ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-5016 & 15-5017

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 for Defendant-Appellant in No. 15-5016,

AND

HISPANIC LEADERSHIP FUND,
Intervenor for Defendant-Appellant in No. 15-5017.

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

BRIEF FOR APPELLEE CHRIS VAN HOLLEN

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

Parties

The Appellants are Center for Individual Freedom ("CFIF") and Hispanic Leadership Fund ("HLF"), who were intervenors in the district court. The Appellee is Rep. Chris Van Hollen, who was the plaintiff in the district court. The Federal Election Commission ("FEC" or the "Commission"), who was the defendant in the district court, is an appellee. No amicus briefs were filed in the district court. Cause of Action has filed an amicus brief in support of Appellants with this Court. Van Hollen does not anticipate any additional amicus curiae briefs will be filed.

Rulings Under Review

At issue in this appeal is the November 25, 2014 Memorandum Opinion and Order by the Honorable Amy Berman Jackson granting plaintiff Van Hollen's motion for summary judgment, denying defendant FEC's cross-motion for summary judgment, denying intervenor-defendant CFIF's cross-motion for summary judgment, and vacating 11 C.F.R. § 104.20(c)(9). The district court's November 25, 2014 Memorandum Opinion and Order has yet to be published in the Federal Reporter but is reprinted at JA404-450. In its Notice of Appeal, CFIF

stated its intent to appeal the May 1, 2013 Memorandum Opinion and Order of the Honorable Amy Berman Jackson denying CFIF's motion for leave to amend, which is reported at 291 F.R.D. 11 and reprinted at JA396-399. JA451. In its opening brief, however, CFIF has disclaimed any challenge to the May 1, 2013 opinion and order. *See* CFIF Br. 43 n.8.

Related Cases

The case on review was previously before this Court in *Center for Individual Freedom v. Van Hollen*, Nos. 12-5117, 12-5118. In a per curiam opinion, 694 F.3d 108 (D.C. Cir. 2012), this Court reversed the district court's prior order vacating the challenged regulation under *Chevron* Step One and remanded for the district court to decide in the first instance whether the challenged regulation survives review under *Chevron* Step Two or the "arbitrary and capricious" standard of *State Farm*. Counsel is aware of no related cases.

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GLOSSARY

APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
CFIF	Center for Individual Freedom
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
HLF	Hispanic Leadership Fund
JA	Joint Appendix

STATEMENT OF ISSUES

1. Whether the district court correctly held that the Federal Election Commission's regulation governing disclosure of the sources of funding for electioneering communications, 11 C.F.R. § 104.20(c)(9) (the "Disclosure Regulation"), is invalid:

(A) under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as an unreasonable interpretation of § 201(a) of the Bipartisan Campaign Reform Act of 2002, 52 U.S.C. § 30104(f) (formerly codified at 2 U.S.C. § 434(f)),[1] and

(B) under the Administrative Procedure Act as arbitrary, capricious, and contrary to law.

2. Whether the district court properly vacated the Disclosure Regulation upon holding it invalid.

STATUTES AND REGULATIONS

All relevant statutes and regulations are contained in the appendix to the Brief for Appellant Center for Individual Freedom.

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[1] At the time this litigation was filed, the disclosure provision of the Bipartisan Campaign Reform Act was codified at 2 U.S.C. § 434. It has since been transferred to 52 U.S.C. § 30104. Unless otherwise noted, this brief cites the current recodified section.

STATEMENT OF THE CASE

A. The Bipartisan Campaign Reform Act

For more than a century, Congress has sought to "shed the light of publicity" on election-related spending by requiring disclosure of its sources. *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (per curiam); *see id*. at 61-62. In *Buckley*, the Supreme Court upheld provisions of the Federal Election Campaign Act of 1971 ("FECA"), as amended, that required "[e]very person" making a minimum amount of "expenditures" to disclose, among other things, the name and address of each person who made one or more "contributions" in a calendar year of at least $100. *Id*. at 74-84; *see also id.* at 157-158, 160 (quoting the then-current version of 2 U.S.C. § 434(b), (e)).[2] The Act defined "contribution" to mean a gift made "for the purpose of" influencing a federal election. *Id.* at 145 (quoting the then-current version of 2 U.S.C. § 431(e)). The Court struck down limits on the amounts individuals and political committees could spend on communications to influence federal elections, *id.* at 44-59, but upheld the disclosure requirements as advancing three substantial government interests: "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate'"; "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of

[2] Other provisions subjected political committees and candidates to similar requirements. *See Buckley*, 424 U.S. at 63-64.

publicity"; and facilitating enforcement of campaign-finance regulations. *Id.* at 66-68; *see id.* at 76, 80-81.

To avoid vagueness and overbreadth, the Court in *Buckley* construed the "expenditures" subject to FECA's disclosure requirements to include only funds used for "explicit words of advocacy"—that is, "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 43, 44; *see also id.* at 80. FECA was later amended to reflect this construction. *See* 52 U.S.C. § 30101(17).[3] As a result, "the use or omission of 'magic words' such as 'Elect John Smith' or 'Vote Against Jane Doe' marked a bright statutory line separating 'express advocacy' from 'issue advocacy.'" *McConnell v. FEC*, 540 U.S. 93, 126 (2003); *see also Buckley*, 424 U.S. at 44 n.52 ("express words of advocacy" include "vote for," "vote against," and "elect"). Corporations, unions, and others began to spend hundreds of millions of dollars on

[3] The disclosure requirements considered in *Buckley* did not apply to corporations or labor unions, which had long been prohibited from using treasury funds to make expenditures in connection with any federal election. *See* Tillman Act, ch. 420, 34 Stat. 864 (1907); War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167 (1943); Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (1947). Ten years after *Buckley*, in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Supreme Court considered that longstanding ban and held that "an expenditure must constitute 'express advocacy'" as defined in *Buckley* to be subject to the prohibition. *Id*. at 249. The Court further held that the prohibition on independent expenditures was unconstitutional as applied to certain nonprofit corporations that were organized for the purpose of promoting political ideas rather than for business purposes and that raised their funds only from individuals. *Id.* at 263-264.

purported "issue ads," which omitted those magic words and thus fell outside of FECA's disclosure requirements. *McConnell*, 540 U.S. at 126-127.[4] By the 1996 election, between $135 and $150 million was spent on such ads. *Id.* at 127 n.20. By the 2000 election, that number had grown to an estimated $500 million. *Id.*

In response to this proliferation of "sham issue ads,"—and to the growing use of "soft money" to fund such ads and other campaign-related spending—Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"); *see generally McConnell*, 540 U.S. at 129-132; *Shays v. FEC*, 414 F.3d 76, 81-82 (D.C. Cir. 2005) ("*Shays I*"). A primary motivation for BCRA's enactment was to expand disclosure of the sources of funding for issue ads. In particular, BCRA's sponsors expected that more robust disclosure would deter corruption by revealing "who is trying to influence the election" and would "inform the voting public of who is sponsoring and paying for an electioneering communication." 147 Cong. Rec. S3022, 3034 (daily ed. Mar. 28, 2001) (statement of Sen. Jeffords); *see also* 147 Cong. Rec. S3070, 3074 (daily ed. Mar. 29, 2001) (statement of Sen. Snowe) ("What we are saying is disclose who you are. Let's unveil this masquerade. … Tell us who is financing these ads to the

[4] Because these ads fell outside the prohibition on "express advocacy" as defined in *Buckley*, corporations and labor organizations could pay for them using general funds without disclosing their contributors. *McConnell*, 540 U.S. at 127-128. Qualifying nonprofit corporations as defined in *Massachusetts Citizens for Life*, *see supra* n.3, could additionally use their general funds to pay for "express advocacy" ads; such expenditures were subject to FECA's disclosure requirements.

tune of $500 million in this last election. The public has a right to know."). In addition, broader disclosure would expose election-related ads to "the scrutiny of the voting public" by preventing their sponsors from "hiding behind dubious and misleading names." *McConnell*, 540 U.S. at 197; *see also* 147 Cong. Rec. S3233, 3238 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein) ("The attacks come and no one knows who is actually paying for them.").

Consistent with these purposes, in BCRA, Congress identified a new category of campaign spending called "electioneering communications," which it defined to include any broadcast, cable, or satellite communications that refer to a clearly identified federal candidate, are made shortly before an election in which the identified candidate is seeking office and, in the case of House and Senate candidates, are geographically targeted to the relevant electorate. *See* BCRA § 201, 52 U.S.C. § 30104(f)(3). BCRA required "[e]very person" who makes disbursements for electioneering communications in an amount greater than $10,000 during any calendar year to disclose the sources of funding for such expenditures. BCRA § 201, 52 U.S.C. § 30104(f)(2). Specifically, BCRA provided:

> (E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals … directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. …

> (F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

Id. BCRA banned corporations and labor unions from spending general treasury funds on such electioneering communications. *See* BCRA § 203, 52 U.S.C. § 30118(b)(2), *invalidated by Citizens United v. FEC*, 558 U.S. 310 (2010). But that prohibition did not extend to nonprofit advocacy corporations qualified under *Massachusetts Citizens for Life* to fund electioneering communications out of their general treasury funds. *See McConnell*, 540 U.S. at 209-211; *see supra* nn.3, 4.

In *McConnell*, the Supreme Court upheld BCRA's regulation of electioneering communications in substantial part. The Court first rejected the plaintiffs' challenge to the definition of "electioneering communications," holding that Congress could regulate communications beyond those constituting "express advocacy" as *Buckley* had defined it. 540 U.S. at 190-194. As the Court explained, "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law," *id.* at 190, and nothing in the First Amendment "erects a rigid barrier between express advocacy and so-called issue advocacy," *id.* at 193. The Court went on to reject the "facial attack" on BCRA's disclosure requirements, *id.* at 197, holding that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure

requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA," *id.* at 196. These interests, the Court held, justify the application of disclosure requirements to "the entire range of 'electioneering communications,'" enabling the public to "'identify the source of the funding behind broadcast advertisements influencing certain elections.'" *Id.* Finally, a majority of the Court rejected a facial challenge to BCRA's prohibition against corporations' and unions' use of general treasury funds to finance electioneering communications, on the understanding that the prohibition did not apply to qualifying nonprofit corporations as defined in *Massachusetts Citizens for Life*. *Id.* at 203-211. Three of the dissenting Justices would have invalidated that prohibition, but nonetheless agreed that the disclosure requirements should be upheld as substantially related to valid government interests. *Id.* at 321 (Kennedy, J., dissenting).

B. The Federal Election Commission's Implementation Of BCRA

In 2002, the Federal Election Commission ("FEC" or the "Commission") issued a notice of proposed rulemaking to implement BCRA. 67 Fed. Reg. 51,131 (Aug. 7, 2002). As part of that rulemaking, the Commission proposed a disclosure regime applicable to all persons and organizations permitted to use general funds to finance electioneering communications, including unincorporated organizations,

partnerships, individuals, limited liability companies that do not qualify as corporations, unincorporated trade associations or membership organizations, and unincorporated nonprofits, as well as those incorporated nonprofits permitted to use general funds for electioneering communications under the Supreme Court's decision in *Massachusetts Citizens for Life*. *See id.* at 51,137.

As finally promulgated in 2003, the regulation's disclosure provision mirrored BCRA's disclosure provisions in pertinent part, requiring "[e]very person who has made an electioneering communication … aggregating in excess of $10,000 during any calendar year" to file a statement containing, among other things, the following disclosures:

> (7) If the disbursements were paid exclusively from a segregated bank account consisting of funds provided solely by individuals …, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; and
>
> (8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

11 C.F.R. § 104.20(c) (effective Feb. 3, 2003) (the "2003 regulation"); *see id.* § 104.20(b).

The Commission explained that the first of these two requirements would apply to any person wishing to use a separate bank account to fund electioneering

communications. 68 Fed. Reg. 404, 413 (Jan. 3, 2003). The Commission acknowledged comments suggesting that requiring qualified nonprofit corporations as defined in *Massachusetts Citizens for Life* to disclose their donors would burden free-speech rights and that the option to use a segregated bank account would impose administrative burdens. *Id.* But the Commission rejected those assertions, explaining that those corporations were subject to BCRA's mandatory disclosure requirements and would not be unduly burdened because "electioneering communications are not subject to disclosure until disbursements related to them exceed $10,000," and even then only the identities of persons contributing $1,000 or more need be disclosed. *Id.* Moreover, the Commission explained, the use of separate bank accounts would allow these corporations to "reduce their reporting obligations." *Id.*

With respect to the alternative disclosure provision at subparagraph (8) of the 2003 regulation, the Commission explained that it promulgated that provision "to clarify that all persons who make electioneering communications would be required to disclose their donors who donate $1,000 or more in the aggregate during the prescribed period" if they do not use segregated bank accounts. 68 Fed. Reg. at 414. As the Commission explained, BCRA "specifically mandates disclosure of this information." *Id.*

Finally, the Commission explained that the 2003 regulation used the term "donation" rather than "contribution" to clarify that funds given to persons or corporations who make electioneering communications did not thereby become "contributions" as defined in FECA and subject to FECA's limitations, prohibitions, or reporting requirements. *See* 68 Fed. Reg. at 412-413.[5] Thus, all such funds were subject to the disclosure requirements regardless whether they constituted "contributions." *Id.*

C. *Wisconsin Right To Life* And The Regulation Under Review

Although *McConnell* had rejected a facial challenge to the provision of BCRA prohibiting corporations from using general treasury funds to finance electioneering communications, *supra* pp. 6-7, the Supreme Court was soon presented with an as-applied challenge. In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Court held that BCRA's ban on corporate electioneering communications was unconstitutional as applied to ads that did not contain "express advocacy" or its functional equivalent. *Id.* at 469-470 (opinion of Roberts, C.J.). As a result of that decision, corporations and labor unions could now use general treasury funds to finance some electioneering communications. But the plaintiffs in

[5] Section 30101(8), a pre-BCRA provision of FECA, defines "contribution" to include "(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 52 U.S.C. § 30101(8)(A).

Wisconsin Right to Life did not challenge the constitutionality or scope of BCRA's disclosure requirements with respect to electioneering communications, and the Court consequently made no mention of those provisions.[6]

Shortly after the Court's decision, the James Madison Center for Free Speech petitioned the Commission for a rulemaking "implementing the holding" of *Wisconsin Right to Life* by exempting "genuine issue ads" from the electioneering-communication prohibition and repealing an alternative definition of express advocacy the Commission had previously adopted. JA19-20. The petition did not propose any change to the disclosure requirements for electioneering communications. JA19-25.

In response, the Commission issued a notice of proposed rulemaking requesting comments on proposed rules to "implement the Supreme Court's decision in [*Wisconsin Right to Life*]." JA27. Although neither *Wisconsin Right to Life* nor the petition for rulemaking had mentioned disclosure, the Commission stated that its rulemaking would address both the funding of electioneering communications by corporations and labor unions and the effect of *Wisconsin*

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[6] Three years later, in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court struck down the remaining limitations on corporate and union political spending as facially unconstitutional. Consequently, corporations and unions may now use their general treasury funds to pay for electioneering communications containing even express advocacy or its functional equivalent. However, eight Justices in *Citizens United* rejected the petitioners' as-applied challenge to BCRA's disclosure requirements for electioneering communications. *See id.* at 316, 318, 364-371.

Right to Life on "the rules governing reporting of electioneering communications." JA28. The notice sought comment on "two proposed alternative ways to implement the *Wisconsin Right to Life* decision in the rules governing electioneering communications." *Id.* Under Alternative 1, the Commission would create a new exemption to its rules prohibiting the use of corporate and labor organization funds for electioneering communications. *Id.* Under that approach, corporations and unions would be permitted to use general treasury funds for issue ads, but would be required to file disclosure reports if they spent more than $10,000 in a calendar year on such communications. *Id.* Alternative 1 accordingly included proposed revisions "to accommodate reporting by corporations and labor organizations." JA37. In particular, the Commission sought comment on whether corporations or unions making electioneering communications using general treasury funds would be required to disclose their donors and, "[i]f so, how would a corporation or labor organization determine which receipts qualify as 'donations'? Should the Commission limit the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications?" *Id.*

Under Alternative 2, in contrast, the Commission would "incorporate the new exemption into the definition of 'electioneering communication'" by redefining electioneering communications to exclude any communications other

than "express advocacy" or its "functional equivalent." JA28. As the Commission acknowledged, this approach would exempt non-express-advocacy electioneering communications from disclosure requirements altogether—not only for corporations and labor unions, but for any person engaging in electioneering communications. JA29.

The Commission received 27 written comments. Eleven comments, including a joint comment submitted by BCRA's congressional sponsors, urged the Commission to leave intact the disclosure requirements governing electioneering communications.[7] As the district court summarized, those comments explained that the disclosure requirements had not been at issue in *Wisconsin Right to Life*, had been upheld in *McConnell*, and served important informational purposes without imposing the burdens of a restriction on expenditures. JA427-430. Other comments either did not address the disclosure

[7] *See* Comments of S.B. Hornik, JA26; Comments of Professors Richard L. Hasen of School of Law: Loyola University Chicago and Professor Richard Briffault of Columbia Law School, JA41-44; Comments of Washington State Public Disclosure Commission, JA45-46; Comments of Professor Allison Hayward of George Mason University Law School, JA52-55; Comments of Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee, JA60-61; Comments of Center for Competitive Politics, JA80-82; Comments of Common Cause, Public Citizen, and U.S. Public Interest Research Group ("PIRG"), JA84-85, 87; Comments of Senators McCain, Feingold, and Snowe and Representative Shays, JA101-104; Comments of Public Campaign, JA111-112; Comments of the Campaign Legal Center, Democracy 21, Brennan Center for Justice, Common Cause, League of Women Voters, and U.S. PIRG, JA113-133; Comments of Campaign Legal Center and Robert F. Bauer, JA141-142.

requirements at all, JA424-425,[8] or else advocated for Alternative 2, which would have exempted ads protected by *Wisconsin Right to Life* from the definition of electioneering communications—and thus from the reporting requirements—altogether, JA425-427.[9]

The Commission held a two-day hearing on the proposed changes. JA168-282. After the hearing, the Commission's General Counsel submitted a memorandum and draft final rules to the Commission, proposing for the first time that the disclosure requirements applicable to corporations and labor organizations be limited to cover only donations "made for the purpose of furthering electioneering communications." JA288. The Commission received only one comment in response to its draft rules, which generally "urge[d] the Commission to revert to the rule" it had originally proposed, JA296, and to "continue to apply BCRA's 'electioneering communication' disclosure requirements to all ads meeting the statutory definition of that term," JA298.

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[8] *See, e.g.*, Comments of the James Madison Center for Free Speech, *Van Hollen v. FEC*, No. 11-cv-00766 (ABJ) (D.D.C.), Dkt. 17.2 (Administrative Record), at 193-219; Comments of the American Cancer Society Cancer Action Network, JA47-48.

[9] *See, e.g.*, Comments of Citizens United, JA70-75; Comments of Independent Sector, JA97-100; Comments of National Association of Realtors, JA105-107; Comments of OMB Watch, JA108-110; Comments of Alliance for Justice, JA145-146; Comments of American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), American Federation of State, County, and Municipal Employees ("AFSCME"), National Education Association ("NEA"), and Service Employees International Union ("SEIU"), JA157-162.

On December 26, 2007, the Commission promulgated the final Disclosure Regulation, 11 C.F.R. § 104.20. JA299-315. The Commission explained that it had "decided to implement the [*Wisconsin Right to Life*] decision" essentially by adopting its proposed Alternative 1. JA300-301. Alternative 2, the Commission explained, would have conflicted with BCRA, which "requires every 'person' (which by definition includes corporations and labor organizations) funding [electioneering communications] over the reporting threshold to report." JA301. The Commission nevertheless "decided to depart from the rules proposed in the [notice of proposed rulemaking] and instead to require corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering [electioneering communications] made by that corporation or labor organization." JA311.

Thus, for disbursements "made by a corporation or labor organization" and paid for out of general funds rather than a segregated account, subsection (c)(9) of the Disclosure Regulation narrowed the required disclosures by adding the late-proposed "purpose" requirement:

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

JA313 (emphasis added). The Commission made no such change to the parallel rules governing disclosure of donors to partnerships, unincorporated associations, or individuals that used the donations to fund electioneering communications. *See id.* (11 C.F.R. § 104.20(c)(8)).

The Commission acknowledged that the plaintiff in *Wisconsin Right to Life* had challenged only the funding restrictions and did not contest BCRA's disclosure requirements. JA301. It further acknowledged that none of the opinions in *Wisconsin Right to Life* discussed the disclosure requirements, that the holding of *Wisconsin Right to Life* did not extend to the disclosure requirements, and that "*McConnell* continues to be the controlling constitutional holding" regarding disclosure of electioneering communications. *Id*. The Commission thus concluded that it "ha[d] no mandate" to revise or remove the definition of "electioneering communications" or the existing disclosure requirements. *Id*.

The Commission nevertheless stated that it drew the purpose requirement "from the reporting requirements that apply to independent expenditures made by persons other than political committees"—referring to FECA's separate pre-BCRA reporting requirements for "independent expenditures." JA311 n.22.[10] Without

[10] *See* 52 U.S.C. § 30104(c)(2)(C) (providing that persons other than political committees must file statements disclosing "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made *for the purpose of furthering an independent expenditure*" (emphasis added)).

explaining why the FECA standard for independent expenditures could apply to BCRA's distinct statutory language, the Commission cited two reasons for adding a purpose test to limit disclosure of the sources of corporate spending under BCRA.

First, the Commission stated that it sought to require disclosure of only "those persons who actually support the message conveyed by the [electioneering communications]." *Id*. The Commission reasoned that corporations' general funds might derive from shareholders who have purchased stock, customers who have bought products or services, or persons who have donated to support the corporation's general mission. *Id.* These persons, the Commission explained, "do not necessarily support the corporation's electioneering communications." *Id*. Similarly, the Commission noted that a labor organization might derive dues from members who "may not necessarily support the organization's electioneering communications." *Id*.

Second, the Commission stated that a purpose test would serve to avoid "imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of [electioneering communications]." JA311. The Commission cited witnesses who testified at the hearing that, absent a purpose test, "the effort necessary to identify

those persons who provided funds totaling $1,000 or more to a corporation or labor organization would be very costly and require an inordinate amount of effort." *Id.*

The Commission acknowledged the suggestion made by one commenter that the "donations" subject to disclosure in the case of a corporation or labor organization should exclude membership dues, investment income, or other commercial or business income. *Id.* But although its rationales for adopting the purpose test each rested on the assumption that such income would constitute "donations" subject to disclosure, the Commission did not respond to that suggestion or explain how such income would qualify as a "contrib[utions]" or "donat[ions]" within the meaning of BCRA or the previous version of the disclosure regulation. *Id*.

D. This Litigation

In April 2011, Congressman Chris Van Hollen sued the Commission under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), contending that the Disclosure Regulation was arbitrary, capricious, and contrary to law, and that it was inconsistent with the provisions of BCRA that it purported to implement. JA316; *see* JA316-328. The complaint alleged that the Disclosure Regulation frustrated congressional intent and "creat[ed] a major loophole in [BCRA's] disclosure regime by allowing corporations, including non-profit corporations, and labor organizations to keep secret the sources of donations they receive and use to

make 'electioneering communications.'" JA316. In particular, the complaint noted evidence that persons making electioneering communications in 2010 disclosed the sources of less than 10 percent of their $79.9 million in spending. JA326; *see also id.* (showing that the 10 persons reporting the highest spending on electioneering communications disclosed the sources of only five percent of money spent).

The Center for Individual Freedom ("CFIF") and the Hispanic Leadership Fund ("HLF") (together, "Intervenors") intervened as defendants in support of the Commission. JA5. The parties filed cross-motions for summary judgment. JA6-7. On March 30, 2012, the district court granted Van Hollen's motion for summary judgment, holding at step one of the analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that Congress had spoken plainly in BCRA and required disclosure of "all" contributors who contributed more than $1,000 during the reporting period. JA354-367.[11]

The Commission did not appeal that decision. The intervenors appealed, first moving unsuccessfully in the district court for a stay pending appeal. JA372-376. A panel of this Court likewise denied the Intervenors' motions for a stay pending appeal, JA377, holding that they had failed to make the requisite "'strong showing that [they were] likely to succeed on the merits'" or to demonstrate irreparable injury, JA379; *see* JA379-381.

[11] The district court also held that Van Hollen had standing to challenge the regulation. JA350-351.

Upon consideration of the expedited appeal, a different panel of this Court reversed the district court's judgment. JA382-386. This Court agreed with the district court that Van Hollen had standing to challenge the regulation, JA384, but concluded that the district court had "erred in holding that Congress spoke plainly" in BCRA's disclosure provisions, JA385. The Court reasoned that the words "contributors" and "contributed" as used in BCRA's disclosure provisions could be construed to include a purpose requirement, and that Congress had not manifested an intention on the precise question at issue, which arose because of the *Wisconsin Right to Life* decision. JA385-386. The Court remanded the case to the district court with instructions to first refer the matter to the Commission so it could decide whether to pursue further rulemaking. JA386. In the event the Commission declined to do so and instead elected to defend the Disclosure Regulation as written, the Court instructed the district court to decide whether the Disclosure Regulation survives review under *Chevron* Step Two or "arbitrary and capricious" review under *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983). JA386.

On remand, the Commission reported to the district court that it would not undertake further rulemaking and would defend the existing regulation. JA13.[12]

[12] Over a year and a half later, on October 15, 2014, the Commission notified the district court that it had approved final rules implementing the Supreme Court's decision in *Citizens United*. JA16; *see* Notice of Amendment to Regulations, Dkt.

After additional briefing and oral argument, JA14-16, the district court again invalidated the Disclosure Regulation, holding that it reflected an unreasonable interpretation of BCRA and that its promulgation was arbitrary, capricious, and contrary to law, JA404-450. The court found that the Disclosure Regulation was unmoored from the Commission's stated basis for undertaking the rulemaking and was not supported by the Commission's explanation; that the administrative record did not support the Commission's decision and did not indicate that the Commission had examined the relevant data or articulated a rational connection between the facts found and the choice made; and that the Disclosure Regulation contravenes the language and purpose of BCRA. *Id.* The court accordingly vacated the regulation. JA450.

The Commission again declined to appeal. Intervenors CFIF and HLF each appealed. JA451-456.

No. 97, *Van Hollen v. FEC*, No. 11-cv-766 (D.D.C. Oct. 15, 2014) ("Notice of Amendment"); *see also* 79 Fed. Reg. 62,797, 62,815-62,816 (Oct. 21, 2014) (final rule); 76 Fed. Reg. 80,803, 80,804 (Dec. 27, 2011) (proposed rule). Among other changes, the revised regulations removed a provision of the rules—not at issue here—that addressed restrictions on corporate spending for electioneering communications and "had become superfluous" in light of *Citizens United*. Notice of Amendment 1. Because the Disclosure Regulation challenged in this case included a cross-reference to that now-removed provision, the Commission amended the Disclosure Regulation to "delet[e] those cross-references." *Id.* at 1-2. The Commission also added language to the Disclosure Regulation to clarify that paragraph (c)(9) "applies when the reporting entity does not use the segregated account option of paragraph (c)(7)." 79 Fed. Reg. at 62,816. Paragraph (c)(9) otherwise remained unchanged. The Commission thus advised the court that these regulatory changes required no supplemental briefing. Notice of Amendment 2.

SUMMARY OF ARGUMENT

The district court correctly held that the Disclosure Regulation is an unreasonable interpretation of BCRA because it flouts the very purpose and policies underlying BCRA's enactment—that is, to fix a broken campaign-finance regulatory scheme and to reveal who was actually paying for campaign ads. Rather than unveiling "all contributors" as BCRA requires, the Disclosure Regulation has allowed those financing electioneering communications to continue to hide behind dubious and misleading names in conflict with BCRA's goal of increased disclosure. The Intervenors—but not the Commission—challenge the district court's decision on the ground that the electioneering-communication disclosure requirements should mirror those governing independent expenditures. That argument fails in light of BCRA's distinct statutory language, history, and purpose. And that argument is further belied by the Commission's treatment of unincorporated associations, partnerships, and individuals, which—consistent with BCRA—are required to disclose all donors without evidence of their subjective purpose.

The district court also correctly concluded that the Commission's promulgation of the Disclosure Regulation was arbitrary, capricious, and contrary to law. Although the Commission promulgated the Disclosure Regulation purportedly to implement the Supreme Court's decision in *Wisconsin Right to Life*,

nothing in that decision warranted any narrowing of BCRA's disclosure requirements. The Commission advanced two rationales for nevertheless limiting disclosure only to those donors that express a subjective purpose of supporting electioneering communications, but neither rationale is persuasive. The Commission relied on faulty reasoning unsupported by any actual evidence in the record before it, failed to consider other options that would have addressed its alleged concerns, and failed to consider the significant risk that the Disclosure Regulation would invite evasion capable of entirely swallowing the rule.

The Intervenors contend that the Disclosure Regulation's "purpose" limit was somehow constitutionally required. But the Commission did not rely on constitutional concerns in promulgating the rule. And it would have made no sense to do so, because the Supreme Court has upheld the disclosure requirements applicable to electioneering communications against constitutional challenge.

Finally, the district court did not abuse its discretion in its remedial order. Vacatur was proper here given the Disclosure Regulation's serious failings and the fact that vacatur has not caused disruption. Reinstating the Disclosure Regulation, in contrast, would deprive candidates and the public of information to which they are statutorily entitled.

STANDARD OF REVIEW

This Court reviews the district court's holdings under *Chevron* and the APA de novo. *Shays v. FEC*, 528 F.3d 914, 919 (D.C. Cir. 2008) ("*Shays III*"). Under the *Chevron* two-step analysis, the Court "ask[s] first whether Congress has spoken directly … to the precise question at issue, and second, if it has not, whether the agency's interpretation is reasonable." *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) ("*Shays I*") (internal quotation marks omitted; alteration in original). Under the APA, the Court asks whether the challenged regulation is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)).

This Court "review[s] the district court's decision to vacate, as [it] do[es] any decision to grant or withhold equitable relief, for abuse of discretion." *State of Neb. Dep't of Health & Hum. Servs. v. Department of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE DISCLOSURE REGULATION INVALID

In its prior decision, this Court held that although this case could not be resolved at *Chevron* Step One, the district court should decide in the first instance whether the Disclosure Regulation can "survive review under *Chevron* Step Two or *State Farm*." JA386. The district court's thorough analysis demonstrates that it

cannot. Under *Chevron*, even where statutory language is less than perfectly clear, an agency cannot adopt an interpretation that "'frustrate[s] the policy that Congress sought to implement.'" *Shays III*, 528 F.3d at 919. Rather, a court must set aside agency interpretations that are impermissible in light of the language, legislative history, and policies of the statute. *See Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996).

The inquiry at *Chevron* Step Two "overlaps with the arbitrary and capricious standard, for whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable," *Shays I*, 414 F.3d at 96 (internal quotation marks and citations omitted). Under the APA, a court cannot uphold a regulation when the agency failed to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). In conducting this inquiry, the Court may consider "only the rationales the [agency] actually offered in its decision" to "determine whether its interpretation is 'rationally related to the goals of' the statute." *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

Here, the Disclosure Regulation reflects an impermissible interpretation of BCRA that frustrates Congress's purpose by enabling massive evasion of the

statute's disclosure requirements. The Commission offered no persuasive justification for adopting that rule and has twice declined to defend it on appeal.[13] The Commission's proffered explanation makes no sense, disregarded significant considerations, and rested on a host of unexamined assumptions with no supporting evidence. The Disclosure Rule is therefore invalid.[14]

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[13] Given the Commission's persistent refusal to defend the Disclosure Regulation on appeal, it is questionable whether the Commission's interpretation merits any deference at all. *See Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1341 (9th Cir. 1992) (ordinary deference does not apply where agency dismissed its appeal and acquiesced in district court judgment). But even applying normal *Chevron* principles, the Disclosure Regulation fails.

[14] Amicus Cause of Action argues that this case should be dismissed on several grounds, none of which the Intervenors or the Commission have raised. Each argument fails. First, the Commission's promulgation of rules implementing *Citizens United*, *see supra* n.12, does not render this case moot. In that rulemaking, the Commission repromulgated the Disclosure Regulation—including the challenged purpose test—in substantively identical form, making only minor changes unrelated to this litigation. It is "'well settled' … that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice'" where there is a reasonable likelihood that the defendant will engage in the same practice again. *Northeast Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). That analysis applies "a fortiori" where, as here, "[t]here is no mere risk that [the agency] will repeat its allegedly wrongful conduct," but the agency "has already done so" by repromulgating an identical regulation that "differs in only some insignificant respect." *Id.*; *see also National Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001); *Dow Chem. Co. v. EPA*, 605 F.2d 673, 679 (3d Cir. 1979).

Van Hollen also did not waive his challenge or fail to exhaust administrative remedies. Regardless of whether a particular plaintiff participated in the rulemaking process, an issue is exhausted when it has been considered by the agency. *See Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1150-1151 (D.C. Cir. 1987). Here, the Commission plainly considered whether corporate and

A. The Disclosure Regulation Reflects An Unreasonable Interpretation Of BCRA

As discussed, one of Congress's primary purposes in enacting BCRA was to improve disclosure of the sources of funding for campaign ads and to curtail circumvention of campaign-finance rules. *Shays I*, 414 F.3d at 82; *supra* pp. 4-5. With respect to disclosure in particular, Congress sought to ensure that the public could "identify the source of funding behind broadcast advertisements influencing certain elections" and to prevent organizations from "hiding behind dubious and misleading names" to avoid "the scrutiny of the voting public." *McConnell*, 540 U.S. at 196-197 (internal quotation marks omitted). When it first promulgated rules to implement BCRA in 2003, the Commission acknowledged these purposes in recognizing that BCRA "specifically mandates disclosure" of donor information by "all persons who make electioneering communications," regardless of their corporate form or subjective intent. 68 Fed. Reg. at 414; *see supra* pp. 8-10.

As promulgated after *Wisconsin Right to Life*, however, the Disclosure Regulation subverts those purposes and contravenes the statutory language. Under *Chevron*, even where Congress has not unambiguously answered the precise

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union spending should be subject to the same disclosure requirements that apply to individuals and other entities. JA310; *see supra* pp. 11-18. Nor is this case unripe. Van Hollen challenges the Disclosure Regulation as promulgated in 2007, not the later *Citizens United* rule, which simply repromulgated the same challenged purpose test. The Commission's position was fully crystalized in the 2007 final rule, and the whole record is before the Court.

question at issue, an agency's interpretation can still be unreasonable in light of the statute's language, history, and purpose. *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1261-1263 (D.C. Cir. 1990). Here, as the district court stated, BCRA calls for disclosure of "'*all* contributors'" whose aggregate donations exceeded the $1,000 threshold, "with no limitation other than the threshold amount." JA446. And although, as this Court has explained, the words "contributors" and "contributed" might be construed to entail some purposive element, JA385, Congress's use of expansive language—"[e]very person," "all contributors"—without limitations as to purpose or corporate form indicates that Congress would not have intended BCRA to be interpreted so narrowly as to effectively swallow the disclosure requirements altogether. Yet swallowing the rule is the precise consequence of the Commission's narrow "purpose" test. As the district court observed, "[a] donor can avoid reporting altogether by transmitting funds but remaining silent about their intended use." JA447.

Experience bears out the district court's prediction. In the election cycle following the Disclosure Regulation's implementation, disclosure concerning the funding of electioneering communications dropped precipitously.[15] Disclosure fell still further in the 2010 election cycle. As the Commission admitted in its Answer,

[15] *See* Center for Responsive Politics, "Outside Spending by Disclosure, Excluding Party Committees," *available at* http://www.opensecrets.org/outsidespending/disclosure.php?range=tot) (visiting May 11, 2015).

the public record reflects little or no disclosure of the numerous contributors to nonprofit corporations that made substantial electioneering communications in the 2010 congressional races. JA 337 ¶ 31. Persons making such communications "disclosed the sources of less than 10 percent of the $79.9 million" in related spending. *Id.* ¶ 30. The ten "persons" that reported spending the most on electioneering communications (all of them claiming tax-exempt status under Sections 501(c) or 527 of the Internal Revenue Code) disclosed the sources of only five percent of the money they spent. *Id.* Of these ten "persons," only three disclosed any information about their funders. *Id.*

"At *Chevron* step two and under the APA, courts must reject administrative constructions of a statute that frustrate the policy that Congress sought to implement." *Shays III*, 528 F.3d at 925. In *Shays III*, this Court held invalid a rule restricting coordination of election-related spending between campaigns and outside groups, holding that the regulation was contrary to BCRA because it frustrated Congress's goal of prohibiting the use of soft money in connection with federal elections. *Id.* The rule "not only ma[de] it eminently possible" that the regulation would be evaded, but "also provide[d] a clear roadmap" to do so. *Id.* Like the regulation at issue in *Shays*, the Disclosure Regulation challenged here frustrates BCRA's purpose and allows corporations and labor organizations to avoid reporting requirements with nothing more than a "wink or nod." *Id.* (internal

quotation marks omitted). An organization wishing to circumvent BCRA's disclosure requirements need only solicit funds for general support and instruct its donors to remain silent. And even absent such intentional measures, a corporation or labor organization will rarely have evidence of a contributor's specific intent to further electioneering communications.

The Intervenors contend that the Disclosure Regulation "complements" the statutory structure by mirroring the disclosure regime applicable to express advocacy under FECA, which requires persons making independent expenditures for express advocacy to identify donors who made contributions "for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). *See* CFIF Br. 20; *see also id.* at 20-23; HLF Br. 44. This argument fails for several reasons.

First, while the Commission stated that it drew the "purpose" test in the Disclosure Regulation from the reporting requirements that apply to independent expenditures under FECA, JA311 n.22, it did not explain why it was reasonable to do so when Congress had included language in FECA expressly limiting disclosure to those contributions that are earmarked for independent expenditures but included no such limitation in BCRA. Unlike the FECA provision requiring disclosure of contributions made "for the purpose of furthering an independent expenditure," 52 U.S.C. § 30104(c)(2)(C), the disclosure requirements of BCRA require disclosure of "all contributors who contributed" an amount exceeding the

threshold, without any other limitation, *id.* § 30104(f)(2)(F). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *cf. Shays I*, 414 F.3d at 108 ("[W]hen BCRA says 'made,' we presume, absent compelling indication otherwise, that it means 'made' and not 'made for a fee.'"); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 470-471 (1959) (court would not impute congressional intention to create a right of reparation in statutory provision from which it was omitted, where Congress specifically provided for right in another provision of the same statute); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 573 (1979) (refusing to imply private remedy in statute because when Congress wished to provide a private damage remedy, it did so expressly). CFIF cites (at 21) this Court's decision in *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999), but that case simply held that language in one section of a statute could inform the meaning of related language in another section of the statute. *Public Citizen* did not address the situation presented here, where one of two statutory provisions containing otherwise identical language includes a limiting clause and the other provision does not.[16]

[16] The Intervenors selectively cite statements by some of BCRA's sponsors to the effect that BCRA would subject so-called issue ads to the "same" disclosure rules that governed express-advocacy ads under FECA. *See* CFIF Br. 21-23; HLF

Second, if the disclosure rules governing electioneering communications under BCRA were supposed to mirror the disclosure rules for express advocacy, then the "purpose" test adopted by the Commission here should have been included in the 2003 version of the regulation. Instead, that 2003 regulation required every person making disbursements for electioneering communications without a segregated account to disclose "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," without further limitation. 11 C.F.R. § 104.20(c)(8) (2003). Indeed, in promulgating the 2003 regulations, the Commission explicitly stated that it had adopted that language to make explicit that "all persons who make electioneering communications would be required to disclose their donors who donate $1,000 or more in the aggregate during the prescribed period, if they do not use segregated bank accounts." 68 Fed. Reg. at 414. The Commission explained that it had done so because "BCRA at 2 U.S.C. [§] 434(f)(2)(F) specifically mandates disclosure of this information." *Id.* CFIF acknowledges (at 6) that the 2003 regulation "essentially restated the statute." Moreover, the 2003 regulation continues to apply—with no purpose limitation—to electioneering-communication disclosures

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Br. 28. As discussed, however, the text that Congress ultimately adopted did not mirror the preexisting disclosure rules for express advocacy, *supra* pp. 30-31, and those sponsors clearly intended BCRA to break from the prior FECA regime they perceived to be ineffective. *Infra* pp. 33-34.

by unincorporated organizations, partnerships, and individuals, further belying the suggestion that electioneering-communication disclosure requirements should simply parallel the independent-expenditure disclosure requirements.

Third, BCRA's legislative history and purpose refute the contention that Congress would have intended BCRA's regulations of electioneering communications to parallel the old regime of regulations governing independent expenditures for express advocacy. As this Court has recognized, BCRA was intended to be a major departure from the disclosure regime in effect under FECA. *See Shays I*, 414 F.3d at 81-82. A Senate investigative committee concluded in 1998 that "the campaign finance system had suffered a 'meltdown'" in light of the confinement of FECA's restrictions and disclosure requirements to magic words of express advocacy. *Id.* It is unreasonable to contend that Congress intended in BCRA simply to replicate a disclosure system that was widely perceived to be ineffective.[17]

HLF contends (at 44) that it does not make sense to require greater disclosure of the sources of electioneering communications than the sources of

[17] Citing *Bob Jones University v. United States*, 461 U.S. 574 (1983), HLF argues (at 44) that Congress has acquiesced in the Disclosure Regulation by failing to amend BCRA to reject it. But this Court has held that "absent an extraordinary counter-indication, congressional failure to act is of no probative value." *Bismullah v. Gates*, 551 F.3d 1068, 1074 (D.C. Cir. 2009). HLF cites no such "extraordinary counter-indication" akin to the legislative action that preceded the Supreme Court's decision in *Bob Jones*. *See* 461 U.S. at 600-601.

express advocacy. But the disclosure rules for independent expenditures are more demanding in other ways. For example, with respect to express advocacy, persons (other than political committees) become subject to the disclosure requirements merely by making independent expenditures in an aggregate amount or value in excess of $250 during a calendar year; but disclosure requirements are not triggered under BCRA until a person's disbursements for electioneering communications exceed $10,000 in the reporting period. *Compare* 52 U.S.C. § 30104(c)(1), *with id.* § 30104(f)(1). Moreover, as HLF acknowledges (at 28-29), individual donors that contribute as little as $200 must be disclosed under the independent-expenditure rules, but need not be disclosed until their donations exceed $1,000 for electioneering communications. *Compare* 52 U.S.C. § 30104(c)(2)(C), *with id*. § 30104(f)(2)(F). These differences between the two reporting regimes confirm that it was unreasonable for the Commission to import without explanation the purpose requirement of FECA's independent-expenditure provisions into the disclosure rules governing corporate spending for electioneering communication.

Finally, CFIF contends (at 29) that even if the Disclosure Regulation frustrates Congress's policy of increasing disclosure, it should nonetheless be upheld because its vacatur will simply encourage organizations that would otherwise engage in electioneering communications to "convert their ads … to

express advocacy" and thereby avoid disclosing the identity of their backers. While the willingness of some organizations to tailor their ads to avoid disclosure rather than to the substance of their message might reveal much about those organizations' motivations, it does not provide a basis to uphold an unreasonable interpretation of a statute that affirmatively requires disclosure.

B. The Commission Offered No Rational Justification And Failed To Support Its Decision With Reasoning Or Evidence

Even if the Commission's "purpose" test were not incompatible with BCRA's language, structure and legislative purpose, the Disclosure Regulation would still be invalid under the APA's "arbitrary and capricious" standard because the Commission offered no persuasive justification for it, relying instead on irrational assumptions unsupported by evidence and ignoring critical considerations. *See State Farm*, 463 U.S. at 43; *see also, e.g.*, *Shays I*, 414 F.3d at 100, 102, 112, 114-115. The Commission did not even consider the possibility that the "purpose" requirement it adopted would facilitate—indeed, invite—rampant evasion of BCRA's disclosure mandate.

1. The Commission's proffered explanation does not support the "purpose" test

Although the Commission presented the Disclosure Regulation as an effort to "implement" the Supreme Court's decision in *Wisconsin Right to Life*, JA300, nothing in that decision supports the Commission's choice to limit drastically the

disclosure required for electioneering communications. As this Court previously held, the *Wisconsin Right to Life* decision may have created a need for "regulatory guidance" on how the existing disclosure rules should apply to newly permissible corporate spending on electioneering communications. JA385. But nothing in *Wisconsin Right to Life* required the Commission to fill the resulting "gap" in the statutory regime by relieving corporations and labor organizations of any obligation to disclose donors except those that expressly indicate an intent to support electioneering communications. As the Commission acknowledged in both the notice of proposed rulemaking, JA28, and the final rule, JA301, *Wisconsin Right to Life* did not address or question the reporting requirements applicable to electioneering communications. *Supra* p. 16. And as the district court observed, even vocal opponents of disclosure conceded at the administrative hearing that "no change to the disclosure requirements was required by the [*Wisconsin Right to Life*] decision." JA432. The Commission therefore concluded, correctly, that it "ha[d] no mandate" under *Wisconsin Right to Life* to narrow the disclosure regime. JA301.

Instead, as discussed, the Commission gave two reasons for limiting disclosure in this manner. First, the Commission believed that disclosure should be limited to only "those persons who actually support the message conveyed by the [electioneering communications]," and that corporations' and labor

organizations' general funds might include income from persons who do "not necessarily support" those ads. JA311 (the "support" rationale). Second, the Commission claimed that identifying all those who had donated more than $1,000 "would be very costly and require an inordinate amount of effort." *Id.* (the "burden" rationale). Neither of these explanations suffices.

With respect to the "support" rationale, it was unreasonable for the Commission to assume that contributors who donated more than $1,000 would not support the organization's electioneering communications. As the district court concluded after thoroughly examining the administrative record, there was no evidence before the Commission that contributors who donate thousands of dollars to organizations making electioneering communications would be likely to disagree with those communications. JA444-445; *see* JA424-443. For example, no evidence suggested that enforcement of the 2003 disclosure rules—which required disclosure of all donors to partnerships, unincorporated organizations, or qualified nonprofit corporations defined in *Massachusetts Citizens for Life*, *supra* pp. 7-8—had resulted in disclosure of donors who disagreed with the electioneering communications their donations funded. The Commission cited no such evidence and made no such findings, and the Intervenors point to none.

Moreover, it is doubtful such evidence could exist. With respect to most nonprofit corporations, "[i]ndividuals who contribute … are fully aware of [the

organization's] political purposes, and in fact contribute precisely because they support those purposes." *Massachusetts Citizens for Life*, 479 U.S. at 260-261. As the Supreme Court has explained:

> It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor.

Id. at 261. The Commission offered no rational explanation for assuming to the contrary that a contributor might "not necessarily" support an organization's electioneering communications just because the contributor did not specifically earmark a donation for electioneering communications.

Moreover, the Commission's "support" rationale—and the Intervenors' defense of it—misapprehends the purpose of disclosure. Disclosure serves not only to reveal a candidate's constituencies, identify individuals who share a particular political view, or convince a voter to "reconsider[] her vote after studying the American Cancer Society's donor list," CFIF Br. 25. Rather, disclosure serves the broader and simpler purpose of identifying the sources of funding of electoral messages so that "citizens and shareholders can react to the speech of corporate entities in a proper way." *Citizens United*, 558 U.S. at 371. Even for ads that "only

pertain to a commercial transaction," the Supreme Court has emphasized the public's "interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 369. For instance, disclosure provides important information even when it reveals that the resources used to fund a campaign ad "are *not* an indication of popular support" for the ideas expressed, but simply reflect "resources amassed in the economic marketplace." *Massachusetts Citizens for Life*, 479 U.S. at 257-258 (emphasis added).

The Commission's "burden" rationale is similarly unpersuasive. As the district court noted, the Commission relied on conclusory assertions about supposed "costs of compliance," but stated no details about what such costs entail, the magnitude of their impact, or how many entities those costs might affect. JA444. For instance, the Commission cited no evidence and made no findings that compliance with the 2003 version of the disclosure regulation—which contained no purpose limitation—had been costly or burdensome for individuals, partnerships, unincorporated associations, or qualified nonprofit corporations during the four years it had been in effect.

Moreover, even if the Commission had made any findings in support of the "burden" rationale, those findings would have had no support in the administrative record. *See Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003) (agency's factual findings must be supported by substantial evidence in the

record). The administrative record is devoid of any concrete evidence that identifying donors of donations aggregating more than $1,000 "would be very costly and require an inordinate amount of effort." JA311. The Intervenors assert that "many" or "several" commenters expressed concerns about the burdens attending disclosure. CFIF Br. 34; HLF Br. 1. But examining the Intervenors' record citations reveals that they repeatedly cite the views of just a few commenters, none of whom provided any detail or specific facts to support the notion that reporting would be "very costly and require an inordinate amount of effort" as the Commission asserted, JA311. Without repeating the district court's careful summary of the administrative record, *see* JA420-445, certain features of that record bear emphasis. The commenters on which CFIF relies (at 8-9, 35-36) provided nothing more than vague and conclusory assertions of burden. *See* JA73 (disclosure "would likely prove difficult"); JA153 ("accounting and reporting burdens w[ould] be enormous"); JA163 (disclosure would be "burdensome," and burden on unions would be "especially great"); JA166 ("burden of complying … would be hard to understate"); JA206 ("tremendous burden on unions" would be "remarkable); *see also* HLF Br. 19, 24 (citing JA152-153, 163, 206).[18] None

[18] CFIF also cites comments asserting that disclosure would burden the privacy of donors that wished to remain anonymous, contending that the Commission properly tailored the Disclosure Regulation to avoid intruding on donor privacy. Br. 33-34 (citing JA99, 109, 139, 262); *see also* HLF Br. 18. But BCRA requires disclosure of all contributors whose contributions to electioneering

provided any facts, data, or examples to support those bald assertions. And, as the district court explained, "the commenters who expressed concerns about the burdens" were "primarily advancing the view that [corporate or union electioneering communications] should fall outside of the scope of the regulatory regime altogether." JA427. Self-serving assertions advocating that view do not equate to "substantial evidence" capable of sustaining the Commission's decision. *Missouri Pub. Serv. Comm'n*, 337 F.3d at 1070.[19]

HLF attempts to defend the Disclosure Regulation by asserting that the Commission made a predictive judgment about the burdens disclosure would impose without a purpose limitation. *See, e.g.*, HLF Br. 25-26, 31-32, 35, 37. But even when making such judgments an agency "must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions."

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communications exceed the threshold, regardless of their desire to remain anonymous, and that requirement has survived constitutional scrutiny. *See supra* pp. 5-7. The Commission was not free to contradict Congress's decision that the public's interest in knowing the sources of political spending generally outweighs the interest in anonymity. *See also infra* pp. 46-48.

[19] CFIF also notes (at 36) that "no stakeholder who favored broader disclosure presented any contrary evidence" that a purpose test was unnecessary to avoid administrative burdens. But that does not relieve the Commission of its obligation to "support its decision with reasoning *and evidence*." *Shays III*, 528 F.3d at 929 (emphasis added). Moreover, neither of the Commission's proposed alternative rules included a purpose test in the notice of proposed rulemaking. Although Van Hollen has not contended that the Commission's late introduction of the purpose test constituted a technical violation of the notice-and-comment procedure, *cf.* CFIF Br. 40-41, the district court correctly observed that the "chronology here has an impact upon … the *State Farm* analysis," JA423.

Missouri Pub. Serv. Comm'n, 337 F.3d at 1070; *see also National Gypsum Co. v. EPA*, 968 F.2d 40, 43 (D.C. Cir. 1992) (agency action was arbitrary and capricious where its "inferences [were] nothing more than unsupported assumptions"). The Commission did not do that here.[20]

2. The Commission relied on arbitrary assumptions without explanation and failed to consider significant relevant factors

Both of the Commission's rationales rested on the assumption that, without a purpose limitation, the "contributors" potentially subject to disclosure under BCRA could include a corporation's shareholders or customers or a labor union's members. JA311. According to the Commission, it is those contributors who "may not necessarily" support the organization's electioneering communications and whose identification might prove difficult or burdensome. *Id.* But the Commission did not explain how investors, customers, or creditors could be defined in the first place as "contributors" under BCRA (or "donors" under the

[20] The cases cited by HLF merely stand for the proposition that agencies' predictive judgments are entitled to deference when they are based on evidence in the record. *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014); *Nuvio Corp. v. FCC*, 473 F.3d 302, 306-307 (D.C. Cir. 2006); *American Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000). Indeed in *Sorenson* (cited at HLF Br. 26, 27, 32, 34, 35), the court ultimately held that the agency's promulgation of the rule at issue was arbitrary and capricious, explaining that the agency's predictive judgments "'must be based on some logic and evidence, not sheer speculation.'" 755 F.3d at 708. Likewise here, the Commission's speculative judgment regarding the burdens associated with disclosure—untethered to any actual evidence in the record—cannot support the Disclosure Regulation.

Disclosure Regulation) or why organizations paying for electioneering communications would be unable to distinguish their "donors" from shareholders, customers, or other sources of commercial income. Indeed, to maintain tax-exempt status, section 501(c) organizations must already distinguish donations from unrelated business taxable income and other revenue sources on their tax returns. *See* 26 U.S.C. § 6033(b)(5); Treas. Reg. § 1.6033-2(a)(2)(ii)(f). As the Commission acknowledged, one commenter specifically suggested that "donations" could be distinguished from other revenue in this way by applying the IRS criteria. JA311. But the Commission did not address this possibility. *Id*.

Nor did the Commission consider the suggestion offered by witnesses at the administrative hearing that the Commission could simply clarify that business income and other funds that do not entail "truly a donative act" are exempt from the disclosure requirement on the ground that they do not constitute a "donation" or "contribution." JA212, 217-218. The Commission had taken a similar approach in promulgating the 2003 version of the disclosure rules, clarifying that "individuals are required to disclose donations received, which does not include salary, wages, or other compensation for employment." 68 Fed. Reg. at 414. The Commission could have done so here as well, and it acknowledged comments suggesting that it do so. JA311. Yet the Commission ignored that option without explanation and instead gutted BCRA's disclosure requirement based on concerns

about how the rules would apply to business income that would not fall within the terms the Disclosure Rule uses to begin with and that the Commission could have explicitly exempted to avoid any possible misunderstanding.

As the district court noted, the Commission also failed to consider or explain why the option to use a segregated bank account "was not a suitable solution" for any of its purported concerns. JA445. The Commission had acknowledged in promulgating its 2003 regulations that organizations could reduce their reporting obligations and avoid any supposed burden by establishing a segregated account for electioneering communications and disclosing only those contributors that contributed more than $1,000 to the separate account. 68 Fed. Reg. at 413. That is the alternative Congress adopted for groups wishing to avoid disclosure of membership dues. One commenter specifically raised that point in the administrative hearing:

> The other protection to put in, which shouldn't be undervalued, is the ability of an organization to set up a segregated fund and engage in the disclosure only insofar as donations to the segregated fund are concerned. What Congress was doing here was trying to balance the importance of disclosure on the one hand versus the intrusiveness or burden of disclosure. And these are the balances that Congress struck and the protections they tried to build in.

JA215. But the Commission ignored this option without explanation. JA300-301, 311.

The Intervenors argue that the option to use a segregated account might be impractical for some organizations. *See* CFIF Br. 38-39; HLF Br. 40. But the Commission did not rely on this rationale, and a court cannot sustain a regulation based on a rationale the agency did not offer. *See Village of Barrington*, 636 F.3d at 660 (court may consider "only the rationales the [agency] actually offered in its decision" to "determine whether its interpretation is 'rationally related to the goals of' the statute"). In any event, the Intervenors' criticism of the segregated-account option is unpersuasive. For example, HLF cites comments submitted by a group of labor organizations arguing that using a segregated bank account would undermine the holding of *Wisconsin Right to Life* that organizations can use general treasury funds for electioneering communications without establishing a separate account. HLF Br. 40 (citing JA163). But *Wisconsin Right to Life* did not recognize any right to use general funds for electioneering communications *without disclosing the sources of those funds*. *Supra* pp. 10-11.

Finally, the Commission failed entirely to consider the significant risk that its purpose test would facilitate complete evasion of any requirement to disclose, enabling "savvy campaign operators" to exploit the "enormous loophole" it created "to the hilt." *Shays III*, 528 F.3d at 928. Under *State Farm*, an agency's rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." 463 U.S. at 43. Commenters noted the likelihood that a

narrow approach to disclosure "w[ould] lead again to a proliferation of issue ads by entities with misleading names." JA43; *see also* JA114, 118. The precipitous decline in disclosure following the Disclosure Regulation's promulgation confirms that to be true. *See supra* pp. 18-19, 28-29.[21] The Commission's failure even to acknowledge, much less consider, this critical consequence of its decision was arbitrary and capricious and requires the Disclosure Regulation's invalidation.

C. The Intervenors' Constitutional Arguments Cannot Save The Disclosure Regulation

Finally, the district court correctly rejected the Intervenors' attempt to support the Disclosure Regulation on the ground that it "fairly balanced the need for disclosure against sensitive First Amendment and privacy concerns." JA449. The Commission did not cite the First Amendment as a reason for adopting the purpose requirement. To the contrary, the Commission acknowledged that "eight Justices in *McConnell* voted to uphold the [electioneering communications] reporting requirements" and that "*McConnell* continues to be the controlling constitutional holding" on that issue. JA301. The Commission thus disclaimed any "mandate" to alter the disclosure requirements based on First Amendment considerations. *Id.*

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[21] The Court may consider information outside the administrative record to determine whether the agency considered all the relevant factors or adequately explained its decision. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *see also IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997).

The Commission was correct to do so. The Supreme Court in *McConnell* upheld the reporting rules applicable to electioneering communications against a facial challenge. *Supra* pp. 6-7. Seven years later, in *Citizens United*, eight Justices rejected an as-applied challenge to the statutory disclosure requirement and reaffirmed the important purposes served by disclosure. 558 U.S. at 364-370. Accordingly, no further "narrow tailoring" was required to preserve the constitutionality of BCRA or the Commission's prior implementing regulations.

HLF contends (at 29) that the three-judge district court's passing citation in *Citizens United* to the Disclosure Regulation challenged here creates an inference that the Commission's "purpose" limitation was a permissible construction of BCRA and necessary to the Supreme Court's constitutional holding in that case. That inference is improper because the three-judge district court in *Citizens United* was not considering the question at issue here, *i.e.*, whether the Disclosure Regulation was arbitrary and capricious or an unreasonable interpretation of BCRA. Nor does the Solicitor General's brief in *Citizens United* support HLF's argument in this case. *Cf.* HLF Br. 29. The Solicitor General did not contend that the constitutionality of BCRA's disclosure requirements turned in any way on the loophole the Commission created by adopting the purpose limitation in the Disclosure Regulation. *See* Appellee Br., *Citizens United v. FEC*, No. 08-205, 2009 WL 406774, at *40-41 (U.S. Feb. 17, 2009). And the argument that the

Supreme Court must have "viewed the donor disclosure requirement as similarly narrow" because it described it as requiring disclosure only "of 'certain contributors'" fails because the Supreme Court cited BCRA itself, not the regulation. *See Citizens United*, 558 U.S. at 367-368. The Court's reference to "'certain contributors'" thus reflected only the statutory limits on which contributors must be disclosed—*i.e.*, those that give $1,000 or more.

In short, the Supreme Court was certainly not misled into upholding BCRA's disclosure requirements against First Amendment challenge. *Cf.* HLF Br. 28-30. To the extent any organization subject to BCRA's disclosure requirements faces threats, reprisals, harassment, or retaliation, or a chilling of its speech or expression that is not justified by the public's informational interest in "knowing who is speaking about a candidate shortly before an election," its remedy lies in an as-applied challenge. *Citizens United*, 558 U.S. at 369-370; *see also McConnell*, 540 U.S. at 198-199.[22]

[22] In *Independence Institute v. FEC*, No. 14-cv-1500 (CKK), 2014 WL 4959403 (D.D.C. Oct. 6, 2014), the district court rejected an as-applied First Amendment challenge to an application of BCRA § 201's disclosure provisions for "electioneering communications," now codified at 52 U.S.C. § 30104(f)(2)(E), (F). The court's decision does not cite or rely on the limiting "purpose" language of the Disclosure Regulation in holding the statute constitutional as applied.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN VACATING THE UNLAWFUL REGULATION

The district court had discretion whether to vacate the Disclosure Regulation or to remand without vacating under the APA, which provides that the "reviewing court shall … hold unlawful and set aside agency action" found to be arbitrary, capricious, or contrary to law. 5 U.S.C. § 706(2)(A); *see State of Neb. Dep't of Health & Hum. Servs. v. Department of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (reviewing vacatur for abuse of discretion); *National Parks Conservation Ass'n v. Jewell*, __ F. Supp. 3d __, 2014 WL 5355048, at *8 (D.D.C. Feb. 20, 2014) (discussing district court discretion). Having properly concluded that the Disclosure Regulation was an unreasonable interpretation of BCRA under *Chevron* and was arbitrary and capricious in violation of the APA, the district court did not abuse its discretion in vacating it.

"[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted). Whether to depart from the norm and leave an unlawful rule intact pending further rulemaking depends on the seriousness of the regulation's deficiencies and the disruptive consequences of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993). In applying the APA, this Court does "not hesitate[] to vacate a rule when the agency has not

responded to empirical data or to an argument inconsistent with its conclusion." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *see also id.* at 10; *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring).

Here, the regulation "creates an exception that has the potential to swallow the rule entirely." JA447. The district court's order vacating it has not caused significant disruption, and does not threaten future disruption, because that action simply restored the prior 2003 version of the regulation. As the district court explained in denying the Intervenors' motion for a stay pending their initial appeal, "there was a valid regulation in effect" implementing BCRA's disclosure requirements before promulgation of the 2007 Disclosure Regulation, and "[i]n light of the Court's ruling, that regulation now governs." JA374; *see also Action on Smoking & Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam) (vacating regulation has effect of reinstating prior regulation); *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 n.25 (3d Cir. 2011) (same); JA450 (same). Notably, the Commission has "fail[ed] to join the [I]ntervenors in their present challenge to … vacatur" of the Disclosure Regulation, "reinforc[ing] th[e] belief" that vacatur was not improper and the district court did not abuse its discretion. *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002), *on rehearing of* 280 F.3d 1027 (D.C. Cir. 2002) ("A defense of the [regulation], if it was defensible, clearly would have been cognizable with respect

to the choice between vacatur and remand. Consequently, … we infer that the [agency]'s failure to defend the [regulation] indicates its inability to do so.").

Contrary to CFIF's denials (at 44), reinstating the Disclosure Regulation pending remand to the Commission *would* lead to affirmative harm, because the "existence of loopholes and unfaithful regulations constitutes a daily injury to both [plaintiffs'] interests and the clearly articulated intent of Congress." *Shays I*, 340 F. Supp. 2d 39, 52 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). Candidates for federal office must be able to draw attention to the person or persons who finance "electioneering communications" about them and thereby put such electioneering communications in the proper context. For example, in denying the Intervenors' motion for a stay pending appeal, this Court held that a stay would cause Van Hollen substantial harm because without full disclosure he would be hampered in his ability to respond effectively to groups sponsoring electioneering communications mentioning him by name. JA381.

Moreover, if the district court had left in place regulations that do not faithfully implement the FECA and BCRA disclosure provisions, candidates and the public would be deprived of information to which they are entitled under those statutes for an indefinite period until the Commission mustered a majority vote for a new rule. As this Court previously stated, the Supreme Court's decisions upholding BCRA against constitutional challenge recognize that "the public

interest is best served by access to more, not less, information." JA381. Given the Commission's paralysis, a remand without vacatur would hinder substantial informational interests and contravene congressional intent.

CONCLUSION

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

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because the brief contains 12,189 words, excluding parts of the brief exempted by Federal Rule Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on May 11, 2015, the foregoing Brief for Appellee Chris Van Hollen was filed using the Appellate CM/ECF system and service accomplished through the CM/ECF system on all participants in this case.

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