UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

and

CENTER FOR INDIVIDUAL FREEDOM,

Defendant

and

HISPANIC LEADERSHIP FUND,

Defendant

Civil Action No. 1:11-cv-00766 (ABJ)

MEMORANDUM IN SUPPORT OF
HISPANIC LEADERSHIP FUND'S
MOTION FOR STAY PENDING APPEAL

On March 30, 2012, this Court issued its order (Doc. No. 47, amended by Doc. No. 49), accompanied by memorandum opinion,granting summary judgment to the plaintiff; denying Hispanic Leadership Fund's (HLF's) motion to dismiss; and denying Center for Individual Freedom's (CFIF's) cross motion for summary judgment. HLF submits this memorandum in support of its motion for stay pending appeal. HLF also adopts the arguments presented in CFIF's memorandum in support of its motion for stay pending appeal and supplements those arguments with the analysis included herein in the interest of avoiding duplication of arguments.

ARGUMENT

HLF supplements Defendant Center for Individual Freedom's Motion For Stay Pending Appeal (E.C.F., Docket # 51) with the following additional arguments regarding jurisdictional issues and whether the stay applicant has made a strong showing that he is likely to succeed on the merits.

A. Plaintiff Lacks Standing

The Court concluded that Plaintiff has "informational standing" to challenge 11 C.F.R. § 104.20(c)(9) based on his representation that "[i]f the FEC regulations do not faithfully implement these disclosure provisions, I will be deprived of information to which I am entitled under FECA and BCRA." Memorandum Opinion (Mem.Op.) at 12. However, the Court did not provide a thorough review of HLF's arguments on the matter of standing, and summarily concluded that Plaintiff's rote declaration "made the necessary showing to support informational standing under *Shays III* and *Akins*." *Id*. Neither *Shays III* nor *Akin*, however, stand for the proposition that a simple assertion that one is "deprived of information to which I am entitled" is sufficient to satisfy Article III standing requirements. *FEC v. Akins*, 524 U.S. 11 (1998); *Shays v. FEC ("Shays III")*, 528 F.3d 914, 923 (D.C. Cir. 2008).

The Court mischaracterized Plaintiff's assertion of standing through its omission of crucialmaterial. The Plaintiff declared:

> The FEC's regulation codified at 11 C.F.R. § 104.20(c)(9) directly affects me. If the challenged regulation is allowed to stand, I will be forced to raise money, campaign, and attempt to discharge my important public responsibilities in a system that is widely perceived to be, and I believe in many respects threatens to be, significantly corrupted by non-disclosure of the sources of funds of "electioneering communications." If the challenged regulation is allowed to stand, I will also be the subject of "electioneering communications" that are financed by donors whose names would have otherwise been disclosed. The challenged regulation injures me directly as a candidate because I cannot draw attention to the person or persons who finance "electioneering communications"

> about me and thereby put such "electioneering communications" in their proper context for votes to consider.

In his Complaint, Plaintiff asserted:

> The challenged regulation infringes Rep. Van Hollen's protected interest in participating in elections untainted by expenditures from undisclosed sources for "electioneering communications." If 11 C.F.R. § 104.20(c)(9) stands, Rep. Van Hollen likely will be subjected to attack ads or other "electioneering communications" financed by anonymous donors, and will not be able to respond by, inter alia, drawing to the attention of the voters in his district the identity of persons who fund such ads. Rep. Van Hollen, as a citizen and voter, also has an informational interest in disclosure of the persons whose donations are used to fund "electioneering communications" by corporations and labor organizations."

Virtually all of these assertions are intended to convince the Court that Plaintiff satisfies the "competitor standing" theory of *Shays I*. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I*"). The District Court, however, did not reach the arguments regarding "competitor standing," basing its conclusion solely on a finding of "informational standing." Mem.Op. at 12.

Plaintiff made only the barest of assertions regarding "informational standing." *See* Complaint at ¶ 11 ("Rep. Van Hollen, as a citizen and voter, also has an informational interest in disclosure of the persons whose donations are used to fund "electioneering communications" by corporations and labor organizations."). If the Court's determination regarding informational standing is affirmed, it will have the effect of conveying standing to every single "citizen and voter" in the United States to sue the FEC for a perceived disclosure-based grievance. The established prudential requirement that a generalized grievance does not convey standing would be effectively erased in this class of cases. *See U.S. v. Richardson*, 418 U.S. 166, 176-177 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)).

In *FEC* v. *Akins*, the Supreme Court did not simply find that a group of "citizens and voters" had informational standing because the FEC had not required the disclosure of certain information. *See Akins*, *supra*. Rather, the case arose in the context of an enforcement action,

and the "citizens and voters" who were found to have informational standing were the same citizens and voters who filed a complaint with the FEC pursuant to 2 U.S.C. § 437g, had their complaint dismissed by the FEC, and subsequently challenged the FEC's dismissal pursuant to statute. *See* 2 U.S.C. § 437g(a)(8)(A) ("Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.").

This matter, of course, does not arise in the context of a 2 U.S.C. § 437g enforcement matter. The Supreme Court's conclusion in *Akins* is inseparably linked to the statutory standing language of Section 437g. The Supreme Court wrote, "Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering this kind of injury here at issue, intended to authorize this kind of suit." *Akins*, 524 U.S. at 20 (1998).

In the context of the informational standing doctrine, Plaintiff's claimed injury is not particularized, and is merely a generalized grievance regarding the scope of a regulation adopted by the FEC. Plaintiff has never filed a complaint with the FEC challenging any particular person's non-disclosure of allegedly required information. No person has ever even broadcast an "electioneering communication" containing a reference to Plaintiff, but omitting donor information on the associated reporting form. Thus, Plaintiff, as a "citizen and voter," is no differently situated than any other American of voting age. As the Supreme Court noted in *Akins*, "[w]hether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process,

rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Id*. at 23.

However, even if "sufficiently concrete and specific" to overcome the fact that Plaintiff's alleged injury is "widely shared," *Akins* still does not support informational standing in this case. *Id*. 25. The Supreme Court wrote:

> We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.

Id., at 24-25. Congress has not done so in this case. This lawsuit was not brought pursuant to any statutory grant of standing, such as existed and provided the justification for standing in *Akins*.

If the statutory grant of standing in *Akins* is disregarded as a material fact, *Shays III* still requires a showing of redressibility. *See Shays III* at 923 ("the injury would be redressed were this court to invalidate the rule"). The "redress" that Plaintiff claims would be provided by the invalidation of the FEC's regulation does not actually exist under the statute.

Plaintiff claims informational standing on the grounds that "[t]he challenged regulation injures Plaintiff because it deprives him of information to which he is entitled under BCRA as a voter, leader and member of a political party, and candidate – the names of 'all contributors' whose money corporations and labor organizations use to fund 'electioneering communications' made both in his own district and nationwide." *See* Plaintiff's Reply To Intervenors' Opposition To Plaintiff's Motion For Summary Judgment at 1 ("Pl. Reply To Intervenors").

If this Court grants the relief requested by Plaintiff, on the grounds advanced by Plaintiff, the FEC would be forced to adopt a new regulation that would still not provide Plaintiff with the information that would enable him to "draw attention to the person or persons who finance

'electioneering communications' about me and thereby put such 'electioneering communications' in their proper context for voters to consider." Pl. Reply To Intervenors at 1; Decl. of Rep. Van Hollen In Support of Mot. Summ. J. at ¶ 4.Rather, Plaintiff's requested relief would ultimately yield a revised regulation requiring the disclosure of a portion of the organization's membership/supporter list, namely, a simple listing of "all contributors who contributed an aggregate amount of $1,000 or more" to the organization during a specified time period. 2 U.S.C. § 434(f)(2)(F). Here, the relief Plaintiff seeks would provide him with only a list of persons who may or may not have contributed funds over a specific dollar amount to an organization, which were subsequently used to finance an advertisement.[1] Plaintiff would obtain no information detailing the specific person or entities that financed any particular electioneering communication for the simple reason that the statute, as read by Plaintiff, does not require this type of disclosure. The relief that Plaintiff ultimately seeks – the ability to draw attention to and respond to the funders of specific electioneering communications – is simply not available under the statute, and therefore, Plaintiff's claimed injury cannot be redressed by this Court.

B. The Court Erred in its Analysis under the *Chevron* Standard

In explaining the application of *Chevron U.S.A. Inc*. v. *Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), the Court wrote, "the fundamental inquiry at the first level of the *Chevron* analysis" is whether "*Congress* has authorized the agency to make rules to fill in the gap." Mem.Op. at 13 (emphasis in original). The Court further explained that"there is no indication that Congress charged the FEC with clarifying anything, either explicitly or implicitly,

[1]An organization such as a labor union or large membership organization could segregate out donations from multiple members into a separate account such that no member contributed over $950. This would result in disclosure of no donors or members whatsoever if the organization financed an electioneering communication from this account.

and the text favors the plaintiff at *Chevron* step one." *Id*. at 16. The standard applied by the Court to guide its *Chevron* Step One analysis is not what *Chevron* requires.

In *Chevron*, the Supreme Court explained that the first step of its inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. The precise question at issue in this case is what disclosure is required when a corporation or labor union finances an electioneering communication from its general treasury funds. Congress could not possibly have spoken directly to the precise question at issue because the very plain intent of Congress was to ***completely*** prohibit corporate and labor union financed electioneering communications such that neither organization of either type would ever file a disclosure report. Thus, with respect to the *specific issue before the Court*, Congress was either silent or ambiguous. In either case, "Congress has not spoken clearly, and a permissible agency interpretation of the statute merits judicial deference." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

The plain language of the statute, supplemented by the legislative history, demonstrates this point. In a footnote, the Supreme Court added, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. The FEC was faced with a situation in which the intention of Congress was clear, but the Supreme Court determined that intention to be unconstitutional. The question of whether "Congress has explicitly left a gap for the agency to fill" is a separate and distinct question from "whether Congress has directly spoken to the precise question at issue." The Court has treated these two questions as one and the same. We believe this is error.

It is not necessarily the case that when Congress does not speak directly to a precise issue that it delegates to the administering agency the authority to do so. A finding that "Congress has explicitly left a gap for the agency to fill," simply serves as a signal to the reviewing court to consider the matter under step two of the *Chevron* analysis. It does not answer the question, however, of "whether Congress has directly spoken to the precise question at issue."

The Court noted, "[a]ccording to defendant, the rule it promulgated is appropriate, in part, because the Supreme Court took action that rendered the statute ambiguous." Mem.Op. at 13. This is an understatement: the Supreme Court's decision in *Wisconsin Right to Life, Inc*., altered the legal landscape to the point where that which Congress had specifically prohibited was deemed constitutionally protected and permissible.[2] *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 551 U.S. 449 (2007). The Court indicated that this case is analogous to *Penn. Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) and *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). However, those cases involved questions of whether an agency had the authority to extend otherwise *valid* statutory language to situations that Congress had not contemplated. While *Yeskey* may indeed stand for the proposition that "[t]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; it demonstrates breadth," this case has nothing to do with the flexibility and potential breadth of statutory language. *Yeskey*, at 212 (1998). This case is about what happens when a court *explicitly permits* that which Congress has forbidden by invalidating a portion of a statute, excising that portion of the statute, while leaving in place a corollary provision specifically designed to work

[2]To the extent that the FEC indicated that corporations and labor unions must file reports "as required by" the statute that statement was either incorrect or misconstrued by the Court. Memo Op. at 15. The statute *as adopted by Congress* did not require corporations and labor unions to file electioneering communications reports. Rather, it prohibited them from making electioneering communications altogether, meaning the disclosure provisions were wholly inapplicable and irrelevant to them.

in conjunction with the invalidated and excised provision. And this is an inquiry that necessarily falls beyond step one of the *Chevron* analysis.

The Court's conclusions about the degree of ambiguity and the existence of a "gap" are informed by a key conclusion: "the disclosure rules did apply as written to at least *some* corporations." Mem. Op. at 18. We dispute this contention and submit that the legislative history of the Wellstone Amendment conclusively demonstrates that the intent and purpose of the Wellstone Amendment was to remove the ability of any corporation to make an "electioneering communication" by expressly applying a uniform prohibition to *all* corporations. Speaking on the Wellstone Amendment, Senator John Edwards explained:

> The problem with what Senator Wellstone is attempting to do is there is a U.S. Supreme Court case, the FEC v. The Massachusetts Citizens for Life, that is directly on point, saying that these 501(c)(4)s have a limited constitutional right to engage in electioneering to do campaign ads. There are some limits, but unfortunately if you lump them in with unions and for-profit corporations, you create a very serious constitutional problem because the U.S. Supreme Court has already specifically addressed that issue.
>
> So the reason Senator Feingold and Senator McCain are opposing this amendment is the same reason that I oppose this amendment: It raises very serious constitutional problems. The U.S. Supreme Court, in fact, in 1984 [sic] specifically ruled on this question.
>
> What we urge the Members of the Senate to do is not support this amendment, to vote for tabling. Those people who are in favor of real and meaningful campaign finance reform we hope will support Snowe-Jeffords, support McCain-Feingold, and vote to table the Wellstone amendment.

147 Cong. Rec. at S2883 (statement of Sen. J. Edwards). Shortly thereafter, the Wellstone Amendment was approved by the Senate, by a vote of 51-46, over the objections of the bill's sponsors, Senators McCain and Feingold, and also over the objections of the proponents of the alternative approach, Senators Snowe and Jeffords. *Id*. at S2884. As a result, the Wellstone Amendment became part of the final legislation and all present fully understood that it applied to

all corporations, for-profit and non-profit, and that it was specifically designed *not* to include the *MCFL* exception – as the floor statement of Senator Edwards makes clear. While the lead sponsors of the McCain-Feingold legislation may have *preferred* a provision that included an exception for *MCFL* organizations, that is not what Congress adopted.

Senators McCain, Feingold, Snowe, and Jeffords subsequently submitted rulemaking comments to the FEC in which they advised, "in order for the provision to comply with the Supreme Court's ruling in the MCFL case, the prohibition should not apply to qualified nonprofit corporations as provided in 11 CFR § 114.10." Comments of Senators McCain, Feingold, Snowe, and Jeffords, and Representatives Shays and Meehan (Aug. 23, 2002). The FEC's subsequent adoption of a *MCFL* exemption in the electioneering communications provisions was contrary to Congressional intent.

C. Definition of "Person"

HLF's arguments pertaining to the intended scope and application of BCRA's electioneering communication provisions are also relevant to the Court's conclusions regarding the use of the term "person." As demonstrated above, and as originally enacted, Section 203 of BCRA prohibited *all* corporations and labor organizations from making electioneering communications with corporate or union general treasury funds.

Thus, while Congress used the term "person" to define the scope of the electioneering communication disclosure provision, it very clearly did not intend for that term to ever have any impact on corporations or labor organizations. No corporation or labor union would ever file an electioneering communication report because no corporation or labor union would ever make an electioneering communication. Thus, while the term "person" is used in the electioneering

communications provisions, Congress never intended for that term to have any application or relevance to corporations or labor unions.

In fact, BCRA's electioneering communications provision uses the term "person" in two very different ways. For example, 2 USC 434(f)(1) refers to a "*person* who makes a disbursement for the direct costs of producing and airing electioneering communications…." At 2 USC § 434(f)(3)(C), however, Congress provided that "a communication which refers to a clearly identified candidate or 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 . . . the Congress; or (ii) in the State the candidate seeks to represent, in the case of a candidate for Senator." The latter use of "persons" most likely refers only to individuals. Congress appears to have used the term "person" flexibly and not necessarily as a term of art. Within the same statutory provision, it was used in one instance to refer to individuals; in another instance Congress intended that it not have any application to corporations and labor unions, who were prohibited from engaging in the activity described.

In 2002, when the FEC was first considering its electioneering communications regulations, the agency acknowledged being flummoxed by this inconsistent use (and apparent misuse) of what had previously been a defined term of art: "It is not clear from the legislative history of BCRA whether the term "person" in new 2 U.S.C. 434(f)(3)(c) is intended to be restricted to only individuals, households, U.S. citizens, voters, those within the voting age population, or any other category of 'person.'" Notice of Proposed Rulemaking on Electioneering Communications, 67 Fed. Reg. 51,133 (Aug. 7, 2002).

To the extent that the FEC engaged in a "policymaking function" in 2007, its actions were entirely consistent with *Chevron* itself. Mem. Op. at 2. Here, the "intent of Congress" was clear: corporations were barred from financing electioneering communications, and therefore would never be in the position of filing disclosure reports. Accordingly, it was plain that "Congress ha[d] not directly addressed the precise question at issue," namely, what information must be reported to the FEC on a corporation's electioneering communication report. As the Supreme Court recognized, "[t]he power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (citing *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). Here, Congress left a "gap" in the statute when it determined that corporations were prohibited from making electioneering communications. It did not address what disclosures were required of prohibited speakers. When the Supreme Court determined that these prohibited speakers were actually permissible speakers, that "gap" required attention.

Congress is of course free to now fill that gap, and efforts have been made to do so. Plaintiff's twice-introduced DISCLOSE Act is just such an effort. H.R 5157; H.R. 4010. However, the absence of a Congressional response in no way diminishes the FEC's statutory authority to "make, amend, and repeal [] rules, pursuant to the provisions of the [APA], as are necessary to carry out the provisions of [FECA]." 2 U.S.C. § 437d(a)(8).

If the FEC's regulatory response "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, the Court should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845 (citing *United States* v. *Shimer*,

367 U.S. 374, 382, 383 (1961)). This question of "reasonableness" is addressed in part two of the *Chevron* analysis, which the Court declined to reach, in error.

CONCLUSION

For the foregoing reasons, and for the reasons provided in CFIF's memorandum in support of its motion for stay pending appeal and adopted by HLF, this Court should grant HLF's motion for stay pending appeal.

Dated: April 5, 2012

Respectfully submitted,

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