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

CHRISTOPHER VAN HOLLEN, JR., *Appellee* v. FEDERAL ELECTION COMMISSION, *Appellant,* and CENTER FOR INDIVIDUAL FREEDOM, *Appellant,* and HISPANIC LEADERSHIP FUND, *Appellant.*	No. 12-5117

HISPANIC LEADERSHIP FUND'SREPLY TO APPELLEE'S OPPOSITION TO EMERGENCY MOTIONFOR STAY OF DISTRICT COURT ORDER

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SUMMARY AND LEGAL STANDARD

Hispanic Leadership Fund (HLF) presents this reply in support of its emergency motion for stay of the District Court for the District of Columbia's order. *See* No. 11-cv-0766, Dkt. No. 60; *Van Hollen v. FEC*, 2012 U.S. Dist. LEXIS 44342 (D.D.C. Mar. 30, 2012). HLF relies on the arguments presented in the emergency motions, and additionally provides its reply to Appellee's opposition.

HLF reiterates that this Court's stay of the district court's order is well-supported by the following four factors that guide the Court's exercise of discretion: "(1) whether the stay applicant has made a strong showing that he 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." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal citation omitted).

Appellee contends that this Court should reject HLF's arguments because the district court rejected similar arguments.[1] Opposition at 5. Appellee errs by disregarding the standard of review. This Court reviews the district court's

[1]Appellee cites to *In re Special Proceedings*, 2012 U.S. Dist. LEXIS 34693, at *2 (D.D.C. Feb. 27, 2012) to support this position. However, that case involved a district court's decision to not repeat its review of arguments already made to that same district court in a separate motion. In the case at hand, HLF submits its arguments for this Court's initial consideration.

analysis of the stay factors under the abuse of discretion standard. *See Ark. Dairy Coop. Ass'n v. U.S. Dept. of Agric.*, 573 F.3d 815, 821 (D.C. Cir. 2009) (discussing the standard of review in the context of a district court denial of motion for preliminary injunction). However, "[t]o the extent the district court's decision hinges on questions of law, [] this [C]ourt's review is essentially *de novo*."*See id.* (citing *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir 1998)).

ARGUMENT

I. THE PRESENCE OF A NOVELQUESTION OF LAW WEIGHS IN FAVOR OF GRANTING A STAY PENDING APPEAL

The specific novel and serious legal question here is what happens when a court *explicitly permits* that which Congress has *explicitly forbidden* by invalidating a portion of a statute, excising that portion of the statute, while leaving in place a corollary provision specifically designed to work in conjunction with the invalidated and excised provision.[2]The district court recognized that this case presents "what appears to be a novel question," and ultimately resolved that novel question under the first step of the *Chevron* analysis. *Van Hollen*, 2012 U.S. Dist.

[2] The Supreme Court appears to have a similar issue pending before it in *Florida v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted* and *National Federation of Independent Business v. Sebelius*, 80 U.S.L.W. 3297 (U.S. Nov. 14, 2011) (No. 11-393), *cert. granted*. The question of severability and the Court's role in potentially excising certain provisions and considering what to do with the remainder of the statutory scheme are at issue in those cases.

LEXIS 44342, at *1, 16 (*citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The Appellee contends, without any supporting authority, that this Court should disregard the presence of this novel question of law because "the [d]istrict [c]ourt did not say that the question was a close one." Opposition at 5. However, in considering the issuance of a stay, courts have simply considered whether a novel question of law exists while gauging the likelihood of success on the merits. *See Maqaleh v. Gates*, 620 F.Supp. 2d 51, 56 (D.D.C. 2009) ("The issues presented are novel and weighty . . . . It follows, then, that these cases present serious legal questions . . . [that are] so serious, substantial, [and] difficult as to make them a fair ground for litigation.") (internal citations omitted). Given the nature of the claims at stake in this matter, the novel question presented warrants further consideration at the appellate level, and this, in turn, weighs in favor of this Court staying the district court's order.

The presence of a novel, weighty, and difficult legal question weighs in favor of a stay. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question . . ."). The novel nature of the legal question on appeal indicates that the difficulty involved in resolving the question may not be easily ascertained. Appellee suggests that it is

somehow relevant that the district court "did not say that the question was a close one." The district court "did not say" many things; it did, however, acknowledge the FEC's "most compelling argument." *Van Hollen*, 2012 U.S. Dist. LEXIS 44342, at *16. Furthermore, it is simply not the case, as Appellee suggests, that a case resolved on grounds of *Chevron* step one is necessarily an "easy" case where different courts could not possibly reach different conclusions.

Appellee asserts that "[g]ranting 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." However, the novel legal question presented here carries such great weight, in significant part because "Congress's plain intent" in enacting BCRA § 201 – to bar corporations and labor unions from engaging in this variety of political speech – was deemed unconstitutional.

II. APPELLE ASSERTS THE INCORRECT STANDARD FOR COMPELLED DISCLOSURE AND EXAGGERATES POTENTIAL PUBLIC HARM

Appellee cites language from *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010), to suggest that any and all disclosure is valid, permissible, "harmful" to the person being disclosed only in the rarest of circumstances, and has the Supreme Court's approval. Appellee's assertions are intended to amplify what it sees as the harm to the public that would result from staying the district court's order.

However, "[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) v. Federal Election Commission*, 333 F.3d 168, 175 (D.C. Cir. 2003). The Supreme Court requires that "there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

It cannot be argued that the public is harmed by an absence of disclosure *unless* the disclosure contemplated actually falls within the realm of valid governmental interests. No court has endorsed compelled disclosure simply because the result is more information for the public to digest, and there exists no valid "public interest" in such wide-ranging, unlimited disclosure. The harm to the public, therefore, must be measured in terms of whether the disclosure at issue actually "serves an important public function" insofar as it (i) sheds light on sources of a candidate's financial support; (ii) serves to deter actual corruption and the appearance of corruption, and/or (iii) enables contribution limit violations to be detected. *See Buckley*, 424 U.S. at 67-68. We note that this case does not involve financial support of candidates, does not implicate any contribution limits, and entails only speech independent of candidates which the Supreme Court held is not

corrupting. *See Citizens United*, 130 S. Ct. at 909 ("we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption").

Appellee further asserts that "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." Opposition at 12. The effect of the district court's order, however, is to require the disclosure of considerable information that is not fairly categorized as "campaign-related." One result of the district court's order, for example, is to require the disclosure of the name and address of any person who "contributes" (or "donates") $1,000 or more to a membership organization that subsequently makes an "electioneering communication" with general treasury funds. Such information may or may not be "campaign related," and because Congress intended to prohibit most electioneering communications, Congress never actually legislated any such result.

As this Court previously explained, "the Supreme Court has concluded that extensive interference with political groups' internal operations and with their effectiveness does implicate significant First Amendment interests in associational autonomy." *AFL-CIO*, 333 F.3d at 177. Thus, any weighing of the public interest should take into account that the district court's order will require the disclosure of broad swaths of information pertaining both to persons' speech and associational

choices and organizations' internal affairs – much of which may not actually be "campaign related" – and that this result was *never* intended by Congress.

Appellee also suggests that disclosure requirements "do not prevent anyone from speaking." Opposition at 14-15. While courts are fond of making this observation, the evidence in this particular matter shows otherwise. Since the District Court issued its order, those who would make "electioneering communications" (i.e., constitutionally protected political speech) have stopped speaking almost entirely. Between January 1, 2012 and March 31, 2012, thirty-three (33) electioneering communication reports were filed with the FEC. *See* Exhibit A, *available at*http://www.fec.gov/finance/disclosure/ec_table.shtml (visited May 1, 2012). Since March 30, 2012, the day the district court issued its order, only three Electioneering Communication Reports have been filed. *Id*. Two of these reports relate to communications that were actually distributed prior to March 30, 2012. Only a single electioneering communication was been distributed on or after March 30 – and that communication likely began airing earlier in the day - before the district court issued its opinion in the late afternoon. *Id*.

Thus, while disclosure requirements "do not prevent anyone from speaking," orders from courts that dramatically and suddenly alter the rules of the game during an ongoing election appear to do precisely that. This Court is urged to

recognize that as long as the rules remain uncertain, it is would-be speakers who suffer ongoing harm.

III. THREE OF SIX FEC COMMISSIONERS DISAGREE THAT THE MEANING OF 'CONTRIBUTORS' IS AS PLAINLY OBVIOUS AS THE DISTRICT COURT SUGGESTS

The Federal Election Commission lacked four votes to appeal this matter. Chair Hunter and Commissioners McGahn and Peterson voted to appeal, while Vice Chair Weintraub and Commissioner Bauerly voted not to pursue an appeal.[3] Both groups of Commissioners issued Statements of Reasons explaining their votes. These Statements are attached as Exhibit B (Statement of Three Commissioners in Support of Appeal) and Exhibit C (Statement of Two Commissioners in Opposition to Appeal).

The Commissioners who sought to pursue an appeal in this matter raised a series of questions regarding the district court's order, with a heavy focus on what the statutory phrase "contributors who contributes" actually means. The district court indicated that "an individual's status as a 'contributor' is not dependent on

[3]The Commissioners who opposed the appeal, proposed repealing the regulatory language invalidated by the district court in January 2011. *See* Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporate and Labor Organizations, Draft A at 74-78, Agenda Doc. No. 11-02 for Meeting of Jan. 20, 2011,*available at*http://sers.nictusa.com/fosers/showpdf.htm?docid=68481 (visited May1, 2012). The Commissioners who favored appeal have resisted those efforts to open a new rulemaking focusing on the disclosure question.

his or her purpose in transferring the funds." *Van Hollen*, 2012 U.S. Dist. LEXIS 44342, at *14. This is not how the Federal Election Campaign Act defines the obviously related term "contribution," which is limited to transfers of money or other things of value "for the purpose of influencing any election for Federal office." 2 USC § 431(8)(A)(i). Appellee agrees, but maintains that even though the relevant statutory language requires certain disclosures of "all contributors who contributed," the definition of "contribution" cannot be used to inform the meaning of "all contributors who contributed" because it "would not make sense." Opposition at 6-7.

The three FEC Commissioners who voted to appeal this matter note that in 2003, the FEC substituted "each donor who donated" for "all contributors who contributed," on the grounds that "donor" had a different connotation than "contributor." Exhibit B at 2-3. The Commissioners noted, "if BCRA's electioneering communications reporting provision was clear on its face, then it is unclear why it is appropriate for the Commission's now-revived 2003 regulation to substitute different terminology with a more 'clear connotation' than what was used in the statute." *Id* at 3.

These views indicate that the statutory language of BCRA is not nearly as unambiguous as the district court suggests, and further evidences that Appellants are more likely to prevail on the merits than is argued by Appellee.

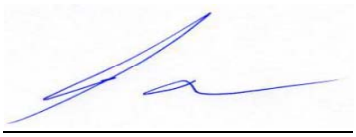
CONCLUSION

For the foregoing reasons, and for the reasons provided in HLF and CFIF's emergency motions, this Court should grant HLF's emergency motion for stay pending appeal.

Dated: May 2, 2012

Respectfully submitted,

Holtzman Vogel Josefiak PLLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2012, I electronically filed the foregoing Hispanic Leadership Fund's Reply to Appellee's Opposition to Emergency Motion for Stay of District Court Order, with the Clerk of the Circuit Court for the District of Columbia using the CM/ECF system.

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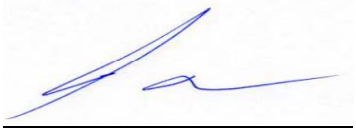

Jason Torchinsky

EXHIBIT A

Electioneering Comm s Reports

Electioneering Communications are broa , radio, cable, satellite), made by people or groups who do not file regular reports wi r to a federal candidate, are targeted to voters and appear within 30 days of a pr a general election. Individual contribution limits do not apply here, but, with some orate or union funds may be used to pay for these ads, and they must be disclosed. T lectioneering communication reports filed with the FEC, beginning with the most recent e of the filings below amend earlier reports, so the same activity may appear in two igs.

Filer Date	Filer ID	Filer Name	Amendment Indicator	Begin Cvg Date	End Cvg Date	Public Distribution Date	Total Donations this statement
16-APR-12	C30001788	AMERICAN HOSPITAL ASSOCIATION	N	31-MAR-10	05-APR-10	05-APR-10	0
13-APR-12	C30001945	PLANNED PARENTHOOD ACTION FUND INC.	A	31-JAN-12	31-JAN-12	31-JAN-12	0
05-APR-12	C30001986	FREEDOM PATH	N	30-MAR-12	04-APR-12	04-APR-12	0
22-MAR-12	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	N	16-MAR-12	21-MAR-12	21-MAR-12	0
22-MAR-12	C30001986	FREEDOM PATH	N	16-MAR-12	21-MAR-12	21-MAR-12	0
19-MAR-12	C30001978	PATRIOTIC VETERANS INC.	N	01-JAN-12	31-MAR-12	17-MAR-12	0
15-MAR-12	C30001978	PATRIOTIC VETERANS INC.	N	01-JAN-12	31-MAR-12	12-MAR-12	0
12-MAR-12	C30001028	AMERICAN FUTURE FUND	N	24-FEB-12	07-MAR-12	07-MAR-12	0
12-MAR-12	C30001028	AMERICAN FUTURE FUND	N	24-FEB-12	07-MAR-12	07-MAR-12	0
09-MAR-12	C30001952	AMERICAN CONSERVATIVE UNION	N	06-FEB-12	07-MAR-12	07-MAR-12	0
23-FEB-12	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	A	26-JAN-12	05-FEB-12	05-FEB-12	0
23-FEB-12	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	A	26-JAN-12	06-FEB-12	06-FEB-12	0
22-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	19-FEB-12	19-FEB-12	0
22-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	19-FEB-12	19-FEB-12	0
22-FEB-12	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	A	26-JAN-12	01-FEB-12	01-FEB-12	0
17-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	17-FEB-12	17-FEB-12	0
17-FEB-12	C30001952	AMERICAN CONSERVATIVE UNION	A	06-FEB-12	07-FEB-12	07-FEB-12	0
10-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	09-FEB-12	09-FEB-12	0
10-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	09-FEB-12	09-FEB-12	0
10-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	09-FEB-12	09-FEB-12	0
10-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	09-FEB-12	09-FEB-12	0

10-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	09-FEB-12	09-FEB-12	0
10-FEB-12	C30001101	US CHAMBER OF COMMERCE	N	06-FEB-12	09-FEB-12	09-FEB-12	0
07-FEB-12	C30001028	AMERICAN FUTURE FUND	A	14-OCT-10	22-OCT-10	15-OCT-10	0
07-FEB-12	C30001028	AMERICAN FUTURE FUND	A	26-OCT-10	28-OCT-10	26-OCT-10	0
07-FEB-12	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	N	26-JAN-12	06-FEB-12	06-FEB-12	0
07-FEB-12	C30001952	AMERICAN CONSERVATIVE UNION	N	06-FEB-12	07-FEB-12	07-FEB-12	0
07-FEB-12	C30001960	AMERICANS FOR PROSPERITY	N	03-FEB-12	06-FEB-12	06-FEB-12	0
06-FEB-12	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	N	26-JAN-12	05-FEB-12	05-FEB-12	0
02-FEB-12	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	N	26-JAN-12	01-FEB-12	01-FEB-12	0
01-FEB-12	C30001945	PLANNED PARENTHOOD ACTION FUND INC.	N	31-JAN-12	31-JAN-12	31-JAN-12	0
25-JAN-12	C30001028	AMERICAN FUTURE FUND	N	17-JAN-12	24-JAN-12	24-JAN-12	0
25-JAN-12	C30001028	AMERICAN FUTURE FUND	N	17-JAN-12	24-JAN-12	24-JAN-12	0
25-JAN-12	C30001028	AMERICAN FUTURE FUND	N	17-JAN-12	24-JAN-12	24-JAN-12	0
25-JAN-12	C30001028	AMERICAN FUTURE FUND	N	17-JAN-12	24-JAN-12	24-JAN-12	0
16-JAN-12	C30001937	RON VINCENT FOR CONGRESS COMMITTEE VINCENT J	N	01-JAN-12	31-DEC-12		1000
15-DEC-11	C30001929	ENDING SPENDING INC	N	15-DEC-11	20-JAN-12	15-DEC-11	357545
13-DEC-11	C30001564	WORKERS FOR A BETTER HAWAII	N	10-MAY-10	18-MAY-10	10-MAY-10	0
13-DEC-11	C30001655	CROSSROADS GRASSROOTS POLICY STRATEGIES	N	09-DEC-11	12-DEC-11	12-DEC-11	0
08-DEC-11	C30001564	WORKERS FOR A BETTER HAWAII	N	30-APR-10	09-MAY-10	01-MAY-10	100000
13-SEP-11	C30001911	EMERGENCY COMMITTEE FOR ISRAEL	N	12-SEP-11	12-SEP-11	12-SEP-11	0
19-MAY-11	C30001101	US CHAMBER OF COMMERCE	A	16-MAY-11	18-MAY-11	18-MAY-11	0
18-MAY-11	C30001101	US CHAMBER OF COMMERCE	N	16-MAY-11	25-MAY-11	18-MAY-11	0
31-MAR-11	C30001648	AMERICAN ACTION NETWORK	N	12-OCT-10	14-OCT-10	14-OCT-10	0
11-MAR-11	C30001028	AMERICAN FUTURE FUND	A	27-SEP-10	12-OCT-10	08-OCT-10	0
04-MAR-11	C30001028	AMERICAN FUTURE FUND	A	09-AUG-10	24-AUG-10	12-AUG-10	0
03-MAR-11	C30001028	AMERICAN FUTURE FUND	A	27-SEP-10	12-OCT-10	29-SEP-10	0
02-MAR-11	C30000368	OCEAN CHAMPIONS VOTER FUND	A	28-SEP-10	30-SEP-10	30-SEP-10	150000
22-FEB-11	C30001812	COLORADO PROGRESSIVE ACTION	A	01-OCT-10	11-NOV-10	23-OCT-10	60000
18-FEB-11	C30000160	CAMPAIGN MONEY WATCH	A	27-SEP-10	07-OCT-10	06-OCT-10	725000
18-FEB-11	C30000160	CAMPAIGN MONEY WATCH	A	14-OCT-10	17-OCT-10	16-OCT-10	0
18-FEB-11	C30000160	CAMPAIGN MONEY WATCH	A	01-JAN-09	26-SEP-10	26-SEP-10	50000

18-FEB-11	C30000160	CAMPAIGN MONEY WATCH	A	08-OCT-10	13-OCT-10	08-OCT-10	350000
15-FEB-11	C30001903	AMERICANS FOR COMMON SENSE SOLUTIONS	N	03-SEP-10	20-SEP-10	03-SEP-10	15000
15-FEB-11	C30001903	AMERICANS FOR COMMON SENSE SOLUTIONS	N	26-OCT-10	02-NOV-10	26-OCT-10	75000
15-FEB-11	C30001903	AMERICANS FOR COMMON SENSE SOLUTIONS	N	07-OCT-10	01-NOV-10	08-OCT-10	25000
15-FEB-11	C30001903	AMERICANS FOR COMMON SENSE SOLUTIONS	N	20-OCT-10	01-NOV-10	21-OCT-10	50000
15-FEB-11	C30001903	AMERICANS FOR COMMON SENSE SOLUTIONS	N	19-OCT-10	02-NOV-10	21-OCT-10	0
04-FEB-11	C30001853	AMERICANS UNITED FOR SAFE STREETS	A	29-OCT-10	01-NOV-10	01-NOV-10	100572.4
03-FEB-11	C30001754	WOMEN'S VOICES WOMEN VOTE ACTION FUND	A	20-OCT-10	20-OCT-10	20-OCT-10	0
03-FEB-11	C30001770	CARE MEMBERSHIP ORGANIZATION	A	15-OCT-10	18-OCT-10	18-OCT-10	0
02-FEB-11	C30001861	SET IT STRAIGHT	A	21-OCT-10	27-OCT-10	26-OCT-10	5000
02-FEB-11	C30001861	SET IT STRAIGHT	A	27-OCT-10	03-NOV-10	29-OCT-10	2000
01-FEB-11	C30000921	SUSAN B ANTHONY LIST INC	A	06-APR-10	09-APR-10	06-APR-10	0
01-FEB-11	C30001770	CARE MEMBERSHIP ORGANIZATION	A	15-OCT-10	18-OCT-10	18-OCT-10	0
11-JAN-11	C30001804	WEST VIRGINIANS FOR LIFE INC.	A	19-OCT-10	28-OCT-10	19-OCT-10	
20-DEC-10	C30001648	AMERICAN ACTION NETWORK	A	20-AUG-10	24-AUG-10	23-AUG-10	0
20-DEC-10	C30001648	AMERICAN ACTION NETWORK	A	30-SEP-10	01-OCT-10	30-SEP-10	0
29-NOV-10	C30001861	SET IT STRAIGHT	N	27-OCT-10	03-NOV-10	29-OCT-10	2000
19-NOV-10	C30001861	SET IT STRAIGHT	N	27-OCT-10	03-NOV-10	29-OCT-10	2000
02-NOV-10	C30001853	AMERICANS UNITED FOR SAFE STREETS	N	29-OCT-10	01-NOV-10	01-NOV-10	100572.4
01-NOV-10	C30001184	Catholics United	N	29-OCT-10	01-NOV-10	31-OCT-10	5557.32
01-NOV-10	C30001887	MICHIGAN CITIZENS FOR FISCAL RESPONSIBILITY	N	31-OCT-10	01-NOV-10	31-OCT-10	0
01-NOV-10	C30001887	MICHIGAN CITIZENS FOR FISCAL RESPONSIBILITY	N	31-OCT-10	01-NOV-10	31-OCT-10	0
01-NOV-10	C30001887	MICHIGAN CITIZENS FOR FISCAL RESPONSIBILITY	N	31-OCT-10	01-NOV-10	31-OCT-10	0
01-NOV-10	C30001895	COOK INLET SPORTFISHING CAUCUS	N	29-OCT-10	01-NOV-10	31-OCT-10	24990.31
31-OCT-10	C30001721	WEST VIRGINIA CONSERVATIVE FOUNDATION INC.	N	30-OCT-10	31-OCT-10	31-OCT-10	0
29-OCT-10	C30001051	AMERICANS FOR PROSPERITY	N	27-OCT-10	28-OCT-10	28-OCT-10	0
29-OCT-10	C30001754	WOMEN'S VOICES WOMEN VOTE ACTION FUND	N	20-OCT-10	28-OCT-10	28-OCT-10	0
29-OCT-10	C30001879	HISPANIC LEADERSHIP FUND	N	27-OCT-10	01-NOV-10	29-OCT-10	0
28-OCT-10	C30001051	AMERICANS FOR PROSPERITY	N	22-OCT-10	27-OCT-10	27-OCT-10	0
28-OCT-10	C30001648	AMERICAN ACTION NETWORK	N	12-OCT-10	28-OCT-10	28-OCT-10	0

28-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	28-OCT-10	28-OCT-10	0
28-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	28-OCT-10	28-OCT-10	0
28-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	28-OCT-10	28-OCT-10	0
28-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	28-OCT-10	28-OCT-10	0
28-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	28-OCT-10	28-OCT-10	0
28-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	28-OCT-10	28-OCT-10	0
27-OCT-10	C30001028	AMERICAN FUTURE FUND	A		26-OCT-10	28-OCT-10	26-OCT-10	0
27-OCT-10	C30001101	US CHAMBER OF COMMERCE	N		27-OCT-10	28-OCT-10	28-OCT-10	0
27-OCT-10	C30001101	US CHAMBER OF COMMERCE	N		26-OCT-10	27-OCT-10	27-OCT-10	0
27-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	26-OCT-10	26-OCT-10	0
27-OCT-10	C30001705	PATRIOT MAJORITY USA FUND	N		22-SEP-10	26-OCT-10	26-OCT-10	605000
27-OCT-10	C30001846	ENTERPRISE FREEDOM ACTION COMMITTEE	N		22-OCT-10	26-OCT-10	26-OCT-10	0
27-OCT-10	C30001853	AMERICANS UNITED FOR SAFE STREETS	N		25-OCT-10	26-OCT-10	26-OCT-10	153173.14
27-OCT-10	C30001861	SET IT STRAIGHT	N		21-OCT-10	27-OCT-10	26-OCT-10	10000
26-OCT-10	C30001028	AMERICAN FUTURE FUND	N		26-OCT-10	28-OCT-10	26-OCT-10	0
26-OCT-10	C30001051	AMERICANS FOR PROSPERITY	N		21-OCT-10	25-OCT-10	25-OCT-10	0
26-OCT-10	C30001838	FAITH & FREEDOM COALITION	N		25-OCT-10	01-NOV-10	25-OCT-10	0
25-OCT-10	C30001770	CARE MEMBERSHIP ORGANIZATION	A		15-OCT-10	18-OCT-10	18-OCT-10	0
25-OCT-10	C30001812	COLORADO PROGRESSIVE ACTION	N		01-SEP-10	02-NOV-10	23-OCT-10	60000
25-OCT-10	C30001820	MI FAMILIA VOTA CIVIC PARTICIPATION CAMPAIGN	N		23-OCT-10	03-NOV-10	23-OCT-10	87350.28
24-OCT-10	C30001747	CENTER FOR INDIVIDUAL FREEDOM	N		21-OCT-10	23-OCT-10	23-OCT-10	0
23-OCT-10	C30001028	AMERICAN FUTURE FUND	A		27-SEP-10	12-OCT-10	08-OCT-10	0
23-OCT-10	C30001051	AMERICANS FOR PROSPERITY	N		20-OCT-10	22-OCT-10	22-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	22-OCT-10	22-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	22-OCT-10	22-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	22-OCT-10	22-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	22-OCT-10	22-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	21-OCT-10	21-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	21-OCT-10	21-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	21-OCT-10	21-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	21-OCT-10	21-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	21-OCT-10	21-OCT-10	0
22-OCT-10	C30001648	AMERICAN ACTION NETWORK	N		12-OCT-10	22-OCT-10	22-OCT-10	0

EXHIBIT B

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT ON *VAN HOLLEN v. FEC*

Chair CAROLINE C. HUNTER and
Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN

On March 30, 2012, the United States District Court for the District of Columbia ruled in favor of the plaintiff's motion for summary judgment in this matter.[1] We voted against the recommendation by the Commission's Office of General Counsel not to appeal the decision. We supported appealing the district court's ruling[2] initially because we feared that the opinion left the Commission with insufficient guidance as to what an acceptable regulatory implementation of the statute would look like. The district court subsequently issued an order and opinion denying defendant-intervenors' motion for a stay pending appeal. While the latter ruling settled – for now – the regulatory question, the court's opinions still create, in our view, a maze of uncertainty for many advocacy groups wishing to exercise their First Amendment rights.

BACKGROUND

2 U.S.C. § 434(f)(2) provides that sponsors of electioneering communications[3] must report the names and addresses of "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement [for the electioneering communication] during the period beginning on the first day of the preceding calendar year and ending on the disclosure date."[4] If the sponsor established a segregated bank account in advance, then the reporting may be limited to "all contributors who contributed an aggregate amount of $1,000 or more to that account" during the same period.[5]

In 2007, prior to our appointment, the Commission promulgated a regulation to implement this statute, which required reporting under the following conditions:

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[1] *Van Hollen v. FEC*, No. 11-0766, slip op. (D. D.C. Mar. 30, 2012).

[2] Because the Commission may not act without an affirmative vote of at least four of its members, and our colleagues voted against appeal, the Commission is not seeking an appeal in this matter. 2 U.S.C. § 437c(c).

[3] Generally, an electioneering communication is any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office and is made within 30 days before a primary or 60 days before a general election, and is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A).

[4] 2 U.S.C. § 434(f)(2)(F).

[5] 2 U.S.C. § 434(f)(2)(E).

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

11 C.F.R. § 104.20(c)(9).[6]

Plaintiff brought a challenge under the Administrative Procedure Act ("APA") on the grounds that the Commission's 2007 regulation impermissibly narrowed the scope of the rule for corporations and labor organizations to reporting only donors who made donations for the purpose of furthering electioneering communications.[7] On March 30, 2012, the United States District Court for the District of Columbia ruled in favor of the plaintiff's motion for summary judgment.[8] Under a "*Chevron* step one"[9] analysis, the district court held that the Commission improperly narrowed the regulation because the meaning of the term "contribute" in the statute was plain, and did not include a purpose or intent element.[10] In reaching this conclusion, the court relied primarily on the definitions of "contributor" and "contribute" set forth in the Oxford English Dictionary and Merriam-Webster Dictionary. Ultimately, the court agreed with the plaintiff and held that "contributor 'means a person who gives money without expectation of service or property or legal right in return.'"[11]

ANALYSIS

The district court's decision is confusing in two ways: First, there seem to be internal contradictions in the opinion. Second, it seems that a rule consistent with the opinion, when applied to real-world examples, might lead to potentially absurd results.

In rendering its decision, the court held that the BCRA was not ambiguous with respect to the reporting of electioneering communications. Yet, the court's opinion appeared to condone the Commission's initial rulemaking in 2003, in which the Commission implemented the statute by requiring the reporting of "each *donor* who *donated* an amount aggregating $1,000 or more to the

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[6] *See* Draft Final Rules on Electioneering Communications, Certification dated November 21, 2007, *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=73272 (Commissioners Lenhard, Mason, Walther, and Weintraub voted affirmatively. Commissioner von Spakovsky dissented).

[7] *Van Hollen v. FEC*, No. 11-0766, Complaint at ¶ 3 (D. D.C. filed Apr. 21, 2011).

[8] *See supra* note 1.

[9] Under "*Chevron* step one," the court asks "whether Congress has directly spoken to the precise question at issue," and whether "the statute unambiguously forecloses the agency's interpretation." *Van Hollen v. FEC*, slip op. at 12 (*citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

[10] *Id*. at 26-28.

[11] *Id*. at 27.

person making the disbursement."[12] The court noted approvingly that, "If [the BCRA's use of] 'all contributors who contributed' was ambiguous from the start, the FEC had a rulemaking to address it. And its substitution of the words 'donor' and 'donation,' with their clear connotation of providing something for nothing . . . seems to ameliorate the concerns supposedly raised by the expansion of the statute's reach to include corporations and unions."[13] In its subsequent opinion denying defendant-intervenors' motion for a stay pending appeal, the district court confirmed that the 2003 regulation "now governs the disclosures required under the BCRA."[14]

Yet, if BCRA's electioneering communications reporting provision was clear on its face, then it is unclear why it is appropriate for the Commission's now-revived 2003 regulation to substitute different terminology with a more "clear connotation" than what was used in the statute. Under *Chevron* step one, the court, had it followed its own logic, should have found the entirety of what is now designated as 11 C.F.R. § 104.20(c)(9) to be invalid, rather than just the 2007 portion that was added to the regulation. But the court only struck the challenged addition made in 2007 and, indeed, confirms the 2003 rule now governs.

Alternatively, notwithstanding *Chevron* step one, if BCRA was ambiguous, and the Commission did address its ambiguity in 2003, the court seems to be suggesting the agency cannot revisit that initial determination.[15] If that is true, it would severely limit an agency's ability to fix mistakes in its regulations or reconsider close calls with the benefit of experience. In other words, if an ambiguity can be resolved in more than one way and still be consistent with the statute, it is not apparent why choosing one option should foreclose an agency from reopening that determination later.

As for the requirement in the 2003 regulation that sponsors of electioneering communications report their "donors," the court did not provide sufficient guidance as to what that term would cover in the post-*WRTL* and post-*Citizens United* landscape. Rather, the court asked rhetorically, "[i]s it really difficult to determine if dues paid in return for the benefits of membership are 'donations,' or if investors who pay for shares of stock and customers who pay for goods and services are a corporation's 'donors?'"[16] First, this question appears to concede that there is a line between receipts that trigger reporting and receipts that do not – and that line is determined by the purpose behind the money. More importantly, although the court thought the answer as to where that line should be is obvious, we are not sure the answer is so clear.

The considerations that animated the Commission's 2007 rulemaking illustrate the difficulty in discerning the difference between dues and donations. There, it was shown to be quite difficult to craft a rule that would capture consistently the concept of "donation" with respect to the diversity

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[12] 11 C.F.R. §§ 104.20(c)(7), (8) (2003) (emphasis added).

[13] *Van Hollen v. FEC*, slip op. at 25 n.8.

[14] *Van Hollen v. FEC*, No. 11-0766, slip op. (D. D.C. Apr. 27, 2012) at 3 (*hereinafter*, "Opinion on Motion for Stay").

[15] *Van Hollen v. FEC*, slip op. at 25 n.8.

[16] *Id*.

of entities that may make electioneering communications. The idea of "benefits for memberships" does not necessarily answer the question. For example, take the contrast between a labor organization and a Section 501(c)(4) organization such as the Sierra Club.[17] On the one hand, member dues given to a labor union might not appear to be "donations" or "contributions"[18] because the members are getting in return the "benefits of membership," as the court suggests. On the other hand, the Sierra Club asks its supporters to "*donate*" to the organization,[19] and for one's $15 "donation," a donor gets the following "Member-only *benefits*":

- One-year subscription to Sierra magazine
- Worldwide Members-only outdoor trips
- Automatic membership in your local Sierra Club Chapter
- Discounts on Sierra Club calendars, books, and other merchandise[20]

It is unclear, if there is a difference between the two, why the benefits received from union membership would prevent union dues from triggering reporting requirements, yet benefits received from Sierra Club membership would not.

Moreover, "donors" to the Sierra Club presumably care about the group's work "in preserving wilderness, wildlife and nature's most splendid wild places,"[21] and this type of work, along with the group's lobbying efforts, could, in some non-trivial sense, be viewed as the type of "benefits of membership" described by the district court. Thus, when applied to actual entities, the court's distinction between "dues" (for which the payer receives "benefits") versus "donations" (for which the payer receives no "benefits") is not so neatly drawn.

To add to this confusion, a rule distinguishing between a labor union and a Section 501(c)(4) entity creates an anomalous result. If union dues were to be excluded from treatment as contributions or donations (because members get a benefit from their dues), but funds given to the Sierra Club are included, then labor unions running electioneering communications would be

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[17] Sierra Club, IRS Form 990, *available at* http://dynamodata.fdncenter.org/990_pdf_archive/941/941153307/941153307_201012_990O.pdf (last visited April 19, 2012).

[18] It strikes us that it would not be improper in this context to use the term "contribution" colloquially to also mean "dues," which, again, calls into question the court's *Chevron* step one analysis. The term also is used colloquially to include transactions such as "contributions" made by individuals to their Individual Retirement Accounts, for which they receive certain tax benefits. *See, e.g.*, "IRA Contribution Limits," Internal Revenue Service, *at* http://www.irs.gov/retirement/participant/article/0,,id=211358,00.html (last visited Apr. 23, 2012).

[19] Sierra Club, "Donate," *at* https://secure.sierraclub.org/site/Donation2?idb=0&df_id=1282&1282.donation=form1&autologin=true&s_src=N10ZSCZZ02&s_subsrc=JRG (last visited April 19, 2012) (emphasis added).

[20] Sierra Club, "Join the Sierra Club," *at* https://secure.sierraclub.org/site/Donation2?idb=0&df_id=7040&7040.donation=form1&s_src=N10ZSCMC01&s_subsrc=MC (last visited April 19, 2012) (emphasis added).

[21] Sierra Club, "Why join the Sierra Club?", *at* https://secure.sierraclub.org/site/SPageServer?pagename=Why_Join (last visited April 19, 2012).

required to disclose less information about who financed their ads than non-profit corporations. However, there is nothing in the legislative history that indicates Congress intended this. After all, at the time BCRA was passed, unions were prohibited from even making electioneering communications, unlike certain non-profit corporations that take funds only from individuals.[22] In other words, entities that were more strictly regulated (*i.e.*, unions) would be subject to a lesser disclosure requirement than entities that had been regulated less (*i.e.*, certain non-profit corporations) at the time BCRA was passed.

Moreover, there are still additional ambiguities to resolve. According to the court:

> The Oxford English Dictionary defines "contributor" as "one that contributes or gives to a common fund; one that bears a part in effecting a result." The verb "contribute" is defined, in relevant part, as "to give or pay jointly with others; to furnish a common fund or charge." Similarly, the Merriam-Webster dictionary defines "contributor," in relevant part, as "to give or supply in common with others [;] . . . to give a part to a common fund or store[.]" Each of these definitions suggests that as the term is commonly used, an individual's status as a "contributor" *is not dependent on his or her purpose in transferring the funds*.[23]

The practical reality is that it is implausible that anyone would give money to any entity, whether it is a for-profit or non-profit corporation or labor organization, for no purpose whatsoever. Thus, if the reporting of "contributors" is "not dependent on his or her purpose in transferring the funds," is the district court essentially requiring the reporting of all funds that an entity receives for any and all purposes (provided that the aggregate reporting threshold is met)? If so, does this mean that unions and groups like the Sierra Club would, in fact, have to report every person who gives $1,000 or more to the organization if it sponsors an electioneering communication?

This certainly cannot be what Congress intended.[24] In fact, there is legislative history that makes clear that Congress intended the opposite result. Senator Jeffords, one of the principal

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[22] *See* 2 U.S.C. § 441b(b)(2) (2002) (prohibiting labor union funding of electioneering communications); *FEC v. Massachusetts Citizens for Life, Inc*., 479 U.S. 238 (1986). The district court was well aware of the post-*MCFL* legal regime. *See Van Hollen v. FEC*, slip op. at 4 n.1. Several years after BCRA, the Supreme Court further relaxed the prohibition on corporate- and labor-sponsored electioneering communications, and which decision was the impetus for the Commission's 2007 rulemaking on electioneering communications. *See* note 28, *infra*. Of course, *Citizens United v. FEC* removed the prohibition altogether. 130 S. Ct. 876 (2010).

[23] *Van Hollen v. FEC*, slip op. at 26 (internal citations omitted) (emphasis added).

[24] The counterpoint to this is that entities may set up the segregated bank accounts set forth in 2 U.S.C. § 434(f)(2)(E) for the purpose of sponsoring electioneering communications, whereby the reporting obligation attaches only to funds deposited into such accounts. But what about an entity that decides to exercise its First Amendment rights on an *ad hoc* basis, perhaps in response to a legislative issue that arises suddenly? If the entity did not set up a segregated account more than a calendar year in advance of speaking (within which period the electioneering reporting obligation attaches with respect to an entity's "contributors"), depending on how broadly the Commission implements this decision, the practical difficulty of reporting sources of funds may effectively prevent that entity from speaking. This may contravene the Supreme Court's holding in *Citizens United* that a corporation may fund electioneering communications and independent expenditures from its general treasury funds, and cannot be required to make such communications only from a separate segregated fund. 130 S. Ct. 876.

architects of the electioneering communication provisions, said as much. In deliberating the bill, Senator Jeffords made clear that the electioneering communication provisions "will not require the invasive disclosure of all donors . . . ."[25] By resolving the case on *Chevron* step one, the district court does not look to such legislative history.

The court views the separate bank account as a way to address the practical concerns that animated the Commission's 2007 rulemaking which the court strikes down:

> [T]he separate bank account option Congress provided in BCRA might be a viable way to solve the agency's concerns about the burden the disclosure rule would impose on the newly regulated entities . . . So it appears to the Court that the separate bank account option already included in the statute would largely solve the problem the FEC set out to address.[26]

Yet, the court's decision could be read to cast doubt on the Commission's 2007 implementation of the statute's electioneering communications reporting requirement for sponsors that choose to use the option of the segregated bank account. The language in BCRA originally specified that these accounts were to "consist[] of funds contributed solely by *individuals*."[27] In response to the Supreme Court's 2007 ruling in *FEC v. Wisconsin Right to Life* ("*WRTL*"),[28] in addition to adding the purpose element to the electioneering communications regulation at issue in this litigation, the Commission altered its regulations to allow for corporate and union funds to be accepted into the segregated accounts set forth in 2 U.S.C. § 434(f)(2)(E).[29] Since the court rejected the Commission's argument that *WRTL's* expansion of the right to sponsor electioneering communications to additional entities justified the Commission's introduction of the purpose element in the 2007 rulemaking,[30] does that also affect the Commission's regulations regarding separate accounts? Under the court's reasoning, assuming that the language of BCRA is to be read literally (notwithstanding other judicial decisions and other language in the Act), the availability of the separate electioneering communications reporting accounts for use in accepting corporate and labor organization funds may also be cast into doubt, since the statute on its face does not appear to provide for this interpretation.

Given these and other questions, uncertainty has been created as to how sponsors must report their electioneering communications going forward. *Roll Call* has said, "[t]he March 30 ruling muddies the waters further," while the law firm of Covington & Burling has noted, "[t]o the

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[25] 147 Cong. Rec. S2813 (Mar. 27, 2001).

[26] *Van Hollen v. FEC*, slip op. at 20 n.5.

[27] 2 U.S.C. § 434(f)(2)(E) (emphasis added).

[28] 551 U.S. 449 (2007).

[29] 11 C.F.R. § 114.14(d)(2)(i); *see also* Explanation and Justification for Regulations on Electioneering Communications, 72 Fed. Reg. 72899, 72912 (Dec. 26, 2007).

[30] *Id*. at 16-22.

degree that individuals view the election laws as *murky, counterintuitive or the product of an Alice in Wonderland-like experience*, the effect of this decision may serve to reinforce that view."[31]

CONCLUSION

The district court's ruling in this litigation leaves us with little direction to resolve the difficult questions facing members of the public who sponsor electioneering communications. This problem is especially acute for those entities that BCRA and the Commission's 2003 regulation did not contemplate as being eligible to fund electioneering communications. Short of an appeal, the best advice the Commission may be able to offer the public is to take any "reasonable interpretation"[32] of the statute, the regulation, and the court opinion. This is not the preferred course. As the Supreme Court has stated, vagueness in the law must be avoided so as to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and this is especially so in "sensitive areas of basic First Amendment freedoms," where vagueness "'operates to inhibit the exercise of (those) freedoms.'"[33] Speakers ought not be left to guess at the potential breadth of the reach of attendant reporting obligations, particularly when Congress itself has not sanctioned such breadth.

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[31] Eliza Newlin Carney, *FEC Ruling Leaves Ad Uncertainty*, ROLL CALL, Apr. 9, 2012 (emphasis added).

[32] *See, e.g.*, "Federal Election Commission Announces Plans to Issue New Regulations to Implement the Honest Leadership and Open Government Act of 2007," Federal Election Commission, Sep. 24, 2007, *at* http://www.fec.gov/press/press2007/20070924travel.shtml.

[33] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

EXHIBIT C

FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

Statement of Vice Chair Weintraub and Commissioner Bauerly regarding the Commission's decision not to appeal the decision in *Van Hollen v. FEC*

April 27, 2012

On March 30, 2012, the United States District Court for the District of Columbia issued its opinion and order granting summary judgment to the Plaintiff in *Van Hollen v. FEC*.[1] Yesterday the Commission apprised the District Court that it does not intend to appeal the Court's order.[2] We supported the decision not to appeal.

The case, brought by U.S. Representative Chris Van Hollen, challenged a regulation defining the disclosure requirements for corporations and labor unions that fund electioneering communications. Rep. Van Hollen argued that the regulation was contrary to the disclosure regime set forth in the Bipartisan Campaign Reform Act (BCRA) and should therefore be declared invalid. The District Court's decision granted Rep. Van Hollen's motion for summary judgment.

We believe in the general presumption that the regulations promulgated by the Commission should be defended, including, if necessary, by appealing an adverse district court decision. However, it has not been the Commission's practice automatically to appeal any adverse ruling. On the contrary, in some cases, the costs of prolonged defensive litigation, to both the Commission and the public as a whole, outweigh its potential benefits. That was the conclusion we reached here.[3]

All told, the District Court's opinion in this case is thorough and well-reasoned, and does not have sufficient weakness to suggest it is likely to be reversed on appeal. Nor does this case raise significant constitutional issues or require further guidance from the courts.[4] It presents a straight-forward application of the plain language of the statute.

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[1] *Van Hollen v. FEC*, __ F. Supp. 2d __, 2012 WL 1066717 (D.D.C. Mar. 30, 2012).

[2] *See* Notice, Dkt. No. 60, *Van Hollen v. FEC*, No. 11-cv-00766-ABJ (D.D.C. Apr. 26, 2012).

[3] It is also the conclusion that we recently reached when we, along with our colleagues, decided not to appeal the District Court's ruling in *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), and instead enter into a negotiated final stipulated judgment. This is consistent with earlier decisions by the Commission, such as the decision not to appeal the invalidation of a number of regulations in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004); the Commission instead proceeded through rulemakings.

[4] Despite the "sky is falling" rhetoric adopted by some with respect to the District Court's decision, the Commission need not throw up its hands and declare that it cannot offer meaningful advice on how to

Consequently, we could not support expending the significant resources necessary for an appeal. Rather, the wisest and most efficient course of action is to quickly bring our regulations into conformity with the statute.

In addition, we also would have preferred to inform the District Court and the D.C. Circuit that the Commission opposed the motion for stay pending the appeal being attempted by the two intervenors. In any event, the District Court today denied that motion, noting that the intervenors failed to show both likelihood of success on the merits of their appeal and a threat of irreparable harm.[5] We also continue to believe – as the Commission articulated before the District Court[6] – that only the Commission has the right to appeal. The Commission has now determined not to appeal.

We note finally that we have attempted on several occasions to seek public input on the regulation invalidated by the District Court and others concerning disclosure of campaign finance information. As the Supreme Court explained in *Citizens United*, "effective disclosure" is what "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[7] We now welcome the opportunity to work with our colleagues to bring our regulations governing the reporting of electioneering communications into compliance with the Act, guided by the Supreme Court's teaching.

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comply with the Act. For several years prior to adoption of the rule at issue in 2007, the Commission administered a rule that clearly and simply applied the Act's requirements of disclosing those who give more than $1000 to Qualified Nonprofit Corporations.

[5] *See* Memorandum Opinion & Order, Dkt. No. 61, *Van Hollen v. FEC*, No. 11-cv-00766-ABJ (D.D.C. Apr. 27, 2012).

[6] *See* Defendant FEC's Response to the Motion to Intervene at 1-2, Dkt. No. 18, *Van Hollen v. FEC*, No. 11-cv-00766-ABJ (D.D.C. June 30, 2011).

[7] *Citizens United v. FEC*, 558 U.S. __, 138 S. Ct. 876, 916 (2010).