ORAL ARGUMENT NOT YET SCHEDULED

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)

OPENING BRIEF FOR APPELLANT CENTER FOR INDIVIDUAL FREEDOM

Jan Witold Baran
Thomas W. Kirby
Caleb P. Burns
Samuel B. Gedge
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
Tel.: 202.719.7000
E-mail: tkirby@wileyrein.com

Dated: April 10, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellant Center for Individual Freedom provides the following information in accordance with D.C. Circuit Rules 26.1 and 28(a)(1):

A. Parties and Amici.

The Center for Individual Freedom (CFIF) intervened as a defendant in the district court and is the appellant in Case No. 15-5016. Pursuant to Circuit Rule 26.1, CFIF certifies that no publicly held company has a ten-percent-or-greater ownership interest in CFIF and that CFIF has no parent companies as defined in the Circuit Rule. CFIF is a non-partisan, non-profit § 501(c)(4) organization whose mission is to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution.

The Hispanic Leadership Fund intervened as a defendant in the district court and is the appellant in Case No. 15-5017.

Christopher Van Hollen, Jr., is the plaintiff in the district court and is an appellee in this Court.

The Federal Election Commission is a defendant in the district court and is an appellee in this Court.

No amicus curiae appeared in the district court. CFIF understands that at least one party may appear as amicus in this appeal. In addition, in the first appeal before this Court, Nos. 12-5117 & 12-5118, Mitch McConnell, U.S. Senator;

American Civil Rights Union; Base Connect, Inc.; Citizens United; Conservative Legal Defense and Education Fund; Downsize DC Foundation; DownsizeDC.org; Free Speech Coalition, Inc.; Free Speech Defense and Education Fund, Inc.; Gun Owners Foundation; Gun Owners of America, Inc.; Institute on the Constitution; Let Freedom Ring USA; National Right to Work Committee; Public Advocate of the United States; U.S. Border Control; U.S. Constitutional Rights Legal Defense Fund, Inc.; and U.S. Justice Foundation appeared as amici in support of the appellants. AARP, Brennan Center for Justice, Center for Media and Democracy, Center for Responsive Politics, Citizens for Responsibility and Ethics in Washington, Common Cause, League of Women Voters of the United States, Progressives United, and Sunlight Foundation appeared as amici in support of appellee Van Hollen.

B. Rulings Under Review.

On November 25, 2014, the district court (Judge Amy Berman Jackson) entered an order in Civil Action No. 1:11-cv-00766-ABJ, granting plaintiff Van Hollen's motion for summary judgment and denying the cross-motions for summary judgment of defendant Federal Election Commission and intervenor-defendant CFIF. The order has not been published in the Federal Supplement; it is located at District Court Docket Number 99 and is reproduced at page JA404 in the Joint Appendix. The memorandum opinion accompanying the order is located at

District Court Docket Number 100 and will be published at ___ F. Supp. 3d ___, 2014 WL 6657240 (D.D.C. Nov. 25, 2014). It is reproduced at pages JA405-50 in the Joint Appendix.

C. Related Cases.

This case was previously before this Court. Those consolidated appeals were numbered 12-5117 and 12-5118, and this Court's resulting judgment is titled *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (per curiam) (Brown, Edwards, and Randolph, JJ.). The Center for Individual Freedom is not aware of any other related case, as defined by Circuit Rule 28.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

52 U.S.C.

Regulations

Legislative Materials

Other Authorities

GLOSSARY OF ABBREVIATIONS

BCRA	Bipartisan Campaign Reform Act of 2002
CFIF	Center for Individual Freedom
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
JA	Joint Appendix

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. § 1331 and entered final judgment vacating 11 C.F.R. § 104.20(c)(9) on November 25, 2014. Appellant Center for Individual Freedom (CFIF) timely filed its notice of appeal on January 9, 2015. JA451-53.

STATEMENT OF THE ISSUES

(1) Whether 11 C.F.R. § 104.20(c)(9) follows from a reasonable interpretation of the Federal Election Campaign Act of 1971, as amended (FECA or Act), under the second step of the analysis announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(2) Whether 11 C.F.R. § 104.20(c)(9) is arbitrary and capricious under the Administrative Procedure Act, as interpreted by *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

(3) If the Federal Election Commission's explanation for 11 C.F.R. § 104.20(c)(9) is deficient, whether the proper remedy is remand to the agency, without vacating the regulation.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Federal Election Campaign Act and Independent Spending.

1. Until 2010, the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.*, made it "unlawful ... for any corporation whatever, or any labor organization, to make a[n] ... expenditure in connection with any election" for federal office. *Id.* § 30118(a); *Citizens United v. FEC*, 558 U.S. 310 (2010). "Expenditure" is narrowly construed to cover only "express advocacy"—financing speech that explicitly advocates the election or defeat of a clearly identified candidate. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) (*MCFL*). To avoid unconstitutional vagueness, this category of speech includes only communications containing so-called magic words, such as "vote for," "vote against," "elect," or "defeat." *Id.* at 249; *see also Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam).

For those who lawfully fund express advocacy, federal law required—and still requires—that they disclose the dollar amounts spent. Entities whose "major purpose" is political activity (political committees, that is) also must divulge all funds received and the identity of each person who gives more than $200 annually, among other information. 52 U.S.C. §§ 30104(b), 30101(4); *see also* 72 Fed. Reg. 5,595 (Feb. 7, 2007) (discussing "major purpose" test). But for independent speakers who do not cross that major-purpose line, the reporting rules are,

appropriately, more modest. Unlike political committees, these speakers do not need to itemize every source of income. Instead, they must identify only those "person[s] who made a contribution in excess of $200 ... *for the purpose of furthering an independent expenditure*." 52 U.S.C. § 30104(c)(2)(C) (emphasis added); 11 C.F.R. § 109.10(e)(1)(vi). Disclosing those receipts "intended to influence elections," the Supreme Court has said, "provide[s] precisely the information necessary to monitor [a speaker's] independent spending activity and its receipt of contributions." *MCFL*, 479 U.S. at 262. Triggered by express advocacy, this purpose-based provision has been on the books since the 1979 FECA amendments. Pub. L. No. 96-187, 93 Stat. 1354; 45 Fed. Reg. 15,080, 15,087 (Mar. 7, 1980).

2. For a quarter century, express advocacy was the only type of independent speech covered by federal campaign-finance law; all other communications could be funded by corporations or labor unions and "without disclosing the identity of, or any other information about, their sponsors." *McConnell v. FEC*, 540 U.S. 93, 127 (2003). This led to a spike in "issue" ads, which "eschew[ed] the use of magic words" but otherwise "proved functionally identical" to express advocacy. *Id.*

To address this perceived loophole, Congress amended FECA in 2002 to reach spending for a second type of speech. *See* Bipartisan Campaign Reform Act

of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. Termed "electioneering communications," this new category covers any "broadcast, cable, or satellite communication" that (1) refers to a clearly identified federal candidate; (2) is aired within 30 days of the candidate's primary election or 60 days of the general election; and (3) is "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3)(A)(i).

Electioneering communications and express advocacy are separately regulated under mutually exclusive provisions. *Id.* § 30104(f)(3)(B)(ii). But as BCRA's sponsors confirmed, they were deemed two sides of the same coin. Electioneering communications "constitute campaigning every bit as much as ... any ad currently considered to be express advocacy and therefore subject to Federal election laws." 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001) (Sen. Snowe). By extension, regulating electioneering communications "serve[s] the very purposes that underlie the preexisting independent expenditure provisions: bringing campaign spending of the 'issue' ad variety within the scope of [the] longstanding source and disclosure rules" that already governed express advocacy. Br. of Intervenor-Defs. Sen. McCain et al. at 60 n.48, *McConnell*, 540 U.S. 93 (Nos. 02-1674 et al.).

The text of the 2002 amendments highlights these parallels. As it did for express advocacy, Congress barred corporations and unions from funding

electioneering communications. 52 U.S.C. § 30118(a), (b)(2). For other speakers, Congress passed a disclosure law akin to the one in place for express advocacy. *Id.* § 30104(f); *see also* 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (Sen. McCain) ("This bill would simply subject soft money-funded campaign ads that masquerade as issue discussion to the same laws that have long governed campaign ads."); Br. of FEC et al. at 119, *McConnell*, 540 U.S. 93 (Nos. 02-1674 et al.) ("Th[e] provision simply updates the requirements that have long applied to express advocacy ... to reflect BCRA's adjustment of Section [30118] to apply to 'electioneering communications.'").

Under this disclosure provision, speakers spending more than $10,000 in a calendar year on electioneering communications have two reporting options. If they can anticipate their activity ahead of time, speakers can create a "segregated bank account which consists of funds contributed solely by individuals ... directly to this account for electioneering communications … ." 52 U.S.C. § 30104(f)(2)(E). Those reporting under this Subparagraph (E) must disclose everyone who pays $1,000 or more into the political account. *Id.*

But planning speech in advance may be difficult and burdensome, so Congress offered a second option. Speakers can choose to pay "out of funds not described in subparagraph (E)"—out of a personal checking account, for example. *Id.* § 30104(f)(2)(F). Under Subparagraph (F), these speakers must disclose "all

contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement [since] the first day of the preceding calendar year and ending on the disclosure date." *Id.* In turn, FECA defines "contribution" as a transfer of value "for the purpose of influencing any election for Federal office." *Id.* § 30101(8)(A)(i). ("Contributors" and "contributed," in subparagraph (F), are not defined differently.)

3. Following the 2002 amendments, the FEC promulgated many new rules, including one addressing electioneering-communication reporting. 11 C.F.R. § 104.20(c)(7) and (8) echoed FECA's subparagraphs 30104(f)(2)(E) and (F), detailed above. The regulation essentially restated the statute, except for inserting the terms "donor" and "donated" in place of the Act's "contributors" and "contributed." 68 Fed. Reg. 404, 412-13 (Jan. 3, 2003); 67 Fed. Reg. 64,555, 64,561 (Oct. 21, 2002). The rule did not define these terms, but the FEC foresaw that natural or unincorporated persons triggering 11 C.F.R. § 104.20(c)(8) would need to report all "gifts of $1,000 or more from any source." 68 Fed. Reg. at 414; 67 Fed. Reg. 65,190, 65,209 (Oct. 23, 2002) ("[T]heir entire donor base.").

B. The FEC's Disclosure Rule for Corporate and Union Electioneering Communications.

1. The 2002 amendments barred unions and corporations from funding electioneering communications. But that all changed with the Supreme Court's

decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL II*). The Court split the ban down the middle. Under the First Amendment, the Court held, Congress could curtail only those electioneering communications that amounted to "the 'functional equivalent' of express advocacy"—a narrow standard. *Id.* at 480 (Opinion of Roberts, C.J.).

This "abrupt volte-face" by the Supreme Court called for regulatory adjustments by the FEC. *See* Richard Briffault, WRTL II*: The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 Alb. Gov't L. Rev. 101, 105 (2008). For one thing, *WRTL II* left a gap in the reporting regime: Neither Congress nor the FEC had thought to address how unions and corporations should report electioneering communications. As one commenter put it, "it was Congress's explicit design that a union or a corporation acting in compliance with FECA would *never* have occasion to report an [electioneering communication] since it could never lawfully undertake one … ." JA159.

2. In response, the FEC issued a Notice of Proposed Rulemaking seeking comment on, among other topics: "how ... a corporation or labor organization [should] report an electioneering communication funded with general treasury funds[.]" JA37. Given the complexity of corporate and union revenue streams, the Commission asked "how would a corporation or labor organization determine which receipts qualify as 'donations'?" JA37. The Commission proposed two

extremes—one exempting corporations and unions from disclosure entirely, the other imposing wholesale disclosure. JA37-38. The Notice also offered a middle course, inviting comment on whether to "limit the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications[.]" JA37.

The Commission received comments from a cross-section of the regulated community. Many entities submitted that *no* revenue sources should be subject to reporting; others endorsed a disclosure regime keyed to donor purpose. JA68-69, 153-54, 164. Even commenters favoring broader disclosure agreed that "[c]learly the Commission needs to do something to address the particular anomaly that [*WRTL II*] has created … ." JA247.

Regardless of their solutions, commenters speaking for the corporate and labor communities made clear that the FEC must weigh the burdens of disclosure against the governmental interests to be served. On the burden side, administrative costs and privacy concerns featured heavily. Requiring a corporation to sift through up to twenty-two months' worth of revenue to identify "contributors" would present "enormous," "especially great," and "tremendous" challenges, "far exceed[ing] all reporting requirements otherwise applicable to such organizations." JA153, 163, 206. In the labor context, a group of unions explained, "[t]he burden on a union to account for and report all sources of receipts of $1,000 or more"

would actually be more onerous than that imposed by federal labor law. JA163. For smaller, non-profit organizations, "[e]very incremental increase in administrative burden w[ould] divert more ... resources from direct pursuit of the organization's mission." JA166. Without reasonable tailoring, compliance "would likely prove difficult, if not impossible." JA73.

As if to underscore the problem, the rulemaking proceeding saw pervasive uncertainty about what revenue sources would qualify as "contributors" to begin with. *See, e.g.*, JA205 ("[Sales] income and receipts, dues, investment income, damages awards and other commercial income and the like ought not to be subject to disclosure."); JA220 ("What is a donation? Is it interest? Is it royalties? Is it dues?"); JA213 ("The problem I have with membership dues is that there are membership dues for union, but then there are membership dues for other types of organizations like nonprofit organizations."); JA241 ("[G]eneral support grants ... shouldn't be included within the definition of donation for at least this purpose."); JA191 (suggesting that any organization "collecting funds" should disclose revenue using "some reasonable basis"); JA127 (contrasting reportable "donations" with unreportable revenue from "business activities"). In the words of one commenter, "[t]he Commission faces these kinds of questions all the time in how far back you want to peel the onion to figure out [what] the source of the funding for the ad is." JA186.

Mechanics aside, organizations also highlighted constitutional considerations; the Commission was bound to balance the government's interests against the law's intrusion on First Amendment rights. For many, comprehensive disclosure "present[ed] significant privacy concerns that are not outweighed by the government interests in disclosure." JA99. In fact, publicizing every donative transfer above $1,000 would actually disserve the governmental interests at stake. As the labor coalition explained, incoming revenue often bears "no meaningful relationship to [electioneering-communication] spending … ." JA163. Blanket disclosure of financial support and membership payments would thus undercut the government's interest in an informed electorate, "misleading ... the public [by] suggest[ing] a connection between the revenue sources and the ads when none in fact exists." JA153.

3. Concluding that "Congress has [not] spoken directly to this issue," a bipartisan majority of the Commission "d[rew] from the reporting requirements that apply" to express advocacy, adopting a similar purpose-based standard. JA301, 311 n.22. Corporations and unions making electioneering communications would need to report either (a) each donor who gave $1,000 or more (since January 1 of the previous year) to a segregated bank account used to pay for electioneering communications, 11 C.F.R. § 104.20(c)(7)(ii); or (b) each donor who gave $1,000

or more "for the purpose of furthering electioneering communications," if the corporation did not use a segregated account. *Id.* § 104.20(c)(9).

The Commission acknowledged that "current reporting rules for individuals, unincorporated entities, and qualified nonprofit corporations" did not include this more tailored provision. JA310.[1] But the FEC had not been asked to revisit those rules; nor were they challenged during the rulemaking (or since). For corporations and unions, the Commission decided, the final rule struck a fair balance between the government's interest in electoral disclosure and the administrative and associational costs to regulated entities. JA301, 310-11. This was particularly true because "the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications." JA311. Thus, in the Commission's judgment, "the policy underlying the disclosure provisions of BCRA is properly met by requiring corporations and labor organizations to disclose and report only those

[1] "Qualified nonprofit corporations" were a subset of incorporated entities "formed for the express purpose of promoting political ideas," which the Supreme Court historically treated differently from other corporations. *MCFL*, 479 U.S. at 264. Post-*Citizens United*, all corporations have an equal right to independent political speech—electioneering communications and express advocacy alike—meaning that the unique status of qualified nonprofit corporations no longer obtains. The Commission now treats these entities like all other corporations. *E.g.*, 79 Fed. Reg. 62,797, 62,811 (Oct. 21, 2014).

persons who made donations for the purpose of funding [electioneering communications]." JA311.

C. The District Court Vacates the Disclosure Rule.

Congressman Van Hollen sued the FEC three years later, claiming that 11 C.F.R. § 104.20(c)(9) is "inconsistent with the plain language of the statute," is "manifestly contrary to Congressional intent," and is the product of arbitrary and capricious decision-making. JA318. In Van Hollen's view, a "donor's purpose, motive, or reason for making the donation is not relevant" for purposes of the electioneering-communication disclosure law. Van Hollen Mot. for Summ. J. 20 (Dist. Ct. Dkt. 20). CFIF and the Hispanic Leadership Fund intervened alongside the FEC to defend the regulation.

In March 2012, the district court vacated 11 C.F.R. § 104.20(c)(9) at *Chevron* step one. Given FECA's "text, structure, purpose, and legislative history," the court held that the rule's "purpose or intent" element "directly contravened the requirement set forth plainly by Congress that 'all contributors who contributed' be disclosed." JA352, 365, 367.

D. This Court Reverses.

This Court reversed. Looking to "respected dictionaries," the Court held that the statutory terms "contributor" and "contributed" could be "construed to include a 'purpose' requirement … ." JA385. "[T]raditional tools of statutory

construction" did not uncover any contrary legislative intent, JA385, so FECA did not foreclose 11 C.F.R. § 104.20(c)(9) at *Chevron* step one.

At the same time, the rule included features—most notably a cross-reference to another, outdated provision—that made the Court uncertain as to its precise sweep. For this reason, the Court remanded to the district court to give the FEC a chance either to pursue a "prompt" rulemaking or to defend the existing regulation. If the FEC opted to defend, the district court was to decide Van Hollen's "claims that the regulation cannot survive review under *Chevron* Step Two or *State Farm* … .]" JA386.

E. The District Court Vacates the Disclosure Rule on Remand.

Six months after this Court's judgment, the FEC advised that it would defend 11 C.F.R. § 104.20(c)(9) as written. FEC Response to Pl.'s Mot. for Further Relief 1 (Dist. Ct. Dkt. 80).[2] Twenty months after that, the district court again vacated the rule. JA404-50. On the *Chevron*-step-two question, the court recognized that this Court "already stated that the words 'contributors' and 'contributed' can, on their face, be construed to include a purpose requirement." JA446. Even so, on reexamining "the language, legislative history, and policies of the statute," the court held for a second time that "[t]he regulation contravenes the

[2] The Commission has since removed the cross-reference that this Court noted during the first appeal. FEC Notice of Amendment to Regulations (Oct. 15, 2014) (Dist. Ct. Dkt. 97); 79 Fed. Reg. at 62,816.

language and the purpose of" FECA. JA445. Anything less than maximum disclosure would "override a clear Congressional choice in favor of transparency," the court reasoned. JA449. For "Congress did not call for narrow tailoring; it called for just the opposite." JA447.

The district court also held that the FEC's decision-making process failed arbitrary-and-capricious review. For example, the FEC should not have credited the burdens cited by the regulated community—even though the administrative record contained no countervailing material. JA424, 443-44. Nor should the Commission have acknowledged "sensitive First Amendment and privacy concerns." JA449. No one during the rulemaking had contested the constitutional dimensions of coerced disclosure. But the district court thought the "record evidence" on this issue "extremely thin." JA449.

CFIF and the Hispanic Leadership Fund each noticed an appeal, which this Court consolidated.

SUMMARY OF ARGUMENT

I. Say the American Cancer Society (or its advocacy arm) runs a radio ad urging listeners to tell their Congressman to vote for a tobacco-marketing bill. JA47 (comment from The American Cancer Society Cancer Action Network, Inc.). The Congressman is up for reelection, and the ad airs in September, six weeks before Election Day. That makes it an "electioneering communication." It costs

$15,000, so the Society needs to file a report with the FEC. The question in this appeal is whether that report needs to itemize every donor who gave the Society more than $1,000 since January 1 of the previous year. Or did the FEC act reasonably when it said that the government's interests are met by reporting those sources of revenue who actually intended to fund the Society's electioneering communications?

A. In 2012, this Court held that FECA does not unambiguously bar the second, more measured approach, either by its terms or when interpreted using traditional tools of statutory construction. Yet at *Chevron* step two, the district court seemingly applied a more demanding standard than this Court's at *Chevron* step one. Disapproving the FEC's approach for a second time, the district court again said the agency interpretation "contravene[d] the language and the purpose of the statute."

This was error; the FEC's interpretation is structurally sound, consistent with legislative history, and faithful to the agency's duties under FECA and the Constitution. Structurally, 11 C.F.R. § 104.20(c)(9) mirrors the disclosure regime for express advocacy. That regime dates almost to FECA's enactment, and the Supreme Court has endorsed it as "provid[ing] precisely the information necessary" to serve the government's interests in electoral disclosure. *MCFL*, 479 U.S. at 262. Not only that, BCRA's sponsors left a decade-long paper trail

equating the provisions governing electioneering communications with those governing express advocacy.

Nor does the FEC's interpretation thwart Congress's purpose. First, this Court has already held that Congress did not command the boundless disclosure Van Hollen seeks. In holding otherwise, the district court maintained that "Congress did not call for narrow tailoring; it called for just the opposite." But that could not be more wrong. To state the obvious, Congress did not call for "the opposite" of narrow tailoring when it amended a law that governs *only* political speech. "In the First Amendment context, fit matters," *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014) (plurality opinion), and Congress did not break from that cardinal principle here. Far from acting unreasonably, the FEC fulfilled its statutory and constitutional duties by balancing the burdens and benefits of forced disclosure.

Second, while the district court harnessed "disclosure and transparency" to strike the FEC's interpretation as too lax, Van Hollen's dueling interpretation would not be any more effective. Accepting Van Hollen's view, the district court vacated the FEC's limit on reporting only revenue given "for the purpose of furthering" electioneering communications. But that same tailored limit still applies to express advocacy. So the upshot of more intrusive disclosure rules for electioneering communications is that speakers will switch to express advocacy,

and they will continue reporting only those sources who gave "for the purpose of furthering" the ads. (*Citizens United* gives corporations and unions their pick of express advocacy and electioneering communications.) This happened after the district court's first ruling, and there is every reason to think it will happen again. In short, Van Hollen's interpretation comes to rest at virtually the same level of disclosure as the FEC's. Especially at *Chevron* step two, it makes very little sense to frame one interpretation as reasonable and the other as altogether impermissible.

B. The same points answer Van Hollen's arbitrary-and-capricious claim. Again, the district court reached the opposite result, but it did so by "substitut[ing] its judgment for that of the agency" at every turn. *State Farm*, 463 U.S. at 43. Instead of "presum[ing] the validity of agency action," *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (citation omitted), the court overlooked key passages in the Commission's reasoning and discounted uncontroverted record material. Its judgment should be reversed on this score also.

II. Even if this Court were to find the Commission's explanation inadequate under *State Farm*, it should still reverse the district court's remedial order. The district court opted for vacatur, but remand to the agency would be far more fitting. This Court has already said that FECA does not foreclose the rule under *Chevron* step one, and vacatur leaves the regulated community with no

agency guidance and a statute with no plain meaning. The resulting confusion and grave constitutional concerns counsel remand without vacatur.

STANDARD OF REVIEW

In reviewing the FEC's regulation, this Court applies the *Chevron* and *State Farm* standards de novo. *Fox v. Clinton*, 684 F.3d 67, 74 (D.C. Cir. 2012).

ARGUMENT

I. The FEC Permissibly Determined that Corporations and Unions Making "Electioneering Communications" Must Report Only Those Sources of Revenue Given to Fund Electioneering Communications.

A. The FEC's rule is a reasonable interpretation of the Federal Election Campaign Act.

During the first appeal, this Court held that "the District Court erred in disposing of this case under *Chevron* Step One." JA385. Now at *Chevron* step two, the only question is whether the FEC's interpretation of FECA is "permissible under the statute." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Under this analysis, the courts must uphold agency interpretations "as long as they are reasonable" and "'regardless whether there may be other reasonable, or even more reasonable, views.'" *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 296 (D.C. Cir. 2013) (citation omitted).

A straightforward application of these principles should have yielded judgment for the FEC. The Commission's interpretation was "the essence of policymaking." *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1451

(D.C. Cir. 1988). In 2007, the FEC faced both a federal statute that prohibited corporate and union electioneering communications and a Supreme Court decision partially invalidating that law. In untangling this "complicated situation," JA385, the Commission addressed how to regulate these new entrants not contemplated by the federal statute. And for the disclosure requirements, the FEC tailored the law to the governmental interests justifying it.

This was the right approach. For whatever the level of scrutiny, "[i]n the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456. Put most simply, the FEC did exactly what it was supposed to do: It "adapt[ed] [its] rules and policies to the demands of changing circumstances," *Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013), while harmonizing "various, valid policy considerations," *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012). The end-product—11 C.F.R. § 104.20(c)(9)—reflects both FECA's "language, structure, and purpose" and the Act's constitutional dimensions. *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 754 F.3d 1031, 1042 (D.C. Cir. 2014).

1. The rule is consistent with FECA's text.

The Commission's interpretation is permissible as a textual matter. "The statute is anything but clear" on the precise sources of revenue to be reported, and this Court has already said that the statute's reference to "contributors" and

"contributed" can "be construed to include a 'purpose' requirement … ." JA385. This accords with the rest of FECA, which uses "contribution" throughout to mean transfers "for the purpose of influencing" federal elections. 52 U.S.C. § 30101(8)(A)(i).

In holding otherwise, the district court repeated its original error. In the district court's view, "the regulation contravenes the language ... of the statute," because the statutory phrase requiring disclosure of "*all* contributors who contributed" permits "no limitation other than the threshold amount." JA445, 446. But this resuscitates the same analysis this Court rejected in 2012, with the district court echoing its first ruling almost verbatim. *Compare* JA366-67 (district court), *with* JA385 (court of appeals). That should be the end of the matter. If the statutory text did not support invalidating the FEC's interpretation at *Chevron* step one, that is doubly true at *Chevron* step two.

2. The rule fits with FECA's structure and legislative history.

11 C.F.R. § 104.20(c)(9) also complements FECA's structure more broadly, particularly the Act's express-advocacy provisions. For more than two decades before Congress chose to regulate electioneering communications, federal law required express-advocacy speakers to report only revenue given "for the purpose of furthering" their communications. 52 U.S.C. § 30104(c)(2)(C); 11 C.F.R. § 109.10(e)(1)(vi). And in promulgating 11 C.F.R. § 104.20(c)(9), the FEC

deliberately "dr[ew] from" that existing law. JA311 n.22. Even standing alone, these parallels are strong evidence that the rule "does not reflect an unreasonable interpretation of the statute." *Public Citizen v. Carlin*, 184 F.3d 900, 906 (D.C. Cir. 1999). In *Public Citizen*, for instance, this Court rejected a *Chevron*-step-two argument largely because a "neighboring part" of the statute codified the "very approach" the plaintiff challenged. *Id.*

The FEC's decision to follow a sibling provision makes especially good sense here. Congress regulated electioneering communications for the same reasons it regulated express advocacy. *McConnell*, 540 U.S. at 126. Before the Supreme Court, the government styled the electioneering-communication disclosure law as synonymous with the existing law governing express advocacy. *Supra* 5. And for the better part of a decade, a chorus of BCRA sponsors—often speaking through Van Hollen's counsel—subscribed to this interpretation before all three branches of government:

- In 2002, Senator McCain said that BCRA "would simply subject soft money-funded campaign ads that masquerade as issue discussion to the *same laws* that have long governed campaign ads." 148 Cong. Rec. S2141 (emphasis added). This echoed Senator Snowe's earlier assurance that the law would not "have invasive disclosure rules that require the disclosure of entire membership lists." 144 Cong. Rec. S998 (daily ed. Feb. 25, 1998).

- Later that year, BCRA's lead sponsors advised the FEC that "in general, reporting for electioneering communications should be analogous to reporting for independent expenditures [*i.e.*, express advocacy]." Comment of Sen. McCain et al. at 3, Notice 2002-13 (FEC Aug. 23, 2002).[3]
- Following BCRA's enactment, they told the district court of this Circuit that the disclosure provisions for electioneering communications "are just the types of rules that FECA has long imposed on 'independent expenditures' that 'expressly advocat[e]' the election or defeat of a federal candidate." Defendant-Intervenors' Excerpts of Br. of Defendants at I-96, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-582).[4]
- The next year, they successfully defended the law before the Supreme Court on the same grounds, arguing that BCRA merely extended to electioneering communications the same "longstanding ... disclosure rules" that already applied to express advocacy. Br. of Intervenor-Defs. Sen. McCain et al. at 60 n.48, *McConnell*, 540 U.S. 93 (Nos. 02-1674 et al.).
- In 2009, they went even further, representing to the Supreme Court that the electioneering-communication provision actually had "*less* onerous

---

[3] http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

[4] http://campaignfinance.law.stanford.edu/case-materials/mcconnell-v-fec/.

reporting requirements" than those for express advocacy. Br. of Amici Curiae Sen. McCain et al. at 29-30, *Citizens United*, 558 U.S. 310 (No. 08-205) (emphasis in original).

The federal courts took these representations at face value. *E.g.*, *McConnell*, 540 U.S. at 196 n.81 ("The disclosure requirements ... are actually somewhat less intrusive than the comparable requirements that have long applied to persons making independent expenditures."); *McConnell v. FEC*, 251 F. Supp. 2d 176, 641 n.136 (D.D.C. 2003) (Kollar-Kotelly, J.) ("The disclosure of names and addresses of individual contributors is not any more restrictive than the disclosure that the corporation in *MCFL* was forced to make."). That the FEC followed suit is hardly unreasonable. Structurally, the Commission's interpretation may be the *most* reasonable one, though *Chevron* does not set the bar nearly so high.

3. The rule does not frustrate Congress's purpose.

a. The rule also accords with the purposes underlying federal campaign-finance law. As this Court has already held, Congress did not have "'an intention on the precise question at issue' in this case," JA385, and the FEC's tailored interpretation honored both its statutory duties and its constitutional responsibilities. By congressional design, the FEC is charged with "formulat[ing] policy with respect to" FECA, 52 U.S.C. § 30106(b)(1), and it must always ensure that its acts are carefully drawn "to achieve the desired objective." *McCutcheon*,

134 S. Ct. at 1457 (citation omitted). For "[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (citation omitted).

Moreover, not to have considered tailoring the disclosure rule would have raised constitutional concerns of the first order. No less than with any other speech-restrictive law, the government must draw disclosure rules "'in proportion to the interest served,' ... employ[ing] not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *McCutcheon*, 134 S. Ct. at 1456-57 (citation omitted); *see also Davis v. FEC*, 554 U.S. 724, 744 (2008).

Here, the government's interests in compelled disclosure are finite. They are "based on ... 'provid[ing] the electorate with information' about the sources of election-related spending," *Citizens United*, 558 U.S. at 367 (citation omitted), which in turn is material only so far as it "helps voters to define more of the candidates' constituencies," *Buckley*, 424 U.S. at 81; *see also Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) ("Not every intrusion into the First Amendment can be justified by hoisting the standard of disclosure.").

Given this delimited interest, a "donor's purpose, motive, or reason for making the donation" is absolutely relevant to the scope of FECA's disclosure laws. *See* Van Hollen Mot. for Summ. J. 20. Requiring an organization to divulge up to twenty-two months' worth of donor information would impose serious burdens on both speakers and their members. JA301, 311. Yet the resulting flood of data would not reliably aid voter decision-making. An organization's general donors and members "do not necessarily support the corporation's electioneering communications," as the Commission remarked, JA311, so linking them pell-mell to federal campaigns would be more misleading than informative. To give an obvious example, it is hard to imagine a citizen's reconsidering her vote after studying the American Cancer Society's donor list. JA47.

In First Amendment terms, there is no "substantial relation" between unchecked donor disclosure and the state interest in an informed electorate. *Citizens United*, 558 U.S. at 366-67. The Commission was right to perceive this problem. And at the very least, its solution reasonably accommodated the "conflict between values of transparency and privacy," which admits of "no obvious answer." Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 Wm. & Mary Bill of Rts. J. 983, 987 (2011). Indeed, the final balance is one the Supreme Court has long sanctioned. To repeat, disclosing those "contributors who ... intended to influence

elections ... provides *precisely* the information necessary to monitor [a speaker's] independent spending activity and its receipt of contributions." *MCFL*, 479 U.S. at 262 (emphasis added). In the Court's view, this "less restrictive" approach fully meets "[t]he state interest in disclosure." *Id.*

b. The district court recognized the FEC's effort to balance the burdens and benefits of compelled disclosure, but it saw this approach as vice, not virtue. The court ascribed to Congress a "policy goal" of "disclosure and transparency"—to the exclusion of every other consideration. JA446. "Congress did not call for narrow tailoring," the district court declared; "it called for just the opposite." JA447. By extension, any attempt to calibrate the law would "contravene[] ... the purpose of the statute." JA445.[5]

The district court erred in two ways: by misperceiving Congress's "goal" and by assuming that its preferred disclosure law would yield any greater transparency than the FEC's. *First*, by couching Congress's "policy goal" at the highest level of abstraction—"disclosure and transparency"—the court displaced the FEC as decision-maker. It may be true that *Chevron* forecloses "administrative

[5] The district court may have misapprehended the scope of 11 C.F.R. § 104.20(c)(9) when it said that "[a] donor can avoid reporting altogether by transmitting funds but remaining silent about their intended use." JA447. The rule does not stop at revenue "specifically designated" for electioneering communications; it also reaches all donors who gave "in response to solicitations specifically requesting funds" to pay for electioneering communications. JA311.

constructions ... that frustrate the policy that Congress sought to implement." *Shays v. FEC*, 528 F.3d 914, 919 (D.C. Cir. 2008) (citation omitted); *see also* JA414. But such "'purpose-driven' interpretive methodologies" counsel restraint. *Cont'l Air Lines, Inc.*, 843 F.2d at 1451. By "grandly ... resort[ing] to a single 'broad purpose,'" *id.*, the courts may wrongly assume that Congress sought to "pursue[] its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Not only that, a court shouldering agency duties may "distort the legislative process" itself. *Cont'l Air Lines, Inc.*, 843 F.2d at 1450. By substituting judicial black-and-white for legislative gray, the courts ignore legislative compromise and invite "losers in the Congress" to "eschew[] the democratic process and instead enter[] the litigation arena." *Id.*

These cautionary principles apply with full force here. BCRA "emerged after years of debate and compromise" a "very lengthy and complex piece of legislation." H.L. Pohlman, *Constitutional Debate in Action: Civil Rights and Liberties* 208 (2005). Since then, campaign-finance reform has become only more polarized. Congressman Van Hollen himself has three times tried—without success—to amend FECA to require more disclosure. *See* DISCLOSE 2013 Act, H.R. 148, 113th Cong. (2013); DISCLOSE 2012 Act, H.R. 4010, 112th Cong. (2012); DISCLOSE Act, H.R. 5175, 111th Cong. (2010). Yet by taking his policy preferences to the courts, he has successfully hobbled the discretion of an

independent agency and struck a legislative rule approved by that bipartisan body. The "anti-democratic dangers" of this outcome cannot be overstated. *Cont'l Air Lines, Inc.*, 843 F.2d at 1451.

Compounding the problem, the district court erred in identifying Congress's purpose. Contrary to the court's view, Congress did not pass a damn-the-torpedoes law mandating "the opposite" of narrow tailoring. JA447. Lawmakers "took great care in crafting ... language to avoid violating the important p[]rinciples in the first amendment of our Constitution." 147 Cong. Rec. S3033 (daily ed. Mar. 28, 2001) (Sen. Jeffords); 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002) (Sen. Snowe) ("As far back as 1997, I worked to address this thorny issue—how do we ensure freedom of speech while also ensuring the integrity of our election laws?"). The end-result speaks for itself: a disclosure provision that everyone—from sponsors to Solicitor General—understood to be modeled on the tailored, purpose-based provisions governing express advocacy.

Second, even setting aside the district court's mistaken view of Congress's goals, the court's chosen interpretation promises no greater "disclosure and transparency" than the FEC's. Since 1980, Congress and the FEC have mandated purpose-based disclosure for express advocacy parallel to what 11 C.F.R. § 104.20(c)(9) mandated for electioneering communications. And even though there may be little practical difference between express advocacy and

electioneering communications, the two concepts remain mutually exclusive. 52 U.S.C. § 30104(f)(3)(B)(ii). Thus, striking the purpose-based provision for electioneering communications simply invites corporations and unions to put their money into express advocacy instead. *See Citizens United*, 558 U.S. at 372. Tacking on a "vote for" or "vote against," "savvy campaign operators" can convert their ads from electioneering communications to express advocacy in seconds. *Shays v. FEC*, 414 F.3d 76, 115 (D.C. Cir. 2005). With that tweak, they can continue reporting only their election-specific backers, under FECA's express-advocacy provision instead of the electioneering-communications provision.

Van Hollen and the district court ignored this unintended consequence, though many commentators observed it after the court's first bite at the apple.[6]

---

[6] *E.g.*, Matea Gold, *Appeals Court Ruling Lets Donors Stay Secret*, The Spokesman-Review (Sept. 18, 2012) ("[G]roups switched to running explicitly political ads, taking advantage of the conflicting patchwork of campaign finance rules that did not require disclosure of those doing 'express advocacy.'"); George Zornick, *An Appeals Court Strikes a Blow to Campaign Finance Reform*, The Nation Blog (Sept. 19, 2012) ("[I]ronically, by throwing in a few words at the end of a political ad asking voters to take a position on a particular candidate, outside groups were able to avoid any potential fallout from Van Hollen vs. FEC … ."); *Van Hollen Decision Overturned*, OpenSecrets Blog (Sept. 18, 2012) ("Instead, these groups ... had been making independent expenditures—political ads that expressly advocate for or against a candidate."); Kenneth Doyle, *D.C. Circuit Panel Set to Hear Arguments In Political Ad Disclosure Case on Sept. 14*, Bloomberg BNA Money and Politics Report (June 6, 2012) ("[Express-advocacy laws are] unaffected by the Van Hollen litigation and paradoxically are now subject to less disclosure than the issue ads that do not call for votes"); Rick Hasen, *"D.C. Circuit Panel Set to Hear Arguments In Political Ad Disclosure Case on*

There is no reason to think things will be different a second time around; as one journalist noted just this week, "The only category of campaign money to show a sharp drop since 2010 was spending on electioneering communications." Kenneth Doyle, *Money Collected by Candidates Declined In 2014, as PAC Money Shot Up, FEC Says*, BNA Money & Politics Report (Apr. 6, 2015). At base, Van Hollen's interpretation settles at practically the same level of disclosure as the FEC's, so it makes little sense to say that one frustrates Congress's purpose while the other does not. If anything, it is Van Hollen's approach that most clearly breaks with congressional intent. Not only does his interpretation promise no greater disclosure, it breathes life into the precise distinction Congress meant to erase all along—the line between electioneering communications and express advocacy.

B. The FEC's rule is the product of reasoned decision-making.

1. Van Hollen's arbitrary-and-capricious claim fails for similar reasons. Never "particularly demanding," the *State Farm* standard "is satisfied if the agency enables [the courts] to see what major issues of policy were ventilated ... and why the agency reacted to them as it did." *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) (citations, alterations, and quotation marks omitted). This is especially true where, as here, the issue before the agency was "far from an

---

Sept. 14", Election Law Blog (June 5, 2012) ("[Speakers] have instead shifted to independent expenditures … .").

exact science and involve[d] policy determinations in which the agency is acknowledged to have expertise." *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 746 F.3d 474, 489 (D.C. Cir. 2014) (citation omitted).

The agency action here meets this standard. As discussed, the FEC determined that corporations and unions making electioneering communications should disclose those revenue sources that intended to fund electioneering communications. In the Commission's judgment, this interpretation "properly met" the "policy underlying the disclosure provisions of BCRA," JA311, while accounting for the privacy concerns and administrative burdens that attend coerced disclosure. This measured approach "result[ed] from exactly the kind of agency balancing of various policy considerations to which courts should generally defer." *Republican Nat'l Comm.*, 76 F.3d at 408.

2. Although the district court recited the *State Farm* standard, JA412-13, it intensified the scope of review to something approaching strict scrutiny. Far from "presum[ing] the validity of agency action," *Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1228 (citation omitted), the court acted as primary decision-maker and misapprehended both the administrative record and the Commission's reasoning. Like its substantive *Chevron* ruling, the court's decision that the Commission acted arbitrarily and capriciously should be reversed.

a. To begin with, the court thought it "unreasonable for the FEC to alter the statutory reporting requirements on the stated grounds that it was implementing the Supreme Court's decision in *WRTL II*." JA422. Because *WRTL II* "left the reporting provisions untouched," the court saw no cause for the FEC to reassess its disclosure rules in light of that decision. JA421.

This is incorrect. True, *WRTL II* did not pass on FECA's reporting laws. But the decision still changed the landscape markedly—a point the district court recognized in its first ruling. JA353 ("[The FEC] specifically undertook to modify existing law to fit the changed circumstances."). By confirming the right of corporate and union speakers to make electioneering communications, *WRTL II* traded a simple ban for the "unique and complex" provisions that attach to lawful political speech. *Citizens United*, 558 U.S. at 334. It was neither arbitrary nor capricious for the FEC to appraise its regulations in light of these "changed factual circumstances." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Quite the opposite; an agency "*must* consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron U.S.A, Inc.*, 467 U.S. at 864 (emphasis added); *see also* JA386 (noting the Commission's "attempt ... to provide regulatory guidance" following *WRTL II*).

b. Remarkably, the district court also faulted the Commission for taking cognizance of "First Amendment and privacy concerns." JA449. This view

followed from two errors. First, the court believed that "[t]his was not a justification advanced in the Explanation and Justification … ." JA449. But the Commission's basis for decision could not have been clearer. "[U]nder revised section 104.20," the Explanation and Justification stated, "the reporting requirements for corporations and labor organizations ... are narrowly tailored *to address many of the commenters' concerns regarding individual donor privacy*." JA301 (emphasis added); *see also* JA301 ("[T]he Commission believes that the carefully designed reporting requirements detailed below do not create unreasonable burdens on the privacy rights of donors to nonprofit organizations.").

Second, the district court rejected privacy considerations because it saw the "record evidence" as "extremely thin." JA449. Yet the record more than sufficed, especially under arbitrary-and-capricious review. A range of nonprofit organizations affirmed that forcing them to divulge their donor bases would intrude on associational privacy. *See*, *e.g.*, JA99, 109, 139. This in turn would affect fundraising for organizations' missions. As one pair of groups explained, "a requirement that § 501(c)(4) organizations disclose [their] donors of $1,000 or more if they air exempt electioneering communications will have a significant impact on non-profit organizations." JA139. Faced with intrusive disclosure laws, "[n]on-profits ... will see their donor bases shrink, and/or will see donors refusing to give more than $1,000." JA139; *see also* JA139 (describing litigation brought to

"force [a nonprofit group] to disclose the names of its donors … "); JA262 ("Many donors to my clients value their anonymity and will not give if they know that their identities will be disclosed because they have been subjected in the past to reprisal and other manifestations of public hostility … .").

It is not clear what more "record evidence" is needed. JA449. The privacy implications of forced disclosure have been a staple of campaign-finance law for decades—a point many commenters noted and none denied. *E.g.*, JA139. The Commission can hardly be censured for acknowledging the impact its actions would have on associational privacy. The agency is duty-bound to "tailor its policy to avoid unnecessarily burdening ... First Amendment rights … ." *AFL-CIO*, 333 F.3d at 178. If anything, *failing* to consider this factor would have been arbitrary and capricious.

c. The district court further opined that insufficient data "quantif[ied]" the burdens a broad disclosure law would have on the regulated community. JA424. Above all, the court stressed, many commenters "who expressed concerns about burdens" advocated against all reporting laws rather than urging the middle path the Commission adopted. JA427. In great part for this reason, the court found the record "largely devoid of evidence" supporting the Commission's action. JA423.

This is doubly wrong. As a factual matter, the district court erred in saying that "[n]one of the commenters asked the agency to amend the disclosure rules to include a purpose requirement … ." JA407. At least three written comments advocated that approach. JA68-69, 153-54, 164. And at the hearing, even commenters who disfavored a wholesale reporting exemption conceded that "[t]here might very well be a basis" for the rule the Commission adopted. JA255, 189-90.

In any case, the court was mistaken to discount stakeholder insights simply because commenters urged interpretations that differed from the Commission's final action. "[T]here is no requirement that [an agency's] explanation derive from the comments it receives." *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 27 (D.C. Cir. 2015). And as the district court's survey makes clear, JA424-43, the administrative record supported the Commission's judgment. Commenters provided numerous examples of how disclosure laws would adversely affect them. A coalition of labor organizations explained that "[t]he burden on a union to account for and report all sources of receipts of $1,000 or more" would actually be more demanding than under existing labor laws. JA163, 227-28 (identifying pilots, professors, doctors, and dentists as union members "whose dues are ... more than $1,000 a year"). Other organizations explained that extensive disclosure would hinder fundraising efforts, *supra* 33-34, while still others voiced concern

that onerous rules would divert scarce resources, *supra* 9. Under existing campaign-finance law, membership and other nonprofit organizations did not need to publicize *any* donor information; read at its broadest, FECA would have required them to itemize nearly *two years'* worth of data.

As against all this, no stakeholder who favored broader disclosure presented any contrary evidence—or even disputed that burdens would attend an untailored regime. This in itself is a problem, since "[i]t is well established" that courts should not consider "issues not raised in comments before the agency." *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 211 (D.C. Cir. 2007) (citation omitted). And that the district court could envision new lines of inquiry is beside the point. For example, the court thought that the record could have been further developed on "how many non-profit organizations, if any, collected contributions or dues ... that would exceed the $1000 statutory threshold, how many individuals made donations or paid dues in those amounts, or how difficult it would be to keep track of them." JA444. Setting aside the obviously sensitive nature of much of this data, it is not clear why the rulemaking was arbitrary and capricious without it. The question under *State Farm* is not whether a reviewing court can envision a fuller record (the answer to that question will almost always be *yes*), but whether the Commission's decision "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. "Without any

contrary evidence" in the record, *Agape Church, Inc.*, 738 F.3d at 410, there was nothing unreasonable in the FEC's crediting the concerns voiced by corporate and union commenters. *Cf. Investment Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F.3d 370, 375 (D.C. Cir. 2013) (holding that agency's "discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate potential costs and benefits").

At base, the district court's difficulty "put[ting] one's finger upon any data that prompted the ... rule" cannot be squared with the record. JA444. The court should have had "no trouble seeing 'what major issues of policy were ventilated' or why the Commission 'reacted to them as it did.'" *Republican Nat'l Comm.*, 76 F.3d at 408 (citation omitted). It had no such difficulty the first time around. "There is no question," the court said in its original ruling, "that the agency was animated by concerns that the disclosure provision might be too burdensome or too broad as a matter of policy when applied to all corporations and labor unions … ." JA353.

d. Nor do the district court's residual theories justify holding the Commission's action arbitrary and capricious. *First*, the court faulted the Commission for not "explain[ing] why the segregated bank account was not a suitable solution for any of the problems that were identified." JA445. (Recall that corporations and unions can fund their electioneering communications either

from a unique political account or from their general treasury. *Supra* 5.) As the Commission acknowledged, however, stakeholders voiced concerns that segregated accounts would *not* be a "meaningful alternative" to general-treasury spending. JA311. Likewise, in its most recent update to 11 C.F.R. § 104.20(c)(9), the Commission agreed that coercing groups to "use ... such accounts would be 'highly burdensome.'" 79 Fed. Reg. at 62,814.[7]

Again, the record supports this view. For example, one commenter testified that unions and nonprofit groups "don't have that kind of money, they can't raise individual money, they have to use their general support money." JA259. Thus, "as a practical matter, these organizations have to use treasury money … ." JA260. No one contradicted this position, and for good cause. By definition, "electioneering communications" occur only in the final weeks before elections. *Supra* 4. And "[i]t is well known" that "[t]he need or relevance of the speech will often first be apparent at this stage in the campaign." *Citizens United*, 558 U.S. at 334. For this reason, few speakers have the luxury either of budgeting their electioneering communications ahead of time or of launching fundraisers to

[7] The district court may have been under the misimpression that these accounts can receive funds from natural persons only. JA448 n.13. Although the statute provides for "funds contributed solely by individuals," 52 U.S.C. § 30104(f)(2)(E), the Commission has interpreted *WRTL II* and *Citizens United* to permit these separate accounts to receive corporate and union money. JA311-12; *see also* 79 Fed. Reg. at 62,814.

underwrite their ads. "The decision to speak is made in the heat of political campaigns," *id.*, meaning that "as a practical matter for both unions and for many 501(c) organizations[,] the money is coming out of the general treasury," JA259.

Second, the district court minimized the need to further define the disclosure regime at all; in the court's view, it was perfectly clear what sources of corporate and union revenue would need to be reported. JA448. But in fact, the record showed rampant confusion regarding which payors would qualify as "contributors." Commenters and Commissioners alike grappled with distinctions between membership dues, general-support grants, royalties, investment capital, and other income. Even within these revenue streams, stakeholders drew distinctions—between dues paid to unions, for example, versus dues paid to trade associations. *Supra* 9. Confusion persists even in this litigation. According to Van Hollen, "donations to a non-profit corporation in the form of 'membership dues'" should be subject to reporting, Van Hollen Mot. for Summ. J. 31 n.25, but the district court had no qualms assuming that labor-union dues would not, JA448.

To address this disorder, the district court thought that "further elaboration" of the preexisting rule would have better "alleviate[d] any lingering confusion." JA448. Yet this was one of *four* proposals the FEC formally identified in its Explanation and Justification. JA311 ("One commenter argued that the concepts of 'donor' and 'donate' should exclude membership dues, investment income, or

other commercial or business income."). And while that approach may have appealed to the district court, codifying bright-line categories of exempt revenue presents obvious opportunities for evasion. On top of that, "alleviat[ing] ... confusion" was not the only consideration in the mix; as a substantive matter, the FEC aimed to strike a reasonable balance between the benefits and burdens of compelled disclosure. JA301, 311. The Commission was well within its rights to choose the course it did, and in second-guessing that decision the district court wrongly "substitute[d] its judgment for that of the agency." *State Farm*, 463 U.S. at 43. "Congress gave the Federal Election Commission, not th[e] court[s], responsibility for determining the most effective techniques for obtaining donor information." *Republican Nat'l Comm.*, 76 F.3d at 408.

II. The FEC's Notice-and-Comment Process Was Sound.

Throughout its decision, the court put great stock in the fact that the final language of 11 C.F.R. § 104.20(c)(9) did not appear in the Commission's Notice of Proposed Rulemaking. This "procedural history tends to diminish the validity of the regulation under the second level of the *Chevron* analysis," the court said, JA421, and also "has an impact upon [part] of the *State Farm* analysis," JA423.

The court should not have let this misperception color its reasoning—not least because Van Hollen disavowed any claim of inadequate notice:

> The Court: Is there any argument that [the final rule] didn't flow logically from or reasonably develop from the proposed rules and therefore a remand is the [sic] appropriate?
>
> [Plaintiff's Counsel]: We looked at that. ... But in the end, we weren't particularly moved by that argument.
>
> * * *
>
> I don't think it's the most evident or soundest or most defensible ground for—Let me just continue on this burden point … .

JA403.

Van Hollen was right to disclaim this theory. "The final rule need not be the one proposed in the NPRM. Rather, '[a]n agency's final rule need only be a logical outgrowth of its notice.'" *Agape Church, Inc.*, 738 F.3d at 422 (citation omitted). Here, the Notice of Proposed Rulemaking left no doubt that the Commission would consider "limit[ing] the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications[.]" JA37. Particularly given this Court's mandate, JA386, the district court had no warrant to apply anything other than the *Chevron* and *State Farm* standards.

III. This Court Should Reverse the District Court's Remedial Order.

Because the FEC acted reasonably in promulgating 11 C.F.R. § 104.20(c)(9), this Court need not reach the issue of proper remedy. Even if the Court were to find the Commission's explanation inadequate under *State Farm*, however, it should reverse the district court's remedial order. Finding that the FEC failed to provide a reasoned explanation does not alone justify vacating the agency's regulation. Rather, in determining whether vacatur is appropriate, this Court considers: "(1) the seriousness of the ... deficiencies of the action, that is, how likely it is the [agency] will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur." *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009) (quotation marks omitted).

If the Commission's only error was failing to provide an adequate explanation, these two considerations heavily favor remand without vacatur. "When an agency may be able to readily cure a defect in its explanation of a decision, the first factor ... counsels remand without vacatur." *Id.* at 197-98. This principle has special purchase here, for this Court has already determined that FECA does not foreclose the FEC's interpretation at *Chevron* step one. JA385-86.

Left uncorrected, moreover, the district court's vacatur will disrupt the regulated community. Without 11 C.F.R. § 104.20(c)(9), the FEC rules offer no guidance on the reporting duties that accompany general-treasury spending for

corporate and union electioneering communications. (One other regulatory provision addresses how to report spending from general accounts, but it governs only "disbursements ... *not* made by a corporation or labor organization … ." 11 C.F.R. § 104.20(c)(8) (emphasis added).)

Nor can corporations and unions look to FECA itself. As this Court has said, "it is doubtful that, in enacting [52 U.S.C. § 30104(f)], Congress even anticipated the circumstances that the FEC faced when it promulgated 11 C.F.R. § 104.20(c)(9)." JA385. It was precisely because of "the absence of plain meaning in the statute" that the FEC added that provision in the first place. JA385. And the multiplicity of interpretations aired during the 2007 rulemaking is proof positive that some regulatory framework is critical. *Supra* 9. Indeed, as CFIF argued in seeking leave to amend its pleadings, "the statutory language is unconstitutionally vague unless clarified by valid regulation." CFIF Mot. and Mem. for Leave to File Am. and Supp. Answer & Crossclaims 4 (Dist. Ct. Dkt. 81).[8]

[8] The FEC has entered an appearance in this appeal to defend the district court's refusal to grant CFIF leave to amend its pleadings. (This brief does not independently challenge that order, reproduced at JA396-99.) If the Court believes the FEC's views on the district court's final judgment would be helpful, it may consider inviting the Commission to file a brief addressing "the meaning of the statute, the intended reach of the disputed regulation, and the import of the Supreme Court's decisions addressing campaign finance law." JA386; *cf. Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1363 (D.C. Cir. 1988). Otherwise,

Moreover, Van Hollen's interpretation of choice invites even more constitutional problems. Requiring disclosure without a substantial link to the government's election-related interests raises serious First Amendment issues. *Supra* 24-26. And Van Hollen's extreme reading of FECA is untailored by design; he says outright that Section 30104(f) "must" require speakers to divulge donors who gave money "*without* a purpose to influence elections." Van Hollen Reply to FEC Opp. to Mot. for Summ. Judgment and Opp. to FEC's Cross-Mot. for Summ. Judgment 9 (Dist. Ct. Dkt. 35) (emphasis in original). In no universe would the statute, so read, substantially relate to the government's interest in "help[ing] voters to define more of the candidates' constituencies." *Buckley*, 424 U.S. at 81; *see also Citizens United*, 558 U.S. at 367.

Lastly, notwithstanding Van Hollen's stance that 11 C.F.R. § 104.20(c)(9) falls short, there is no claim that the rule does "affirmative harm." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) ("leaving the current rule in place" when challengers agreed that the rule did "no affirmative harm, arguing only that it does not go far enough"). Given all these considerations, the pressing need for regulatory guidance in the upcoming election cycle thus favors preserving the status quo ante.

---

the FEC's views are presented in its submissions before the district court and in the administrative record.

CONCLUSION

For the reasons discussed above and in the Argument section of Hispanic Leadership Fund's opening brief (adopted under Fed. R. App. P. 28(i)), the district court's judgment should be reversed.

Respectfully submitted,

/s/ Thomas W. Kirby
Jan Witold Baran
Thomas W. Kirby
Caleb P. Burns
Samuel B. Gedge
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
Tel.: 202.719.7000
E-mail: tkirby@wileyrein.com

April 10, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations set forth in this Court's February 26, 2015 order because it contains 9,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: April 10, 2015

/s/ Thomas W. Kirby
Thomas W. Kirby

Addendum

TABLE OF CONTENTS

52 U.S.C. § 30101. 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

* * *

52 U.S.C. § 30104. Reporting requirements

* * *

(c) Statements by other than political committees; filing; contents; indices of expenditures

(1) Every 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 containing the information required under subsection (b)(3)(A) for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and shall include–

(A) the information required by subsection (b)(6)(B)(iii), indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii), made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

* * *

(e) Political committees

(1) National and congressional political committees

The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

(2) Other political committees to which section 30125 of this title applies

(A) In general

In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 30125(b)(1) of this title applies shall report all receipts and disbursements made for activities described in section 30101(20)(A) of this title, unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000.

(B) Specific disclosure by State and local parties of certain non-Federal amounts permitted to be spent on Federal election activity

Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 30101(20)(A) of this title shall include a disclosure of all receipts and disbursements described in section 30125(b)(2)(A) and (B) of this title.

(3) Itemization

If a political committee has receipts or disbursements to which this subsection applies from or to any person aggregating in excess of $200 for any calendar year, the political committee shall separately itemize its reporting for such person in the same manner as required in paragraphs (3)(A), (5), and (6) of subsection (b).

(4) Reporting periods

Reports required to be filed under this subsection shall be filed for the same time periods required for political committees under subsection (a)(4)(B) of this section.

(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:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of

such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(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.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include–

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

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

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(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 30101(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.

(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means–

> (A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and
>
> (B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Title 26

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of Title 26.

* * *

52 U.S.C. § 30118. 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 79l(h) of Title 15, the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 30101 of this title, and also includes any direct or indirect payment, distribution, loan, advance, 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.

* * *

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 30104(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 30104(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

* * *

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 30104(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, 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.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 30104(f)(3)(C) of this title.

* * *

11 C.F.R. § 104.20 Reporting electioneering communications (52 U.S.C. 30104(f)).

(a) Definitions.

(1) Disclosure date means:

(i) The first date on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000; or

(ii) Any other date during the same calendar year on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

(2) Direct costs of producing or airing electioneering communications means the following:

(i) Costs charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent; or

(ii) The cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime.

(3) Persons sharing or exercising direction or control means officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners, of the entity or person making the disbursement for the electioneering communication.

(4) Identification has the same meaning as in 11 CFR 100.12.

(5) Publicly distributed has the same meaning as in 11 CFR 100.29(b)(3).

(b) Who must report and when. Every person who has made an electioneering communication, as defined in 11 CFR 100.29, aggregating in excess of $10,000 during any calendar year shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date. The statement shall be filed under penalty of perjury, shall contain the information set forth in paragraph (c) of this section, and shall be filed on FEC Form 9. Political committees that make communications that are described in 11 CFR 100.29(a) must report such communications as expenditures or independent expenditures under 11 CFR 104.3 and 104.4, and not under this section.

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

(1) The identification of the person who made the disbursement, or who executed a contract to make a disbursement, and, if the person is not an individual, the person's principal place of business;

(2) The identification of any person sharing or exercising direction or control over the activities of the person who made the disbursement or who executed a contract to make a disbursement;

(3) The identification of the custodian of the books and accounts from which the disbursements were made;

(4) The amount of each disbursement, or amount obligated, of more than $200 during the period covered by the statement, the date the disbursement was made, or the contract was executed, and the identification of the person to whom that disbursement was made;

(5) All clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates;

(6) The disclosure date, as defined in paragraph (a) of this section;

(7) If the disbursements were paid exclusively from a segregated bank account consisting of funds provided solely by persons other than national banks, corporations organized by authority of any law of Congress, or

foreign nationals as defined in 11 CFR 110.20(a)(3), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

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

(9) If the disbursements were made by a corporation or labor organization and were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section, 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.

(d) Recordkeeping. All persons who make electioneering communications or who accept donations for the purpose of making electioneering communications must maintain records in accordance with 11 CFR 104.14.

(e) State waivers. Statements of electioneering communications that must be filed with the Commission must also be filed with the Secretary of State of the appropriate State if the State has not obtained a waiver under 11 CFR 108.1(b).

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

* * *

(b) Every person that is not a political committee and that makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement or report on FEC Form 5 in accordance with 11 CFR 104.4(e) containing the information required by paragraph (e) of this section. Every person filing a report or statement under this section shall do so in

accordance with the quarterly reporting schedule specified in 11 CFR 104.5(a)(1)(i) and (ii) and shall file a report or statement for any quarterly period during which any such independent expenditures that aggregate in excess of $250 are made and in any quarterly reporting period thereafter in which additional independent expenditures are made.

* * *

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

(1) Contents of verified reports and statement. If a signed report or statement is submitted, the report or statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(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.

(2) Verification of independent expenditure statements and reports. Every person shall verify reports and statements of independent expenditures filed

pursuant to the requirements of this section by one of the methods stated in paragraph (e)(2)(i) or (ii) of this section. Any report or statement verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports or statements filed on paper (e.g., by hand-delivery, U.S. Mail, or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports or statements filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2015, 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.

/s/ Thomas W. Kirby
Thomas W. Kirby