Nos. 12-5117 & -5118

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRIS VAN HOLLEN,
Plaintiff-Appellee
v.

FEDERAL ELECTION COMMISSION,
Defendant.

CENTER FOR INDIVIDUAL FREEDOM,
Intervenor-Appellant in No. 12-5117,

HISPANIC LEADERSHIP FUND,
Intervenor-Appellant in No. 12-5118.

On Appeal from the United States District Court
for the District of Columbia, No. 1:11-cv-00766-ABJ
Before the Honorable Amy Berman Jackson

PLAINTIFF-APPELLEE VAN HOLLEN'S OPPOSITION TO INTERVENORS' "EMERGENCY MOTIONS" FOR STAY

Plaintiff-Appellee Chris Van Hollen respectfully submits this opposition to "emergency motions" for stay filed by intervenor-appellants Center for Individual Freedom ("CFIF") and Hispanic Leadership Fund ("HLF"). Defendant Federal

Election Commission has filed a notice in the District Court that it will not appeal the District Court's judgment, which invalidated an FEC regulation on *Chevron* Step One grounds. *See* No. 11-cv-0766, Dkt. No. 60; *Van Hollen v. FEC*, --- F. Supp. 2d ----, 2012 WL 1066717 (D.D.C. Mar. 30, 2012). The FEC has not taken any position regarding intervenors' stay motion in the Court below or in this Court.

After intervenors filed the instant motions in this Court, the District Court denied their motions to stay below. *See* No. 11-cv-0766, Dkt. No. 61 (April 27, 2012) ("Order Denying Stay") (attached as Exhibit A). It found that intervenors did not meet the heavy burden necessary to justify the extraordinary remedy of a stay because they did not demonstrate a likelihood of success on appeal and failed to show irreparable harm absent a stay. *Id*. at 3-4. The District Court also found that the public interest weighs against imposing a stay. *Id*. at 4.

I. THE DISTRICT COURT PROPERLY VACATED THE REGULATION UNDER *CHEVRON* STEP ONE

The District Court's grant of summary judgment for the plaintiff vacated the challenged FEC regulation. Before the FEC promulgated the regulation that the District Court struck down, a predecessor regulation had validly implemented the disclosure requirements of the Bipartisan Campaign Reform Act ("BCRA") § 201 (codified at 2 U.S.C. § 434(f)). *See* 11 C.F.R. § 104.20(c) (effective Feb. 3, 2003 to Dec. 25, 2007). In light of the District Court's *Chevron* Step One ruling, "that

regulation now governs the disclosures required under the BCRA." Order Denying Stay 3.

As CFIF recognized in its motion for summary judgment below, vacatur is presumptively appropriate when a court concludes that a regulation fails under *Chevron* Step One. *See* No. 11-cv-0766, Dkt. No. 33, 20 (citing *Emily's List v. FEC*, 581 F.3d 1, 25 (D.C. Cir. 2009); *California State Bd. of Optometry v. FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990)); *see also Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78-79 (D.D.C. 2010) (citing cases for proposition that "both the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA"). *But see Shays v. FEC*, 337 F. Supp. 2d 28, 130 (D.D.C. 2004).

Remand without vacatur would produce an illogical result. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002) (affirming vacatur of rule where low probability that Commission would be able to justify retaining the rule and disruption caused by vacatur would not be substantial); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1086 (D.C. Cir. 2001) (vacating agency action where government had failed to defend its action on prior remand); *Illinois Pub. Telecommc'ns Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997) (vacating rule where there was little prospect of agency being able to readopt the regulation with a more adequate explanation).

Thus, vacatur was the appropriate remedy here.

II. INTERVENORS HAVE NOT MET THEIR HEAVY BURDEN IN SEEKING THE EXTRAORDINARY REMEDY OF A STAY PENDING APPEAL

Intervenors must meet a heavy burden to justify the "extraordinary remedy" of a stay pending appeal. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (per curiam); *see also In re Special Proceedings*, --- F. Supp. 2d ----, 2012 WL 859578, at *1 (D.D.C. Feb. 27, 2012) (denying stay of order denying motion to permanently seal the report regarding the prosecution of Senator Stevens). As the District Court correctly held, intervenors fail to do so. *See generally* Order Denying Stay. Indeed, intervenors fail as to each of the four factors that this Court considers in determining whether to grant a stay: (1) their appeals have little chance of success on the merits; (2) they have not shown irreparable harm absent a stay; (3) a stay would substantially injure the other parties interested in the proceeding; and (4) the public interest weighs heavily against a stay. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

A. Likelihood Of Success On The Merits

As the District Court held, intervenors have not persuasively demonstrated that they have a substantial likelihood of success on appeal. *See* Order Denying Stay 2-3. They argue that the presence of a novel question of law weighs in favor of finding that they have satisfied their burden. *See* CFIF Motion 10. While the District Court noted that this case presents "what appears to be the novel question

of whether an agency may promulgate regulations that narrow a statutory provision for the stated purpose of curing a perceived ambiguity or change in the statute's reach that was created by new legal precedent," *Van Hollen*, 2012 WL 1066717, at *1, the District Court did not say that the question was a close one. Rather, it found that the question was readily answered by application of the *Chevron* doctrine. *See, e.g.*, *id*. at *1, *11, *16. Demonstrably, the District Court answered that question correctly.

Intervenors largely rehash the same arguments the District Court rejected in its fully reasoned opinion. Repetition has not made those arguments any stronger. Because intervenors have provided "no new information, authority, or analysis," there is "no basis to conclude" that they have demonstrated a sufficient probability of success on appeal. *In re Special Proceedings*, 2012 WL 859578, at *2.

As plaintiff demonstrated below, BCRA unambiguously requires all "persons," including corporations and labor organizations, that make "electioneering communications" to disclose "all contributors of $1,000 or more." By contrast, the vacated regulation required only disclosure of those who have announced a "purpose of furthering electioneering communications." Subjecting the regulation to the two-step analysis of the *Chevron* case: "asking first whether Congress has spoken directly … to the precise question at issue, and second, if it has not, whether the agency's interpretation is reasonable," *Shays v. FEC*, 414 F.3d

76, 96 (D.C. Cir. 2005) (internal quotation marks and citations omitted), the District Court properly found that the regulation failed at *Chevron* Step One. The District Court held that the FEC "had no explicit or implicit statutory authority to limit the disclosure obligations enacted by Congress, which require [] every 'person' who funds 'electioneering communications' to disclose 'all contributors.'" Order Denying Stay 2-3. The District Court correctly concluded that Congress spoke clearly when it enacted BCRA and had not delegated authority to the FEC to narrow the disclosure requirement.

Intervenors continue to argue that the FECA definition of "contribution" should dictate the definition of the term "contributor." *See* CFIF Motion 11. However, FECA uses the term "contribution" in a different provision, regulating different conduct from the electioneering communications provisions added by BCRA. FECA's definition of "contribution" includes any payment made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8). By contrast, the definition of "electioneering communications" includes communications that are not made "for the purpose of influencing any election for Federal office," especially as that term has been narrowed by judicial interpretation; *see id.* § 434(f)(3); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (drawing line between "issue advocacy" and "express advocacy" and noting that "BCRA's definition of 'electioneering communication' is clear and

expansive”). Thus, applying the FECA definition to BCRA’s disclosure provisions would not make sense.

Nor does the dictionary definition of “contribute” turn on purpose as intervenors maintain. *See* CFIF Motion 12. As the District Court found, the plain meaning of “contribute” does not include an element of intent. *Van Hollen*, 2012 WL 1066717, at *15. Instead, as BCRA makes clear, the term “contribute” means giving or granting in common with others—regardless of purpose—to a common fund or account, 2 U.S.C. § 434(f)(2)(E) (“all contributors who contributed an aggregate amount of $1,000 or more to that account”), or common person, *id.* § 434(f)(2)(F) (“all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement”). *See also Merriam-Webster’s Collegiate Dictionary* 252 (10th ed. 2001) (defining transitive verb “contribute” as “to give or supply in common with others” and intransitive verb as “to give a part to a common fund or store”). As the District Court noted, the following hypothetical offered by plaintiff’s counsel at oral argument illustrates that the plain meaning of “contributor” does not include an intent requirement:

> Let’s say I was a contributor to the Do-Re-Mi Music Festival. Maybe I did that because I love music. Whether or not I love music, I’m a contributor. Maybe I hate music but I like to see my name printed on the program. I have a purely selfish motive. I’m still a contributor. Or maybe I gave because somebody I know was putting the arm on me to give to his favorite charity, and I hate music but I gave anyway. I’m still a contributor. Or maybe I gave because I thought if I give to his charity, he’ll give to my charity. I’m still a contributor.

Van Hollen, 2012 WL 1066717, at *15 n.12.

Intervenors' constitutional arguments likewise fail on multiple grounds. First, plaintiff did not allege that the statute or regulation, as written, violates the Constitution, and intervenors did not file their own claims, so intervenors' constitutional arguments were not properly before the District Court. *See Van Hollen*, 2012 WL 1066717, at *15. Second, as the District Court recognized, intervenors may not defend the challenged regulation on grounds not invoked by the FEC. *See id.* at *15 n.14; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Common Cause v. FEC*, 906 F.2d 705, 707 (D.C. Cir. 1990) (propriety of agency action must only be judged on the grounds invoked by the agency). The FEC did not rely on constitutional considerations in the Explanation & Justification it published when it promulgated the regulation. *See* FEC, Final Rule and Explanation and Justification on Electioneering Communications, 11 C.F.R. Part 104, 114, 72 Fed. Reg. 72,899 (Dec. 26, 2007); *see also* Order Denying Stay 3 n.3. Lastly, even if intervenors' arguments did not suffer from these deficiencies, the Supreme Court's decision in *Citizens United* fully answers the constitutional concerns intervenors advance. The Court upheld BCRA § 201, noting that the "public has an interest in knowing who is speaking about a candidate shortly before an election." 130 S. Ct. at 915.

Intervenors also argue that the District Court Order creates a structural absurdity because it "requir[es] an organization making electioneering communications to provide much broader and more invasive disclosures than if the organization were making independent expenditures." CFIF Motion 13. But the distinction between disclosure requirements related to electioneering communications and one of the requirements related to independent expenditures was created by Congress, not the District Court.[1] Congress used the phrase "for the purpose of furthering" in the FECA provision requiring disclosure of contributors of $200 or more to persons making "independent expenditures," 2 U.S.C. § 434(c)(2)(C), but Congress did not include that or comparable language in the BCRA provision applying to disclosure of contributors of $1,000 or more to persons making "electioneering communications," *id.* § 434(f). The absence of the phrase "for the purpose of furthering" in § 434(f)(2)(F) is significant because Congress could have adopted the language it had earlier included in § 434(c), but chose not to do so. *Cf. Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d

[1] The independent expenditure disclosure requirement is not as limited as intervenors contend. Section 434(c)(1) requires disclosure of all contributors of $200 or more to the person making an independent expenditure. 2 U.S.C. § 434(c)(1) (incorporating 2 U.S.C. § 434(b)(3)(A)).

796, 801-802 (D.C. Cir. 2002) (noting that provisions in pari materia must be construed together to discern their meaning).[2]

B. Irreparable Harm

To justify the extraordinary remedy of a stay, a showing of irreparable harm is crucial. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *FTC v. Church & Dwight Co.*, 756 F. Supp. 2d 81, 86 (D.D.C. 2010) (denying stay where defendant failed to identify clearly irreparable harm), *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011). Intervenors claim that compliance with the disclosure requirements would impose a heavy burden and result in "First Amendment harm." CFIF Motion 15; *see also* HLF Motion 18. But the Supreme Court has rejected such arguments. Disclosure requirements might be unconstitutional as applied to a specific organization where that organization has demonstrated "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United,* 130 S. Ct. at 916. Neither CFIF nor HLF has made such a factual showing. *See Van Hollen*, 2012 WL 1066717, at

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[2] Intervenors are also wrong that all corporations were barred from making electioneering communications prior to *Citizens United*. *See* HLF Motion 10. The Supreme Court found that BCRA permitted *MCFL* corporations to make "electioneering communications." *See McConnell*, 540 U.S. at 211 ("Because our decision in the *MCFL* case was on the books for many years before BCRA was enacted, we presume that the legislators who drafted [the Wellstone Amendment] were fully aware that the provision could not validly apply to *MCFL*-type entities.").

*16. Rather, as the District Court held, "It is [] difficult to see how defendant-intervenors would be harmed by complying with the disclosure provisions that the Supreme Court specifically upheld in *Citizens United*." Order Denying Stay 4.

Intervenors also argue that the District Court's decision vacating the regulation "obfuscates what is and what is not required to be disclosed." HLF Motion 18. Even if that were true, it would not qualify as irreparable injury. But it's not true: corporations and labor organizations that make electioneering communications and that do not use the statute's segregated account option need only abide by the plain text of the statute and disclose "the names and addresses of contributors who contributed an aggregate amount of $1,000 or more." BCRA § 201, 2 U.S.C. § 434(f)(2). Furthermore, in light of the District Court's ruling, the regulation that was in effect prior to the FEC's promulgation of the invalid regulation now governs disclosure requirements for corporations. *See* Order Denying Stay 3; 11 C.F.R. § 104.20(c) (effective Feb. 3, 2003 to Dec. 25, 2007). Intervenors have not demonstrated why it would be difficult to comply with this straightforward regulation.

Thus, intervenors fail to show how they will be irreparably harmed by denial of a stay. A stay would simply allow continued violations of the plain language of BCRA § 201.

C. Harm To Other Interested Parties

Plaintiff, on the other hand, will suffer harm if a stay is granted. *See Shays v. FEC*, 340 F. Supp. 2d 39, 52 (D.D.C. 2004) ("The existence of loopholes and unfaithful regulations constitutes a daily injury to both [plaintiffs'] interests and the clearly articulated intent of Congress"), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). Plaintiff and the rest of the voting public will be harmed because disclosure of important campaign-related information mandated by the plain language of BCRA will not be made. *See Van Hollen*, 2012 WL 1066717, at *7; *see also* Declaration of Representative Chris Van Hollen, No. 11-cv-0766, Dkt. No. 20-1, ¶ 5.

D. The Public Interest

The public interest is a "uniquely important consideration" in evaluating a request for the extraordinary remedy of a stay pending appeal. *National Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980); *see also In re Special Proceedings*, 2012 WL 859578, at *5; *National Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 77 (D.D.C. 2008) (denying stay pending appeal of decision that requirements under Lobbying Disclosure Act were constitutional); *Shays*, 340 F. Supp. 2d at 54 (denying stay pending appeal of ruling that certain FEC regulations violated the APA). As the District Court recognized, the stricken regulation "does not comport with the Congressional purpose and intent behind campaign finance legislation: to expose the parties behind the communications to

the light." *Van Hollen*, 2012 WL 1066717, at *15 n.13. Granting a stay and allowing the unlawful regulation to remain in place would thwart Congress's plain intent in enacting BCRA § 201, thereby depriving the public of crucial information to which it is entitled under the law. *See* Order Denying Stay 4 ("The public has a strong interest in the full disclosure mandated by the BCRA." (citing *Citizens United*, 130 S. Ct. at 914-16)).

As the record below reflects and the FEC conceded below, the disclosure mandated in plain language by BCRA § 201 has sunk to an all-time low under the now-invalidated regulation. *See* Defendant FEC's Answer, No. 11-cv-0766, Dkt. No. 16, ¶ 30. In 2010, persons making electioneering communications disclosed the sources of less than 10 percent of their $79.9 million in electioneering communication spending. *See* Outside Spending, Center for Responsive Politics, *2010 Outside Spending, by Groups*, *available at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=E&chrt=D (last updated Apr. 26, 2012). The ten persons that reported spending the most on electioneering communications (all of them not-for-profit corporations) disclosed the sources of a mere five percent of the money spent. *Id.* Of these ten not-for-profit corporations, only three disclosed any information about their funders. *Id.*[3]

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[3] The Washington Post last week reported that "[n]early all of the independent advertising aired for the 2012 general-election campaign has come from interest groups that do not disclose their donors, suggesting that much of the political

Longstanding Supreme Court precedent recognizes the strong public interest in campaign finance disclosure. As the Court held in *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), disclosure requirements "deter actual corruption and avoid the appearance of corruption." For such reasons, the Court has consistently upheld campaign finance disclosure provisions, such as BCRA § 201. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010); *McConnell v. FEC*, 540 U.S. 93, 201-202 (2003); *Buckley*, 424 U.S. at 67. The Court has specifically said that the disclosure requirements of BCRA § 201 serve an important public function because they provide the electorate with information about the sources of election-related spending and help citizens "make informed choices in the political marketplace." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citation omitted). The Court in *Citizens United* drew attention to the problems that result when groups run ads "while hiding behind dubious and misleading names." *Id*.[4] Contrary to what intervenors argue, disclosure requirements "do not prevent

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spending over the next six months will come from sources invisible to the public." Dan Eggen, *Most independent ads for 2012 election are from groups that don't disclose donors*, Wash. Post, Apr. 24, 2012, *available at* http://www.washingtonpost.com/politics/most-independent-ads-for-2012-election-are-from-groups-that-dont-disclose-donors/2012/04/24/gIQACKkpfT_story.html.

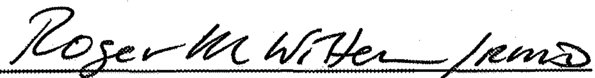
[4] Intervenors erroneously argue that there is a substantial likelihood that this Court could find that the holding in *Citizens United* does not dispose of the First Amendment arguments it has presented because, it is contended, *Citizens United* applies only to the disclosure requirements as limited by the FEC regulation the District Court invalidated. *See* CFIF Motion 13. There is no support for that

anyone from speaking," but they do serve the interests of "transparency," accountability, and promoting informed decision-making by voters. *Id.*

CONCLUSION

For these reasons, intervenors' motions for stay should be denied, as should their request in the alternative for an unreasonably expedited briefing schedule for which they have not shown good cause.

Respectfully submitted,



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contention in the Supreme Court's opinion. When the Court referred to disclosure of "certain contributors," it cited the statute, 2 U.S.C. § 434(f)(2), not the regulation, 11 C.F.R. § 104.20(c)(9). *Citizens United*, 130 S. Ct. at 914. The statute already contains a limitation warranting the phrase "certain contributors," in that it only requires disclosure of persons that give $1,000 or more (or under the segregated account option—those that give $1,000 or more to that account). *See* 2 U.S.C. § 434(f)(2)(E) & (F). Nor did the Government's brief contend that BCRA § 201's constitutionality turned in any way on the loophole-opening effect of the challenged regulation. Brief for Appellee, No. 08-205, 2009 WL 406774, at *40-41 (U.S. Feb. 17, 2009).

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EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CHRIS VAN HOLLEN, Jr., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 11-0766 (ABJ)

MEMORANDUM OPINION AND ORDER

Plaintiff Chris Van Hollen, Jr., brought this lawsuit against defendant Federal Election Commission ("FEC"), alleging that defendant violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, by promulgating 11 C.F.R. § 104.20(c)(9). The lawsuit claimed that defendant exceeded its statutory authority by promulgating a regulation that was contrary to the disclosure regime set forth in the Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 434(f)(2)(E) and (F). Plaintiff also contended that the regulation violated the APA because it was arbitrary, capricious, and contrary to law. The parties cross-moved for summary judgment. On March 30, 2012, this Court issued its Memorandum Opinion ("Mem. Op.") and Order [Dkt. # 47 and # 48], which granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment. The Order also denied defendant-intervenor Hispanic Leadership Fund's ("HLF") motion to dismiss and denied defendant-intervenor Center for Individual Freedom's ("CFIF") cross motion for summary judgment. CFIF and HLF appealed the Order and now move this Court for a stay pending appeal. [Dkt. # 51 and # 52].

A stay pending appeal is an extraordinary remedy. *Cuomo v. U.S. Nuclear Regulatory Comm'n,* 772 F.2d 972, 978 (D.C. Cir. 1985). It is "an intrusion into the ordinary process of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder,* 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). Instead, a stay is an exercise of judicial discretion, and whether to grant it depends upon the specific circumstances of the case. *Id.* at 433. The moving party bears the burden of justifying why the Court should grant this extraordinary remedy. *Id.* at 433–34.

The Court considers four factors in reviewing the motion:

> (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434. The first two factors are the most critical. *Id.* The moving party must make a strong showing on at least one of them and some showing on the other. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 97 (D.D.C. 2011), citing *Cuomo*, 772 F.2d at 974.

Here, defendant-intervenors have not demonstrated a substantial likelihood of success on the merits. In its ruling, the Court struck down a regulation that was expressly designed to "narrow" the disclosure regime established by the BCRA. [1] Defendant had no explicit or

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1 HLF takes issue with the Court's application of the two-step analysis set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). HLF's Mem. in Supp. of Mot. for Stay ("HLF's Mem.") at 6, citing Mem. Op. at 6. HLF submits that "the question of whether 'Congress has explicitly left a gap for the agency to fill' is a separate and distinct question from 'whether Congress has directly spoken to the question at issue.'" *Id*. at 7. The Court notes that it quoted and applied the correct *Chevron* test, *see* Mem. Op. at 2, 12–13, but this was not an obvious *Chevron* situation. The question presented by the case was that the FEC's stated reason for its promulgation of the rule was that the Supreme Court had altered the landscape – not that Congress had left a gap for the agency to fill – so it was incumbent upon the Court to determine what that meant under the *Chevron* test.

implicit statutory authority to limit the disclosure obligations enacted by Congress, which require that every "person" who funds "electioneering communications" to disclose "all contributors." *See* 2 U.S.C. § 434(f)(1). Prior to the promulgation of the regulation that was struck down, there was a valid regulation in effect implementing the BCRA's disclosure requirement. 11 C.F.R. § 104.20(c) (effective Feb. 3, 2003 to Dec. 25, 2007); 68 Fed. Reg. 404, 419 (Jan. 3, 2003); *see also* Mem. Op. at 4–5. In light of the Court's ruling, that regulation now governs the disclosures required under the BCRA.

Defendant-Intervenors also contend that they are likely to succeed on the merits because plaintiff lacks standing to challenge the regulation. HLF's Mem. at 2–6. In light of *FEC v. Akins*, 524 U.S. 11 (1998) and *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), and as defendant FEC's acknowledgement that plaintiff has standing suggests,[2] defendant-intervenors are not likely to succeed on this issue either.

Defendant-Intervenors have also failed to show that they will be irreparably harmed absent a stay. CFIF contends that "[b]ecause the primary election season already is underway, injury to speech and associational rights already is occurring." CFIF's Mem. in Supp. of Mot. for Stay ("CFIF's Mem.") at 9; Mazzella Decl. ¶ 3 [Dkt. # 15-2] (stating that the Court's ruling "will force CFIF to abandon some of its desired speech and alter other speech" and that "[t]his is a substantial impairment of our rights of free speech and association").[3] But, as the Court noted

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2 Defendant FEC agreed at oral argument that plaintiff had standing. Motions Hearing Transcript ("Tr.") at 57 (Jan. 11, 2012).

3 CFIF also contends that it will be irreparably harmed absent a stay because Congress did not evaluate and approve of the "first amendment burdens" that compliance with the Court's ruling would require. CFIF's Mem. at 10. According to CFIF, the FEC *did* contemplate those burdens when it promulgated the rule at issue in this case. The Court notes that the stated justification for the rulemaking was not Constitutional compliance. Electioneering Communications, 72 Fed. Reg. 50,261, 50271 (proposed August 31, 2007) (asking in the Notice

in its memorandum opinion, the Supreme Court expressly upheld the disclosure requirements set forth in the BCRA in *Citizens United v. FEC*, 588 U.S. ---, 130 S. Ct. 876 (2010). In its decision, the Supreme Court observed that the disclosure requirements serve an important public function because they "'provid[e] the electorate with information about the sources of election-related spending,'" 130 S. Ct. at 914, quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), and "help citizens 'make informed choices in the political marketplace,'" *id*., quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003). It is therefore difficult to see how defendant-intervenors would be harmed by complying with the disclosure provisions that the Supreme Court specifically upheld in *Citizens United*.

Because defendant-intervenors have failed to demonstrate two of the four factors necessary for the stay – the likelihood of success on the merits and irreparable harm – the motion will be denied. But the Court notes that the public interest also favors a denial of the requested stay. The public has a strong interest in the full disclosure mandated by the BCRA. *See Citizens United*, 130 S. Ct. at 914–16. The Court is not persuaded by defendant-intervenors' argument that a public interest exists in ensuring that "fundamental constitutional issues are fully aired and carefully considered by the courts." CFIF's Mem. at 12 (internal quotation marks and citation omitted). The Court previously rejected these claims in its opinion, finding that they were not properly before the Court, and in any event, the First Amendment concerns had been addressed by the Supreme Court in *Citizens United*.

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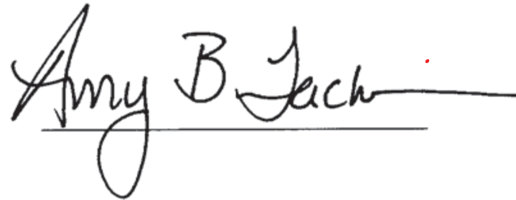
of Proposed Rulemaking, whether, in light of the recent Supreme Court decisions, "the Commission [should] limit the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications?") And, even if the Constitution were the driving force behind the rulemaking, Congress did not delegate authority to the FEC to engage in rulemaking for that purpose, particularly when the statutory language of the BCRA is clear and unambiguous. *See* Mem. Op. at 29.

Accordingly, it is ORDERED that defendant-intervenors' motions for stay pending appeal [Dkt. # 51 and # 52] are DENIED. The Clerk is directed to transmit a copy of this Order to the Court of Appeals for the District of Columbia Circuit.



AMY BERMAN JACKSON
United States District Judge

DATE: April 27, 2012

CERTIFICATE OF SERVICE

I certify that on April 30, 2012, I caused a copy of the foregoing Plaintiff-Appellee Chris Van Hollen's Opposition To Intervenors' "Emergency Motions" For Stay to be served by CM/ECF and overnight courier upon the following counsel:

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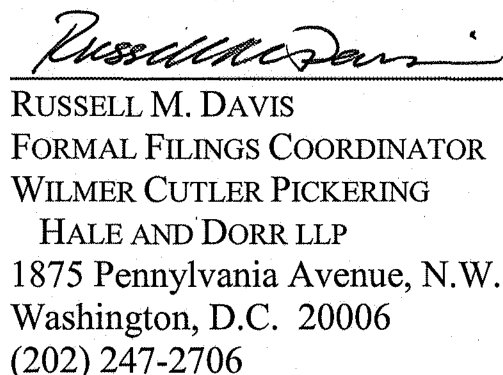

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