grapple with this question for the first time. Plaintiff suggests that the Commission had already considered the issue in 2002 because it had supposedly "promulgated the 'segregated bank account' disclosure provision at subparagraph (7) with corporations in mind." (Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Pl. Br.") at 5; *see also id*. at 6.) (Doc. #20). But of course, the 2003 regulation was not intended to apply to ordinary corporations or to any unions, but solely to *MCFL* corporations, which the Supreme Court had previously held have a constitutional right to engage in such disbursements. *MCFL*, 479 U.S. at 263-64; *McConnell*, 540 U.S. at 209-12. Indeed, the reason that the Court had held in *MCFL* that this small subset of corporations had that constitutional right was precisely because they were so different from ordinary corporations: formed for the sole purpose of promoting political ideas, they did not engage in business activities or accept contributions from for-profit corporations or unions. *Id.* The 2007 rulemaking, therefore, for the first time had to address the vast majority of corporate organizations and unions which, unlike *MCFL* corporations, may have customers, investors, or comparable sources of revenue that might have little or no connection to political activity.

In addressing disclosure for the first time in the post-*WRTL* world, the Commission again had to construe the ambiguous terms "contributor" and "contributed" in 2 U.S.C. § 434(f)(2)(F). Under the controlling opinion in *WRTL*, corporations and unions were now allowed to make electioneering communications as long as they were neither "express advocacy" nor its "functional equivalent"; therefore, money donated to finance this category of newly permissible communications was not congruent with the statutory definition of "contribution," which

includes all transfers made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Moreover, defining who had "contributed" to a corporation or union within the meaning of BCRA's disclosure rules presented a range of novel issues because of the complex finances of these organizations.

The Commission therefore sought comments about how to "determine which receipts qualify as [reportable] donations," 72 Fed. Reg. at 50,271, using the broader term "donations" from the 2003 regulation. In light of the statutory ambiguity, commenters suggested a variety of approaches, including (1) requiring no disclosure at all for the judicially permitted electioneering communications; (2) restricting disclosure to only funds designated for electioneering communications or in response to solicitations for electioneering communications; (3) specifically excluding "membership dues, investment income, or other commercial or business income"; (4) limiting disclosure by non-profit corporations to funds reported to the IRS on a particular line; and (5) requiring disclosure for everyone that donated over $1,000 to the corporation or labor organization. 72 Fed. Reg. at 72,910-11. The Commission ultimately decided not to interpret the statutory language to require corporations and unions to disclose "customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs," and chose instead to limit disclosure to those funds donated for the purpose of furthering electioneering communications. 72 Fed. Reg. at 72,911.

Plaintiff asserts that "[t]he term 'contributors' … is not ambiguous" (Pl. Br. at 20), but his own brief belies that claim. Plaintiff himself proposes multiple ways that the Commission might have distinguished between contributors and non-contributors in drafting its disclosure regulation. (*See* Pl. Br. at 31-32 (suggesting either a regulation that excludes certain sources of funds from its coverage or one that affirmatively defines the specific sources of funds that must

be disclosed).) The alternatives proposed by Van Hollen, which are not found in the statute, may be reasonable approaches to defining the scope of electioneering communication disclosure. But they amount to a concession that the statute is ambiguous, and it is the *Commission's* reasonable interpretation, not Van Hollen's, that merits deference. *See supra* pp. 16-18.[8]

C. An Inoperative Portion of the Snowe-Jeffords Amendment Does Not Establish Congressional Intent Regarding the Scope of Electioneering Communication Disclosure

BCRA could not have both prohibited electioneering communications by corporations and unions and also spoken directly to the precise issue of the appropriate level of disclosure for these activities. Plaintiff tries to overcome this obvious source of ambiguity with an appeal to legislative history, in particular a part of the Snowe-Jeffords Amendment that would have permitted more corporate electioneering communications *but that never actually took effect*. (*See* Pl. Br. at 23.) The relevant legislative history, however, underlines the fact that Congress did not speak directly to the precise issue here. BCRA failed to become law until it was amended to prohibit electioneering communications by corporations and labor organizations.

The campaign finance reform bill that eventually passed as BCRA was debated and amended over a period of many years prior to 2002. In 1998, during the 105th Congress, Senators Olympia Snowe and James Jeffords offered an amendment to a predecessor to BCRA

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[8] Because Congress has never spoken directly to the precise question at issue here, plaintiff's criticism that the Commission failed to "identify any statutory text" when promulgating the regulation makes little sense. (Pl. Br. at 12.) The regulation obviously implements 2 U.S.C. § 434(f), but there is no statutory text directly applicable to this particular situation, as the Commission noted when it promulgated the regulation. *See* 72 Fed. Reg. at 72,901 ("Congress did not expressly address the consequences for the reporting provisions in the event of a successful as applied challenge to the funding restrictions. Thus, the Commission cannot conclude that Congress has spoken directly to this issue.") Plaintiff's claim that the Commission made an "abrupt about-face" (Pl. Br. at 12) is similarly incorrect, because the Commission had never before been required to face this issue.

that included language similar to the electioneering communication disclosure provisions at issue in this case. *See* 144 Cong. Rec. S938 (daily ed. Feb. 24, 1998). The Snowe-Jeffords amendment also would have created an exception to the ban on electioneering communications by corporations and unions to allow 26 U.S.C. § 501(c)(4) non-profit corporations and 26 U.S.C. § 527 political organizations to make electioneering communications, so long as they were "paid for exclusively by funds provided directly by individuals." *See* BCRA § 203(b), adding 2 U.S.C. § 441b(c)(2) and 2 U.S.C. §§ 441b(c)(3), (4). That bill did not pass, but similar language was included when bills were re-introduced in the 106th Congress and again in the 107th Congress. *See* S.26 (106th Congress), 145 Cong. Rec. S425 (daily ed. Jan. 19, 1999); S.27 (107th Congress), 147 Cong. Rec. S298 (daily ed. Jan. 22, 2001).

In the 107th Congress, Senator Wellstone, worried that the Snowe-Jeffords exception would create a loophole, introduced his amendment, which was added to the bill. *See* 147 Cong. Rec. S2845-2849, S2882-2884 (March 26, 2001). The Wellstone Amendment in effect eliminated the exception made for section 501(c)(4) and 527 organizations in Snowe-Jeffords and thus barred *all* corporations and unions from making electioneering communications. *See* BCRA § 204, adding 2 U.S.C. § 441b(c)(6); *McConnell*, 540 U.S. 93, 338-39 ("[T]here is no ambiguity regarding what § 204 is intended to accomplish. Enacted to supersede the Snowe-Jeffords Amendment . . . , § 204 was written to broaden BCRA's scope to include [prohibitions on electioneering communications for] issue-advocacy groups.") (Kennedy, J., concurring and dissenting)).

The portion of the Snowe-Jeffords provision on which plaintiff relies never actually had any effect, and it is impossible to accurately judge congressional intent using language in that inoperative provision. It was not even added to the legislation in the same session of Congress

that enacted BCRA. And because the Wellstone Amendment superseded the language on which plaintiff relies, there is no reason to think that Members actually agreed with that language at the time they voted for BCRA, and no way to know what the disclosure provisions might have looked like if the Wellstone Amendment had never been added — or for that matter, whether BCRA would have passed at all. BCRA was the result of a series of negotiations and compromises among legislators with a wide variety of views. Those bargains must be respected in the interpretive process. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (court must "preserve the delicate legislative compromise that had been struck"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n.14 (1989) ("Strict adherence to the language and structure of [an] Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises.").[9]

Moreover, the only entities addressed by Snowe-Jeffords were certain non-profit corporations and political organizations. It is not apparent that Congress would have treated other corporations, or the unions that were not addressed at all, in the same way had it considered the issue. *See supra* p. 21. The exception created by *WRTL* differed radically from the one contemplated by the superseded portion of Snowe-Jeffords. *Compare WRTL*, 551 U.S. at 469-70 (all corporations have a right to engage in electioneering communications that do not contain "express advocacy" or its "functional equivalent") *with* 2 U.S.C. § 441b(c)(2) (allowing section

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[9] *See also* Rodriguez & Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. Penn. L. Rev. 1417, 1422 (2003) ("By virtue of transforming legislation from a proposal that would not pass into a bill that did pass, the changes as well as the resulting text are part of the law and should be considered such by the courts."); Cubbins, Noll & Weingast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo. L.J. 705, 711-12 (1992) ("[I]f statutory interpretation is guided by the principle of honouring the spirit of the legislative bargain, it must not focus only on the preference of the ardent supporters, but also on the accommodations that were necessary to gain the support of the moderates.").

501(c)(4) non-profit corporations and 527(e)(1) political organizations to make any kind of electioneering communication).

The inoperative portion of the Snowe-Jeffords provision sheds no light on what electioneering communication disclosure Congress would have required had it known how the Supreme Court would alter the scope of BCRA in *WRTL*. In this regard, the statute remains ambiguous.

D. Congress's General Desire for Disclosure on Other Subjects Does Not Mean That It Intended to Mandate the Specific Disclosure Plaintiff Favors

The variety of disclosure requirements in FECA only adds to the ambiguity regarding what Congress would have intended had it known that all corporations and unions would someday be able to make electioneering communications. Despite plaintiff's arguments (Pl. Br. at 21-23) that the statute's general purpose establishes congressional intent on this specific issue, BCRA's disclosure requirements are themselves constrained. For example, the statute does not require disclosure from persons that engage in electioneering communications of less than $10,000 in a calendar year. 2 U.S.C. § 434(f)(1). It does not require the disclosure of electioneering disbursements of less than $200. 2 U.S.C. § 434(f)(2)(C). And it does not require the disclosure of contributors, to either segregated bank accounts or general treasuries, who contributed less than $1,000 in a year to a person that makes electioneering communications. 2 U.S.C. §§ 434(f)(2)(E) & (F).

Congress's desire for some electioneering communication disclosure does not mean that BCRA single-mindedly pursues disclosure to the greatest extent possible. It is wrong to "assume[] that Congress's *primary* goal was *ipso facto* its only goal," because '"no legislation pursues its purposes at all costs.'" *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 408 (D.C. Cir. 1997) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis added)).

"Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526 (emphasis in original). Here, as in *Riley*, 104 F.3d at 408, there is "no evidence that [BCRA] was the product of monomaniacs." *See also Office of Workers Comp. v. Newport News*, 514 U.S. 122, 135 (1995) (Supreme Court has dismissed "the proposition that the statute at hand should be liberally construed to achieve its purposes" as the "last redoubt of losing causes.")

FECA creates distinct reporting requirements for different campaign activities and entities. For example, different types of political committees are subject to varying disclosure requirements. *Compare* 2 U.S.C. § 434(a)(2) (Congressional campaign committees) *with* 2 U.S.C. § 434(a)(3) (Presidential campaign committees) *with* 2 U.S.C. § 434(a)(4) (other political committees). The pre-existing reporting requirements for independent expenditures by persons other than political committees differ from the reporting requirements for electioneering communications added by BCRA. *Compare* 2 U.S.C. § 434(c)(2) (independent expenditures) *with* 2 U.S.C. § 434(f) (electioneering communications). This lack of uniformity of disclosure undermines any suggestion that, after *WRTL*, it was clear what disclosure Congress would want for these new, judicially permitted electioneering communications.

In fact, plaintiff seizes upon the lack of identical statutory language in the independent expenditure and electioneering communication disclosure provisions to argue that Congress's intent on this issue is clear. (*See* Pl. Br. at 22.) But again, when the statutory language in BCRA was passed prior to *WRTL*, Congress never intended to apply the electioneering communication disclosure requirements to corporations or unions in the first place. Thus, it makes no sense to

suggest that Congress had any intention regarding those entities' electioneering communication disclosure requirements.

In sum, because Congress did not design the electioneering communication disclosure requirements for corporations and unions, and because the most relevant language applicable to such disclosure is ambiguous, the Court must proceed to step two of the *Chevron* analysis.

III. THE COMMISSION'S REGULATION PASSES THE SECOND STEP OF *CHEVRON* ANALYSIS BECAUSE IT REASONABLY BALANCES THE IMPORTANCE OF DISCLOSURE WITH POTENTIAL BURDENS ON FIRST AMENDMENT INTERESTS

Under *Chevron* step two, "courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." *Nat'l Rifle Ass'n*, 254 F.3d at 187; *see also Sociedad Anonima Vina Santa Reta v. U.S. Dept. of Treasury*, 193 F. Supp. 2d 6, 16 (D.D.C. 2001). Agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (quoting *State Farm*, 463 U.S. at 42).

A. The Regulation Charts a Middle Course Between the NPRM's Two Proposals and Reasonably Reconciles the Statute With *WRTL*

The challenged regulation was a result of the "changing circumstances," *Brown & Williamson*, 529 U.S. at 157, brought about by the holding in *WRTL*. *See supra* p. 7. Even though *WRTL* did not address disclosure and Congress had not envisioned that the vast majority of corporations or any unions could make electioneering communications, the Commission had to promulgate a regulation that both implemented *WRTL*'s constitutional holding and was consistent with Congress's intent in BCRA. The agency thus solicited comment about "the effect of the [*WRTL*] decision on the Commission's rules governing corporate and labor organization funding of electioneering communications, the definition of 'electioneering communication,' and

the rules governing reporting of electioneering communications." 72 Fed. Reg. at 50,262.

The agency proposed two alternatives in its NPRM. *See supra* p. 8. Plaintiff Van Hollen, first elected to Congress in 2002, did not submit comments in the Commission's 2007 rulemaking. Those who did comment split on the issue of which proposed alternative was more consistent with congressional intent and the *WRTL* opinion. *See supra* pp. 8-9. Commenters supporting Alternative 1 generally argued that *WRTL* did not address reporting requirements, but that BCRA favored electioneering communication disclosure and *McConnell* had upheld those disclosure requirements. 72 Fed. Reg. at 72,900. Those supporting Alternative 2 argued that *WRTL* implied that *WRTL* "issue ads" were exempt from any regulation, including disclosure, and that disclosure would be burdensome when imposed in a way Congress never envisioned and would potentially chill speech. *Id.* Some commenters offered competing disclosure alternatives, including disclosure exempting specific types of sources of revenue and disclosure that would track certain Internal Revenue Service rules. *See supra* pp. 11-13. What the commenters largely agreed upon, however, was that the Commission lacked clear guidance on the disclosure issue.[10]

Balancing legitimate concerns, the Commission ultimately decided on a middle course that it characterized as a "revised version of Alternative 1." 72 Fed. Reg. at 72,901. Declining to adopt Alternative 2, the Commission stated that it would be inconsistent with the statute to have no disclosure at all for electioneering communications made pursuant to *WRTL*, in part

[10] (*See, e.g.,* Gold, AFL-CIO, Hearing Comments, Tab 35, VH0697 ("It is very easy for Congress to throw things at you and it is very easy for the court to come down with great phrases as Chief Justice Roberts did. We are mindful that your task is to really deal with it at a micro level, but a service you can perform is to make as much sense as you can with what has been provided to you. And you may be criticized by some, but you can hardly be faulted in a defensible way if you do that."); Hayward, George Mason University School of Law**,** Hearing Comments, Tab 35, VH0594 ("[the ambiguity] is not [the FEC's] fault. It is partly the fault of Congress and partly the development of the law through the years where it has come across very inconsistently and very deferential to Congress in terms of disclosure.").)

because it would remove public disclosure of some electioneering communications that were contemplated in the statute (*i.e.,* non-"functional equivalent" electioneering communications made by individuals, *MCFL* corporations, and unincorporated entities). *Id.* at 72,900.

The Commission therefore chose to require full disclosure of the identities of persons making electioneering communications, the cost of the new electioneering communications, and the candidates referenced in those communications. But the Commission also determined that it would be unreasonable to subject all corporations and unions to precisely the same disclosure requirements as other entities, because of the burden such a regulation would impose on both such organizations and on donors to corporations and unions who may "not necessarily support the corporation's electioneering communications." 72 Fed. Reg. at 72,911.[11] Thus, regarding the sources of funds used by corporations and unions that make electioneering communications, the Commission limited disclosure to those whose donations were made "for the purpose of furthering" electioneering communications. 11 C.F.R. § 104.20(c)(9). This interpretation is consistent with the definition of "contribution," which is basically defined as a transfer made "for the purpose of influencing" a federal election. 2 U.S.C. § 431(8). As explained *supra* pp. 19-23, although the specific provision the Commission was interpreting (§ 434(f)(2)(F)) uses the undefined terms "contributors" and "contributed," not "contribution," it was reasonable for the Commission to adopt language analogous to the statutory definition of "contribution" and

[11] If the "major purpose" of a corporation is campaign activity and it meets certain statutory criteria, 2 U.S.C. § 431(4)(A), then it is treated as a "political committee." *See, e.g., Buckley,* 424 U.S. at 79 (establishing "major purpose" standard); *MCFL*, 479 U.S. at 262 ("[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.") (citing *Buckley*, 424 U.S. at 79)); Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007). Political committees must periodically disclose all of their receipts and disbursements, including the contributions they have received. 2 U.S.C. §§ 434(a)-(b).

include "for the purpose of furthering" electioneering communications in its new disclosure regulation. As explained *infra* pp. 33-36, the Commission's approach also properly takes into account the sensitive First Amendment environment in which it regulates and avoids unnecessarily infringing on First Amendment rights.

Plaintiff argues that the Commission's choice of this middle ground was unreasonable in part because the agency could have chosen an alternative method by which corporations could distinguish between contributors and non-contributors, rather than one based upon the purpose of the contribution (Pl. Br. at 31-32), but the existence of reasonable alternatives does not make the Commission's choice "unreasonable." *Nat'l Rifle Ass'n*, 254 F.3d at 187. Van Hollen also argues that the regulation is unreasonable because "people do not pay dues to organizations whose mission or purpose they do not endorse, and organizations are not likely to make 'electioneering communications' that undermine their mission and purpose." (Pl. Br. at 32.) But individuals may have varying reasons for joining or donating to the large and diverse kinds of organizations that can now finance electioneering communications after *WRTL*.[12] For example, a person might join the National Rifle Association for gun training classes or a union for the legal services provided, not because they agree with such organizations' electioneering activity. Van Hollen also suggests that "most union dues are under $1,000 and thus do not need to be disclosed" (Pl. Br. at 29 n.24), but there was evidence before the Commission that in fact, some union dues exceed $1,000. (*See* Robinson, AFSCME, Hearing Comments, Tab 35, VH0766-767 (discussing with Commissioners that the dues of physicians, dentists, college professors, airline pilots, and screen actors all might exceed $1,000).)

[12] Although the challenged regulation was promulgated to implement *WRTL*, not *Citizens United*, the latter decision further expands the universe of independent campaign spending that corporations and unions can make with their general treasury funds.

In the absence of a clear statutory directive, and with multiple potential ways to reconcile the statute with *WRTL*, the Commission chose a reasonable middle ground that merits deference.

B. The Regulation Is Reasonable Because It Requires Disclosure of Critical Information About Electioneering Communications, Including Who Is Making the Communication and How Much Is Being Spent

The Commission's regulation requires disclosure of critical information about who is making disbursements for electioneering communications, how much those persons are spending, and who is providing the funds to be used for the communications. As the FEC noted:

> The Commission emphasizes that all the other reporting requirements that apply to any person making ECs … apply also to corporations and labor organizations making ECs permissible under section 114.15. Thus, like all persons making ECs that cost, in aggregate, more than $10,000, corporations and labor organizations must also disclose their identities as the persons making the ECs, the costs of the ECs, the clearly identified candidates appearing in the communications and the elections in which the candidates are participating, and the disclosure dates.

72 Fed. Reg. at 72,911. The regulation requires, for example, that the U.S. Chamber of Commerce and Crossroads GPS report how much each respectively spent on electioneering communications in 2010. (*See* Pl. Br. at 15.) The public can also learn in what races and for what electioneering communications these entities are spending money. Perhaps most critically, the regulation makes public the identities of these spenders — key information *McConnell* noted as missing prior to the passage of BCRA. *See* 540 U.S. at 196-97 (describing groups funding ads to influence federal elections while "concealing their identities from the public"). Thus, all corporations and unions making electioneering communications above the statutory threshold must file reports with the FEC, along with the amounts they are spending and what they are spending the money on. 2 U.S.C. §§ 434(f)(2)(A)-(D); 11 C.F.R. §§ 104.20(c)(1)-(6). The names of these groups must also appear on ad disclaimers. 2 U.S.C. § 441d(a); 11 C.F.R.

§ 110.11. Thus, plaintiff's broad assertion (Pl. Br. at 23) that "virtually all disclosure ceased" after the Commission's 2007 regulation went into effect is wrong.

Corporations and unions must also disclose the identities of all persons that donated for the purpose of furthering these spenders' electioneering communications. 11 C.F.R. § 104.20(c)(9). Plaintiff repeatedly mischaracterizes this requirement as limiting disclosure to those who "have *announced* 'a purpose of furthering electioneering communications'" (*see* Pl. Br. at 1, 17, 19, 23, 32 (emphasis added)), but there is no "announcement" requirement in the regulation. The regulation does not rely solely on statements (public or private) by donors, but applies objective standards to determine which donations meet the regulatory standard. Indeed, the Commission noted in the E&J that the regulation covers, for example, donations "received in response to solicitations specifically requesting funds" for electioneering communications. 72 Fed. Reg. at 72,911. Thus, the Commission's regulatory structure requires disclosure of the critical information about electioneering communications by corporations and unions.

C. The Commission Reasonably Balanced the Interests in Disclosure and the Associated First Amendment Burdens

The Commission reasonably limited disclosure of donors to corporations and unions partly because of the significant burden that these entities and those who provide them funds might face if the entities were forced to disclose all of their "customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs." *Id.* The Commission 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. *Id.* Furthermore, such a broad sweep of information would be misleading and could implicate the privacy interests of those identified despite having no connection at all to the electioneering communications. Plaintiff argues that the Commission overstates these burdens

and that it lacked the authority to even consider them (Pl. Br. at 29-33), but it was well within the Commission's rulemaking discretion to consider burdens on the regulated community, and the Commission carefully considered the rulemaking evidence, mindful that its decision would affect First Amendment activity. Indeed, construing the statute to avoid unnecessary interference with constitutionally protected political speech is a policy choice well within the Commission's discretion. *See AFL-CIO*, 333 F.3d at 179 (in drafting regulations the "Commission must attempt to avoid unnecessarily infringing on First Amendment interests"). *See also Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1436 (D.C. Cir. 1996); *Blitz v. Donovan*, 740 F.2d 1241, 1244-145 (D.C. Cir. 1984).

Many of the burdens associated with the disclosure that plaintiff favors are readily apparent. Plaintiff does not dispute that many corporations and unions receive significant money, often exceeding $1,000 a year, from a wide variety of sources. But the Commission also carefully considered the evidence from the more than 25 comments submitted and two days of hearings. Witnesses testified that for many organizations, identifying all persons that provided funds of over $1,000 "would be very costly and require an inordinate amount of effort." 72 Fed. Reg. at 72,911. *See also supra* pp. 12-13. Van Hollen dismisses this testimony as "self-serving, factually unsupported, and conclusory" (Pl. Br. at 29), but it was not unreasonable for the Commission to rely upon testimony from the parties that would be affected by a new regulation. The Court's role is only to ensure that the Commission "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation and internal quotation marks omitted).

Recently, a federal court reviewed a state law partly modeled on BCRA's disclosure provisions and held that it was unconstitutional to require disclosure of *all* those providing more than $1,000 to those making electioneering communications; the court thus adopted a limiting construction remarkably similar to the FEC regulation challenged in this case. *See Ctr. For Individual Freedom, Inc. v. Tennant*, No. 08-190, 2011 WL 2912735 (S.D.W.V. July 18, 2011). The court held that the state could require the identification of funding sources only to the extent the funds were solicited or earmarked for use in electioneering communications, noting that "requiring the disclosure of corporate or organizational contributor's personal information can be quite burdensome on those entities" and that "[t]he practical effect of requiring such expansive disclosure [of all contributors] is not only to compel a flood of information, but a flood of information that is not necessarily relevant to the purpose the regulation purportedly serves: to provide the electorate with information as to who is speaking." *Id.* at *49.

Plaintiff also argues (Pl. Br. at 25-27) that the Commission cannot take burden into account at all, relying on *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), and *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989), but in neither of those cases had an intervening court decision created a statutory gap never envisioned by Congress. And as plaintiff points out, whether the Commission reasonably interpreted the statute depends in part upon whether the agency "rationally considered the factors deemed relevant by the Act." *Shays*, 414 F.3d at 96-97 (quoting *Gen. Am. Transp. Co. v. ICC*, 872 F.2d 1048, 1053 (D.C. Cir. 1989)). But Congress quite clearly believed that burden was relevant in determining the proper level of disclosure: BCRA does not require disclosure from persons that engage in electioneering communications of less than $10,000 in a calendar year, for electioneering disbursements of less than $200, or for contributors who contribute less than $1,000 in a year. 2 U.S.C. §§ 434(f)(1), (2)(C), (E) &

(F).[13] Each of these limits shows congressional balancing of the potential burden against the other purposes of the statute, as plaintiff concedes; indeed, plaintiff argues that these statutory limits to alleviate burden mean that the Commission can do no more. (Pl. Br. at 26.) But that claim lacks merit when an agency must decide, as the result of a later Supreme Court decision, how to regulate entities that Congress never envisioned could even undertake the conduct in question.

In fact, it is quite possible that Congress would have adopted a standard for disclosure of corporate and union electioneering communications that is similar to the standard the Commission chose, which was "drawn from the [statutory] reporting requirements that apply to independent expenditures made by persons other than political committees." *See* 72 Fed. Reg. at 72,911 (citing 2 U.S.C. § 434(c)(2)(C)). That standard had been part of FECA for more than 30 years and BCRA did not amend it, despite changing many other parts of the statute. In sum, the Commission reasonably balanced potential burdens with the interest in disclosure of electioneering communications in this sensitive constitutional area.

D. The Fact That Congress Has Not Overruled the Commission's Regulation Is Further Evidence That It Is Consistent With Congressional Intent

Congress has had ample opportunity to overturn 11 C.F.R. § 104.20(c)(9) since its promulgation in 2007, and plaintiff Van Hollen has sponsored efforts to do so. Indeed, Congress has tried but failed to enact legislation to change the disclosure requirements for electioneering communications. It is appropriate to consider this inaction as an indication of tacit approval by

[13] Indeed, BCRA also recognized the potential disclosure burdens by providing the option of using a segregated bank account containing only funds from individuals, an option that plaintiff argues (Pl. Br. at 30) corporations and unions could use to alleviate any burdens here. But the organizations that *WRTL* permitted to make electioneering communications are not limited to using individual funds, so that option would be insufficient to relieve the potential burden on them.

Congress.[14] In *Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983), the Supreme Court upheld an IRS interpretation of the charitable deduction allowance, in large part due to such legislative acquiescence. The Court cautioned that application of this principle was appropriate only in certain circumstances, but two factors made it appropriate in *Bob Jones*: (1) the subject matter was one with which Congress was intimately familiar, and (2) Congress made many attempts to override the IRS interpretation, but did not succeed. *Id.* at 600-01.[15]

These two factors are both present here. It is hard to imagine an area of the law with which Members of Congress are more familiar than campaign finance law; it governs their own election campaigns and access to office.[16] In addition, there have been unsuccessful efforts in Congress to overrule the Commission's regulatory interpretation. In 2010, Van Hollen was a sponsor of a bill called the "Democracy is Strengthened by Casting Light on Spending in Elections Act," or "DISCLOSE Act," that would have required corporations that make electioneering communications from treasury funds to disclose all their donors, without regard to the purpose of their donation. *See* H.R. 5175, 111th Cong. § 211(b)(1)(B) (2010). But the 111th Congress did not enact the "DISCLOSE Act"; the bill passed in the House of Representatives, but failed to overcome a filibuster in the Senate. To date, the bill has not been reintroduced in

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[14] This general acquiescence canon has not been statutorily overruled by 5 U.S.C. § 801(g), which states only that the intent of Congress cannot be inferred by "any action or inaction" during the 60-day Congressional review period after an agency submits a regulation.

[15] *Cf. Bismullah v. Gates*, 551 F.3d 1068, 1074 (D.C. Cir. 2009) ("Legislative inaction is not probative here because it is neither long-standing nor is there 'overwhelming evidence' that Congress considered and failed to act upon the 'precise issue' before the [c]ourt." (quoting *Rapanos v. United States*, 547 U.S. 715, 750 (2006)).

[16] Van Hollen himself alleges that, as a result of the challenged regulation, he "likely will be subjected to attack ads or other 'electioneering communications' financed by anonymous donors, and will not be able to respond by, *inter alia*, drawing to the attention of the voters in his district the identity of persons who fund such ads." (Compl. ¶ 11 (Doc. #1)). It is reasonable to assume that all Members of Congress are well aware of any such potential activity.

the 112th Congress. This lawsuit appears to be a judicial effort to achieve what could not be done legislatively.

E. The Court Should Not Consider Evidence That Post-Dates the Commission's 2007 Rulemaking, But Even If It Does, the FEC Could Not Reasonably Have Foreseen the 2010 Decision in *Citizens United*

1. Review of the regulation is limited to the administrative record that existed at the time of the Commission's decision, so plaintiff's post-decisional evidence should not be considered

Plaintiff relies on evidence about electioneering communication disclosure that post-dates the Commission's 2007 rulemaking (*see*, *e.g.*, Pl. Br. at 14-16), but the Court should not consider this material because the "focal point of judicial review" of a federal agency's decision in a rulemaking challenged under the APA "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 141-142 (1973) (per curiam). *See also*, *e.g.*, *Volpe*, 401 U.S. at 420 ("review is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision" (footnote omitted)). "'[S]upplementation of the administrative record is the exception, not the norm.'" *Delano v. Roche*, 391 F. Supp. 2d 79, 88 (D.D.C. 2005) (quoting *Nat'l Wilderness Inst. v. U.S. Army Corps of Engineers*, No. 01-0273, 2005 WL 691775, at *10 (D.D.C. March 23, 2005)). "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

Van Hollen's effort to introduce post-decisional evidence violates the principles of finality and deference underlying the general rule barring such evidence in judicial review of administrative decisions. "To review more than the information before the [decision-maker] at

the time she made her decision risks our requiring administrators to be prescient … ." *Boswell*, 749 F.2d at 793. As the Supreme Court has observed,

> [i]f upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Defense Council, Inc., 435 U.S. 519, 554-55 (1978) (internal quotation marks and citation omitted). "'Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President.'" *Amfac Resorts, L.L.C. v. Dep't. of Interior*, 143 F. Supp. 2d 7, 11 (D.D.C. 2001) (quoting *Deukmejian v. NRC*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984), *aff'd in relevant parts sub. nom. San Luis Obispo Mothers for Peace v. NRC,* 789 F.2d 26 (D.C. Cir. 1986) (en banc)).

In this challenge to a regulation promulgated in 2007, Van Hollen attempts to rely on disclosure reports from the 2010 election cycle, a study based on electioneering reporting in 2010, and newspaper articles from as late as June 2011. (Pl. Exhs. A-O (Doc. #20-3)). Van Hollen uses these exhibits to argue broadly that the Commission should have foreseen that the challenged regulation would lead to "widespread evasion" of the disclosure statute. (*See* Pl. Br. at 1, 14-15, 14 n.14, 32.) But this use of later evidence is precisely what is prohibited in a challenge of this type. *See IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); *Boswell*, 749 F.2d at 793. Post-decisional evidence may be submitted for the limited purpose of explaining an unclear administrative record, *see Corel Corp. v. United States*, 165 F. Supp. 2d 12, 31-32 (D.D.C. 2001), but Van Hollen's exhibits are "offered primarily to attack the propriety of the [Commission's decision]," *id.* at 32. A "judicial venture outside the record . . . can never,

under *Camp v. Pitts*, examine the propriety of the decision itself." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981) (footnote omitted); s*ee also Nat'l Treasury Employees Union v. Hove,* 840 F. Supp. 165, 169 (D.D.C. 1994) ("consideration of outside evidence to determine the correctness or wisdom of the agency's decisions is not permitted") (citation and internal quotation marks omitted).

In trying to avoid the general bar on judicial supplementation of the administrative record, Van Hollen relies on *Esch v. Yeutter,* 876 F.2d 976, 991 (D.C. Cir. 1989), but plaintiff stretches that case beyond its breaking point. First, later cases have clarified that *Esch*'s discussion of situations in which extra-record evidence may be considered as "dicta" that should be read narrowly to be consistent with *IMS*, 129 F.3d at 623-24. *See Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 44-45 (D.D.C. 2009); s*ee also Nat'l Wilderness Institute*, 2005 WL 691775, at *10. Second, *Esch* itself emphasized that a limited "resort to extra-record information" "may sometimes be appropriate" when the "*procedural validity*" of an agency's action is at issue, 876 F.2d at 991 (emphasis added) — a claim that Van Hollen has not alleged here. Third, plaintiff reads *Esch* broadly to permit courts to consider post-decisional evidence to decide "whether the decision was correct or not" (Pl. Br. at 14 n.14), but plaintiff's expansive interpretation would allow the exception to swallow the rule: *All* judicial review of agency action, applying the appropriate standard of review, asks whether the agency's decision was sufficiently correct to be upheld. Fourth, the only *Esch* situation that plaintiff claims applies here is that in which an agency fails to examine all "factors" relevant to its decision, but of course the Commission could not have considered evidence that did not yet exist. Finally, Van Hollen wrongly asserts that the Commission failed to consider "whether or not the regulation would undermine BCRA" by

permitting evasion (Pl. Br. at 14 n.14), but the extent of disclosure that BCRA requires was a key focus of the Commission's rulemaking. 72 Fed. Reg. at 72,901-02, 10-11.

Courts have repeatedly refused to consider the kind of post-decisional evidence on which plaintiff relies when submitted to show that agency decision-making was incorrect. *See*, *e.g.*, *Boswell*, 749 F.2d at 793-94 & n.7 (striking amicus affidavits summarizing post-decisional study and disregarding portions of all briefs referencing them); *Nat'l Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 11 n.2 (D.D.C. 1999) (refusing to consider extra-record and post-decisional evidence); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 n.2 (D.D.C. 1995) (refusing to consider newspaper article and study that post-dated agency decision submitted to show that agency had not considered all relevant factors).

If Van Hollen believes that subsequent events require revisiting the challenged regulation, the proper recourse is to submit a rulemaking petition. *See Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 723 (D.C. Cir. 1997) ("We note that [plaintiffs] are free to petition the [agency] . . . to conduct a new rulemaking … ."); *cf. Meghani v. INS*, 236 F.3d 843, 848 (7th Cir. 2001) (declining to consider post-decisional report as support for immigration application, because "we view our review as generally limited to the administrative record," and noting that the "appropriate recourse for [plaintiff] is to file a motion to reopen" the administrative proceedings).[17] In sum, "to review [the] agency's action fairly," *Boswell*, 749 F.2d at 792, the Court should disregard plaintiff's post-decisional evidence and arguments based on it.

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[17] Indeed, as plaintiff notes (Pl. Br. at 12 n.13), he submitted a rulemaking petition in April 2011 asking the Commission to revise its current regulation regarding disclosure of independent expenditures. Plaintiff asserts that the Commission has "not yet acted" upon the petition, but in fact the Commission issued a Notice of Availability in June 2011. 76 Fed. Reg. 36,000-01 (June 21, 2011).

2. Plaintiff's complaints here are largely the result of *Citizens United*, which made lawful corporate and union electoral activity the FEC could not reasonably have foreseen in 2007

Plaintiff asserts that the FEC "should have considered and foreseen" that corporations might "exploit" 11 C.F.R. § 104.20(c)(9) by running "attack ads … financed by anonymous donors" (Pl. Br. at 1; Complaint at ¶ 11 (Doc.#1)), but to the extent that disclosure of such activity under the regulation is less robust than plaintiff wishes, that is largely a result of *Citizens United*, a change in the law that took place after the rulemaking, and the Commission is not required to be "prescient." *Boswell*, 749 F.2d at 792. When the Commission promulgated its regulation, corporations and unions were prohibited from making any independent expenditures or electioneering communications that contained express advocacy or its functional equivalent. *See WRTL*, 551 U.S. at 469-70. The constitutionality of the ban on such disbursements had been upheld for 20 years. *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652, 668-69 (1990); *McConnell*, 540 U.S. at 203-209. But *Citizens United* held that corporations had a constitutional right to finance such communications with their general treasury funds, and the FEC's regulation now applies to conduct that the agency could not have anticipated. Indeed, despite plaintiff's claim that this was foreseeable, this lawsuit was not brought until 2011, well after *Citizens United* greatly altered the landscape.[18]

The Commission's failure to anticipate the *Citizens United* decision or its effects does not make its rulemaking decision contrary to law. The regulation is a reasonable interpretation of the statute Congress passed, as the law and binding precedent existed in 2007.

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[18] By contrast, the original BCRA regulations were challenged even before they became effective. *See Shays v. FEC*, 337 F. Supp. 2d 28, 37 (D.D.C. 2004) (noting that regulations at issue became effective in November 2002 and February 2003); Compl., *Shays v. FEC*, No. 02-cv-01984-CKK (D.D.C. Oct. 8, 2002) (Doc. #1).

IV. IF THE COURT WERE TO HOLD THAT THE REGULATION IS CONTRARY TO LAW, THE APPROPRIATE REMEDY WOULD BE TO REMAND TO THE COMMISSION WITHOUT VACATING THE REGULATION

In the event that the Court determines that 11 C.F.R. § 104.20(c)(9) is unlawful, the appropriate remedy would be a remand to the Commission, not the unusual remedy of vacating the regulation or imposing a draconian regulatory timetable, as plaintiff urges. (Pl. Br. at 34-35.) "The decision whether to vacate depends on [1] 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

Both *Allied-Signal* factors make vacatur inappropriate here. As the FEC has shown, there can be little doubt that the Commission's regulation was a serious effort to balance competing interests in the wholly unforeseen situation the agency confronted in 2007, and even if the regulation were ultimately found to be defective, vacatur would be inappropriate. Moreover, many of plaintiff's arguments involve alleged inadequacies in the administrative record. (*See, e.g.,* Pl. Br. at 12 (arguing that Commission failed to articulate adequately the justifications for the regulation); *id.* at 29 (arguing that Commission "failed to make any fact-based findings" and "did not present any data or facts in its E&J" regarding burdens of disclosure).) Remand without vacatur is the appropriate remedy to such a deficiency.

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); *see also, e.g., Camp*, 411 U.S. at 142-143 (proper remedy is remand, not *de novo* hearing, to obtain from agency additional explanation of its reasons when there is "such failure to explain administrative action as to frustrate effective judicial review"). If an inadequate explanation is found here, remand without vacatur would permit the Commission to more fully explain the existing regulation.[19]

The second *Allied-Signal* factor also supports remand without vacatur here. The 2012 elections are quickly approaching and, if there were no regulation for any significant time, corporations, unions, contributors, and other interested persons — including Members of Congress like plaintiff — might have inadequate guidance about what disclosure the law requires. Corporations and unions might be uncertain about how to solicit or collect funds and how to treat information about funders who might prefer to remain anonymous, while potential contributors might be uncertain about whether their identities would be disclosed if they did contribute.

Plaintiff also asks the Court to "retain jurisdiction" following any remand and set a strict timetable for the Commission, but a "court-imposed deadline for agency action constitutes an extraordinary remedy." *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1238-39 (10th Cir. 2005) ("While we recognize that nearly nine years have passed since the passage of the Telecommunications Act and over three years since our decision in *Qwest I*, we decline the

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[19] *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."); *accord WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (remand without vacatur appropriate where "non-trivial likelihood" that agency would be able to justify rule on remand).

invitation to retain jurisdiction or impose an arbitrary deadline.").[20] The regulation at issue here was promulgated about six months after *WRTL*, and there is no reason to doubt that, in the event of a remand, the Commission would proceed in a timely way.

CONCLUSION

Because 11 C.F.R. § 104.20(c)(9) is not contrary to law, the Court should grant summary judgment to the Commission and deny plaintiff's motion for relief.

Respectfully submitted,

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[20] A court's consideration of this serious intrusion upon an agency's jurisdiction is guided by "(1) the extent of the delay, (2) the reasonableness of the delay in the context of the legislation authorizing agency action, (3) the consequences of the delay, … (4) administrative difficulties bearing on the agency's ability to resolve an issue … [and 5] consideration of the complexity of the task envisioned by a court's remand order." *Qwest*, 398 F.3d at 1239.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civil Action No. 1:11-cv-00766 (ABJ) [PROPOSED] ORDER

[PROPOSED] ORDER

Upon consideration of the parties' motions for summary judgment and memoranda of points and authorities in support thereof, it is hereby ORDERED that defendant Federal Election Commission's motion be GRANTED and that the motion of plaintiff Chris Van Hollen be DENIED.

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Honorable Amy Berman Jackson
United States District Judge