ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-5016 & 15-5017

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

CHRISTOPHER VAN HOLLEN, JR.
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

CENTER FOR INDIVIDUAL FREEDOM,
Intervenor-Defendant-Appellant,

HISPANIC LEADERSHIP FUND,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia
Case No. 11-cv-00766-ABJ (Hon. Amy Berman Jackson)

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION SUPPORTING APPELLANTS FOR REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Amicus Cause of Action Institute submits this certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

Other than Amicus Cause of Action Institute, the briefs of Appellant Center for Individual Freedom and Hispanic Leadership Fund have listed all parties and participants in the proceedings below.

B. Ruling Under Review

References to the Ruling Under Review appear in the Briefs for Appellants Center for Individual Freedom and Hispanic Leadership Fund.

C. Related Cases

This case was previously before this Court, as set forth in the Briefs for Appellants Center for Individual Freedom and Hispanic Leadership Fund. Cause of Action Institute is not aware of any other related case as defined by Circuit Rule 28.

D. Statement Regarding Appendix

Amicus Cause of Action Institute adopts the Joint Appendix filed by Appellants.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Cause of Action Institute is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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BCRA	Bipartisan Campaign Reform Act of 2002
FEC	Federal Election Commission
JA	Joint Appendix
WRTL II	*FEC v. Wisconsin Right of Life*, 551 U.S. 449 (2007)

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

Amicus curiae Cause of Action Institute ("Cause of Action") is a nonprofit, nonpartisan government oversight organization that, *inter alia*, works to ensure fairness and prevent misuse of discretionary power in the Executive Branch by defending small businesses and individuals in administrative, civil, and criminal cases and appearing as *amicus curiae* before this and other federal courts.

Cause of Action has a particular and substantial interest in opposing bureaucratic overreach, fighting cronyism, and protecting the rule of law, all to promote economic prosperity. To accomplish this mandate, Cause of Action advocates for government transparency and citizen privacy. Consequently, it brings a unique perspective on the nature of transparency and anonymity in relation to political speech and participation, and hence on the issues presented in this case.

Cause of Action supports Appellants in seeking reversal of the District Court's decision invalidating 11 C.F.R. § 104.20(c)(9) (2007). On the unique facts in this case, judicial deference to the administrative agency is appropriate. The Federal Election Commission ("FEC") struck a proper balance between campaign transparency and citizen privacy and the court below should have accordingly deferred.

Cause of Action files this brief with consent of all parties and pursuant to Fed. R. App. P. 29 and U.S. Court of Appeals for the D.C. Cir. Rule 29.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

Pursuant to Fed. R. App. P. 29(c)(5), Cause of Action states that no party or person other than Cause of Action and its counsel participated in or contributed money for the drafting of this brief.

SUMMARY OF ARGUMENT

Plaintiff-Appellee Representative Christopher Van Hollen, Jr. ("Van Hollen") challenged 11 C.F.R. § 104.20(c)(9) (2007), a legislative rule promulgated by the FEC pursuant to its delegated authority under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA") regulating "electioneering communications" by corporations and labor unions. The District Court vacated this rule, holding that it was inconsistent with BCRA.

As a threshold matter, Van Hollen has failed to exhaust administrative remedies and this case is unripe and moot. Furthermore, the District Court erroneously distorted the legislative process by manufacturing from the Congressional Record a controlling intent and purpose in a case where Congress had no intention on the precise question at issue. By doing this, the District Court assumed a policy-making role rightfully resident in the political branches. On the unique and narrow facts of this case, *Chevron* deference was especially

appropriate. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Finally, the District Court's construction of BCRA needlessly created a conflict between the statute and controlling First Amendment authorities. For these reasons, the District Court should be reversed and Van Hollen's action dismissed.

ARGUMENT

I. Van Hollen Failed To Exhaust Administrative Remedies

The notice of proposed rulemaking for 11 C.F.R. § 104.20(c)(9) was published on August 31, 2007. *See* JA27. Senators John McCain, Russell Feingold, Olympia Snowe, and Representative Christopher Shays commented. JA101. Van Hollen did not. The rule was promulgated on December 26, 2007. JA299.

Van Hollen's complaint, filed April 21, 2011, alleged that the rule infringed his "protected interest in participating in elections untainted by expenditures from undisclosed sources for 'electioneering communications.'" JA320. His Motion for Summary Judgment, filed July 1, 2011, alleged that the rule denied him "disclosure of information mandated by BCRA" and "illegally structures a competitive environment" in which he was defending "a 'concrete interest'—retention of elected office." Pl's Mot. Sum. J. at 25, *Van Hollen v. FEC*, 851 F. Supp.2d 69 (D.D.C. 2012) (No. 11-0766). No commentator,

however, raised any of these concerns to the FEC during the comment period in 2007.[1]

Because Van Hollen did not comment, he forfeited his opportunity to sue. *Tesoro Ref. & Mktg. Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009); *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148-50 (D.C. Cir. 2005).[2]

II. The Case Is Unripe and Moot

Van Hollen sued to overturn 11 C.F.R. § 104.20(c)(9) (2007) (the "Old Rule") on April 21, 2011. JA316.

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[1] The recent amendments to 11 C.F.R. § 104.20(c)7-(c)(9), 79 Fed. Reg. 62,797 (Oct. 21, 2014), represent "interim relief or events [that] have completely and irrevocably eradicated the effects of the alleged violation," *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), because the new regulations require disclosure of all donors solicited by a corporation or labor organization for the purpose of contributing to an electioneering communication as well as all donors who contribute for any purpose to segregated bank accounts, trusts, partnerships and LLCs that make disbursements for electioneering communications, resolving Van Hollen's informational injury. Van Hollen's competitor injury is irredressable by the courts under BCRA. Further, as Van Hollen's challenge is not a constitutional challenge of BCRA but is instead brought under the Administrative Procedure Act ("APA"), no court can apply the APA to redress any of his alleged injuries and, even if it could, Van Hollen's injuries could only be redressed by the APA if he alleged an injury raised in a comment submitted before the agency, which he failed to do.

[2] This doctrine, which courts refer to as "issue exhaustion" and "issue waiver," holds that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Advocates for Highway & Auto Safety*, 429 F.3d at 1150 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

On June 21, 2011, the FEC announced a notice of availability for statements in support of or in opposition to a petition for rulemaking "to conform its regulations regarding independent expenditures and electioneering communications by corporations, membership organizations, and labor organizations to *Citizens United v. FEC*," 558 U.S. 310 (2010). 76 Fed. Reg. 36,001 (June 21, 2011).

On December 27, 2011, the FEC issued a Notice of Proposed Rulemaking stating that *Citizens United* invalidated BCRA's prohibitions on independent expenditures and electioneering communications by corporations and labor unions. 76 Fed. Reg. 80,803, 80,813-14 (Dec. 27, 2011).[3]

On October 21, 2014, the FEC published a final rule amending, *inter alia*, 11 C.F.R. § 104.20(c)(9) (the "New Rule") to implement *Citizens United* by removing a cross-reference to 11 C.F.R. § 114.15 and adding a disclosure requirement if disbursements "were not paid exclusively from a segregated bank

[3] In response to this Notice, 9 comments were submitted, representing 21 separate individuals. 79 Fed. Reg. 62,797, 62,798 (Oct. 21, 2014). The FEC received a comment from a group of twelve senators. Comment of Senators Michael Bennet, Barbara Boxer, Sherrod Brown, Al Franken, Kirsten E. Gillibrand, Jeffrey Alan Merkley, Bernard Sanders, Charles E. Schumer, Jeanne Shaheen, Tom Udall, and Sheldon Whitehouse, *Reg. 2010-01 Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations (Citizens United)* (FEC Feb. 21, 2012), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=115034. But Representative Van Hollen failed to comment.

account described in paragraph (c)(7) of this section." 79 Fed. Reg. 62,797, 62,817 (Oct. 21, 2014).

A. This Case Is Unripe

Ripeness is a function of final agency action. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 743 (1997); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). The doctrine protects both Article II and Article III interests by preventing the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and by protecting administrative agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Labs.*, 387 U.S. at 148.

Following *Citizens United*, and no later than June 21, 2011, 11 C.F.R. § 104.20(c)(9) (2007) was not and could not have been the FEC's final word on electioneering communications by corporations and labor unions because that provision was being amended to cure a constitutional deficiency. 76 Fed. Reg. at 36,001. The Old Rule was bound to change and so the New Rule had to be final before this matter could be ripe.

Ripeness also ensures that a reviewing court gains the benefit of a whole record to determine if an agency has acted reasonably, arbitrarily or capriciously. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402,

419-20 (1971); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008) (Tatel, J., concurring). Given that the New Rule, supported by an entirely new administrative record, is now operative, the "whole record" is not before the Court and this case presents only a speculative controversy. *See State Farm v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986); *Abbott Labs.*, 387 U.S. at 148.

B. This Case Is Moot

On November 25, 2014, the District Court vacated the Old Rule. By January 27, 2015, however, the New Rule became effective. Announcement of Effective Date, 80 Fed. Reg. 12,079 (Mar. 6, 2015). The Old and New Rules each include the phrase "for the purpose of furthering electioneering communications," but, as explained below, they are not the same provision. And the fact that Van Hollen might complain about the New Rule as he did about the Old is immaterial. Even if Van Hollen exhausted administrative remedies, which he did not, the New Rule has mooted this case. *See LaRoque v. Holder*, 679 F.3d 905, 907-08 (D.C. Cir. 2012); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-110 (2001); *see also Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) ("The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has

changed. A new system is now in place. We therefore must vacate this aspect of the district court's decision as moot.").

The Old and New Rules differ in language, purpose, and effect. *Compare* 11 C.F.R. §§ 104.20(c)(7)-(c)(9) (2007), *with* 104.20(c)(7)-(c)(9) (2015). For example, the Old Rule was "supposed to be about one narrow subject: what to do to implement the Supreme Court's decision in *WRTL II*." JA414. The New Rule implements *Citizens United*. *See* Final Rules, 79 Fed. Reg. at 62,797-99. Under the Old Rule, a corporation was prohibited from engaging in electioneering communications unless it met certain exceptions or established a separate segregated fund. Stock corporations were distinguished from qualified nonprofit corporations (QNCs), which were excepted from the general prohibition on nonprofit entities engaging in electioneering communications. The New Rule changes definitions and removes exceptions so that "corporation" now includes a tax-exempt corporation and a stock corporation because all corporations are permitted to engage in electioneering communications. 79 Fed. Reg. at 62,816. Finally, the New Rule was promulgated only after a new notice and comment rulemaking procedure, signifying a substantive change to a legislative rule with the force of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 282 (1979); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015)

(describing a "legislative rule"). On this basis alone, the New Rule should moot this case.

Further, Article III of the Constitution requires a live controversy. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). *Citizens United* rendered the Old Rule, together with a host of other interconnected regulations, a dead letter. Notice of Proposed Rulemaking, 76 Fed. Reg. at 80,803. The New Rule substantively changed paragraphs (c)(7) and (c)(9) to limit corporate and labor union disclosure obligations. Furthermore, the FEC finalized the New Rule only after this Court found BCRA to be ambiguous and that it was reasonable to include a purpose requirement. JA384-385. The scope of these changes moots Van Hollen's case because they "completely and irrevocably eradicated" the effects of any possible prior alleged BCRA violation. *County of Los Angeles*, 440 U.S. at 631.

III. *Chevron* Deference Is Uniquely Proper Here

In *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988), this Court correctly recognized the anti-democratic dangers inherent in judicial distortion of congressional process. For example, the robust judicial review provided by the Administrative Procedure Act was a political compromise between pro-regulatory and pro-due process congressional factions.

See, e.g., *Overton Park*, 401 U.S. at 410 (describing the scope of review);[4] Herbert Kaufman, *The Federal Administrative Procedure Act*, 26 B.U. L. Rev. 479, 489-91 (1946) (describing political compromise); Lisa Schultz Bressman, *Procedures As Politics In Administrative Law*, 107 Colum. L. Rev. 1749, 1752 (2007) ("[T]he Court may enforce administrative procedures in order to help ensure that agency decisions track dominant legislative preferences.").

In a typical case, Cause of Action argues against excessive judicial deference to administrative agencies and constricted judicial review, which upend this statutory bargain. *See, e.g.*, Reply Brief of Appellant at 3-13, *LabMD, Inc. v. Fed. Trade Comm'n*, 776 F.3d 1275 (11th Cir. 2015) (No. 14-12144); Compl., *Rhea Lana, Inc. v. U.S. Dep't of Labor*, (No. 14-017), 2014 U.S. Dist. LEXIS 163278 (D.D.C Nov. 21, 2014). This case, however, presents that rare instance in which a court was *insufficiently* deferential to an agency.

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[4]According to the Court:

> A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701 of the Administrative Procedure Act, 5 U. S. C. § 701, provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation, is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing evidence' of a . . . legislative intent" to restrict access to judicial review.

Overton Park, 401 U.S. at 410.

This Court previously ruled that the District Court erred in holding that Congress spoke plainly when it enacted 2 U.S.C. § 434(f) (now codified at 52 U.S.C. § 30104(f)), thus foreclosing any regulatory construction of the statute by the FEC: "The statute is anything but clear, especially when viewed in the light of the Supreme Court's decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010), and *FEC v. Wis. Right to Life, Inc. ("WRTL II")*, 551 U.S. 449 (2007)." JA385. Employing traditional tools of statutory construction, this Court could not find that "Congress had an intention on the precise question at issue" in this case. *Id.* Indeed:

> [I]t is doubtful that, in enacting 2 U.S.C. § 434(f), Congress even anticipated the circumstances that the FEC faced when it promulgated 11 C.F.R. § 104.20(c)(9). It was due to the complicated situation that confronted the agency in 2007 and the absence of plain meaning in the statute that the FEC acted pursuant to its delegated authority under 2 U.S.C. § 37d(a)(8) to fill "a gap" in the statute. *Chevron*, 467 U.S. at 843-44.

Id.

Chevron deference ought to be most compelling under these unique circumstances. On the narrow facts of this case, Congress's democratic prerogative—expressed through its BCRA delegation to the FEC—should have caused the court below to defer to the agency's facially reasonable interpretation, even if it would have come to quite a different view if left to its own devices. *Cont'l Air Lines, Inc.*, 843 F.2d at 1451. Instead, the District

Court relied on the Congressional Record—that most gossamer of authorities—to hold, wrongly, that the Old Rule was "inconsistent with the policies underlying the statute." JA446.

Furthermore, even if the District Court's characterization of congressional purpose was entirely accurate, and even if the Old Rule still applied, the Congressional Record is not controlling here. When BCRA was enacted, corporations and labor unions could not make electioneering communications using general treasury funds. 2 U.S.C. § 441b(a), (b)(2) (now codified at 52 U.S.C. § 30118(a), (b)(2)); *Citizens United*, 558 U.S. at 337. This Court has already held that the congressional intention and purpose under BCRA regarding these persons could not be divined. JA 385. Thus, the District Court erred in manufacturing such after-the-fact justifications. *See Chevron*, 467 U.S. at 843-44.

The District Court's purported justification for its ruling does not stand up. First, there is, in truth, robust financial disclosure with respect to electoral politics. *See, e.g.*, FEC, *Detailed Files About Candidates, Parties and Other Committees: Files By Election Cycle*, http://www.FEC.gov/disclosure.shtml (last visited April 16, 2015); Center for Responsive Politics, Opensecrets.org, http://www.OpenSecrets.org (last visited April 16, 2015); Tampa Bay Times, *PolitiFact*, http://www.PolitiFact.com (last visited April 16, 2015); Mary J.

Walker Wilson, *Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior in 2012*, 63 Cath. U.L. Rev. 953, 977-78 (noting that "[b]ecause money's influence on politics is controversial, and controversy sells, news outlets regularly report on political election spending"); *infra* note 10.[5] It is in the Executive Branch, where there is generally no disclosure at all, that dark money and corruption concerns are most intense. *See, e.g. XP Vehicles, Inc. v. U.S. Dep't of Energy*, No. 13-037 (D.D.C. filed Jan. 10, 2013) (involving

[5] The only valid social scientific research supporting claims about "perception of corruption" is "political efficacy" research to determine if campaign spending distorts perceptions and prevents citizens from turning out to vote. *See* William H. Form & Joan Huber, *Income, Race, and the Ideology of Political Efficacy*, 33 J. Pol. 659, 670 (1971); *McConnell v. FEC*, 540 U.S. 93, 144 (2003) ("the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). To advance the counterfactual narrative that more political speech and a more active marketplace of ideas threatens the future of our Republic, the Brennan Center "analyzed" election spending supposedly caused by *Citizens United*. *See* Ian Vandewalker, *Outside Spending in Senate Races Since Citizens United*, Brennan Center for Justice, http://goo.gl/e886nj. Though ideologically-committed law professors and media rely on these results, social scientists do not because the research design fails basic data quality standards for several reasons. First, the sample size studied was statistically insignificant and varies, changing from ten to eleven "competitive races." Second, the Brennan study claims "[d]ark money in Senate elections has more than doubled since 2010, from $105 million in inflation-adjusted dollars, to $226 million in 2014," *id.*, but does not explore the more statistically relevant question, which is whether that increase is significant compared to total spending. Further, legitimate social science research shows no statistically significant relationship between money in politics and the perception of corruption. *See* Abby K. Blass, Daron Shaw & Brian Roberts, *'Pay to Play' or Money for Nothing? Americans' Assessments of Money and the Efficacy of the Political System*, APSA 2010 Annual Meeting Paper, *available at* http://goo.gl/enrnNA.

governmental cronyism and misuse of taxpayer funds); Cause of Action, *CPPW: Putting Politics To Work* (2013), *available at* http://goo.gl/AwrA8k (detailing use of government funds to engage in illegal lobbying); *CREW Calls On Congress To Investigate Short Sellers Influencing Government To Maximize Profits* (March 18, 2015), *available at* http://goo.gl/UShZ4w.[6]

And second, the District Court's decision will create the absurd result that a 501(c)(3) organization engaged in issue advocacy will be subjected to more onerous disclosure obligations than a 501(c)(4) organization engaged in express advocacy, who need disclose only those contributors who specifically earmark funds for the purpose of furthering the express advocacy. 11 C.F.R § 109.10(e)(1)(vi).

Accordingly, for all of the above reasons, the District Court should have deferred to the FEC in this matter.

[6] *See also* Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint*, N.Y. Times, July 6, 2014, *available at* http://goo.gl/mhOCWs; U.S. S. Comm. on Env't and Pub. Works Minority Staff Report, *The Chain of Environmental Command: How a Club of Billionaires and Their Foundations Control the Environmental Movement and Obama's EPA* (July 30, 2014), http://goo.gl/osxlWY; Rick Cohen, *BP Oil Spill Settlements to Nonprofits: Mechanics and Lessons*, Non-Profit Quarterly, May 9, 2013, http://goo.gl/dp5ABQ.

IV. The District Court Created An Unnecessary Conflict Between BCRA And The First Amendment

The District Court created an unnecessary conflict between BCRA and the First Amendment. The Supreme Court applies "exacting scrutiny" to disclosure requirements, mandating a "substantial relation" between disclosure and "a sufficiently important government interest." *Citizens United*, 558 U.S. at 366-67.[7] Disclosure is justified only on narrow grounds, such as when there is "evidence in the record that independent groups were running election-related advertisements while hiding behind dubious and misleading names." *Id.*

Here, by contrast, the District Court used Congressional Record statements to support a construction mandating disclosure.[8] This construction of

[7] 11 C.F.R. § 104.20(c)(9) (2007) had been in effect for more than three years when *Citizens United* was decided.

[8] The court below also wrongly failed to account for the interplay of *WRTL II* with 11 C.F.R. § 104.20(c)(9) (2007). *See AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (explaining that "the Commission must attempt to avoid unnecessarily infringing on First Amendment interests"). Although *WRTL II* did not specifically invalidate BCRA, it raised critical First Amendment issues the FEC had to address. *See* JA28. For example, the Court rejected the notion that the government may regulate issue advocacy because express advocacy may be regulated, *WRTL II*, 551 U.S. at 477, and explained that a "court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech." *Id*. at 478 (italics in original). The Court also denied that a corporation's issue advocacy could be regulated to avoid corruption or the appearance of corruption or on the basis of an anti-distortion interest. *Id*. at 477-81. The FEC had to take these admonitions to heart in reexamining each restriction, including disclosure obligations, on corporations and labor unions and therefore it was proper for the FEC to issue a new regulation including the phrase "for the purpose of furthering electioneering communications" so that

BCRA, unlike the FEC's construction, leads BCRA into conflict with the First Amendment because the First Amendment bars disclosure when there is a "reasonable probability" that it will lead to "threats, harassment, or reprisal from either Government officials or private parties." *Id.*;[9] *Doe v. Reed*, 561 U.S. 186, 196 (2010); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982) (prohibiting compelled disclosure of members and donors); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 498 (1975); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (recognizing "the vital relationship between freedom to associate and privacy in one's associations"); *see also Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (Court has not "drawn fine lines between contributors and members but [has] treated them interchangeably").

"disclosure of the newly permitted electioneering communications would be *narrowly tailored* . . . ." FEC's Mem. in Supp. of Mot. for Summ. J. at 10-11, *Van Hollen v. FEC*, 851 F. Supp.2d 69 (D.D.C. 2012) (No. 11-0766) (emphasis added).

[9] *See also McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 342 (1995) ("Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent"). Although *McIntyre* suggests monetary donations deserve less protection because "when money supports an unpopular viewpoint it is less likely to precipitate retaliation," 514 U.S. at 355, that notion does not stand up to facts or to later Supreme Court cases requiring only a "reasonable probability" that disclosure will lead to threats or retaliation. *Citizens United*, 558 U.S. at 367.

BCRA should be construed to avoid constitutional problems. *Arizona v. Intertribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013). 11 C.F.R. § 104.20(c)(9) (2007) did this by limiting disclosure to those who fund electioneering communications. The District Court's construction, however, created constitutional doubt. If its decision stands, then every time an organization makes an electioneering communication every donor thereto above the $1000 threshold from the beginning of the preceding calendar year must be disclosed. 52 U.S.C. § 30104(f)(2)(F). This misleads the public about who actually funds the electioneering communication, defeating the ostensible justification for the rule. It also is constitutionally suspect in several respects.

First, as statutorily defined, electioneering communications made by a corporation or labor union excludes express advocacy and refers only to independent speech or issue advocacy. 52 U.S.C. § 30104(f)(3). This does not include speech that expressly advocates for the election or defeat of any candidate, and so the Supreme Court has held there is no tendency in such speech to corrupt or have the appearance of corruption. *Citizens United*, 558 U.S. at 356-61; *WRTL II*, 551 U.S. at 478-79; *see also Emily's List v. FEC*, 581

F.3d 1, 18 (D.C. Cir. 2009). Therefore, there is no constitutionally cognizable basis for regulation under any circumstances.[10]

Second, the District Court infringes controlling authorities protecting a citizen's anonymous speech and associations. Inviolability of privacy in group association often is indispensable to preserve free association, particularly where a group espouses dissident beliefs. *NAACP*, 357 U.S. at 462. To take a recent example, the District Court for the Central District of California granted Americans for Prosperity Foundation, a 501(c)(3) non-profit organization

[10] This is all the more true given that, today, information about candidates, parties, and campaign contributors is widely available through the Internet. Disclosure reports filed by political committees, for example, are now available on the FEC's website within 48 hours and reports filed electronically are available "almost instantaneously." FEC, *Quick Answers to Disclosure Questions*, http://goo.gl/7cYo6o (last visited Apr. 8, 2015). The FEC maintains a free on-line database of election contributions, often reported within hours of the contribution, and makes available free data downloads for further data mining. FEC, *Campaign Finance Disclosure Portal*, http://goo.gl/9rHq5. Perhaps more importantly, there has been an explosion in the development of private entities' searchable systems of contribution disclosure and analysis. The Center for Responsive Politics, for example, maintains the web site OpenSecrets.org, which provides a "Politicians and Elections" portal, http://www.opensecrets.org/elections/, with searchable databases of Presidential, Congressional and party contributions, and cross-links that provide data on such topics as earmarks, personal finances, and past elections. Many private entities also now engage in "opposition research" by covering candidates and campaigns closely and awaiting any missteps that can yield political value. In this new context, the notion that disclosure of a donor who contributes to an organization without any expectation or desire that its money will further electioneering communications must nevertheless be disclosed so as to keep the electorate properly informed simply is not credible.

promoting limited government and free markets, injunctive relief after California's Attorney General (a political opponent) demanded donor names and addresses. *Am. For Prosperity Found. v. Harris*, No. 14-09448, 2015 U.S. Dist. LEXIS 21365 (C.D. Cal. Feb. 23, 2015). Americans for Prosperity sued to protect these donors because of "[g]rotesque threats" against known supporters "ranging from threats to kill or maim, to threats to firebomb buildings." Compl. at 1, *Am. For Prosperity Found. v. Harris*, No. 14-09448, 2015 U.S. Dist. LEXIS 21365 (C.D. Cal. Feb. 23, 2015).[11]

Third, if Van Hollen prevails in this case, the law will be that government-funded and approved organizations, their members and donors, need not give up any First Amendment rights to qualify for taxpayer funds or to engage in political behavior, but privately-funded organizations, their members and donors, must give up First Amendment rights to participate in the marketplace of political ideas. In other words, Van Hollen apparently is prepared to overturn *NAACP* and create a universe in which privately-funded

[11] In granting Americans For Prosperity's motion, the court held that when "an ordinance infringes on First Amendment rights of those 'seeking to express their views' the 'balance of equities and the public interest . . . tip sharply in favor" of an injunction. *Harris*, No. 14-09448, 2015 U.S. Dist. LEXIS 21365, at *4; *see also Citizens United*, 558 U.S. at 480-85 (Thomas, J., dissenting) (highlighting the serious threats, intimidations, and reprisals taken against donors to committees formed in opposition to California's Proposition 8 and the documented chilling effect on potential donors to a candidate challenging an incumbent state attorney general).

political speech, perhaps especially speech critical of him, is chilled, but government-funded speech, of which he presumably approves, is supported.[12]

The lower court's decision accordingly must be reversed, as it improperly requires disclosure in a manner that threatens important First Amendment rights while failing to meet the rationale of accurately informing the electorate of the sources of political speech. This Court should instead uphold the FEC's regulation, to the extent appropriate, which better harmonizes the underlying statute's disclosure requirements with First Amendment protections.

CONCLUSION

Van Hollen has failed to exhaust administrative remedies. Even if he is freed from exhaustion, this case is unripe and moot. Furthermore, the District Court erred by taking on a policy-making function and distorting congressional process, and *Chevron* deference is especially appropriate here. Finally, there is no substantial connection between the District Court's disclosure obligations and that court's stated rationale, creating a clear, but wholly unnecessary, First Amendment conflict.

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[12] *Compare* Brief of Appellee Van Hollen at 23-24, *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (per curiam) (Nos. 12-5117, 12-5118) (standing discussion), *with Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (authorizing lobbying by government-funded entity on First Amendment grounds); *FCC v. League of Women Voters*, 468 U.S. 364, 401 (1984) (authorizing editorializing by government-funded broadcasters).

Dated: April 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(5). Prepared in Microsoft Word 2010, the foregoing brief used proportionally spaced type in 14-point Times New Roman font. The brief, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 4903 words as counted by Microsoft Word 2010.

Dated: April 16, 2015

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ADDENDUM

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Federal Regulations

52 U.S.C. § 30118 (formerly 2 U.S.C. § 441b). Contributions or expenditures by national banks, corporations, or labor organizations.

(a) *In general*. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) *Definitions; particular activities prohibited or allowed*

* * *

(2) For purposes of this section and section 79l (h) of title 15, [1] the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include . . .

* * *

52 U.S.C. § 30104(f) (formerly 2 U.S.C. § 434(f)). Reporting Requirements.

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of

each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8) 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.

(3) *Electioneering communication.* For purposes of this subsection—

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 30101(20)(A)(iii) of this title.

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) *Disclosure date.* For purposes of this subsection, the term "disclosure date" means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) *Contracts to disburse.* For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) *Coordination with other requirements.* Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) *Coordination with title 26.* Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of title 26.

11 C.F.R. § 104.20(c)(7)-(c)(9) (2007). Reporting electioneering communications.

(c) *Contents of statement.* Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information:

* * *

(7)(i) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications not permissible under 11 CFR 114.15, consisting of funds provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or

(ii) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications permissible under 11 CFR 114.15, 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.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

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

11 C.F.R. § 104.20(c)(7)-(c)(9) (2015). Reporting electioneering communications. [Published in 79 Fed. Reg. 62,797, 62,816-17 (Oct. 21, 2014)]

(c) * * *

(7) If the disbursements were paid exclusively from a segregated bank account consisting of funds provided solely by persons other than national banks, corporations organized by authority of any law of Congress, or foreign nationals as defined in 11 CFR 110.20(a)(3), 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.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by a corporation or labor organization, 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.

(9) If the disbursements were made by a corporation or labor organization and were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section, 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. § 114.15 (2007). Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) *Permissible electioneering communications*. Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) *Safe harbor*. An electioneering communication is permissible under paragraph (a) of this section if it:

(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

(c) *Rules of interpretation*. If an electioneering communication does not qualify for the safe harbor in paragraph (b) of this section, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on

balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or

(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:

(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or

(iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication.

(d) *Information permissibly considered*. In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.

(e) *Examples of communications*. A list of examples derived from prior Commission or judicial actions of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) of this section is available on the Commission's Web site, http://www.fec.gov.

(f) Reporting requirement. Corporations and labor organizations that make electioneering communications under paragraph (a) of this section aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.20.

11 C.F.R. § 109.10(e). How do political committees and other persons report independent expenditures?

(e) Content of verified reports and statements and verification of reports and statements.

(1) *Contents of verified reports and statement*. If a signed report or statement is submitted, the report or statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also hereby certify that I will have eight copies hand-delivered or sent via Federal Express overnight delivery to the Court within two business days, pursuant to Circuit Rule 31(b).

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