

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 14, 2012

Case Nos. 12-5117 & 12-5118

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

Center for Individual Freedom,
Defendant-Appellant,
and
Hispanic Leadership Fund,
Defendant-Appellant,
v.
Chris Van Hollen,
Plaintiff-Appellee,
and
Federal Election Commission,
Defendant-Appellee.

**ON APPEAL FROM A FINAL ORDER
OF THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CORRECTED BRIEF OF MITCH MCCONNELL, UNITED STATES
SENATOR, AS *AMICUS CURIAE* SUPPORTING
APPELLANTS FOR REVERSAL**

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CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Amicus Senator Mitch McConnell submits this certificate as to parties, rulings, and related cases.

Parties

Other than Amicus Senator McConnell, the briefs of Appellants Center for Individual Freedom and Hispanic Leadership Fund have listed all parties and participants in the proceedings below.

Ruling Under Review

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

Related Cases

This case has not previously been before this Court and there are no pending related cases.

Statement Regarding Appendix

Amicus Senator McConnell adopts the Joint Appendix filed by Appellant Center for Individual Freedom.

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GLOSSARY OF ABBREVIATED TERMS

BCRA	Bipartisan Campaign Reform Act of 2002, 116 Stat. 81
EPA	Environmental Protection Agency
FEC or Commission	Federal Election Commission
FECA	Federal Election Campaign Act of 1971
Mem. Op.	Judge Amy Berman Jackson's Memorandum Opinion accompanying the March 30, 2012 Orders
<i>WRTL II</i>	<i>FEC v. Wisconsin Right To Life</i> , 551 U.S. 449 (2007)

STATUTES AND REGULATIONS

The pertinent statute and regulations are attached in an Addendum to the brief.

Amicus Senator Mitch McConnell submits this brief in support of Intervenor-Appellants Center for Individual Freedom and the Hispanic Leadership Fund (hereinafter “Intervenors”). Senator McConnell urges this Court to reverse the District Court’s order granting Summary Judgment to Plaintiff-Appellee Chris Van Hollen, and to remand with directions to dismiss the Complaint.

**Statement of Identify, Interest of the Amicus Curiae,
and Source of Authority To File**

Senator McConnell is the senior United States Senator from the Commonwealth of Kentucky. He is the Republican Leader in the United States Senate and the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.

Senator McConnell is a respected senior statesman and is recognized as the Senate’s most passionate defender of the First Amendment guarantee of unrestricted political speech. In an important speech to the American Enterprise Institute on June 15, 2012, he traced the importance of unrestricted political debate to democracy in the United States and warned that ill-advised campaign finance disclosure regulations threaten vibrant debate. Senator Mitch McConnell, Address at the American Enterprise Institute; Remarks on the First Amendment (June 15, 2012). Senator McConnell has acquired considerable practical

experience over the last three decades complying with various federal and state campaign finance restrictions and legislating on campaign finance issues. In particular, Senator McConnell has been Republican Leader during the 111th and 112th Congresses, in which Plaintiff-Appellee has unsuccessfully advocated legislation that would impose disclosure requirements similar to the ones Plaintiff-Appellee advocates before this Court.

This brief is filed with the consent of all parties and pursuant to Federal Rule of Appellate Procedure 29 and U.S. Court of Appeals for the D.C. Circuit Rule 29.

Statement of Authorship and Financial Contribution

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Chevron requires deference to an agency's construction of a statute it is charged with administering unless Congress has "directly addressed the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Congress fails to address the precise question at issue if the statute is ambiguous, or if, as was the case in *Chevron*, Congress did not consider the issue and thus "did not actually have an intent." *Id.* at 845.

In this case, the district court erred by holding that "Congress spoke plainly" in this statute, 2 U.S.C. § 434(f)(2)(F), thus precluding any regulatory construction of the statute by the FEC. Mem. Op. at 31. To the contrary, Congress could not have considered "the precise question at issue" here—that is, the extent to which corporations and labor unions that air electioneering communications must report their funding sources—because the very same legislation containing section 434(f)(2)(F) expressly prohibited corporations and unions from engaging in electioneering communications. Indeed, "the precise question at issue" here arose only after the Supreme Court of the United States invalidated that prohibition as offensive to the First Amendment. *See FEC v. Wisconsin Right To Life ("WRTL II")*, 551 U.S. 449 (2007). *See also Citizens United v. FEC*, 130 S. Ct. 876 (2010). Further, the statute contains both a patent,

or textual, ambiguity, and a latent ambiguity that arose when the circumstances in which the statute was intended to operate changed markedly. For these reasons, the district court erred as a matter of law by refusing to defer to the FEC's judgment.

The circumstances surrounding the FEC's rule, 11 C.F.R. § 104.20(c)(9), demonstrate the wisdom of allowing the agency charged with administering the statute to address these ambiguities. When enacted, section 434(f)(2)(F) required donor disclosure by a narrow class of organizations, including a minute category of non-stock, non-commercial, non-profit, political advocacy corporations. Following the Supreme Court's decisions in *WRTL II* and *Citizens United*, the disclosure regime must address a vast range of multi-purpose, complex corporate and labor organizations, including multi-national corporations, trade associations, international unions, and public interest groups. Further, recent reports show that certain entities are using campaign finance disclosures for the purpose of intimidating and harassing politically active organizations and the donors to such organizations.

The current rule grew out of the expertise of the FEC in the political arena, and reflects its knowledge of and effort to account for these and other considerations. For these reasons, the district court erred in setting aside 11 C.F.R. § 104.20(c)(9), and its order must be reversed.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED *CHEVRON*.

The parties and the district court recognize that the framework set forth in *Chevron* controls this case. Plaintiff advocates and the district court ruled that judicial review need go no further than the first step of *Chevron* because “Congress spoke plainly” and “did not delegate authority to the FEC to narrow the disclosure requirements through agency rulemaking.” Mem. Op. at 31. To the contrary, Congress did *not* “directly address[] the precise question at issue” here because the statute contains a patent, or textual, ambiguity. In addition, Congress prohibited corporations and labor unions from making electioneering communications, but the Supreme Court struck down that prohibition. Thus, under *Chevron*, the FEC had discretion to issue a clarifying regulation, and properly exercised its rulemaking discretion.

A. *Chevron* Restricts Agency Discretion Only When Congress Has “Directly Addressed the Precise Question at Issue.”

In view of its determinative importance to this appeal, a clear understanding of *Chevron* is essential. *Chevron*’s precise holding is that the EPA acted within its delegated authority under the Clean Air Act by allowing States to employ a “bubble” concept for all pollution-emitting devices within the same industrial grouping, rather than just for individual plants. The Court set forth a

two step process for reviewing an agency's construction of a statute that it administers. *First*, the Court must ask "whether Congress has *directly spoken to the precise question at issue*." 467 U.S. at 843 (emphasis added). If Congress has not "directly addressed the precise question at issue," then the Court must determine "whether the agency's answer is based on a *permissible construction of the statute*." *Id.* (emphasis added). In *Chevron*, the Court determined that "Congress *did not actually have an intent* regarding the applicability of the bubble concept to the permit program," and concluded that the EPA's use of the bubble concept "is a *reasonable policy choice* for the agency to make." *Id.* at 845 (emphasis added).

Even though the EPA had recently changed the regulation pursuant to a "Government-wide reexamination of regulatory burdens and complexities" undertaken by the Reagan Administration, *id.* at 857, the Court held:

An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Id. at 863-64 (emphasis added).

Thus, in this case, the first question posed by *Chevron* is whether Congress “directly addressed the precise question at issue.” Put another way, has Congress “unambiguously foreclosed the agency’s statutory interpretation.” *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (quoting *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009)). It did not. As shown below, both Plaintiff and the district court concede that the statute as written is ambiguous in at least one respect. The district court seemed to assume, however, that the FEC’s initial construction of the statute in 2003 was sufficient, for all time and in all circumstances, to address that ambiguity. Mem. Op. at 25 n.8 (FEC’s substitution of “donor who donated” for “contributors who contributed” “seems to ameliorate the concerns supposedly raised by the expansion of the statute’s reach to include corporations and unions”).

Even more pointedly, Congress could not have “addressed the precise question at issue,” that is, the extent to which persons engaging in electioneering communications must disclose their sources of funding. That is because the class of persons who may engage in such speech now is markedly different from and far more expansive than the class of speakers Congress believed it was addressing when it passed the disclosure provision. In the words of *Chevron*, “Congress did not actually have an intent” in this situation. 467 U.S. at 845.

B. Congress Did Not Directly Address the Precise Question at Issue Here.

When Congress attempted to regulate “electioneering communications” in the BCRA, it prohibited *all* labor unions and *virtually all* corporations from funding such communications. 2 U.S.C. § 441b(b)(2). Only a narrow and numerically small class of corporations, recognized by the Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc.* (“MCFL”), 479 U.S. 238 (1986), could engage in electioneering communications. The FEC deems these corporations “Qualified Nonprofit Corporations,” or “QNCs.” A corporation can qualify for QNC status only by meeting rigorous standards set forth in 11 C.F.R. § 114.10(c), including, *inter alia*, being organized as a non-business, non-profit entity under 26 U.S.C. § 501(c)(4) for the sole express purpose of promoting political ideas, with none of its funding from business or labor organizations.

Against that background, Congress imposed disclosure obligations on persons making electioneering communications. The portion of the statute at issue here requires disclosure of:

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 calendar year and ending on the disclosure date.

2 U.S.C. § 434(f)(2)(F) (emphasis added). As the FEC recognized when it issued its initial regulation in 2003, the term “contribution” is a defined term in the Federal Election Campaign Act, meaning (in pertinent part) “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.*” 2 U.S.C. § 431(8)(A)(i) (emphasis added). *See* 68 Fed. Reg. 404, 412-413 (Jan. 3, 2003).

The statute’s use of the term “contributors who contributed” creates a patent ambiguity in the statute. In opposing a stay of the lower court’s order, Plaintiff Van Hollen observed:

FECA’s definition of “contribution” includes any payment made “for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8). By contrast, the definition of “electioneering communications” includes communications that are not made “for the purpose of influencing any election for Federal office,” especially as that term has been narrowed by judicial interpretation; *see id.* § 434(f)(3); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (drawing line between “issue advocacy” and “express advocacy” and noting that “BCRA’s definition of ‘electioneering communication’ is clear and expansive”). *Thus, applying the FECA definition to BCRA’s disclosure provisions would not make sense.*

Plaintiff-Appellee Van Hollen’s Opp. to Intervenor’s “Emergency Motions” for Stay, at 6-7 (filed 4/30/12) (emphasis added). Whether it would “make sense” to interpret the terms “*contributor*” and “*contribute*” in a way consonant with the

statutory definition of “*contribution*” is a debatable question. The key point is that the statute contains an ambiguity that Congress entrusted the FEC to resolve. To address that ambiguity in the circumstances presented in 2003, the FEC substituted a broader term, “donor who donated,” in place of “contributors who contributed” in its original regulation implementing section 434(f)(2)(F). *See* 68 Fed. Reg. at 420 (prior version of 11 C.F.R. § 104.20(c)(8)).

The Supreme Court’s decision in *WRTL II*, however, changed the underlying assumption about who can make electioneering communications. *WRTL II* held, in an “as applied” challenge, that corporations and labor organizations may, in certain circumstances, fund electioneering communications. 551 U.S. at 449. Whereas before *WRTL II* only the extremely limited class of corporations qualifying as QNCs, but no labor organizations, could engage in electioneering communications, *WRTL II* opened up the possibility that any domestic corporation or labor organization could do so. The Supreme Court’s ruling in *Citizens United* striking down the prohibitions on corporate and union advocacy reaffirmed and expanded upon this key point.

Thus, the Supreme Court’s ruling in *WRTL II* created the type of latent ambiguity due to an external event recognized in the famous case of *Raffles v. Wichelhaus*, 2 H. & C., 159 Eng. Rep. 375 (Ex. 1864). In *Raffles*, a seemingly

unambiguous contract for shipment of cotton on the ship “*Peerless*” was rendered ambiguous when the parties learned that *two* ships, both named “*Peerless*,” would be sailing from the same port. This unknown but material fact created a “latent ambiguity” in the contract. Courts recognize similar “latent ambiguities” in construing statutes that have “superficial clarity.” *West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985) (turning to legislative history to resolve a latent ambiguity). As the Supreme Court observed in *United States v. Morton*, 467 U.S. 822, 835 n. 21 (1984), “[I]tigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent.”¹

By vastly expanding the numbers, structures, and funders of organizations allowed to make electioneering communications, *WRTL II* created a *latent ambiguity* in the provision. Congress could not have “directly addressed the precise question at issue” here because it expressly and intentionally *prohibited* electioneering communications by the very types of entities, represented by the Intervenors, now most impacted by the disclosure regulations. In view of this

¹ Plaintiff cites *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998), which held that the Americans with Disability Act applies to state prisoners, for the proposition that application of a statute in a situation not anticipated by Congress suggests breadth of the statute, not ambiguity. But *Yeskey* is not relevant here: it involved a statute found to be unambiguous, did not address agency construction of a statute, and did not apply the *Chevron* analysis.

absence of direction from Congress, the FEC's responsibility was to determine how, if at all, the disclosure regime should be modified in light of this expansion.

Accordingly, after notice and allowing comment, the FEC issued a revised regulation on December 26, 2007, providing:

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

11 C.F.R. § 104.20(c)(9) (emphasis added). *See* 72 Fed. Reg. 72899, 72913 (Dec. 26, 2007). The revised regulation drew on the intent aspects inherent in the congressional use of “contributors who contributed,” but used the term “donation” to expand that notion to fit the broader concept of electioneering communications.

The district court acknowledged a potential ambiguity in the terms “contribute” and “contributed.” Slip op at 25 n. 8.² Further, the court seemed to

² Nothing better illustrates the district court's failure to defer to the FEC than its discussion of the meaning of the word “contributor.” *See* Mem. Op. at 22-28 & nn. 8-12. Even though the Federal Election Campaign Act defines the term “contribution,” 2 U.S.C. § 431(8)(A)(i), and vests administration of the Act in the FEC, *id.* §§ 437c(b)(1), 437d(a)(8), the district court defined the term for itself.

(continued...)

accept that in 2003, when the FEC issued its original regulation, the agency acted within its authority by substituting “donor” and “donated” for those terms. *See* 68 Fed. Reg. 404, 413, 420 (Jan. 3, 2003). The district court erroneously assumed, however, that the FEC’s original solution for the ambiguity “had already narrowed the universe” and “nothing about *WRTL* made the existing regulations ineffective.” Mem. Op. at 25 n.8. In sum, the lower court assumed that the FEC was precluded from revisiting its original construction, even in response to intervening events.

Chevron rejected those propositions, holding that “[a]n initial agency interpretation is *not instantly carved in stone*,” and that “to engage in informed rulemaking,” an agency is not merely authorized but “*must* consider varying interpretations and the wisdom of its policy on a continuing basis.” *Chevron*, 467

Rather than define “contributor” consistent with the statutory definition of “contribution,” however, the court invoked the *Oxford English Dictionary*, *Merriam-Webster Dictionary*, and a hypothetical conceived by plaintiff’s counsel to find a “plain meaning” at odds with the FEC’s construction. By doing so, the district court usurped the FEC’s authority to construe the statute.

In any event, the discussions by the district court and plaintiff’s counsel do not address the difficult aspects of this issue. Is someone who pays membership dues to an organization a “contributor” or a “purchaser” of a membership? Is the policy of disclosing persons who fund advocacy furthered by requiring disclosure of donors who do not intend their donations to be used for electioneering communications? Resolution of these issues is within the domain of the FEC.

U.S. at 863-64 (emphasis added). In *Chevron*, the Supreme Court deferred to an EPA revision of a regulation even though the only change between the old and new versions was a mandate for broad regulatory review by the Reagan Administration.³ Thus, even without the intervening change in law effected by *WRTL*, the FEC has authority to revisit its regulations “on a continuing basis” when it, in its expert judgment, believes appropriate.

WRTL did intervene, however. Reasonable minds might disagree, perhaps, about whether *WRTL II* sufficiently altered the electioneering communications landscape to merit reconsideration of the disclosure regulation. But that was the FEC’s judgment to make. By substituting its own judgment that “nothing about *WRTL* made the existing regulations ineffective,” Mem. Op. at 25 n.8, the district court invaded the agency’s area of expertise and overstepped its judicial prerogative.

³ See also *Nat’l Cable & Telecomm. Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (“Some of the respondents dispute this conclusion [that *Chevron* deference was owed], on the ground that the Commission’s interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”); *id.* at 981-82 (“[I]n *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.”).

To justify its decision, the district court observed that Congress expected some corporations—QNCs—to make electioneering communications. Mem. Op. at 18. As confirmed by the hue and cry of campaign finance reform advocates in response to *WRTL II* and later *Citizens United*, however, the recent expansion of corporate and union funding for electioneering communications is an epochal event in the campaign finance world, and the lower court’s dismissal of this expansion as having no effect on the disclosure regulations is shocking. Certainly, the FEC was within its discretion in concluding that a disclosure regulation appropriate for a small class of single-purpose and simply-organized QNCs is *not* appropriate for multi-purpose, complex commercial corporations, trade associations, public interest organizations, and labor unions.

The textual ambiguity created by BCRA’s use of “contributors who contributed,” and the latent ambiguity created by *WRTL II*, demonstrate that Congress did not address the precise question at issue. Thus, the FEC was within its delegated authority in recognizing that its earlier interpretation of 2 U.S.C. § 434(f)(2)(F) was “not instantly carved in stone,” and thus revisiting “the wisdom of its policy” in view of the dramatic expansion of allowable electioneering communications. *Chevron*, 467 U.S. at 863-64.

C. The FEC Acted Within Its Discretion in Revising Its Regulation.

Having concluded improperly that the FEC violated the statute by undertaking *any* revision of 11 C.F.R. § 104.20(c)(9), the district court did not decide whether the FEC's revision was within its broad zone of discretion. Mem. Op. at 2. To make that determination, this Court asks whether the agency's policy choice will "frustrate the policy that Congress sought to implement." *Shays v. FEC*, 528 F.3d 914, 919 (D.C. Cir. 2008) (citations omitted). As shown, Congress did not anticipate the need for disclosure by commercial corporations, trade associations, labor unions, and the array of other entities now entitled to make electioneering communications, so the FEC undertook notice and comment rulemaking to assess what donor disclosures would be appropriate in this new context.

The FEC reported that "[a]ll commenters who addressed disclosure of [electioneering communications] stated that corporations and labor unions should not be required to report the sources of funds that made up their general treasury funds." 72 Fed. Reg. at 72899 (Dec. 26, 2007). Other commenters argued *against* disclosure of persons paying membership dues, *for* limiting disclosures by nonprofit corporations to the ones made to the Internal Revenue Service, and *against* disclosure of "investors, customers, and donors [who] do not necessarily support the corporation's electioneering communications." *Id.* at 72911. The

FEC also considered 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.]”

Id. Taking all these considerations into account, the FEC “determined that the policy underlying the disclosure provisions of BCRA is properly met by requiring corporations and labor organizations to disclose and report only those persons who made donations for the purpose of funding [electioneering communications].” *Id.* (emphasis added).

As the FEC had observed when it issued the original regulation in 2003, section 434(f)(2)(F) used the terms “contributors who contribute.” Those terms reasonably imply a connection to the statutory term “contribution,” which is defined as a donation “for the *purpose* of influencing a federal election.” In view of this word choice by Congress, the FEC was within its discretion in making “a reasonable policy choice” by including an element of purposefulness for the donations being made. *See Chevron*, 467 U.S. at 845 (upholding EPA’s “reasonable policy choice” in the absence of a congressional directive). By adding the phrase “for the purpose of furthering electioneering communications” the FEC made the disclosure parallel to other disclosure provisions in FECA and the regulations. *See, e.g.*, 11 C.F.R. § 102.6(b)(2) (collecting agent must report only if it makes expenditures or contributions “for the purpose of influencing

federal elections”); *id.* § 100.83(c)(4) (advances from candidate’s brokerage account need not be reported unless “for the purpose of influencing the candidate’s election for Federal office”); *id.* § 109.10(e)(vi) (reporting of persons who contribute to an independent expenditure committee “for the purpose of furthering the reported independent expenditure.”).

As the FEC recognized, corporations and unions typically have multiple sources of funding. *See supra* page 16. Some sources may or may not be from “contributors who contributed.” Others bear little relation to electioneering communications because the contributor may not support or even know about the electioneering communications. The FEC’s targeted approach fulfills the goal of disclosing persons or entities directly involved in funding electioneering communications without imposing unnecessary burden. *Compare Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444, 1455 (D.C. Cir. 1988) (“We cannot say, therefore, that the agency’s interpretation would frustrate the policies of Congress embraced in enacting [the amendment] or is ‘patently inconsistent’ with statutory mandate.”).

II. THE DISCLOSURES ADVOCATED BY PLAINTIFF RAISE SERIOUS FIRST AMENDMENT CONCERNS.

The district court accepted Plaintiffs' erroneous assumption that any and all disclosure requirements on political speakers are per se valid.⁴ No precedent supports this dangerous proposition. Although the Supreme Court has often approved disclosure requirements, it has done so with the caveat that such requirements are permissible only so long as they do not have a tendency to suppress speech. The FEC's disclosure regulation better comports with First Amendment concerns than the regulation advocated by Plaintiff Van Hollen.

A. Disclosure Requirements Are Limited by the First Amendment.

The district court observed that the Supreme Court upheld 2 U.S.C. § 434(f)(1) against a First Amendment attack in *Citizens United*. See Mem. Op. at 29 (citing 130 S. Ct. at 914-16). When the Supreme Court upheld Section 434(f)(1) in *Citizens United*, however, the regulation at issue here had been in

⁴ The lower court suggested that First Amendment considerations were not properly before it because the Intervenor had not filed a complaint or counterclaim asserting them, and the FEC "has no authority . . . to 'save' statutes by promulgating regulations that contravene the plain language of the statute." Mem. Op. at 29. It is basic that FEC Commissioners, having sworn to uphold the Constitution, must act in accordance with its provisions, including the First Amendment. See *Marbury v. Madison*, 5 U.S. 137, 179-80 (1803). Moreover, it is the Plaintiff that is challenging the regulation; Intervenor had no obligation to assert a First Amendment "claim" for the hypothetical situation that will exist if the regulation is invalidated.

effect for over three years, and this Court must assume the Supreme Court was aware of the FEC's regulatory interpretation. Moreover, the constitutionality of the *statute* is not at issue here; it is the way Plaintiff wants the statute implemented through the regulation that raises First Amendment concerns.

More important, the Court in *Citizens United* held section 434(f)(1) was “valid as *applied* to the ads for the movie and to the movie itself,” that were at issue in that case. 130 S. Ct. at 914 (emphasis added). But the Court reiterated its warning from *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), that disclosure requirements may, indeed, run afoul of the First Amendment, noting that “as-applied challenges would be available if a group could show a reasonable probability” that disclosure of contributor names “will subject [the contributors] to threats, harassment, or reprisals from either Government officials or private parties.” 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 74, internal quotation marks omitted). Later, the Court cited *McConnell v. FEC*, 540 U.S. 93 (2003), for this same principle: “In *McConnell*, the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed.” 130 S. Ct. at 916. This is yet another reason the Court must defer to the expertise of the FEC to determine how much disclosure is appropriate in these circumstances.

Although disclosure requirements “impose no ceiling on campaign related activities,” *Buckley*, 424 U.S. at 64 (quoted in *Citizens United*, 130 S. Ct. at 914), they are not immune to First Amendment review. They are subject to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” government interest. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). Plaintiff’s demand for disclosure of every “donor” to an organization making electioneering communications, regardless of the individual donor’s purpose in giving, would not inform the public about persons engaged in political debate.

Moreover, as this Court recently said, if a group can show that a risk of retaliation is “likely to affect adversely the ability of the [group] and its members to pursue their collective effort to foster beliefs which admittedly they have the right to advocate,” then the government can justify the disclosure requirement “only by demonstrating that it directly serves a compelling state interest.” *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003) (internal quotations omitted). *See also SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (“Disclosure requirements . . . burden First Amendment interests because ‘compelled disclosure, in itself, can seriously infringe on privacy of association and belief.’”) (quoting *Buckley*, 424 U.S. at 64).

If a disclosure requirement has the intent or effect of suppressing speech, it may not stand under traditional First Amendment analysis. *See Citizens United*, 130 S. Ct. at 898 (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence”). First Amendment protection is especially strong here, because electioneering communications are by definition independent speech, not coordinated with any candidate or party. The Supreme Court held in *Citizens United* that this form of *speech* has no tendency to corrupt, and this Court held in *Emily’s List v. FEC*, 581 F.3d 1, 18 (D.C. Cir. 2009), that *donations* to groups engaging in independent speech have no potential to corrupt. As this Court put it in *SpeechNow.org*, 599 F.3d at 696, “because *Citizens United* held that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.”⁵ If the independent speech has no potential to corrupt, and donations to the speaker have no potential to corrupt, any anti-corruption purpose of disclosing the identity

⁵ *SpeechNow.org* upheld disclosure requirements by an independent group after noting that “SpeechNow . . . intends to comply with the disclosure requirements applicable to those who make independent expenditures,” and that “the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal.” 599 F.3d at 697. Here, Plaintiff Van Hollen seeks a radical increase of disclosure, which *SpeechNow* does not support.

of those donors is attenuated at best. The FEC's targeted approach to disclosure fulfills the goal of informing the public about donors supporting the electioneering communications with the minimum imposition on the donors' First Amendment rights of privacy, association, and speech.

B. Plaintiff's Demand for Greater Disclosure Threatens To Suppress Core Political Speech.

This case is fundamentally different from earlier disclosure cases. The disclosure requirements previously reviewed by the Court had a good faith intent to inform the public. Immediately after the Supreme Court's decision in *Citizens United*, however, Plaintiff Van Hollen announced that he, Senator Charles Schumer, and others would "make sure [they] do everything possible to make sure [the] decision does not stand." Press Release, Van Hollen Remarks on Supreme Court Ruling in *Citizens United* Case (Jan. 21, 2010). Three months later, he and Senator Schumer held a press conference entitled, "Legislation to **Minimize Corporate Spending** in Elections After Supreme Court's Ruling in *Citizens United*." (April 29, 2010) (emphasis added). The legislation announced at that press conference, known as the DISCLOSE Act, would impose disclosure obligations similar to the ones Plaintiff advocates here. The press release said the bill would "mandate *an unprecedented level of disclosure* not only of an organization's spending *but also its donors*." See, e.g., Press Release, Senator

Jeanne Shaheen, “Shaheen Cosponsors Legislation That Would Blunt Citizens United Ruling,” (April 29, 2010) (emphasis added). During the press conference, Senator Schumer predicted that if the donor disclosure provisions were enacted, corporate political expenditures would “*shrivel up*” and corporations “*won't do them.*” Jim Abrams, “Lawmakers Call for Restrictions on Political Ads,” Associated Press (April 29, 2010). Senator Schumer warned that “*the deterrent effect [of the disclosure requirements] should not be underestimated.*” Jess Bravin and Brody Mullins, “New Rules Proposed on Campaign Donors,” *Wall Street Journal* (February 12, 2010) (emphasis added).

Notwithstanding the high rhetoric about “the public’s right to know,” one motive behind the demand for increased disclosure, and perhaps a dominant motive, is not *more* information for the public, but *less* political speech from adversaries.

C. Recent Experience Shows that Political Adversaries Abuse Donor Disclosures.

Many recent reports show a concerted effort to harass and intimidate persons who are using the rights protected by *Citizens United* to engage in political speech. Media Matters has announced that its staff “will systematically review the independent expenditure reports provided to the FEC,” and use the disclosures of corporate donors to those efforts to “create a multitude of public

relations challenges for corporations that make the decision to meddle in political campaigns.” *Media Matters*, 2012: A Three Year Campaign 82-83 (2009).

“Working with allied organizations,” *Media Matters* intends “*to provoke backlashes among companies’ shareholders, employees, and customers, and the public-at-large.*” *Id.* at 83 (emphasis added).

Disclosure of donors by Restore Our Future, an independent political advocacy organization supporting Mitt Romney’s candidacy for President, led to a highly publicized attack on the donors by Obama for America. *See* “Behind the Curtain: A brief history of Romney’s donors,” Obama for America (April 20, 2012), *available at* <http://www.barackobama.com/truth-team/entry/behind-the-curtain-a-brief-history-of-romneys-donors>. Kimberly Strassel of the *Wall Street Journal* has reported that a former Democratic Senate staffer has recently called an Idaho courthouse to peruse the divorce records of one of Restore Our Future’s donors. Kimberly Strassel, “Trolling the President’s List,” *The Wall Street Journal* (May 11, 2012), *available at* online.wsj.com. *Rolling Stone* magazine ran an “exposé” of donors to Restore Our Future, revealing their businesses and home addresses, and reviling them with epithets like “the pyramid schemer” and “the tax dodger.” Tim Dickinson, “Right-Wing Billionaires Behind Mitt Romney,” *Rolling Stone* (May 24, 2012), *available at* www.rollingstone.com. *See also* Jia Lynn Yang and Dan Eggen, “Exercising New Ability to Spend on

Campaigns, Target Finds Itself a Bull's-eye," *Washington Post*, August 19, 2010 (recounting backlash against Target for donating to an advocacy organization).

Far from an effort to inform the public, the demand for greater donor disclosure from organizations exercising the rights recognized in *WRTL II* and *Citizens United* represents an effort to suppress legitimate political debate. The FEC's revised regulation fulfills the purpose of section 434(f)(2)(F) of identifying contributors who support electioneering communications, while avoiding the overdisclosure of persons and entities involved only tangentially, or not at all, with these communications.

CONCLUSION

For the reasons set forth above and in the briefs of the Intervenors, Amicus Senator Mitch McConnell urges the Court to reverse the district court's order and remand for dismissal of Plaintiff's complaint.

June 21, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of the Court's May 25, 2012, Order because this brief contains 5,590 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14-point type.

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Dated: June 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2012, I caused a copy of the foregoing BRIEF OF MITCH MCCONNELL, UNITED STATES SENATOR to be served on the following counsel through this Court's electronic filing system and/or by electronic mail:

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-ADDENDUM OF STATUTES AND REGULATIONS

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2 U.S.C. § 431. Definitions.

* * *

(8)(A) The term “contribution” includes--

(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

2 U.S.C. § 434. Reporting Requirements.

* * *

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of Statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

* * *

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

* * *

(3) Electioneering communication

For purposes of this subsection--

(A) In general

(i) The term “electioneering communication” means any broadcast, cable, or satellite communication which--

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

(II) is made within--

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

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

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

* * *

(B) Exceptions

The term “electioneering communication” does not include--

* * *

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

* * *

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is “targeted to the relevant electorate” if the communication can be received by 50,000 or more persons--

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

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

2 U.S.C. § 437c. Federal Election Commission.

* * *

(b) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of Title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

2 U.S.C. § 437d. Powers of Commission.

* * *

(a) Specific authorities

The Commission has the power--

* * *

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26; and

2 U.S.C. § 441b. Contributions or expenditures by national banks, corporations, or labor organizations.

(a) In general

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

(b) Definitions; particular activities prohibited or allowed

* * *

(2) For purposes of this section and section 791(h) of Title 15, the term “contribution or expenditure” includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advice, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the

establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

26 U.S.C. § 501. Exemption from tax on corporations, certain trusts, etc.

* * *

(c) List of exempt organizations. The following organizations are referred to in subsection (a)

(4) (A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(B) Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.

11 C.F.R. § 100.83. Brokerage loans and lines of credit to candidates.

* * *

(c) Routine living expenses

(1) A loan derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, that is used by the candidate solely for routine living expenses, as described in 11 CFR 100.153, does not need to be reported under 11 CFR part 104 provided that the loan, advance, or line of credit is repaid exclusively from the personal funds of the candidate or payments that would have been made irrespective of the candidacy pursuant to 11 CFR 113.1(g)(6).

(4) Notwithstanding paragraph (c)(1) of this section, the portion of any loan or advance from a candidate's brokerage account, credit card account, home equity line of credit, or other line of credit that is used for the

purpose of influencing the candidate's election for Federal office shall be reported under 11 CFR part 104.

11 C.F.R. § 102.6. Transfers of funds; collecting agents.

(b) Fundraising by reporting agents; No reporting required--

* * *

(2) Collecting agent not required to report. A collecting agent that is an unregistered organization and that follows the procedures of 11 CFR 102.6(c) is not required to register and report as a political committee under 11 CFR parts 102 and 104,, provided that the organization does not engage in other activities such as making contributions or expenditures for the purpose of influencing Federal elections.

11 C.F.R. § 104.20. Reporting electioneering communications.

* * *

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

* * *

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

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

* * *

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

* * *

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

11 C.F.R. § 114.15. Permissible use of corporate and labor organization funds for certain electioneering communications.

* * *

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