PANEL DECISION ISSUED JANUARY 21, 2016

Nos. 15-5016 & 15-5017

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

CHRISTOPHER VAN HOLLEN, JR.,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

CENTER FOR INDIVIDUAL FREEDOM,
Intervenor-Defendant-Appellant,

HISPANIC LEADERSHIP FUND,
Intervenor-Defendant-Appellant,

On Appeal from the United States District Court for the District of Columbia
No. 1:11-cv-00766-ABJ (Hon. Amy Berman Jackson)

APPELLANT HISPANIC LEADERSHIP FUND'S OPPOSITION TO APPELLEE VAN HOLLEN'S PETITION FOR REHEARING EN BANC

Dated: April 5, 2016

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GLOSSARY

BCRA	Bipartisan Campaign Reform Act, 116 Stat. 81
CFIF	Center for Individual Freedom
FEC	Federal Election Commission
HLF	Hispanic Leadership Fund
JA	Joint Appendix
MCFL	*FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986)
WRTL II	*FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007)

INTRODUCTION

Two panels of this Court have reversed the district court in this case. Both panels reversed the district court unanimously. Van Hollen[1] did not seek *en banc* review of the first panel's reversal of the district court ruling under *Chevron* Step I. Van Hollen now seeks *en banc* review under *Chevron* Step II of the second panel's decision upholding the FEC's Electioneering Communication Disclosure Regulation.

In upholding the FEC's regulation under *Chevron* Step II and *State Farm*, the second panel used routine administrative law analysis to arrive at the conclusion that the FEC sufficiently explained its rationale and sufficiently discussed the issues. The second panel also ruled that the FEC did not frustrate Congress's policy of *expanding* disclosure under BCRA. Congress wanted to expand disclosure, but not at the expense of the First Amendment. Congress wanted to *expand* disclosure, but Congress did not want *maximum* disclosure *at all costs*. For the FEC to adopt Van Hollen's proposed "maximization of disclosure policy" would violate the FEC's unique mandate to refrain from unnecessary infringement on First Amendment rights.

[1] Congressman Van Hollen is currently a candidate for United States Senate in Maryland. Maryland's congressional primary is scheduled for April 26, 2016. News reports indicate this is a hotly contested primary. Should Congressman Van Hollen not prevail – and therefore no longer be a candidate for federal office in 2016 – it is not clear that he would have standing to maintain this petition for *en banc* review beyond that date.

This Court should uphold the second panel's decision as a routine analysis of administrative law. To reverse the panel would jeopardize settled administrative law precedent.

BACKGROUND

The U.S. Supreme Court's ruling in *FEC v. Wis. Right to Life, Inc.* ('*WRTL II*') 551 U.S. 449 (2007) declared unconstitutional BCRA's ban on corporations' and labor unions' ability to use general treasury funds to make electioneering communications. This ruling created a 'complicated situation' that Congress likely did not expect when it enacted the corporate and labor union prohibition on electioneering communications in 2002. *See Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) ('first panel'). Both the complicated situation and lack of plain meaning in the statute permitted the FEC to 'fill the gap' under its delegated authority. *See id*.

In *WRTL II*'s wake, the FEC initiated rulemaking proceedings to adjust its BCRA regulations to "apply to a class of speakers Congress never expected would have anything to disclose." *Van Hollen v. FEC*, 811 F.3d 486, 490-491 (D.C. Cir. 2016) ('second panel'). The FEC requested comment on two alternatives: the first required the disclosure of all of donors who donated $1,000 or more in a calendar year, the same requirement as applied to qualified non-profit corporations. The second option would exempt corporations and unions from disclosing anything. *See*

id. at 491. After receiving 27 comments, some expressing concerns about reporting burdens, reporting persons unrelated to the communication, and privacy concerns, *see e.g.*, (JA99, 139, 152-54 163, 204, 206, 243-44), the FEC chose a middle ground. The FEC's adopted regulation required corporations and unions to disclose all donors who donated $1,000 or more for the purpose of furthering electioneering communications. *See Van Hollen*, 811 F.3d at 491.

Congressman Van Hollen challenged the FEC's regulation under *Chevron*. Twice the district court agreed with Van Hollen, invalidating the regulation first on *Chevron* Step I grounds and, after reversal and a remand from the first panel, then again on *Chevron* Step II grounds. On both occasions, panels of this Court reversed the district court unanimously. *See Van Hollen*, 694 F.3d at 112; *Van Hollen*, 811 F.3d at 502. The first panel's decision that the FEC acted pursuant to delegated authority to fill a gap in the statute—making the level of disclosure a policy question left to the FEC to answer—largely foreordains the second panel's result. *Van Hollen*, 694 F.3d at 110-11; *Van Hollen*, 811 F.3d at 493.

STANDARD OF REVIEW

The rules of appellate procedure state unequivocally that hearings *en banc* are not favored. *See* Fed. R. App. P. 35(a). Courts will ordinarily deny petitions for *en banc* review unless it is shown that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or the proceeding involves a question of

exceptional importance." Fed. R. App. P. 35(a)(1-2). The standard to obtain *en banc* review is demandingly high and is granted only "[i]n the rarest of circumstances." *See Bartlett on behalf of Neuman v. Bowen*, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J., concurring the denial of rehearing *en banc*); *see Jenkins v. Tatem*, 795 F.2d 112, 114 (D.C. Cir. 1986).[2]

Petitions for reharing *en banc* are denied where the petitioners challenge a panel's discussion that "[i]s not necessary to the disposition of the merits." *See Ghaleb Nassar Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring in the denial of rehearing *en banc*).

ARGUMENT

I. The Second Panel Held That The FEC Properly Vindicated Its Mandate To Not Unnecessarily Infringe First Amendment Rights When It Adopted Its Purpose Driven Disclosure Regulation.

The second panel rightly upheld the FEC's Electioneering Communication Disclosure Regulation on three grounds: the support rationale, the burden rationale, and the First Amendment rationale. *See* (JA301, 311). Van Hollen disputes only the

[2] Experience demonstrates that *en banc* review is granted rarely. For example, between 1991 and 2001, this Court decided 7,662 cases. From these cases, 1,784 petitions for rehearing *en banc* were filed. Only 27—1.5%—were granted. *See* Boynton, Brian M. & Ginsburg, Douglas H., The Court En Banc: 1991-2002, 70 GEO. WASH. L. REV. 259, 263 (2002). Furthermore, from 1995 to 2001, only 0.18%, or 1 in every 555 of the cases "[d]ecided by a unanimous panel were reheard by the court *en banc*." *See id*. at 264-65.

First Amendment rationale. Van Hollen wrongly asserts that the second panel incorrectly relied upon dissenting opinions for the proposition that the First Amendment required the FEC to narrowly tailor its regulation. The second panel relied on Supreme Court precedent. *See, e.g., Tally v. California*, 362 U.S. 60 (1960). Second, Van Hollen wrongly contends that the second panel advanced a rationale that the FEC did not advance. (Pet. 13-15).

i. The FEC Justified Its Disclosure Regulation On The Basis That It Protected First Amendment Rights.

The FEC justified its Electioneering Communication Disclosure Regulation on the basis that it protected First Amendment rights. In its Explanation and Justification the FEC states that its purpose driven disclosure regulation is "*narrowly tailored to address many of the commenters' concerns regarding individual donor privacy*. See Section D below." (JA301) (emphasis added). Then, in Section D, after justifying its support rationale and its burden rationale, (JA311), the FEC notes the balance it struck in its adopted regulation still requires the public disclosure of information "[a]bout those persons who actually support the message conveyed by the [electioneering communications]..." while not imposing a "significant burden" on corporations and labor unions to disclose "[v]ast numbers of customers, investors, or members, who have provided funds for purposes *entirely unrelated to the making of* [electioneering communications]." (JA311) (emphasis added).

The D.C. Circuit does not require that an agency's explanation "be a model of analytical precision." *Van Hollen*, 811 F.3d at 496-97 (quoting *Dickson v. Sec. of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995)). Instead, for a regulation to survive, the reviewing court must be able to "reasonably discern the agency's analytical path." *Id*. at 497 (quoting *Bowman Transp. Inc. v. Ark.-Best Freight Sys. Inc.*, 419 U.S. 281, 286 (1974)).

In justifying modified Alternative 1, the FEC used terms of art that courts use when analyzing the constitutionality of campaign finance regulations. The FEC's concern about narrow tailoring, avoiding significant burdens, and avoiding the disclosure of persons 'entirely unrelated' to the speech, is language courts use to analyze the constitutionality of campaign finance regulations. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("Compelled disclosure, in itself, can seriously infringe on privacy of association and belief."); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57, 1459 (2014) (acknowledging that the regulations that burden speech must be narrowly tailored and noting that disclosure requirements burden speech but not unconstitutionally so); *FEC v. Mass. Citizens for Life, Inc.* ('*MCFL*'), 479 U.S. 238, 261 (1986) (noting that the FEC can achieve their goals "[b]y means far more narrowly tailored and less burdensome..."); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (noting that to satisfy the First Amendment, disclosure requirements must have a *substantial relationship* to the government's

sufficiently important interest). The FEC was justifying its disclosure regulation using language drawn from tests to ensure campaign finance regulations do not violate the First Amendment. The second panel was therefore able to "reasonably discern the agency's analytical path." *Van Hollen*, 811 F.3d at 497 (quoting *Bowman Transp. Inc.*, 419 U.S. at 286). The FEC sufficiently explained its First Amendment reasons for striking the balance that it did. *See id*. at 499-500.

ii. The Second Panel's Discussion Of The Supreme Court's Disclosure Jurisprudence Cannot Conflict With The Holdings Of This Circuit Because It is Dicta.

The second panel noted that the FEC is unique among the federal agencies because its mandate requires the regulation of "[c]ore constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *Id*. at 499. (citing and quoting *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003)). This is why the FEC has a duty to "[a]ttempt to avoid unnecessarily infringing First Amendment interests." *AFL-CIO*, 333 F.3d at 179. Thus, the second panel noted that the FEC's efforts at tailoring the disclosure regulation "[t]o satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate." *Van Hollen*, 811 F.3d at 499. The second panel held that the FEC's purpose test struck the appropriate balance between the public's need for disclosure with the interests of not disclosing every customer, investor, and member of an organization. *See id*. at 501. The purpose requirement contained in the disclosure

regulation was an appropriate exercise of the FEC's "[u]nique prerogative to safeguard the First Amendment..." *Id*. (citing *AFL-CIO*, 333 F.3d at 170).

The second panel's discussion concerning the current tension within the Supreme Court's disclosure jurisprudence is dicta. The second panel's discussion highlights that on the one hand, the Supreme Court has upheld disclosure statutes requiring the disclosure of certain contributors, *see, e.g., Citizens United v. FEC*, 558 U.S. 310, 370-71 (2010), but, on the other hand, the Supreme Court declared unconstitutional Ohio's prohibition of anonymous speech in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); *see Van Hollen*, 811 F.3d at 499-501. These two lines of cases are "[f]iercely antagonistic." *Id*. at 500. This discussion, however, was unnecessary to the decision that the FEC promulgated a regulation that reasonably interpeted a statute that used a defined term of art containing a purpose element – contributor – in a manner that properly balances First Amendment rights with disclosure. (JA311).

Panels within this Circuit are bound only to the holdings of panels and not the dicta. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC,* No. 13-1074, 2015 U.S. App. LEXIS 1487 at *3 (D.C. Cir. Jan. 30, 2015) (Circuit Judges Brown and Wilkins and Senior Circuit Judge Silberman, concurring in denial of petition for rehearing *en banc*); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 897 (D.C. Cir.

1992) ("Binding circuit law comes only from the holdings of a prior panel, not from its dicta.").

The second panel's discussion of the tension in the Supreme Court's disclosure case law is dicta that the panel did not purport to resolve. Rather, the second panel relied on binding circuit precedent in *AFL-CIO v. FEC* to note that the FEC's balancing was necessary to fulfill its unique mandate to refrain from unnecessary infringement of First Amendment rights. *See Van Hollen*, 811 F.3d at 499, 501.

II. The Second Panel Rightly Concluded That The FEC's Regulation Does Not Frustrate The Policy Of Congress.

Shays recognized that "[F]ederal campaign finance law is complex, and BCRA is no exception." *Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005). That is especially true here. When crafting the disclosure statute with its desire to "shine[] sunlight on the undisclosed expenditures for sham issue advertisements", 147 Cong. Rec. S3022-05, S3034 (March 28, 2001) (statement of Sen. Jeffords), Congress "took great care in crafting . . . language to avoid violating the important principles in the First Amendment." 147 Cong. Rec. S3033 (daily ed. Mar. 28, 2001) (statement of Sen. Jeffords). For example, as part of the "Snowe-Jeffords Amendment" to BCRA, Senator Snowe placed into the record an academic's analysis of her amendment explaining that it "requires disclosure of large contributions *designated for such ads*." 147 Cong. Rec. S3005, 3038 (daily ed. March 29, 2001) (statement of Sen. Snowe)

(emphasis added). In a materially similar bill, Senator Snowe explained that the disclosure provision was drafted narrowly to avoid abridging First Amendment rights. *See* 144 Cong. Rec. S972-01, S973 (daily ed. Feb 25, 1998). The second panel was correct in rejecting Van Hollen's contention that anything less than maximum disclosure would frustrate the purpose of Congress. (Pet. at 16); *Van Hollen*, 811 F.3d at 494.

Desperate to generate an intra-circuit split, Van Hollen contends that the second unanimous panel's phrase "results-oriented brand of purposivism" was a rejection of this Court's holding in *Shays*. (Pet. at 16). In fact, the second panel was describing Van Hollen's and the district court's position. *See Van Hollen*, 811 F.3d at 494. The second panel begins noting that, according to Van Hollen and the district court, BCRA's legislative history was to inform voters of who was attempting to influence elections. *See id*. (citing and quoting *Van Hollen v. FEC*, 74 F. Supp.3d 407, 433-34 (D.D.C. 2014)). *Then*, the second panel says that the "[a]rt of statutory construction has moved beyond this particularly results-oriented brand of purposivism." *Id*.

The second panel did not reject *Shays*. The second panel merely recognized that Congress both wanted disclosure but also "took great care in crafting . . .

language to avoid violating the important principles in the First Amendment." *Id.* (citing 147 Cong. Rec. at S3033).[3]

Furthermore, basic principles of administrative law mandate that since the case reached *Chevron* Step II's question, there was already a judicial determination that Congress was silent on the precise question at issue. Van Hollen did not seek *en banc* review from a unanimous first panel's *Chevron* Step I determination. Therefore, "[c]ongressional silence of this sort is, in *Chevron* terms, 'an implicit delegation from Congress *to the agency* to fill in the statutory gaps.'" *See Van Hollen*, 811 F.3d at 495 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (emphasis supplied by second unanimous panel)). The second panel then held that due to BCRA's text (using a defined term of art 'contributor' that contains a purpose element), history (Senators Jeffords' and Snowe's comments), and purposes (11 C.F.R. 104.20(c)(1-6) requires, *inter alia*, the disclosure of those individuals who control an entity's activities), the FEC's electioneering communication disclosure regulation consequently passes the low threshold of being "rationally related to the goals of the statute." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011); *see also Continental Air Lines, Inc. v. Department of Transp.*, 843

[3] Since 2007, Congress has failed to amend the electioneering communication statute, despite efforts to do so, even by Congressman Van Hollen himself. *See Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983); *see* H.R. 5175, 111th Cong. § 211(b)(1)(B) (2010).

F.2d 1444, 1453 (D.C. Cir. 1988) (noting that an agency need not adopt a regulation that best promotes the goals of Congress but only a regulation that is compatible with the goals of Congress); *Van Hollen*, 811 F.3d at 495. The FEC's regulation certainly does not contravene *Shays* or the "[p]recedent on which it drew." (Pet. at 17).

Nor can it be said that *Shays* compels this Court to affirm the district court. The purpose driven disclosure regulation requires the identification of those individuals responsible for the advertisements. Prior to BCRA, groups could avoid disclosure requirements so long as these groups did not use *Buckley*'s magic words. *See Van Hollen*, 811 F.3d at 489. After BCRA, electioneering communications require disclosure reports identifying *inter alia* the individual or individuals who control an entity's activites. *See, e.g.*, 11 C.F.R. § 104.20(c)(2-3).

III. This Case Is A Routine Administrative Law Case; Not An Exceptionally Important Case Warranting *En Banc* Review.

Van Hollen never explains how this case is an exceptionally important case warranting *en banc* review. Instead, Van Hollen persists in arguing that both the FEC and the second panel erred in its administrative law analysis. Even if true, these errors do not satisfy the high burden necessary to obtain *en banc* review.

First, Van Hollen's claim that the FEC's regulation cripples BCRA's disclosure regime is hyperbole. (Pet. at 18). The FEC requires the public disclosure of, *inter alia*, who paid for the communication; who directs or controls the entity's

activities; who has custody of the entity's books; and the names and addresses of the persons who contributed $1,000 or more in the previous calendar year for the purpose of funding the communication. *See* 11 C.F.R. § 104.20(c)(1-3, 9). Even with the purpose requirement, BCRA's disclosure regime is not crippled but expanded.[4]

Second, Van Hollen challenges the FEC's adoption of the independent expenditure purpose requirement because the FEC did not do so in 2003. (Pet. at 19). The 2003 rulemaking involved a statute that prohibited most entities from using their general treasury funds to make electioneering communications. Only qualified non-profit corporations could use general treasury funds to make electioneering communications. *See WRTL II*, 551 U.S. at 455-57; *MCFL*, 479 U.S. at 263-64 (narrowly defining qualified nonprofit corporations).

This is why the *WRTL II* decision presented the FEC with a "complicated situation" requiring that the FEC adapt the electioneering communication regime to the many new entities that Congress previously prohibited from speaking. *See Van Hollen*, 694 F.3d at 111; *see Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (holding that an agency must be given ample latitude to adapt its rules to changing circumstances). The FEC acknowledged *WRTL II*'s impact and explained that

[4] In fact, the district court's order is what crippled First Amendment speech. *See* FEC Electioneering Communications Table 1, *available at* http://www.fec.gov/press/summaries/2012/tables/ec/EC1_2012_24m.pdf. *See* HLF's Opening Br. at 44-45 (Document #1548356, April 21, 2015).

Congress had not spoken on the precise issue of disclosure for entities that Congress had previously prohibited from speaking. (JA28, 301, 311-12). A reviewing court could therefore "reasonably discern the agency's analytical path" that the FEC needed to adapt its rule to circumstances Congress likely did not foresee. *See Bowman Transp. Inc.*, 419 U.S. at 286. Comparing disclosure considerations in 2003 to 2007 is an exercise in comparing apples to oranges.

Third, Van Hollen contends that the FEC did not address the separate segregated fund option despite adopting it in 2003. (Pet. at 19). The FEC did address this concern. The AFL-CIO comment—representing 15 million members and 60 organizations—contended that the segregated bank account was not a "meaningful alternative" because it undermines *WRTL II*'s holding that the labor union could use its general treasury funds to make electioneering communications. (JA163). The FEC credited the labor unions' comment. (JA311). Imposing separate segregated fund burdens on committees whose major purpose is not the election or defeat of candidates is unconstitutionally burdensome. *See MCFL*, 479 U.S. at 252-54. The government cannot impose a prohibitive burden as the price for exercising First Amendment rights. *See Citizens United*, 558 U.S. at 337-38, 351.

Fourth, Van Hollen complains that the FEC did not address the concern that the FEC's purpose driven regulation would lead to a proliferation of ads by entities with misleading names. (Pet. at 21). Van Hollen mischaracterizes the comment he

relies upon, describing it as opposed to a narrow approach. In fact, this comment was urging the FEC to adopt Alternative 1 and reject Alternative 2, which exempted electioneering communications from the disclosure requirements entirely. (JA42-43); (Pet. at 21). The FEC followed the advice of this comment and rejected Alternative 2. (JA301).

The FEC did consider the so-called decline in disclosure and determined that its regulation struck the appropriate balance between disclosure and the burden and privacy interests of the speakers. *Van Hollen*, 811 F.3d at 501; (JA311).

CONCLUSION

For the foregoing reasons, and the reasons articulated in CFIF's brief, incorporated into this brief by reference, this Court should deny Van Hollen's petition for a rehearing *en banc*.

Dated: April 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2016, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

Dated: April 5, 2016 Respectfully submitted,

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