ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 14, 2012

Nos. 12-5117 & 12-5118

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

AND

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

v.

CHRIS VAN HOLLEN,
Plaintiff-Appellee,

AND

FEDERAL ELECTION COMMISSION,
Defendant.

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

BRIEF FOR APPELLEE CHRIS VAN HOLLEN

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 355-9610

ROGER M. WITTEN
FIONA J. KAYE
CHRISTINE ELY
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, New York 10007
(212) 230-8800

July 20, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Chris Van Hollen submits this Certificate as to Parties, Rulings, and Related Cases.

I. PARTIES

The Appellants are Center for Individual Freedom and Hispanic Leadership Fund, who were intervenors in the district court. The Appellee is Chris Van Hollen, who was the plaintiff in the district court. The Federal Election Commission, who was the defendant in the district court, is not appealing the district court's order. No *amicus curiae* briefs were filed in the district court. Mitch McConnell and Free Speech Coalition, et al. have filed *amicus curiae* briefs in support of Appellants with this Court and Van Hollen anticipates one or more *amicus curiae* briefs will be filed in support of Appellee.

II. RULINGS UNDER REVIEW

At issue in this appeal is the March 30, 2012 Order by the Honorable Amy Berman Jackson granting plaintiff's motion for summary judgment. *See Van Hollen v. FEC*, --- F. Supp. 2d ----, No. 11-00766, 2012 WL 1066717 (D.D.C. Mar. 30, 2012). The ruling is reproduced in the Joint Appendix at 133-165. The decision is not yet published in the federal reporter.

III. RELATED CASES

This case has not previously been before this Court on the merits. On May 14, 2012, a motions panel refused to enter a stay pending appeal but expedited briefing and argument of the appeal. *See* Joint Appendix 178-179. There are no pending related cases.

TABLE OF CONTENTS

TABLE OF CONTENTS—CONTINUED

TABLE OF AUTHORITIES*

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES—CONTINUED

TABLE OF AUTHORITIES—CONTINUED

TABLE OF AUTHORITIES—CONTINUED

STATUTES AND RULES

TABLE OF AUTHORITIES—CONTINUED

REGULATIONS AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—CONTINUED

OTHER AUTHORITIES

GLOSSARY

APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
CFIF	Center for Individual Freedom
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
HLF	Hispanic Leadership Fund
JA	Joint Appendix
MCFL	*FEC v. Massachusetts Citizens for Life, Inc.*
WRTL	*FEC v. Wisconsin Right to Life, Inc.*

JURISDICTIONAL STATEMENT

Appellants' Statements of Jurisdiction are correct.

STATEMENT OF THE ISSUES

I. Whether the district court correctly held that Representative Van Hollen had standing to challenge an FEC regulation exempting organizations making certain political expenditures from disclosing all of their contributors, 11 C.F.R. § 104.20(c)(9), due to his interest in obtaining full disclosure of the information required by the statute that the regulation purported to implement.

II. Whether the district court correctly held that the challenged FEC regulation was inconsistent with the unambiguous language of the statute it purported to implement, 2 U.S.C. § 434(f)(2), which requires disclosure of all contributors.

III. If the answer to Issue II is no, whether the challenged regulation is unreasonable, arbitrary, and capricious.

STATEMENT OF THE CASE

In April 2011, Congressman Chris Van Hollen sued the Federal Election Commission ("FEC") for promulgating a regulation that permits corporations and unions that make "electioneering communications" to disclose only contributors who gave for the specific purpose of supporting those communications despite the clear statutory requirement that any person (including a corporation or union) making an "electioneering communication" disclose all contributors who gave the person $1,000 or more in the election cycle. 2 U.S.C. § 434(f)(2)(F). Van Hollen brought suit under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"). The FEC regulation at issue is 11 C.F.R. § 104.20(c)(9), which was

purportedly issued to implement the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155. The Center for Individual Freedom ("CFIF") and the Hispanic Leadership Fund ("HLF") intervened as defendants. The parties filed cross-motions for summary judgment, and HLF filed a motion to dismiss, questioning Van Hollen's standing to challenge the regulation.

The district court granted summary judgment for Rep. Van Hollen, holding under *Chevron* Step One that the challenged regulation was inconsistent with the unambiguous language of BCRA § 201. The district court accordingly vacated the regulation. Joint Appendix ("JA") 164. The district court did not reach *Chevron* Step Two. *Id*. The district court also denied HLF's motion to dismiss. *Id*.

The FEC has not appealed. Intervenors CFIF and HLF appealed and moved in the district court for a stay pending their appeal. The district court denied the stay, holding that the intervenors had failed to demonstrate a likelihood of success on appeal, had failed to show irreparable harm, and had not demonstrated that the public interest required a stay. JA 172-174.

Before the district court had ruled, CFIF and HLF moved for a stay in this Court. Following the district court's stay ruling, a panel of this Court denied a stay, concluding that Van Hollen has informational standing, that CFIF/HLF had failed to demonstrate a strong likelihood that the district court erred in interpreting the plain text of BCRA, and that, in view of *Citizens United v. FEC*, 130 S. Ct. 876

(2010), CFIF/HLF had failed to demonstrate the other requirements for issuance of a stay. JA 180-182.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for CFIF.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court construed provisions of the Federal Election Campaign Act ("FECA") that capped the amount of "expenditures" individuals and political committees could make to support or oppose federal candidates. It held that those provisions applied only to disbursements for communications that used "express words of advocacy" such as "vote for," "vote against," and "elect." *Id*. at 44 n.52. Having thus narrowed the provisions to avoid vagueness problems, the Court invalidated them on First Amendment grounds. *Id*. at 22-38.

Ten years later, the Court gave a similar narrowing construction to the then-longstanding statutory ban on corporate and union expenditures to support or oppose federal candidates.[1] *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*"). Thereafter, corporations, unions, and other

[1] 2 U.S.C. § 441b(a); *see* Tillman Act, ch. 420, 34 Stat. 864 (1907); War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167 (1943); Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (1947).

groups spent vast sums on purported "issue ads" that avoided the use of "express advocacy" language—so-called "magic words"—but praised or criticized federal candidates during the campaign season. *McConnell v. FEC*, 540 U.S. 93, 126-127 & n.20 (2003), *overruled in part on other grounds*, 130 S. Ct. 876 (2010).

In light of these and other developments, Congress concluded that the campaign finance system had suffered a "meltdown," and responded by enacting BCRA. *See Shays v. FEC*, 414 F.3d 76, 81-82 (D.C. Cir. 2005) ("*Shays I*"). To address the problem of "sham issue ads," BCRA defined a new category of campaign spending, which Congress called "electioneering communications": broadcast, cable, or satellite communications that refer to a clearly identified federal candidate, are made shortly before an election in which the identified candidate is seeking office and, in the case of House and Senate candidates, are geographically targeted to the relevant electorate. *See* BCRA § 201, 2 U.S.C. § 434(f)(3). There is no requirement in BCRA that "electioneering communications" be made for the purpose of influencing a federal election; they may, or may not be made for that purpose. BCRA banned corporations and unions from spending their treasury funds for electioneering communications. BCRA § 203, 2 U.S.C. § 441b(b)(2). It also required "all [persons]" who make electioneering communications to disclose "all contributors who contributed" to

the person making the communications unless the communications were paid for using a segregated account. BCRA § 201, 2 U.S.C. § 434(f)(2).

More specifically, BCRA prescribed two disclosure options for persons making electioneering communications in an aggregate amount exceeding $10,000 per calendar year:

> (E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals . . . 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.

Id.

During the floor debate, Senator Jeffords, who played a key role in drafting the legislation, stated: "Corruption will be deterred when the public and the media are able to see clearly who is trying to influence the election. In addition our provisions will inform the voting public of who is sponsoring and paying for an

electioneering communication." 147 Cong. Rec. S3022, 3034 (daily ed. Mar. 28, 2001). Similarly, Senator Snowe said, "What we are saying is disclose who you are. Let's unveil this masquerade. . . . Tell us who is financing these ads to the tune of $500 million in this last election. The public has the right to know." 147 Cong. Rec. S3070, 3074 (daily ed. Mar. 29, 2001). And Senator Feinstein commented, "The attacks come and no one knows who is actually paying for them. . . . I believe it is unreasonable and it must end." 147 Cong. Rec. S3233, 3238 (daily ed. Apr. 2, 2001). The legislative record contains many other statements to similar effect.

II. THE FEC'S 2003 REGULATION IMPLEMENTING BCRA

In 2003, the FEC issued regulations implementing BCRA that, in relevant part, tracked § 434(f) and thus required any person making disbursements for electioneering communications to make, among others, the following disclosures:

> (7) If the disbursements were paid exclusively from a segregated bank account . . . consisting of funds provided solely by individuals . . . 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; or
>
> (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).[2]

When the FEC promulgated these regulations, it was understood that they would apply to at least some corporations. Under *MCFL*, a subset of section 501(c)(4) groups that had ideological, not business, purposes and that raised their funds only from individuals (known as "qualified non-profit corporations") were exempt from the statutory ban on corporate spending for electioneering communications, and thus subject to the related disclosure requirements. *See* 11 C.F.R. § 114.10 (defining qualified non-profit corporations). Accordingly, the FEC proposed a disclosure regime for "section 501(c)(4) corporations that meet the conditions for *MCFL* groups." FEC, Notice of Proposed Rulemaking, 67 Fed. Reg. 51,131-01, 51,137-51,138 (Aug. 7, 2002); *see also* FEC, Notice of Final Rulemaking, 68 Fed. Reg. 404-01, 413 (Jan. 3, 2003).

In considering the application of this disclosure regime to qualified non-profit corporations, the FEC rejected "administrative burden" objections, because "electioneering communications are not subject to disclosure until disbursements

---

[2] This version of § 104.20(c) is now in effect as a result of the district court's ruling (*see* JA 173 (Op. Denying Stay); *see also* JA 180 (D.C. Cir. Order Denying Stay)). CFIF claims that the district court ruled that the agency was barred from taking a different view of the statute by its issuance of the 2003 regulation. CFIF Br. 32. That is neither what the district court held, nor what Van Hollen argues. The district court simply held—and Van Hollen agrees—that prior to promulgation of the challenged regulation, "there was a valid regulation in effect implementing the BCRA's disclosure requirement." JA 173.

related to them exceed $10,000," and even then only the identities of persons contributing $1,000 or more need be disclosed. 68 Fed. Reg. at 413. The FEC found that these corporations could "reduce their reporting obligations by using separate bank accounts." *Id.*

The FEC stated that it had promulgated the alternative disclosure provision at subparagraph (8) of the regulation to make explicit that "all persons who make electioneering communications would be required to disclose their donors who donate $1,000 or more in the aggregate during the prescribed period, if they do not use segregated bank accounts." 68 Fed. Reg. at 414. The FEC explained that "BCRA at 2 U.S.C. 434(f)(2)(F) specifically mandates disclosure of this information." *Id.*

The FEC's regulation used the synonym "donor" instead of the statutory term "contributor," in order to emphasize that funds given to persons—including corporations—who make electioneering communications are not "contributions" as FECA defines that term in 2 U.S.C. § 431(8).[3] The FEC's Notice of Final Rulemaking stated:

---

[3] Section 431(8), a pre-BCRA provision of FECA, defines "contribution" to include (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose. 2 U.S.C. § 431(8)(A).

> The Commission sought comment on whether amounts given to persons who make disbursements for electioneering communications are contributions subject to the limitations, prohibitions, and reporting requirements of the Act. In the new reporting provisions for electioneering communications in BCRA, the statute uses the terms "contributor" and "contributed," but it does not use the term "contribution." 2 U.S.C. 434(f)(2)(E) and (F). . . . Nor does BCRA amend the definition of "contribution." *See* 2 U.S.C. 431(8). . . . Based on this analysis, the Commission proposed to treat funds given to persons who make electioneering communications as "donations[.]"

68 Fed. Reg. at 412-413.

III. *WRTL*, PROMULGATION OF THE CHALLENGED REGULATION, AND THE RESULTING CONSEQUENCES

In 2007, the Supreme Court in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), held that BCRA's ban on corporate electioneering communications was unconstitutional as applied to ads that did not contain either "express advocacy" or its functional equivalent. *Id.* at 469-470. *WRTL* did not address or question the constitutionality or scope of BCRA's disclosure requirements applicable to these newly-permitted electioneering communications. Those provisions had not been challenged in *WRTL*.

Soon after the Court's decision, the FEC received a petition requesting a rulemaking to implement the *WRTL* holding. The petition did not request any change to the disclosure requirements, as they would be applied to corporations and unions after *WRTL*. Even so, the FEC said in its post-*WRTL* Notice of Proposed Rulemaking that it would revisit the disclosure rules. JA 35. The FEC

wrote: "If the corporation or labor organization does not pay for the electioneering communication from [a segregated] account . . . , would the corporation or labor organization be required to report 'the name and address of each donor who donated an amount aggregating $1,000 or more' . . . *as required by 2 U.S.C. § 434(f)(2)(F)* . . .?" JA 44 (emphasis added). Or, the Notice went on to ask, "[s]hould the Commission limit the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications?" *Id*.

The FEC promulgated a new version of § 104.20(c) on December 26, 2007. The revision added a new subsection (c)(9) to § 104.20, narrowing the disclosure requirements for corporations and unions by including a new "purpose" requirement not found in the language of § 434(f)(2)(F):

> If the disbursements were made by a corporation or labor organization . . . 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*.

JA 89 (emphasis added). The FEC did not add any such purpose test to the parallel rules requiring disclosure of contributors to partnerships, unincorporated associations, or individuals that make electioneering communications, *see* 11 C.F.R. § 104.20(c)(8).

The FEC's Explanation and Justification ("E & J") for its new rule did not point to any asserted ambiguity in BCRA's text, or indeed refer to any statutory text as the basis for the amended rule. Nor did it indicate that First Amendment or other constitutional considerations compelled addition of the purpose test. Rather, the FEC cited just two reasons for adding the purpose test: (1) to limit identification of persons who gave money to "those persons who actually support the message conveyed by the [electioneering communications]," and (2) to avoid "imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members[.]" JA 87.

With respect to its first rationale, the FEC stated that corporations and unions may have sources of funds other than donations. Shareholders, customers, and union members, for example, may exchange money for shares, products, and membership. These persons, the FEC said, may not support the corporation's or union's electioneering communications. JA 87. The FEC, however, did not explain how such persons could be defined as "contributors" or "donors," or why doing so would make any sense in the context of BCRA's disclosure requirements. With respect to its "burden" rationale, the FEC explained that, in the absence of a purpose test, tracking and reporting the name of, for example, every customer who

paid a corporation more than $1000 over the course of a year would be costly and require "inordinate" effort. *Id.*

The FEC acknowledged that it had drawn its "for the purpose of furthering" test not from BCRA but from FECA's pre-BCRA reporting requirements for "independent expenditures." *See* 2 U.S.C. § 434(c)(2)(C) (providing that persons other than political committees must file statements disclosing "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made *for the purpose of furthering an independent expenditure*" (emphasis added)).

Following the promulgation of the challenged regulation, the 2008 election cycle saw disclosure concerning the funding of electioneering communications fall considerably.[4] Disclosure fell still further in the 2010 cycle. As the FEC admitted

[4] *Compare* Outside Spending, Center for Responsive Politics, "2004 Outside Spending, by Groups" and "2006 Outside Spending, by Groups" with "2008 Outside Spending, by Groups," *available at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=E&chrt=D (electioneering communications filter). CFIF/HLF attack Van Hollen for citing post-rulemaking facts, *see* CFIF Br. 22, 40 n.40, but themselves rely on numerous post-rulemaking events. *See id.* 15-18, 33-34; HLF Br. 12, 35, 36, 37, 43. In any event, the Court may consider information outside the administrative record to determine whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision. *See Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *see also IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997). The Court may consider the actual effect of the challenged regulation in determining whether the FEC failed to consider whether the regulation would create a loophole and thereby undermine BCRA.

in its answer below, the public record reflects little or no disclosure of the numerous contributors to non-profit corporations that made substantial electioneering communications in the 2010 congressional races. JA 30 ¶ 31. Persons making such communications "disclosed the sources of less than 10 percent of the $79.9 million" in related spending. JA 30 ¶ 30.[5] The ten "persons" that reported spending the most on electioneering communications (all of them claiming tax-exempt status under Sections 501(c) or 527 of the Internal Revenue Code) disclosed the sources of only five percent of the money they spent. *Id*. Of these ten "persons," only three disclosed *any* information about their funders. *Id*.

IV. *CITIZENS UNITED*

In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Supreme Court struck down limitations on corporate and union political spending as facially unconstitutional. As a result, corporations and unions may now use their general treasury funds to pay for ads, including those containing express advocacy or its functional equivalent. However, the Court rejected, 8-1, petitioners' as-applied challenge to the disclosure requirements for electioneering communications, reasoning that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id*. at 915. The Court explained that "disclosure permits citizens . . . to react to the speech of corporate entities in a

[5] *See* "2010 Outside Spending, by Groups," *supra* note 4.

proper way. . . . [T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916.

V. PROCEEDINGS IN THE DISTRICT COURT AND BEFORE THE MOTIONS PANEL

On March 30, 2012, the district court granted Congressman Van Hollen's motion for summary judgment. Relying on Van Hollen's statement that, if the FEC regulations did not faithfully implement the BCRA disclosure provisions, he would be deprived of information to which he was entitled under those statutes, the court held that Van Hollen had informational standing. *See* JA 144-145.

The court held that Congress spoke plainly when it enacted BCRA, and did not delegate authority to the agency to narrow the electioneering communications disclosure requirement. It further concluded that the potentially expanded universe of entities that are now permitted to finance electioneering communications—and hence are required to disclose their contributors—after the Supreme Court's decisions striking down some of the law's substantive restrictions on who can lawfully make or fund electioneering communications in the first place did not render the plain language of the statute ambiguous. "The agency cannot unilaterally decide to take on a quintessentially legislative function; if sound policy suggests that the statute needs tailoring in the wake of *WRTL* or *Citizens United*, it is up to Congress to do it." JA 164.

In holding that the text favors Van Hollen at *Chevron* Step One, the court concluded more specifically that there is "no question" that BCRA requires every "person" who makes electioneering communications to disclose "all contributors"; that the statutory definition of "person" explicitly includes corporations and unions; and that there are "no terms limiting that requirement to call only for the names of those who transmitted funds accompanied by an express statement that the contribution was intended for the purpose of funding electioneering contributions." JA 149. The court also concluded that it is "clear that Congress intended to 'shine[] sunlight on the undisclosed expenditures for sham issue advertisements,'" and thus Congress' "clearly articulated legislative purpose" favors Van Hollen's interpretation of the statute. JA 153-154 (citation omitted). The district court vacated the challenged regulation, which had the effect of reinstating the FEC's 2003 rule. The court also denied HLF's motion to dismiss for lack of standing and held that CFIF/HLF's constitutional arguments for limiting disclosure lacked merit in light of *Citizens United*'s strong affirmation of the constitutionality of the statutory disclosure requirements.

In denying CFIF/HLF's motions for a stay pending appeal, the district court held that they had not demonstrated a substantial likelihood of success on the merits because the FEC "had no explicit or implicit statutory authority to limit the disclosure obligations enacted by Congress," and under *FEC v. Akins*, 524 U.S. 11

(1998) and *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), Van Hollen has standing. JA 172-173. The court also stated that 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*," whereas the public has a "strong interest in the full disclosure mandated" by BCRA. JA 174.

A motions panel of this Court agreed with the district court when the panel ruled on CFIF/HLF's motions for stay. The panel recognized that Van Hollen has informational standing and that CFIF/HLF did not demonstrate a strong likelihood of success on appeal because the statute's "disclosure requirement applies to all contributors regardless of their subjective purpose in contributing." JA 180-181. It concluded that CFIF/HLF's other arguments "fare[d] no better" and noted that CFIF/HLF are "free to create" segregated bank accounts to fund electioneering communications "if they wish to protect the anonymity of those who contribute for a purpose other than funding 'electioneering communications.'" JA 181-182.

SUMMARY OF ARGUMENT

Congressman Van Hollen has both informational and competitor standing to bring this lawsuit. Because the regulation deprives Van Hollen of information to which he is entitled under the law—"the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more" to persons making

disbursements to fund electioneering communications, *see* 2 U.S.C. § 434 (f)(2)(F)—he has informational standing under *Akins* and *Shays III*, as both the district court and the motions panel concluded. Additionally, though the district court and motions panel did not need to reach the issue, Van Hollen has competitor standing under *Shays I* because he is entitled to run for office in an election free of BCRA-banned practices.

The district court rightly concluded that Congress spoke clearly when it enacted BCRA's electioneering communications disclosure provisions: BCRA's plain text requires that every "person" who makes an electioneering communication must disclose "all contributors" of $1,000 or more. The ordinary meaning of "contribute" does not include a specific subjective intent; as the district court held, it means to give money without an expectation of or right to services or property in return. Other traditional tools of statutory construction—legislative purpose and statutory context—also support the district court's holding.

Even if Congress did not envision that corporations and unions would make electioneering communications—as CFIF/HLF argue—Supreme Court precedent holds that the unambiguous text of a statute applies as written in unanticipated circumstances. The term "contributor" as used in BCRA cannot import the FECA definition of "contribution" because there is a structural disconnect between the two terms: a FECA "contribution" is one made for the purpose of influencing

federal elections, while electioneering communications include communications that are not, or may not be, made for the purpose of influencing federal elections. Moreover, reading a purpose test into 2 U.S.C. § 434(f)(2)(F) would make the segregated account option in § 434(f)(2)(E) surplusage and contravene basic principles of statutory construction.

If this Court concludes that BCRA's disclosure provisions are ambiguous, it should hold that the regulation is unreasonable, arbitrary, and capricious. The FEC's burden rationale is premised on absurd notions, for example, that "contributors" include customers and investors; and it relies on no data, just the comments of entities that would be subject to the disclosure requirements. Moreover, given the limitations Congress already wrote into the statute, as well as the segregated account option, the burden rationale cannot be taken seriously. The FEC's only other rationale—to limit disclosure to only those contributors that support the message conveyed by the electioneering communication—is also arbitrary and capricious, given the availability of the segregated account option.

STANDARD OF REVIEW

The Court reviews *de novo* the district court's holdings sustaining Van Hollen's standing and invalidating the FEC's regulation as inconsistent with the statute it purports to implement. *See Shays III*, 528 F.3d at 920.

ARGUMENT

I. THE DISTRICT COURT AND MOTIONS PANEL CORRECTLY CONCLUDED THAT VAN HOLLEN HAS STANDING

HLF is the only party that has challenged Van Hollen's standing. The district court correctly held, and the motions panel agreed, that Van Hollen has informational standing under Supreme Court and Circuit precedent. Although the district court and motions panel found it unnecessary to address the issue, Van Hollen also has competitor standing under applicable Circuit precedent.

A. Van Hollen Has Informational Standing

The Supreme Court first recognized informational standing in the campaign finance context in *FEC v. Akins*, 524 U.S. 11, 21 (1998). In *Akins*, voters challenged the FEC's determination that a particular organization did not qualify as a "political committee" subject to FECA's disclosure requirements. *Id.* at 15-16. The Court held that the voters had suffered an "injury" sufficient to establish standing based on their inability to obtain information about the organization's donors and expenditures that FECA required the organization to disclose. *Id.* at 21. The Court noted that it had "previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* (citing *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989)).

This Court followed *Akins* in *Shays III*, which is on all fours with this case. In *Shays III*, Representative Shays challenged a regulation the FEC issued to implement BCRA's requirement that the agency define "coordinated communications." *Shays v. FEC*, 528 F.3d 914, 918 (D.C. Cir. 2008) ("*Shays III*"). The Court held "Shays plainly [had] standing under [*Akins*]," *id.* at 923, explaining that "as in *Akins*, Shays's injury is the denial of the information he believes the law entitles him to . . . the regulation illegally denies him information about who is funding presidential candidates' campaigns." *Id.*

Because § 104.20(c)(9) deprives Van Hollen, like Shays, of "information to which [he is] entitled under . . . BCRA," JA 93, Van Hollen has suffered an injury in fact. The standing allegations in Van Hollen's complaint track those found sufficient in *Shays III*. *Compare* Complaint for Declaratory and Injunctive Relief at 6 ¶ 11, *Shays v. FEC*, No. 06-1247-CKK (D.D.C. July 11, 2006), Dkt. 1 ("*Shays III* Complaint") *with* JA 12 ¶ 10. Van Hollen, like Shays, claims informational standing because, in his capacity as a voter, candidate, and elected officeholder, he has an interest in obtaining full disclosure of information that the challenged regulations inhibit. *Compare Shays III* Complaint at 8 ¶ 13 *with* JA 12-13 ¶ 11.

HLF ignores *Shays III* in wrongly contending that the Supreme Court's *Akins* decision was "inseparably linked to the statutory standing language of [2 U.S.C.] § 437g." HLF Br. 17. *Shays III* was not a § 437g case: Shays sued the

FEC under the APA, as Van Hollen has done here. And, as in *Shays III*, the APA confers upon Van Hollen the right to bring this action as "[a] person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute[.]" 5 U.S.C. § 702. This Court saw "no difference between [Shays's] injury and the injury deemed sufficient to create standing in *Akins*." *Shays III*, 528 F.3d at 923. Moreover, the Supreme Court in *Akins* found Article III standing separately from the plaintiffs' statutory standing under § 437g. *See Akins*, 524 U.S. at 26 ("[R]espondents, as voters, have satisfied both prudential and *constitutional* standing requirements." (emphasis added)). If the denial of information were not an injury for constitutional standing purposes, Congress's conferral of a statutory right to bring an action under § 437g would never have sufficed.

HLF further errs in asserting that Van Hollen's injury is merely a generalized grievance. As the Supreme Court has held, that other voters, party members, and candidates suffer the same injury does not diminish the concrete injury to Van Hollen because "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." *Akins*, 524 U.S. at 24-25; *see also Kean for Congress Comm. v. FEC*, 398 F. Supp. 2d 26, 36 (D.D.C. 2005) ("The Court in *Akins* did not require the plaintiffs to establish a

statutory right to information and then further establish an additional concrete and immediate harm."). As in *Akins* and *Shays III*, the information Van Hollen seeks would help him "evaluate candidates for public office" and "evaluate the role that outside groups' financial assistance might play in a specific election." 524 U.S. at 21; 528 F.3d at 923.

HLF also errs in arguing that invalidating § 104.20(c)(9) will not redress Van Hollen's injury because he will not be able to access information "detailing the specific person or entities that financed any particular electioneering communication[.]" HLF Br. 20. Van Hollen does not seek such information: He seeks disclosure only of the information BCRA requires to be disclosed—"the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more" to persons making disbursements to fund electioneering communications. *See* 2 U.S.C. § 434 (f)(2)(F). HLF's assertion that Van Hollen should prefer a form of information that he does not want and that is different from the information BCRA entitles him to receive is irrelevant. Van Hollen seeks information about *all* contributors financing electioneering communications, not, as HLF suggests, only information about contributors who specifically seek to further the purpose of the electioneering communications they finance. The relief Van Hollen seeks will lead to the disclosure of exactly the information BCRA entitles him to and, therefore, will redress his grievance.

Shays III provides further evidence that invalidating the challenged regulation will properly redress Van Hollen's injury. There, Shays claimed that the FEC's unlawful regulation denied him information about who was funding presidential campaigns. This Court held that invalidating the rule and requiring disclosure of the illegally withheld information would redress that injury. *See Shays III*, 528 F.3d at 923. HLF does not distinguish *Shays III*.

B. Van Hollen Also Has Competitor Standing

Section 104.20(c)(9) also injures Van Hollen because it "infringes [his] protected interest in participating in elections untainted" by activities that disregard BCRA's statutory disclosure requirements. JA 12-13. Because the challenged regulation permitted and encouraged corporations and unions making electioneering communications not to disclose "all contributors," Van Hollen could not draw voters' attention to the identity of those who might fund attacks on him or other candidates. *See* JA 12-13, 93. Van Hollen's injury is traceable directly to the challenged regulation, and the district court's order invalidating § 104.20(c)(9) redressed it.

This Court has held that federal candidates "suffer injury to a statutorily protected interest if under FEC rules they must compete for office in contests tainted by BCRA-banned practices." *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005) ("*Shays I*"); *see also id.* at 83-96. In *Shays I*, the Court determined that a

candidate for federal election need not show that he has already been injured by the BCRA-banned practice or that "specific rivals have exploited each challenged rule[.]" *Id.* at 90. Rather, candidates "may challenge FEC subversion of BCRA's guarantees without establishing with any certainty . . . that the challenged rules will disadvantage their reelection campaigns." *Id.* at 91 (internal quotation marks and citation omitted). Van Hollen has made that showing here. *Compare id.* at 84 (quoting declarations of Reps. Shays and Meehan), *with* Van Hollen Decl. ¶ 4 (JA 92-93).

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CHALLENGED REGULATION WAS INCONSISTENT WITH BCRA'S UNAMBIGUOUS TEXT

In assessing an agency's purported implementation or construction of a statutory provision, a court first employs "the traditional tools of statutory construction, including examination of the statute's text, legislative history, and structure, as well as its purpose" to determine whether Congress has itself spoken unambiguously to the issue in question. *E.g.*, *Shays I*, 414 F.3d at 105 (internal quotation marks and citations omitted); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). If the statutory language is clear—as it is here—then the Court's inquiry is at an end. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 217-218 (2002) ("[I]f the statute speaks clearly to the precise question at issue, we must give effect to the unambiguously expressed intent of Congress." (internal quotation marks omitted)); *see also Performance Coal Co. v. Federal*

Mine & Health Review Comm'n, 642 F.3d 234, 238 (D.C. Cir. 2011) ("[T]o defeat application of a statute's plain meaning, Respondents must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." (internal quotation marks omitted)).

A. The Electioneering Communications Disclosure Provisions Are Unambiguous

BCRA unambiguously speaks to the precise question at issue here, which is what a "person" making a certain volume of electioneering communications must disclose. Applying the foregoing principles of statutory interpretation, the district court held that § 104.20(c)(9) was inconsistent with an unambiguous legislative text—2 U.S.C. § 434(f)(2)(E) and (F). BCRA plainly prescribes that, if a person spending more than $10,000 per year on electioneering communications does not establish a segregated account under 434(f)(2)(E), the person must disclose "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement," § 434(f)(2)(F).

The term "contributor" is not ambiguous. As the district court held, it means a person who gives money without expectation of or right to receive service or property in return. JA 160; *see* Oxford English Dictionary, 2d edition (1989) (online version 2012) (defining "contributor" as "one that contributes or gives to a common fund" and defining "contribute," in relevant part, as "to give or pay

jointly with others; to furnish a common fund or charge"); *see also* Merriam-Webster Dictionary online at 1, 3, *available at* http://www.merriamwebster.com/dictionary/contributor (defining "contributor," in relevant part, as "to give or supply in common with others [;] . . . to give a part to a common fund or store").

As the district court and motions panel recognized, the plain meaning of "contribute" does not include a requirement that the contributor have any particular state of mind. JA 160; JA 181. Instead, as BCRA makes clear, the term "contribute" means giving or granting in common with others—regardless of purpose—to a common person, 2 U.S.C. § 434(f)(2)(F) ("all contributors who contributed an aggregate amount of $1,000 or more *to the person* making the disbursement") (emphasis added), or common fund or account, *id*. § 434(f)(2)(E) ("all contributors who contributed an aggregate amount of $1,000 or more *to that account*") (emphasis added). CFIF argues that dictionary definitions support the FEC regulation because dictionaries "define the verb 'contribute' to include a purpose element." CFIF Br. 29. Van Hollen does not contend that "contributors" never give money with a purpose but what defines whether someone is a "contributor" to another person is simply whether one has made a donation to support that person; it is not whether one has a purpose to support a specific act

that the recipient may perform with the money contributed. Nothing in the definitions CFIF cites supports requiring some more specific purpose.

The district court and motions panel both found the following hypothetical useful to illustrate that the ordinary meaning of "contributor" does not require that the contributor harbor or express a particular intent:

> 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.

See JA 160 n.12; *see also* JA 181. BCRA requires disclosure of contributors who gave to the person making the expenditure; thus, no purpose other than a purpose to contribute to the person making the electioneering communication can be read into the statute.

The statutory context also demonstrates that 2 U.S.C. § 434(f) is unambiguous. BCRA's electioneering communications disclosure requirements include one provision that effectively limits disclosure to persons with an intent to give specifically to finance electioneering communications—the segregated account option in § 434(f)(2)(E), which requires disclosure only of amounts contributed by individuals "directly to [such an] account for electioneering communications." If corporations want to disclose only donors who specifically

wish to fund electioneering communications, they can set up a segregated account and accept contributions for that purpose only from individuals. If CFIF and HLF were correct that the term "contributor" necessarily includes a purpose element, the segregated account option would be surplusage and the option would make no sense. And where Congress has recognized the significance of a donor's purpose in only one of two closely related subsections of the statute, there is no warrant for the FEC to impose such a limitation on the other. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation and alteration omitted); *see also Coalition for Responsible Regulation, Inc. v. EPA*, --- F.3d ---- 2012 WL 2381955, at *30 (D.C. Cir. June 26, 2012) (the fact that certain narrowing language was used in one subsection and not in another "strongly suggest[ed]" that the subsection without such language "was meant to be construed broadly").

Furthermore, 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 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 added the language it had earlier included in § 434(c) when it amended FECA through BCRA, but chose not to do so. *See Russello*, 464 U.S. at 23.

B. BCRA's Purpose Further Shows That BCRA's Electioneering Communications Disclosure Provisions Are Unambiguous

Beyond the statutory text itself, a court applying the first step of the *Chevron* analysis may also consider legislative purpose in determining whether Congress's command is unambiguous. As the district court held, because the addition of a purpose requirement in the FEC's challenged regulation would foreseeably facilitate wholesale evasion of BCRA's statutory disclosure requirement, *see supra* 12-13, it was contrary to Congress' intent in enacting BCRA. *See Shays I*, 414 F.3d at 106 (holding, at *Chevron* Step One, that FEC regulation was invalid because it facilitated circumvention of the statute). A corporation could avoid complying with BCRA under the invalid regulation simply by not asking contributors why they gave money. *Shays I*, 414 F.3d. at 103 (observing that under FEC's definition of the word "solicit," a candidate could state that "it's important for our state party to receive at least $100,000 from each of you" without having "asked" for money (internal quotation marks omitted)); *id.* at 106 ("The FEC's definitions fly in the face of [BCRA's] purpose because they reopen the very loophole the terms were designed to close.").

As the district court put it, "[T]he general legislative purpose here is clearly expressed . . . : that Congress intended to shine light on whoever was behind the communications bombarding voters immediately prior to elections." JA 154. *See supra* 5-6. The Supreme Court has said the same—about this very statute. *See Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) ("[T]he public has an interest in knowing who is speaking about a candidate shortly before an election.").

CFIF misconstrues BCRA's legislative history when it points to statements by BCRA's sponsors that "assured fellow legislators that the provision would not permit 'invasive disclosure rules.'" CFIF Br. 35. The assertion that the disclosure rules would not be 'invasive' is consistent with the scope of limitations Congress explicitly provided: (1) persons who do not spend more than $10,000 on electioneering communications do not need to disclose any contributors; (2) if a person establishes a segregated account, only contributors of $1,000 or more to the account need to be disclosed; and (3) only contributors of $1,000 or more need to be disclosed without a segregated account.

CFIF also cites testimony indicating that the provision is aimed at disclosure of contributors who donated "*toward the ad*." *Id.* This language does not support CFIF's argument. Donations that go to the pool of money an organization uses for electioneering communications are donations "toward the ad" regardless of the subjective purpose of the person who gave money. CFIF does not cite any

evidence indicating that Congress intended to limit disclosure to persons who not only contribute "toward" electioneering communications, but also subjectively intend that their money be used for that specific purpose.

C. CFIF/HLF's Arguments for Reversing the District Court Lack Merit

1. Congress Has Unambiguously Addressed the Question at Issue

HLF argues that Congress has not spoken to the question at issue here because at the time it enacted the disclosure provisions corporations and unions were barred from making electioneering communications. HLF Br. 24. That argument fails for several reasons.

First, the statutory language itself is clear. By its plain text, BCRA requires every "person" that finances electioneering communications to file disclosure reports that include "all contributors." 2 U.S.C. § 434(f). The definition of "person," as referenced in the E & J, is not limited to particular types of corporations or unions. *See* 2 U.S.C. §§ 431(11) ("the term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons"); 434(f)(1) (reporting requirements for every "person" who makes electioneering communications); *see also* JA 77 ("[T]he statute requires every 'person' (which by definition includes corporations

and labor organizations) funding [electioneering communication]s over the reporting threshold to report." (citing 2 U.S.C. § 431(11)).

Second, as the FEC conceded below, *see* FEC Mot. for Summ. J. at 6, *Van Hollen v. FEC*, No. 11-cv-00766-ABJ (D.D.C. Aug. 1, 2011), Dkt. 25, at the time Congress enacted BCRA, it was understood that § 201 would apply to some corporations. The FEC so construed the statute in the immediate aftermath of its passage. *See* FEC, Notice of Final Rulemaking, 68 Fed. Reg. 404-01, 413 (Jan. 3, 2003). BCRA's sponsors "agree[d] that in order for the provision to comply with the Supreme Court's ruling in the *MCFL* case, the prohibition [on corporations and unions paying for electioneering communications with their treasury funds] should not apply to qualified nonprofit corporations . . . ."[6] Because the Supreme Court decided *MCFL* long before Congress enacted BCRA, Congress understood that *MCFL* corporations would or might well be subject to the electioneering communications reporting rules. *See McConnell v. FEC*, 540 U.S. 93, 210-211 (2003), *overruled in part on other grounds*, 130 S. Ct. 876 (2010). Thus, in *McConnell*, the Supreme Court expressly held that BCRA implicitly permitted *MCFL* corporations to engage in electioneering communications. *Id*.

---

[6] Comments from Senators John McCain, Russell D. Feingold. Olympia Snowe, and James Jeffords, and Representatives Christopher Shays and Marty Meehan (Aug. 23, 2002) *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

Third, *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), forecloses HLF's argument. In *Yeskey*, the Supreme Court held that, even if "Congress did not 'envision that the ADA would be applied to state prisoners,'" that would be "irrelevant" "in the context of an unambiguous statutory text." *Id.* at 212; *cf. Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (rejecting agency's argument that it lacked authority to regulate greenhouse gases because Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming").

HLF maintains that, unlike *Yeskey*, this case is one where a court leaves in place a statutory provision that was specifically designed to work in conjunction with another invalidated provision. HLF Br. 31. As the motions panel recognized, however, BCRA's severability provision shows that Congress was well aware that certain provisions of the Act might be held unconstitutional.[7] Accordingly, "[n]othing in the plain text of section 201 suggests Congress did not mean what it said—that section 201's disclosure requirement applies to all contributors regardless of their subjective purpose in contributing." JA 180-181.

[7] "If any provision of this Act or amendment made by this Act . . ., or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, shall not be affected by the holding." 2 U.S.C. § 454 note.

CFIF claims that *Yeskey* applies only where Congress did not think about a statute's coverage. CFIF Br. 37. That reading of *Yeskey* finds no support in the Supreme Court's opinion, whose message is clear: An unambiguous statutory text applies as written even in unanticipated circumstances, regardless of how much thought Congress may or may not have given to the statute's expected coverage.

2. *Citizens United* Did Not Imply That the Regulation Permissibly Construes BCRA

CFIF erroneously contends that the *Citizens United* three-judge district court's passing citation to the FEC's regulation challenged here creates an inference that the regulation was a permissible construction of the statute.[8] That inference is improper because the three-judge district court was not considering the question at issue here, *i.e.*, whether 11 C.F.R. § 104.20(c)(9) was inconsistent with BCRA's plain text.

CFIF also seeks refuge in the Supreme Court reference in *Citizens United* to disclosure of "certain contributors." That argument too is unavailing because the Supreme Court 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 reference to "certain

[8] The Solicitor General's brief did not contend that BCRA § 201's constitutionality turned in any way on the loophole-opening effect of the challenged regulation. Brief for Appellee, *Citizens United v. FEC*, No. 08-205, 2009 WL 406774, at *40-41 (U.S. Feb. 17, 2009).

contributors" was thus a reference to the limits the statute itself delineated on the scope of the disclosures it required. *See* 2 U.S.C. § 434(f)(2)(E) & (F).

3. FECA's Definition of the Term "Contribution" Does Not Apply

CFIF/HLF contend that the FECA definition of "contribution" dictates the meaning of the terms "contributor" and "contributed" as used in BCRA's disclosure provisions relating to the funding of electioneering communications. *See* CFIF Br. 27-28; HLF Br. 35-36. But the term "contributor" as used in BCRA cannot import the FECA definition of "contribution" because there is a structural disconnect between the two terms: a FECA "contribution" is one made for the purpose of influencing federal elections, 2 U.S.C. § 431(8), while electioneering communications are not so limited: they include communications that are not, or may not be, made for the purpose of influencing federal elections. *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"). It would have made no sense for Congress to have defined the term "contributor" in BCRA in a way that does not match up with BCRA's cognate definition of the term electioneering communications. CFIF/HLF's argument cannot support the FEC regulation challenged here because a purpose limitation drawn from the

FECA definition would have a scope different from and inconsistent with the actual regulatory limitation.

Moreover, CFIF/HLF's argument fails because the statutory terms they point to are not the same. As the Supreme Court recently confirmed, a statutory definition of one form of a word does not determine the meaning of another form of the word used elsewhere in the statute in a different context and for different purposes. In *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011), the Court rejected the argument that use of the word "personal" in the Freedom of Information Act incorporated the statutory definition of the word "person," where the statute defined "person" but not "personal." *Id.* at 1182. The Court explained that "in ordinary usage" two words with the same root "may have meanings as disparate as any two unrelated words," and held that when a statute does not define the precise term at issue, the Court "'give[s] the phrase its ordinary meaning.'" *Id*. (quoting *Johnson v. United States*, 130 S. Ct. 1265, 1267 (2010)). As shown above, the ordinary meaning of "contributor" does not turn on purpose. *See supra* 25-26.

4. The Language Congress Enacted Rules Out a Purpose Requirement

CFIF argues that Congress could have selected language that would "rule out a purpose requirement." CFIF Br. 30. But Congress did just that. As discussed above and as the motions panel recognized, Congress "demonstrated that it knew how to limit its word choice based on the actor's purpose" by using the

phrase "for the purpose of furthering" in the FECA independent expenditures disclosure provision, 2 U.S.C. § 434(c)(2)(C). JA 181. "By contrast, in BCRA Congress evinced a clear intent *not* to limit section 434(f)(2)'s reach, and instead to cover *all* contributors," *id*. (emphasis in original), when it enacted BCRA's electioneering communications disclosure provision, 2 U.S.C. § 434(f). Similarly, in crafting the alternative disclosure options that it provided in subsections 434(f)(2)(E) and (F), Congress used words that take account of purpose in one but not the other. The negative implication of that choice is clear.

CFIF also suggests that Congress could have ruled out a purpose requirement by mandating disclosure of "all receipts." CFIF Br. 30. But disclosure of "contributors" is different from requiring disclosure of "receipts." Contributors are those who give money—not in return for value or ownership rights—but to support the organization. *See supra* 25-26. Requiring disclosure of all "receipts" would expand the provision's reach and would require disclosure of payments from customers, lenders, debtors, and shareholders. Congress' use of "contributors" rather than a term like "receipts" thus reflects a clear expression of intent to require disclosure of all those who give $1,000 or more to the person making the electioneering communication, as opposed to those who do business with that person.

5. Constitutional Considerations Do Not Require the Addition of a Purpose Requirement

The FEC's E & J did not articulate or rely on any constitutional concerns that required it to adopt the challenged regulation. *See* JA 87. Under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), a court generally may not uphold an agency rule on grounds the agency did not itself articulate. *See id*. at 196 ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."); *see also Association of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1117 (D.C. Cir. 2001) ("Agency decisions must generally be affirmed on the grounds stated in them.").

Moreover, the constitutional concerns advanced by CFIF/HLF do not justify the distinction drawn by the FEC between unincorporated associations and partnerships, which must still report all contributors, and corporations and unions, which need not do so.

In any event, as the district court held and the motions panel concluded, HLF/CFIF's and their supporting amici's constitutional arguments are meritless. *See* JA 161; *see also* JA 182. The Supreme Court has consistently upheld campaign finance disclosure provisions against constitutional challenges. *See, e.g.*, *Citizens United*, 130 S. Ct. at 916; *McConnell*, 540 U.S. at 201-202; *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam). And, as the district court noted, *see*

JA 139, the Supreme Court has upheld this particular statute. *See Citizens United*, 130 S. Ct. at 914-916. In *Citizens United*, the Court rejected an as-applied challenge by a corporation to 2 U.S.C. § 434(f). *Id.* at 914. In doing so, the Court specifically referred to § 434(f)(2) as requiring disclosure of contributors to corporations that make electioneering communications. *Id*. The Court commented that, since *Buckley*, it had sustained such disclosure provisions "based on the governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United*, 130 S. Ct. at 914 (alteration in *Citizens United*). The Court further recounted that in *McConnell* it had rejected facial challenges to § 434(f), based on evidence that "independent groups were running election-related advertisements 'while hiding behind dubious and misleading names.'" *Citizen United*, 130 S. Ct. at 914 (quoting *McConnell*, 540 U.S. at 197). The Court noted that it had upheld § 434(f) in *McConnell* on the ground that it would help citizens "'make informed choices in the political marketplace.'" *Citizen United*, 130 S. Ct. at 914 (quoting *McConnell*, 540 U.S. at 197). The *McConnell* Court had found that "important state interests" amply supported application of the disclosure requirements to the "entire range of 'electioneering communications.'" 540 U.S. at 196. And in *Citizens United*, the Court specifically rejected the general contention "that disclosure requirements can

chill donations to an organization by exposing donors to retaliation," 130 S. Ct. at 916, and stressed:

> [P]rompt disclosure of expenditures can provide . . . citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . [C]itizens can see whether elected officials are in the pocket of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens . . . to react to the speech of corporate entities in a proper way.

Id. (internal quotation marks and citations omitted).[9]

Since *Citizens United*, the federal courts of appeals, including this Court, have repeatedly upheld similar disclosure requirements. *See, e.g., The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *see also National Org. for Marriage Inc. v. Secretary*, No. 11-14193, 2012 WL 1758607 (11th Cir. May 17, 2012) (unpublished); *National Org. for Marriage, Inc. v. McKee*, 669 F.3d 34 (1st Cir. 2012); *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012); *Family PAC v. McKenna*, --- F.3d ----, Nos. 10-35832 &10-35893, 2012 WL 266111 (9th Cir. Jan. 31, 2012); *National Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 553 (2010). The

[9] CFIF/HLF's reliance on *Center for Individual Freedom, Inc. v. Tennant*, Nos. 08-cv-00190 & -01133, 2011 WL 2912735 (S.D. W. Va. July 18, 2011) (notice of appeal filed Sept. 1, 2011), CFIF Br. 37 n.36, is unavailing. The district court in that case made no attempt to square its ruling with *Citizens United*.

suggestion that the Constitution requires limiting disclosure to funders who explicitly intend to support specific types of political expenditures finds no support in this broad consensus in favor of disclosure.

Amici wrongly contend that BCRA's electioneering communications disclosure provisions are unconstitutional under *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). *McIntyre*, which upheld the right of a lone, self-publishing pamphleteer to speak anonymously, is not applicable here. The *McIntyre* Court expressly distinguished the First Amendment treatment of a "personally crafted statement of a political viewpoint" in a "written election-related document" at issue there, from mandatory disclosure of campaign-related spending at issue in *Buckley*: "[E]ven though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill[,] and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation." *McIntyre*, 514 U.S. at 355. Moreover, *McConnell* and *Citizens United*, which specifically upheld § 201 against constitutional challenge, came after *McIntyre*.

For these reasons, there is no weight to the suggestion that the FEC's addition of a purpose requirement to the statute was necessary to save it from any constitutional infirmity.

III. THE REGULATION IS ALSO INVALID UNDER *CHEVRON* STEP TWO AND IS ARBITRARY AND CAPRICIOUS, SHOULD THE COURT REACH THE ISSUE

Because BCRA is unambiguous and the challenged regulation is contrary to the statute's plain language and purpose, this Court, like the district court, need not reach the second step of the *Chevron* analysis and APA review. If, however, this Court were to reverse the district court's *Chevron* Step One ruling and conclude that the statutory provision itself is ambiguous, it could either remand to the district court for consideration of the Step Two and APA issues, because typically "'a federal appellate court does not consider an issue not passed upon below,'" *Bowie v. Maddox*, 642 F.3d 1122, 1131 (D.C. Cir. 2011) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)), or it could proceed to decide those issues, *see, e.g.*, *Gas Appliance Manufacturers Association, Inc. v. Department of Energy*, 998 F.2d 1041 (D.C. Cir. 1993) (reaching issue district court did not consider).

Where a statute is ambiguous, reviewing courts give deference to permissible administrative interpretations, *Chevron*, 467 U.S. at 844, but only if the agency has offered a "reasoned explanation for why it chose that interpretation[,]" *Village of Barrington, Illinois v. Surface Transportation Board*, 636 F.3d 650, 660 (D.C. Cir. 2011). To merit deference, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The inquiry at *Chevron* Step Two "overlaps with the arbitrary and capricious standard, for whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable," *Shays I*, 414 F.3d at 96 (internal quotation marks and citations omitted), and courts frequently consider the *Chevron* Step Two and APA inquiries together.

Here, the FEC failed to make such a rational connection between the facts and its decision. Rather, the agency's decision rested on a misunderstanding of the consequences of requiring corporations to report all contributors, on unsupported factual assertions about the extent of the burdens the agency supposed would result from disclosure, and on a failure to consider the fact that corporations could avoid all those supposed burdens by using the segregated account option.

A. The FEC's Burden Rationale Is Arbitrary and Capricious

CFIF/HLF contend, as the FEC did below, that § 104.20(c)(9) properly accommodates the burdens corporations and unions would face in complying with BCRA's disclosure requirements for electioneering communications. *See* CFIF Br. 41; HLF Br. 41; *see also* JA 100-104. But the FEC's burden rationale is arbitrary and capricious.

First, the burden rationale is premised entirely on the erroneous—indeed, absurd—notion that the term "contributors" could include corporate customers,

shareholders, and/or lenders. Under the generally accepted definition of "contributor"—someone who gives money without an expectation of or right to receive services or property in return, *see supra* 25-26—the entire premise for the FEC's burden rationale vanishes. Alternatively, even if the Court were to conclude that there was some degree of ambiguity in the term, "contributor," the premise of the FEC's burden rationale still would fail because there is no reasonable construction of the term that includes customers, shareholders, or creditors.

Second, even apart from the linguistic absurdity of the FEC's premise, the agency did not have before it a sufficient evidentiary basis to find that identifying "all contributors who contributed an aggregate amount of $1,000 or more" generally would impose undue burdens on corporations and unions. The FEC's E & J cited no data and made no specific fact-based findings estimating the likely costs and difficulties corporations and unions would purportedly incur. Section 501(c) organizations already must distinguish donations from unrelated business taxable income and other revenue sources on their tax returns in order to maintain their tax exempt status. *See* 26 U.S.C. § 6033(b)(5); Treas. Reg. § 1.6033-2(a)(2)(ii)(f). Rather, the FEC's E & J uncritically accepted conclusory comments to the effect "that the effort necessary to identify those persons who provided $1,000 or more to a corporation or labor organization would be very costly and

require an inordinate amount of effort." JA 87. The E & J cited only two commenters' specific remarks on burden,[10] as well as one witness's testimony on the subject.[11] The FEC's E & J also did not rely on or identify any evidence suggesting that corporations and labor unions do not already track contributors at certain monetary levels, so the agency had no basis to assume that disclosing contributors who contribute $1,000 or more would require these organizations to compile information they do not currently maintain.

The FEC's failure to provide a reasoned, fact-based explanation for its conclusions about potential burden renders its decision unreasonable, arbitrary, and capricious. *See State Farm*, 463 U.S. at 48-49 (invalidating agency rescission of regulation for failure to provide reasoned analysis supporting rescission); *National Gypsum Co. v. EPA*, 968 F.2d 40, 44, 47 (D.C. Cir. 1992) (agency was not required to perform further tests to support contested finding, but "must at least give a reasoned explanation for its assumption" that the finding was correct); *see*

---

[10] The E & J stated that one commenter "asserted that segregated bank accounts are not a meaningful alternative for labor organizations, and argued that disclosing the sources of their general treasury funds would impose a heavy burden on labor organizations," and another commenter "argued that more extensive reporting requirements would far exceed all other reporting requirements that currently apply to nonprofit organizations, such as reporting to the Internal Revenue Service." JA 87.

[11] The E & J stated, "one witness noted that labor organizations would have to disclose more persons to the Commission under the [electioneering communications] rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act." JA 87.

also Missouri Pub. Serv. Comm'n v. FERC, 337 F.3d 1066, 1070 (D.C. Cir. 2003) (agency action was arbitrary and capricious where agency failed to "fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions" (citations omitted)).

Third, Congress already carefully considered and mitigated the burden of complying with BCRA's electioneering communications disclosure requirements. BCRA does not require a corporation or union, or any other person, making electioneering communications to disclose its contributors unless the disbursements total an "aggregate amount in excess of $10,000 during any calendar year." 2 U.S.C. § 434(f)(1). Additionally, like other persons subject to the statutory requirements, a corporation or union making electioneering communications must disclose only contributors who individually contribute "an aggregate amount of $1,000 or more" during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. *See id*. § 434(f)(2)(E)-(F). Nothing in the statute invites the FEC to substitute its judgment for that of the Congress.

Fourth, and importantly, a corporation or union wishing to make electioneering communications without disclosing all those who have donated money to its general treasury funds may perform the simple step of establishing a segregated bank account under § 434(f)(2)(E) and use money contributed to that

account by individuals to pay for electioneering communications. Absent any cogent explanation for effectively disregarding the segregated account option in its burden calculus, the FEC's decision was unreasonable, arbitrary, and capricious.

B. The FEC's Desire to Limit Disclosure to Contributors Who Actually Support Particular Electioneering Communications Is Arbitrary and Capricious

The FEC's E & J also attempted to justify the challenged regulation on the ground that the agency wanted to limit disclosure to only "those persons who actually support the message conveyed by the [electioneering communications]." JA 87. That rationale is arbitrary and capricious for several reasons.

First, this rationale is not much different from the FEC's burden rationale, since it too is based in part on the implausible notion that the term "contributor" could include customers, shareholders, and creditors. *See supra* 43-44.[12]

Second, the record does not sustain the hypothesis that many "contributors" give money to corporations making electioneering communications the contributors do not support. The FEC had no evidence before it and made no fact-

[12] The FEC stated that in its judgment, "requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering [electioneering communications] appropriately provides the public with information about those persons who actually support the message conveyed by the [electioneering communications] 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 [electioneering communications]." JA 87 (emphasis added).

based findings demonstrating that this supposed problem exists, let alone that any such problem is big enough to justify the challenged regulation. *See generally* JA 86-88.

Third, if this problem did exist, it would presumably also affect contributors to partnerships, unincorporated associations, or individuals that make electioneering communications, yet the FEC has not added a purpose requirement to the parallel regulations governing electioneering communications disclosures by those parties. *See* 11 C.F.R. § 104.20(c)(8).

Fourth, by promulgating § 104.20(c)(9), the FEC advanced a policy not legitimate under BCRA's terms. The challenged regulation assumes that the goal of disclosure is to identify only contributors who agree with an organization's electioneering activity. But as the statutory language, *see supra* 25-29, Congressional members' stated reasons for enacting BCRA, *see supra* 4-6, and *Citizen United*, *see supra* 38-40, make clear, the point of disclosure is to identify the sources of funding for electoral messages, not to identify individuals who do or do not share a particular political view.

Fifth, and most importantly, the FEC's rationale does not take into account the foreseeable loophole-opening effect of engrafting the purpose requirement onto the statute. "BCRA reflects 'the hard lesson of circumvention' Congress has learned from 'the entire history of campaign finance regulation,'" *Shays III*, 528

F.3d at 927. The FEC did not even consider this risk. Disregarding the "hard lesson of circumvention," the FEC adopted a regulation that effectively invites evasion of BCRA's disclosure requirements. *See State Farm*, 463 U.S. at 43 (noting that an agency rule would be arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem."). The FEC's decision to promulgate an easily circumvented regulation was arbitrary and capricious.

CONCLUSION

For these reasons, the Court should affirm the district court's ruling.

Respectfully submitted,

/s/ Roger M. Witten

ROGER M. WITTEN
FIONA J. KAYE
CHRISTINE ELY
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, New York 10007
(212) 230-8800

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 355-9610

EDWARD C. DUMONT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

DONALD J. SIMON
SONOSKY CHAMBERS SACHSE
ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

TREVOR POTTER
J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
215 E Street N.E.
Washington, D.C. 20002
(202) 736-2200

July 20, 2012

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 11,382 words, excluding parts of the brief exempted by Federal Rule Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ Roger M. Witten
ROGER M. WITTEN

July 20, 2012

CERTIFICATE OF SERVICE

I certify that on July 20, 2012, the foregoing Plaintiff-Appellee Chris Van Hollen's Opposition To Intervenors' Appeal was filed using the Appellate CM/ECF system and service accomplished through the CM/ECF system on all participants in this case and by electronic mail upon the following counsel:

JASON BRETT TORCHINSKY
HOLTZMAN VOGEL JOSEFIAK, PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
jtorchinsky@hvjlaw.com
(540) 341-8808
Attorney for Intervenor-Appellant
Hispanic Leadership Fund

JAN WITOLD BARAN
CALEB PAUL BURNS
THOMAS W. KIRBY
ANDREW GILLUM WOODSON
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006-2359
JBaran@wileyrein.com
CBurns@wileyrein.com
TKirby@wileyrein.com
AWoodson@wileyrein.com
(202) 719-7000
Attorneys for Intervenor-Appellant
Center for Individual Freedom

DAVID BRETT KOLKER
HOLLY JEAN BAKER
HARRY JACOBS SUMMERS
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
dkolker@fec.gov
hbaker@fec.gov
hsummers@fec.gov
(202) 694-1650
Attorneys for Defendant

/s/ Roger M. Witten
ROGER M. WITTEN