Oral Argument Not Yet Scheduled

No. 18-5261

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

CROSSROADS GRASSROOTS POLICY STRATEGIES.
Appellant,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *ET AL.*,

Appellees

On appeal from the United States District Court
for the District of Columbia, No. 16-259 (Hon. Beryl A. Howell)

Amicus Curiae Brief of the Institute for Free Speech in Support of Appellant

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March 18, 2019

CERTIFICATES AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *Amicus Curiae* Institute for Free Speech submits its Certificate as to Parties, Rulings, and Related Cases.

A. Parties and *Amici*[1]

Appellant is Crossroads Grassroots Policy Strategies, intervenor-defendant below. Appellees, both Plaintiffs below, are respectively Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak. The Federal Election Commission was a defendant in district court, but it was unable to authorize an appeal and is also an Appellee. In addition to its own brief, *Amicus* is aware that briefs will be filed by other parties.

B. Rulings Under Review

On August 3, 2018, in *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Howell, J.), the United States District Court for the District of Columbia vacated 11 C.F.R. § 109.10(e)(1)(vi). In addition, on March 22, 2017, Judge Howell issued an earlier opinion regarding motions to dismiss, which is reported at 243 F. Supp. 3d 91.

[1]The Institute reaffirms its previous filing, stating that it has no parent company, and that no publicly-held company has a 10 percent or greater ownership interest in it.

C. Related Cases

There are no related cases, aside from Crossroads Grassroots Policy Strategies's earlier emergency motion for a stay pending appeal, reported at 904 F.3d 1014 (D.C. Cir. 2018) (*per curiam*) (Henderson, Millett, and Wilkins, JJ.)

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GLOSSARY

CREW ..... Citizens for Responsibility and Ethics in Washington

Crossroads GPS..... Crossroads Grassroots Policy Strategies

FEC..... Federal Election Commission

FECA..... Federal Election Campaign Act

PAC..... political committee

STATUTES AND REGULATIONS

The pertinent statutes and regulations are provided in Appellant's Brief and Addendum.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE [2]

Founded in 2005, the Institute for Free Speech is a nonpartisan, nonprofit organization that works to protect and defend the rights to free speech, assembly, press, and petition. As part of that mission, the Institute often represents clients in cases both before and against the Federal Election Commission and is familiar with the mosaic of constitutional and statutory law informing that body's regulatory and enforcement decisions.

The Institute certifies that its brief will be of unique help to the Court, as the filing will provide an experienced perspective on both points.

Counsel for all Parties have consented to the Institute's participation as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has recognized that because it "has as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals

[2] No other party's counsel authored this brief in whole or in part, nor did any person contribute money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

and groups only insofar as they act, speak[,] and associate for political purposes," the Federal Election Commission ("Commission" or "FEC") is "[u]nique among federal administrative agencies." *Am. Fed'n of Labor-Congress of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) ("*AFL-CIO*") (quotation marks and citation omitted). The Commission's delicate task is especially complicated because much of the statute it administers, the Federal Election Campaign Act ("FECA"), has been invalidated or modified by the judiciary, and because Congress has often abdicated its responsibility to re-write or reform the statute in response.

Thus, "the plain language, structure, history, and purpose of the statute at issue," *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 316 F. Supp. 3d 349, 387 (D.D.C. 2018) ("*CREW*"), often demonstrates an unconstitutional Congressional intent, rendering a rote application of "the familiar *Chevron* framework," *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1279 (Fed. Cir. 2015), insufficient.

Such was the case here. The district court's application of *Chevron* has had a profoundly negative effect: a regulation that limited the scope of damage to First Amendment privacy interests – interests identified by the Supreme Court in the context of this very statute – was eliminated. That decision will affect many organizations not before this court, including entities that behave very differently

from Appellant Crossroads Grassroots Policy Strategies ("Crossroads GPS"), and groups lacking the means to adequately defend themselves when the FEC abdicates the defense of its own enforcement decisions. Left to stand, the district court's opinion will open the door to future efforts to conduct regulation-through-litigation by ideological interests seeking to vacate rules with which they disagree. Those decisions will be made by district courts, based upon the specific facts of a carefully chosen defendant, instead of by an expert agency with the benefit of notice and comment. Nevertheless, those judicial rulings will function, for all intents and purposes, as rules of general applicability.

In addition, vacatur of 11 C.F.R. § 109.10(e)(1)(vi) inadvertently created new constitutional difficulties, which the lower court failed to address. While the district court professed to limit its ruling only to those donors giving "for political purposes," it failed to explain that inherently vague term. As a result, groups cannot know whether their intended activities will fall within or without that constitutionally-required safe harbor. Reversal would close this unwisely opened box.

ARGUMENT

I. The Federal Election Commission's regulation properly balanced cornerstone First Amendment precedent against the plain text of the Federal Election Campaign Act.

The FEC has been tasked with "mak[ing], amend[ing], and repeal[ing] such rules…as are necessary to carry out" the Federal Election Campaign Act. 52 U.S.C.

§ 30107(a)(8). This routine statutory language belies the unusual nature of the FEC's mission.

FECA operates in an area of extraordinary constitutional sensitivity, directly regulating the "free discussion of governmental affairs…discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Ala.*, 384 U.S. 214, 218-219 (1966). "[T]here is practically universal agreement," *id.* at 218, that in such circumstances "the First Amendment 'has its fullest and most urgent application.'" *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). But the First Amendment does not merely protect speech and discussion—it also defends freedom of association and the ability to create—and fund—organizations that collectively enhance the speech of their members. Six uninterrupted decades of Supreme Court precedent have held that this right embraces a donor's privacy in choosing to associate with such an organization. *NAACP v. Ala.*, 357 U.S. 449, 462 (1958) ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations"). As Justice Thurgood Marshall acknowledged, "[t]he First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the

organization, absent a compelling governmental interest requiring disclosure." *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 98 (1974) (Marshall, J., dissenting).

FECA's registration, reporting, and disclosure provisions, which advance "transparency, an extra-constitutional value," *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016), operate in this area of core constitutional concern. *Buckley*, 424 U.S. at 64 ("We long have recognized th[e] significant encroachments on First Amendment rights of the sort that compelled disclosure imposes…"); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("[I]t is now beyond dispute that freedom of association for the purpose of advancing ideas…[is] protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference").

Indeed, the FEC's "sole" mission is the regulation of precisely these First Amendment liberties. *AFL-CIO*, 333 F.3d at 170. [3] It occupies a "[u]nique" space in

[3] Initially, there was no Federal Election Commission to enforce the Federal Election Campaign Act. But after the first prosecution brought under FECA was engineered by John Mitchell's Justice Department against a group calling for President Nixon's impeachment, *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972), Congress constructed the FEC, ultimately providing it with an even-membered, bipartisan structure in recognition of FECA's mission to "regulate[]…core constitutionally protected activity." *AFL-CIO*, 333 F.3d at 170; Legislative History of the Federal Election Campaign Act Amendments of 1976 at 89 (design intended to ensure the FEC could not "become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate") (written statement of Sen. Alan Cranston); https://transition.fec.gov/pdf/legislative_hist/legislative_history _1976.pdf.

the firmament of the administrative state. *Id.* This was not lost on the courts that first reviewed FECA's restrictions in the 1970s and sharply curtailed the reach of federal law, regardless of Congress's desire "to achieve 'total disclosure' by reaching 'every kind of political activity.'" *CREW*, 316 F. Supp. 3d at 371 (quoting *Buckley*, 424 U.S. at 76).

For instance, under FECA, contributions and expenditures were defined by reference to their purpose and reached money raised or spent "for the purpose of…influencing" an election—a startlingly subjective standard that the statute did not define. *Buckley*, 424 U.S. at 78 (quotation marks omitted, ellipsis in original); *see id.* at 77 ("It appears to have been adopted without comment from earlier disclosure Acts"). Concerned that such vague language was intended to achieve "total disclosure" by regulating the totality of civil society, the *Buckley* Court facially narrowed those provisions to cordon their reach.

Congress never responded to *Buckley* by imposing a constitutional definition of those terms. The underlying definition of "contribution," which is essential to understanding the meaning of both 52 U.S.C. § 30104 and 11 C.F.R. § 109.10(e)(1)(vi) at issue here, is still the constitutionally problematic "anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A). And this is no outlier: Congress has refused to properly re-define the similarly overbroad definition of "expenditure," *Buckley*, 424

U.S. at 79-81, repeal the ban against corporate independent expenditures, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), recognize the existence of independent expenditure-only committees ("Super PACs"), *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), repeal the aggregate contribution limits, *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014), or codify the major purpose requirement for political committees ("PACs") announced in *Buckley*, 424 U.S. at 79. It is only carefully constructed Commission regulations that keep these unconstitutional statutes from collapsing in on themselves, taking much of the edifice of federal campaign law with them.

In short, the Commission must "administer[]" its "particular statute" in this constitutionally-fraught environment. *Van Hollen*, 811 F.3d at 499. Focusing on Congress's limited 1979 work regarding independent expenditure reporting, as the district court did, is akin to critiquing impressionist artwork from a vantage point of six inches. Pulling back, it becomes plain that "every action the FEC takes implicates fundamental rights," and yet the Commission is constantly applying statutory text that the Supreme Court has repeatedly found to have been enacted by a Congress intending unconstitutional results. *Van Hollen*, 811 F.3d at 499.

It is against this backdrop that the FEC interpreted FECA's demand that "[e]very person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar

year shall file a statement" that "identifi[es]…each person who made a contribution in excess of $200 to the" maker of independent expenditures "for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(1)-(2). The FEC's narrow reading, reaching only donors that earmark a particular gift for a particular independent expenditure, ensures that the statutory scheme remains loyal to a greater constitutional framework. 11 C.F.R. § 109.10(e)(1)(vi) ("…which contribution was made for the purpose of furthering the *reported* independent expenditure") (emphasis supplied).

Below, this nuance fell victim to the buzzsaw of *Chevron*. That precedent fails to explain how agencies should interpret statutes that have been placed in judicial receivership due to their constitutional infirmities.[4] For example, the district court showed little concern that its understanding of the "plain meaning" of 52 U.S.C. § 30104(c) imposed "similar" "obligation[s]" on civil society groups as "the donor identification…applicable to political committees." *CREW*, 316 F. Supp. 3d at 389. Yet, much of the Supreme Court's campaign finance jurisprudence, from the "seminal campaign finance case" of *Buckley*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting), to the present day, has been dedicated to preventing the imposition of PAC or PAC-like obligations on

[4] It is unsurprising, then, that the opinion below dispatches with significant constitutional considerations in a few paragraphs and instead embraces "congressional policy choice." *CREW*, 316 F. Supp. 3d at 401-402, 414.

civil society groups merely because they engage in some electioneering. *See Citizens United*, 558 U.S. at 337 (rejecting alternative of allowing corporations to form PACs because "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations"). Similarly, rather than read the Commission's action as a bulwark protecting associational liberties, the district court fretted that disclosure might risk certain nonprofits being transformed into "pass-through entities" for super PACs, *CREW*, 316 F. Supp. 3d at 380, even though no super PAC was before the district court and pass-through activity is already illegal. *See Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) ("*WRTL II*") (discouraging "a prophylaxis-upon-prophylaxis approach to regulating expression").

At bottom, since Congressional intent in enacting FECA was an "effort to achieve total disclosure by reaching every kind of activity," *Buckley*, 424 U.S. at 76 (quotation marks and citation omitted), a phrase the Supreme Court did not intend as a compliment, the district court imposed what it thought was required by that intention—whatever the constitutional consequence. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

In the context of a typical Administrative Procedure Act case with mere financial equities at stake, perhaps such an approach would have been appropriate.

But here, it was error for the district court to give such short shrift to the Commission's efforts to regulate with an eye toward maximizing privacy in "association…a 'basic constitutional freedom,' that is 'closely allied to freedom of speech and right which, like free speech, lies at the foundation of a free society.'" *Buckley*, 424 U.S. at 25 (internal citation omitted) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)).

Just three years ago, this Court emphatically affirmed the FEC's "unique prerogative to safeguard the First Amendment when implementing its congressional directives." *Van Hollen*, 811 F.3d at 501; *cf. WRTL II.*, 551 U.S. at 474 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor"). The district court erred in not following that guidance.[5]

Undoing the Commission's efforts to "tailor the regulations such that they both effectuate [FECA's] purpose in disclosure while also minding carefully the constitutional interests in privacy also at stake" had significant ramifications. *Van*

[5] The district court argued that *Van Hollen* was inapposite because this Court referred to the agency's balancing act after it determined the statute at issue was ambiguous and Congress could not have anticipated the need to regulate disclosure of corporate electioneering communications. *CREW*, 316 F. Supp. 3d at 409. But the dictates of the Constitution always trump the vicissitudes of *Chevron* review. U.S. Const. art. VI, cl. 2. Moreover, just as the 2002 Congress could not have anticipated the Supreme Court's decision to permit certain corporate electioneering communications, it is impossible to assume the 1979 Congress could have foreseen the Supreme Court's decision in *Citizens United*, which allowed corporations like Crossroads GPS to make independent expenditures.

Hollen, 811 F.3d at 499. The disclosure regulation at issue here did not simply apply to Crossroads GPS. It protected many groups. The district court struck down these protections on the basis of facts carefully chosen by an activist, non-governmental plaintiff, in a single case, involving an organization that is not representative of the larger regulated community. Ctr. for Responsive Politics, "2018 Outside Spending, by Group"[6] (showing that the vast majority of groups making independent expenditures spent far less than $1 million in 2018); *cf. CREW*, 316 F. Supp. 3d at 359 ("Crossroads GPS ultimately reported spending $6,363,711 in independent expenditures in the 2012 Ohio race opposing Senator Brown…")

That is the worst of all worlds. Instead of general notice and comment open to the whole public, a federal court invalidated a constitutionally-protective regulation based upon a limited record involving a carefully chosen defendant. Instead of a consideration of both the statute and the many ways in which it has been narrowed by the courts, the district court sliced text from context to engineer a result aimed at stifling super PACs—a type of regulated committee that was not before it. And instead of a situation where an agency makes its decision and defends it,[7] certain

[6]https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=I

[7] It is noteworthy that this case is before this Court due to an administrative complaint that was dismissed by the Commission in its prosecutorial discretion. Nevertheless, it has been transmogrified into a facial attack on a regulation. *See* Crossroads Br. at 22-34 (arguing that Appellee is not entitled to attack 11 C.F.R. § 109.10(e)(1)(vi)); *cf. Natural Resources Defense Council, Inc. v. U.S. Food and*

members of the Commission appear to have intentionally outsourced their agency's responsibilities to private, agenda-driven actors.[8] *Cf. Buckley*, 424 U.S. at 66 (need for "strict test[s]" and suspicion of regimes which would enact more disclosure).

Left to stand, then, the district court's decision will serve as a homing beacon for additional regulation-via-targeted-litigation. That is not a recipe for the considered rulemaking required by the Administrative Procedure Act and public notice and comment, because the resulting "rules" will be based only on carefully cherry-picked cases. And because this approach will only be available to those who seek *greater* enforcement, it will inevitably serve as a one-way regulatory ratchet–despite the First Amendment concerns presented, uniquely, in this regulatory sphere. Krishan, *Elections Commission Chief…* ("More than a third of the current litigation against the FEC has been filed by CREW"). This cannot be what Congress intended, nor what the judiciary should wish. *Cf. Van Hollen*, 811 F.3d at 499 ("By tailoring

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Drug Admin., 760 F.3d 151, 171 (2d Cir. 2014) ("Ordinarily, administrative discretion is at its zenith when an agency decides whether to initiate enforcement proceedings").

[8] The Commission has shown an unwillingness to appeal cases, including this one, and its Chair has expressed a policy of not defending even its own enforcement decisions and, possibly, ignoring court orders that are contrary to her personal policy preferences. Nihal Krishan, *Elections Commission Chief Uses the "Nuclear Option" to Rescue the Agency From Gridlock*, Mother Jones, Feb. 20, 2019 ("[T]he agency's new chair says she won't allow FEC lawyers to defend the government when the FEC has been sued for not enforcing the law," and "Weintraub says she might pursue a second nuclear option: refuse to comply with…court order[s]"); https://www.motherjones.com/politics/2019/02/elections-commission-chief-uses-the-nuclear-option-to-rescue-the-agency-from-gridlock/.

the disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate").

II. The district court's decision inadvertently created a new constitutional dilemma.

Given the district court's reliance on a limited record and its decision not to emphasize the constitutional limitations imposed by *Buckley* and its progeny, it is unsurprising that its order has accidentally opened a new First Amendment question. The district court averred that its order would not force universal disclosure of all donors who give to nonprofit, non-political committees such as Crossroads GPS. *CREW*, 316 F. Supp. 3d at 400 (discounting as "erroneous" the "plaintiffs'…view of the [statute]…as requiring identification of *all* contributors over $200 to a not-political committee") (emphasis in original); *cf.* 26 U.S.C. § 6104(d)(3)(A) (privileging the confidentiality of donors to § 501(c) nonprofit corporations). Rather, the district court limited its ruling to "only those donors contributing" over $200 "for *political purposes* to influence any federal election." *CREW*, 316 F. Supp. 3d at 400 (emphasis supplied); *see Buckley*, 424 U.S. at 23, n.24 ("[D]ollars given to another person or organization that are earmarked for political purposes are contributions under the Act").

But the phrase "for political purposes" was never explained by either the *Buckley* Court or the court below. *CREW*, 316 F. Supp. 3d at 372. And after *Buckley* was handed down, Congress never amended FECA's definition of "contribution" to

give concrete meaning to the phrase. This is unfortunate, because the phrase is inherently vague, and might be read to cover contributions funding "completely nonpartisan public discussion of issues of public importance" or "issue discussions unwedded to the cause of a particular candidate, [which] hardly threaten the purity of elections," rather than candidate advocacy. *Buckley v. Valeo*, 519 F.2d 821, 832, 873 (D.C. Cir. 1975) (*en banc*); *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 832 (7th Cir. 2014) ("the statutory definition of 'political purposes'…is vague and overbroad"). The Second Circuit, specifically in the context of FECA, conceded that the Constitution demands that this phrase must be "give[n] content." *Fed. Election Comm'n v. Survival Educ. Fund*, 65 F.3d 285, 294 (2d Cir. 1995).

11 C.F.R. § 109.10(e)(1)(vi) avoided this issue entirely, by only requiring the disclosure of contributions specifically earmarked for an independent expenditure. But with that regulation vacated, the safe harbor has been dammed and drained.[9] Organizations that once knew precisely what donors to report—contributors that earmarked their gift for the propagation of a specific independent expenditure—must now guess as to which donors to report, or outsource the question to compliance

[9] *Amicus* has submitted a petition to the Federal Election Commission for a rulemaking on this question. But given the posture of this very case, even a regulation that provides a definition for "political purposes" may only spur another round of litigation.

attorneys.[10] *Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney").

Presented with this quandary, other groups will no doubt cease making independent expenditures, given the civil and criminal penalties for improper reporting and the possibility that they will become targets for their ideological opponents. 52 U.S.C. § 30109 (providing for civil and criminal enforcement for, *inter alia*, reporting violations under FECA); *Thomas v. Collins*, 323 U.S. 516, 535 (1945) ("Whether words intended and designed to fall short of invitation would miss that mark is a question of both intent and of effect…Such a distinction offers no security"). Self-silence will only dampen our national debate, which ought to "be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Citizens United*, 558 U.S. at 393 ("We should celebrate," not "condemn the addition of this speech to the public debate") (Scalia, J., concurring).

At a bare minimum, this Court must provide meaning to the phrase "for political purposes." If it chooses to act, it should apply the remedy given by the Second Circuit. There, the court simply made "for political purposes" synonymous with the express advocacy limitation imposed by the *Buckley* Court on the definition of independent expenditure. *Survival Edu. Fund*, 65 F.3d at 295. This approach

[10] An option for well-financed operations like Appellant, certainly, but not for smaller grassroots groups.

would reinforce the Supreme Court's cornerstone campaign finance precedent and avoid the "shoals of vagueness," *Buckley*, 424 U.S. at 78, while creating sensible parity for the scope of "contributions" and "expenditures"—the two central concepts of the campaign finance system.

A better approach, however, would be for the Court to reverse, upholding the FEC's considered regulatory judgment and the constitutional constraints under which it operates. If Appellee Citizens for Responsibility and Ethics in Washington wishes to change that regulation, it ought to do so by petitioning its government for a statutory change or by bringing a rulemaking petition before the agency itself, so that the merits and demerits of contribution reporting are treated in full, rather than on a narrow record concerning a single, specifically targeted entity.

CONCLUSION

11 C.F.R. § 109.10(e)(1)(vi) constitutes the FEC's "able attempt to balance the competing values that lie at the heart of campaign finance law" in accordance with its "unique prerogative to safeguard the First Amendment when implementing its congressional directives." *Van Hollen*, 811 F.3d at 501. It should be reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure because it contains 3,797 words, according to a word count by Microsoft Word 2016, excluding the parts of the brief exempted by Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared in a proportionally-spaced typeface—Times New Roman—using 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2019, I caused the foregoing to be filed with the Clerk of this Court via the appellate CM/ECF system. Counsel for all parties in the instant matter are registered CM/ECF users and will be served by the appellate CM/ECF system.

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