**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| CHRIS VAN HOLLEN,<br><br>Plaintiff,<br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant,<br><br>and<br><br>CENTER FOR INDIVIDUAL FREEDOM,<br><br>Defendant,<br><br>and<br><br>HISPANIC LEADERSHIP FUND,<br><br>Defendant. | ) | Civ. A. No. 1:11-cv-00766 (ABJ) |

**DEFENDANT CENTER FOR INDIVIDUAL FREEDOM'S OPPOSITION TO PLAINTIFF VAN HOLLEN'S MOTION FOR SUMMARY JUDGMENT AND CFIF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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Defendant Center for Individual Freedom, Inc. ("CFIF") respectfully joins in Defendant Federal Election Commission's ("FEC") Motion for Summary Judgment and Opposition to Plaintiff Van Hollen's Motion for Summary Judgment (Dkt. No. 25). In accordance with the Court's August 1, 2011, Minute Order, CFIF has refrained from repeating arguments already made in the FEC's Memorandum of Points and Authorities ("FEC Memorandum") with which it agrees. CFIF hereby adopts the FEC's Memorandum, subject to the additional or differing positions presented herein.

CFIF is a nonprofit corporation operating under § 501(c)(4) of the Internal Revenue Code. Although CFIF engages in speech near elections, its activities principally support the general good and common welfare and are not primarily political. CFIF safeguards the privacy of its supporters and, hence, stands silent if desired speech creates a risk that they might have to be identified. Plaintiff's Complaint (Dkt. No. 1 ¶ 31) is explicit that it seeks to force CFIF to make such disclosures, with the result that CFIF's core First Amendment speech will be burdened and suppressed.[1] To protect its interests, CFIF in this case intervened as a defendant.[2]

## INTRODUCTION AND OVERVIEW

In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Supreme Court held that the core First Amendment right to engage in election-time speech about those who govern us and how they govern extends to corporations (and by implication labor unions). Congressman Van Hollen immediately vowed to "do everything possible to make sure that [*Citizens United*] does not stand." Press Release, Congressman Chris Van Hollen, Van Hollen Remarks on Supreme

[1] Additional information about the Center for Individual Freedom ("CFIF") is found at its website, http://www.cfif.org, and in its motion to intervene as a Defendant in this case (Dkt. No. 15), which CFIF incorporates here by reference.

[2] Having been granted intervention, CFIF now "becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985). CFIF is not merely supporting the FEC's motion but is itself moving for summary judgment.

Court Ruling in Citizens United Case (Jan. 21, 2010).[3] Working with Senator Charles Schumer and others, Plaintiff proposed new legislation designed as a "deterrent" to make corporations and others "think twice" before exercising their First Amendment rights. Press Conference, *Campaign Spending Rules*, Feb. 11, 2010 (remarks of Sen. Schumer).[4]

The legislation was dubbed the "Democracy Is Strengthened by Casting Light on Spending in Elections Act" (or "DISCLOSE Act"). Plaintiff heralded the bill as "landmark legislation [to] provide unprecedented disclosure and transparency in America's elections."[5] Press Release, Congressman Chris Van Hollen, Van Hollen Statement on Passage of the DISCLOSE Act (June 24, 2010).[6] Plaintiff's section-by-section analysis of the bill included the headings "EXPANDED REQUIREMENTS FOR DISCLOSURE" and "IMPROVED DISBURSEMENT REPORTING REQUIREMENTS." Congressman Van Hollen, The Van Hollen "DISCLOSE ACT;"[7] *see also* Press Release, Congressman Chris Van Hollen, Van Hollen Statement on Senate Leaders' Commitment to Act on DISCLOSE (June 22, 2010) ("The DISCLOSE Act will provide the most transparency and disclosure of political expenditures in the history of our elections.");[8] Chris Van Hollen and Mike Castle, *The Disclose Act Is a Matter of Campaign Honesty*, Wash. Post, June 17, 2010 ("this legislation will . . . shine an unprecedented amount of sunlight on campaign expenditures").

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3 Available at http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=167326.

4 Available at http://www.c-spanvideo.org/program/SpendingRu&start=204.

5 All emphasis is added unless otherwise noted.

6 Available at http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=192278.

7 Available at http://vanhollen.house.gov/UploadedFiles/DISCLOSE_Summary_042910.pdf.

8 Available at http://vanhollen.house.gov/News/DocumentPrint.aspx?DocumentID=191675.

President Obama, Senator Schumer, Senate Majority Leader Reid, other Members of Congress, and an attorney for Congressman Van Hollen in this lawsuit all said the disclosure provisions were novel and extreme, describing them as: "the toughest-ever disclosure requirements," "unprecedented transparency," an "enhanced [and] unprecedented level of disclosure," "a series of new disclosure requirements that will create an unprecedented paper trail," "rigorous new disclosure requirements . . . to shed new light," "new disclosure requirements [of] all . . . donors," "unprecedented transparency and disclosure," and "comprehensive new disclosure requirements."[9] The bill was considered by both houses of Congress and rejected. *See* Library of Congress, Bill Summary & Status of H.R. 5175, 111th Cong. (2009-2010).[10]

Undaunted, Plaintiff then brought this lawsuit claiming that a statute enacted in 2002 already imposed the "unprecedented" disclosures proposed by his bill, and that Congress's clear intent had been thwarted by a regulation the FEC adopted in 2007 to implement *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). The statute requires persons who engage in electioneering communications to disclose "all contributors who contributed an aggregate of $1,000 or more to the person making the disbursement" for electioneering

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[9] Press Release, President Barack Obama, Statement by the President on the DISCLOSE Act (Apr. 29, 2010), *at* http://m.whitehouse.gov/the-press-office/statement-president-disclose-act; Press Release, President Barack Obama, Statement by the President on Passage of the Disclose Act in the House of Representatives (June 24, 2010), *at* http://m.whitehouse.gov/the-press-office/statement-president-passage-disclose-act-house-representatives; 156 Cong. Rec. S3029 (daily ed. May 3, 2010) (statement of Sen. Schumer); Press Conference, *Campaign Spending Rules*, Feb. 11, 2010, available at http://www.c-spanvideo.org/program/SpendingRu&start=204 (remarks of Sen. Schumer); Press Release, Senator Harry Reid, Reid Statement on House Administration Committee Passage of the DISCLOSE Act (May 22, 2010), *at* http://democrats.senate.gov/2010/05/22/reid-statement-on-house-administration-committee-passage-of-the-disclose-act/); 156 Cong. Rec. S3031 (daily ed. May 3, 2010) (statement of Sen. Feinstein); 156 Cong. Rec. H4789 (June 24, 2010) (statement of Rep. Jackson Lee); H.R. 5175, The DISCLOSE ACT, "Democracy Is Strengthened by Casting Light on Spending in Elections," 111th Cong. 10 (2010) (testimony of Donald J. Simon, General Counsel, Democracy 21).

[10] Available at http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05175:@@@L&summ2=m&.

communications. 2 U.S.C. § 434(2)(f). Another statute provides that a transaction is a "contribution" if it was made "for the purpose of influencing" an election. *Id.* § 431(8)(A)(i). The implementing FEC regulation accordingly requires disclosure of contributors who are persons that provide funds "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).

Plaintiff nevertheless argues that giving weight to the purpose of funding is flatly unlawful, and that experience after 2007 shows that the regulation defeats the statute's purpose. In short, he seeks to accomplish through litigation what Congress recently and flatly refused.[11] Plaintiff's attempt to circumvent the legislative process should be rejected for many of the reasons set forth in the FEC's Memorandum and for the additional reasons set forth below.

**1. Plaintiff's Action Is Premature.**

The threshold flaw in Plaintiff's case is that it rests on factual material and legal arguments never before presented to the FEC commissioners or to the public for comment. Thus, Plaintiff's request for judicial "review" is premature. Moreover, the fact that, during the comprehensive 2007 rulemaking proceeding, not one of the eight sets of pro-disclosure comments argued that the statute precluded consideration of purpose is compelling empirical proof that the statutory meaning Plaintiff portrays as plain and unambiguous actually is invisible.[12]

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[11] This is not the first such attempt to end-run Congress. In *FCC v. ABC*, 347 U.S. 284 (1954), for example, the FCC asked Congress to forbid certain game shows and, when Congress refused, then attempted to interpret existing law to permit it to impose "the same result" through regulation. The Court disapproved, ruling the agency had "over-stepped." *Id.* at 296-97.

[12] The eight sets of comments were submitted by: (1) Senators McCain, Feingold, and Snowe, along with Congressman Shays (dated Oct. 1, 2007) (Dkt. No. 17-3, VH0370-VH0374); (2) Common Cause, Public Citizen, and U.S. PIRG (dated Oct. 1, 2007) (Dkt. No. 17-2, VH0347-VH0360); (3) the Campaign Legal Center, Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters, and U.S. PIRG (dated Oct. 1, 2007) (Dkt. No. 17-3, VH0394-VH0414); (4) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (Oct. 1, 2007) (Dkt. No. 17-2, VH0265-VH0269); (5) Public

The challenged regulation was adopted in 2007, and Plaintiff has never sought its reconsideration. The rulemaking petition Plaintiff recently filed relates to other regulations. *See* Pl. Mem. at 12 n.13 (Dkt. No. 20). Yet Plaintiff's "Statement of Facts" (at 14-15) consists primarily of assertions about the 2008 and 2010 elections and predictions about 2012 and citations to sources such as www.opensecrets.org and www.citizen.org. Until those materials are evaluated by the FEC, however, a challenge based on them is premature. The review sought here is "confined to the full administrative record before the agency at the time the decision was made." *Envt'l Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). The Court is "exclusively" limited to "an inquiry into the legality and reasonableness of the agency's action . . . solely on the basis upon which the action was administratively projected." *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 839-40 (D.C. Cir. 1976).

As the FEC Memorandum demonstrates (at 39-41), none of the narrow circumstances in which review may extend beyond the record before the agency are present here.[13] Moreover, Plaintiff formally stipulated to a decision "on the administrative record within the meaning of the Federal Rules of Civil Procedure and the Rules of the United States District Court for the District

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Campaign (dated Oct. 1, 2007) (Dkt. No. 17-3, VH0390-VH0391); (6) Professors Richard Briffault and Richard L. Hasen (dated Sept. 25, 2007) (Dkt. No. 17-2, VH0184-VH0188); (7) the State of Washington's Public Disclosure Commission (dated Sept. 28, 2007) (Dkt. No. 17-2, VH0191-VH0192); and (8) Bob Bauer and the Campaign Legal Center (as an additional joint comment) (dated Oct. 1, 2007) (Dkt. No. 17-3, VH0432-VH0433); *see also* Pl. Mem. at 8 (Dkt. No. 20).

[13] Extra-record evidence may be relevant in exceptional cases where the agency "failed to examine all relevant factors," Pl. Mem. at 14 n.14 (Dkt. No. 20) (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)), but, by definition, the FEC could not have "failed to examine" data from 2008 and 2010 during the 2007 rulemaking because the data did not yet exist. Plaintiff asserts that extra-record evidence is appropriate because the FEC "failed to consider the factor of whether or not the regulation would undermine" the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Pl. Mem. at 14 n.14. This legal claim not only fails to provide a basis for incorporating new factual evidence into the Court's analysis, but it is belied by the FEC's stated justification for the Final Rule: "[T]he Commission has determined that the policy underlying the disclosure provisions of [the statute] is properly met by requiring corporations and labor organizations to disclose and report only those persons who made donations for the purpose of funding [electioneering communications]." *Final Rule and Explanation and Justification on Electioneering Commc'ns*, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

of Columbia." *See* Stipulation at 1 (Dkt. No. 9). Plaintiff then used a briefing format that Local Rule 7(h)(2) allows only where "judicial review is based solely on the administrative record." Thus, Plaintiff has waived any right to rely on facts not presented to the FEC.

To make matters worse, Plaintiff interweaves his new factual assertions with a new legal position the FEC has not had a chance to address. During the 2007 rulemaking, the eight sets of written comments opposing any refinement to the prior disclosure regulation argued that *WRTL* did not directly address disclosure, broad disclosure was consistent with congressional policy, and other similar arguments. Those comments were prepared by skilled counsel. But not one set advanced Plaintiff's claim that the statute unambiguously deprived the FEC of discretion to adjust the disclosure burden based on purpose. To the contrary, as noted above, Plaintiff and his allies recently insisted that legislation compelling broad disclosures would be entirely new and unprecedented.

Plaintiff certainly is free to "apply for a rehearing before [the agency] or to institute new proceedings" to present new facts and legal theories. *See Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445 (1930). To avoid piecemeal litigation, the Court may exercise its discretion to stay or dismiss this proceeding for a time to allow such a petition. At minimum, the Court should refuse to consider factual materials and be very skeptical of legal arguments that lay unrecognized for a decade and have not yet been presented to the FEC.

**2. The Statute Unambiguously Validates the Regulation at Step One of *Chevron*.**

Plaintiff contends that the consideration of purpose in the FEC regulation violates a clear statutory prohibition and thus fails at Step One of the analysis in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pl. Mem. at 18-23. Plaintiff has it backwards. The statute not only permits but requires that a giver's purpose be considered in deciding who

must be disclosed, thus validating the regulation. The FEC elects to bypass Step One, arguing for Step Two deference to the agency's resolution of supposed statutory ambiguity. Prevailing on that basis would maximize the agency's discretion and power. But because the statute unambiguously validates the regulation at Step One, the Court need not reach Step Two.

At Step One, the Court uses all "'traditional tools of statutory construction' to determine whether Congress has unambiguously expressed its intent, including an examination of the statute's text, structure, purpose and legislative history." *Smirnov v. Clinton*, Civ. A. No. 11-1126, 2011 WL 2746308, at *8 (D.D.C. July 14, 2011) (citation omitted). Here, as Plaintiff concedes, the key statutory phrase is "contributors who contributed." *See* Pl. Mem. at 3, 19-20. Although "contributor" and "contributed" are not defined in the statute, they "share the same root as the defined term 'contribution.'" *See* FEC Mem. at 20. The statute defines "contribution" in terms of the giver's relevant purpose – *i.e.*, "for the purpose of influencing any election for federal office." 2 U.S.C. § 431(8)(A)(i). Indeed, it was this exact purpose that provided the essential constitutional rationale for Congress to enact the electioneering communication disclosure requirement. *See McConnell v. FEC*, 540 U.S. 93, 196 (2003) (relying on informational interests identified in *Buckley v. Valeo*, 424 U.S. 1 (1976), to allow for disclosure of electioneering communication spending "to influence federal elections").[14]

Courts regularly give the same meaning to noun and verb forms of the same term. *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 46 (1994) ("'it seems reasonable to give . . . a similar construction' to a word used as both a noun and a verb in a single statutory sentence");

[14] Plaintiff cites *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), for the proposition that electioneering communications can have purposes other than to influence elections. Pl. Mem. at 21. But those purposes are not what motivated Congress to enact the electioneering communication provision. *See McConnell v. FEC*, 540 U.S. 93, 193-94 (2003) ("Congress enacted [the electioneering communication provision] to correct the flaws it found in the existing system" in order to regulate "advertisements . . . intended to influence the election").

*King v. D.C.*, 277 F. 562, 564-65 (D.C. Cir. 1922) (construing verb "registered" in accordance with statutory definition of noun "registration"). Moreover, the Supreme Court has consistently referred to those who make a "contribution" under the statute as "contributors." *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) ("[C]ontribution limits" restrict "the contributor's freedom of political association"); *McConnell*, 540 U.S. at 134-35 (a "contributor's ability to engage in free communication" is impacted by "contribution limits"); *Buckley*, 424 U.S. at 21 (a "contribution" shows the "contributor's support" for a particular "candidate and his views"). Thus, a "contributor who contributed" is one who made a "contribution" as defined by the statute, which requires an election-influencing purpose.

Plaintiff argues that the statute's internal definition should yield to external dictionaries. The cited dictionaries, however, actually reinforce the statutory definition. Plaintiff contends, for example, that the dictionary definition of "contribute" is "to give or grant in common with others." Pl. Mem. at 20 (quoting Webster's Third New Int'l Dictionary 496 (2002)). But that is not the entire definition. The full first definition is: "contribute," *i.e.*, "to give or grant in common with others (as to a common fund or for a common purpose): give (money or other aid) for a specified object." Webster's Third New Int'l Dictionary 496 (emphases added). Another dictionary cited by Plaintiff also turns on purpose: to "contribute" is "to give in order to help achieve something." Pl. Mem. at 20 (quoting Concise Oxford English Dictionary 310 (11th ed. 2004)). Plaintiff's dictionaries thus confirm that "contribution" turns on the giver's purpose.[15]

[15] Plaintiff makes another omission. As noted in the FEC Memorandum (at 33), Plaintiff repeatedly argues that the regulation requires disclosure only if a contributor "announces" an intent to further electioneering communications. But the regulation also requires disclosure of funds "received in response to solicitations specifically requesting funds to pay for [electioneering communications] as well as funds specifically designated for [electioneering communications]." 72 Fed. Reg. at 72911. No "announcement" is required.

Plaintiff also cites statements in the legislative record for support. But those focus on purpose as well, calling for disclosure of persons who "sponsor[] and pay[] for an electioneering communication" (Sen. Jeffords), decide to "financ[e] these ads" (Sen. Snowe), or "actually pay[] for them" (Sen. Feinstein). *See* Pl. Mem. at 4 n.2. One would not select such language to describe persons who merely paid dues without regard for, agreement with, or knowledge of a company's or union's electioneering activities. Instead, the quoted language is a natural way to describe payments for the purpose of sponsoring or financing electioneering communications.

Moreover, contrary to Plaintiff's assertion, the statute's reference to "all contributors" does not expand the class of contributors that must be disclosed. *Id.* at 19. As Plaintiff recognizes, "all" means "the whole amount" or "every member of [the] set or group." *Id.* It prevents exception but does not require more than the specified class. By using "all," Congress required disclosure of every "contributor who contributed," but not of other funding sources. *E.g.*, *Transtech Indus., Inc. v. A&Z Septic Clean*, 270 F. App'x 200, 210 (3d Cir. 2008) (because "'all' modifies 'claims made,'" it cannot reach "claims which could have been made"); *Ziegler v. HRB Mgmt, Inc.*, 182 F. App'x 405, 407 (6th Cir. 2006).

Indeed, Plaintiff acknowledges that the term "all contributors" requires consideration of the giver's purpose. Pl. Mem. at 30-31. In his view, if money is given for investment purposes, in connection with a sale, or as payment for a loan, it need not be disclosed. *Id*. On the other hand, if money is not given to obtain an equivalent return – *e.g.*, to pay dues to "non-profit groups and labor organizations" – Plaintiff would require its disclosure. *Id*. at 32. In short, Plaintiff assigns the giver's purpose a controlling role, but prefers to stress a different purpose.

Plaintiff attempts to justify his choice of purpose by arguing that the 2003 regulation originally implementing the disclosure requirement referred to a contributor as someone who

makes a "donation." *Id.* at 20. But Step One analysis turns on the statute's text, not on a term first employed in a subsequent regulation. The statutory term is "contributor." The language, structure, purpose, and history of the statute all confirm that the relevant purpose is to support electioneering communications. Because that is what the regulation provides, it is validated at Step One and the judicial inquiry should end there.

**3. Moreover, Plaintiff Cannot Show That the Statute Unambiguously Forbids Consideration of the Giver's Purpose under Step One.**

If the Court were not persuaded that Step One analysis conclusively validates the regulation, it then would face Plaintiff's claim (at 18-27) that the statute so clearly forecloses consideration of the giver's purpose that there is no room for FEC discretion and Plaintiff must prevail at Step One. The FEC Memorandum (at 18-28) already refutes that aspect of Plaintiff's claim, but the following three considerations bolster the FEC's position.

First, Congress clearly did not contemplate any disclosure of the funding sources of corporations and unions because the statute prohibited such funding. Federal law already flatly "prohibited . . . corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media" in connection with federal elections. *Citizens United*, 130 S. Ct. at 887. In the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, Congress extended the ban to electioneering communications by corporations and unions, even if such speech fell short of express advocacy. 2 U.S.C. § 441b. Since corporate and labor union electioneering communications were unlawful, Congress never considered how much disclosure was warranted for such speech.[16]

[16] Commenters during the 2007 rulemaking explained that the lack of congressional consideration meant that "the agency is writing on a blank slate" given the "unexpected situation" presented by *WRTL*. Comment from the Alliance for Justice (dated Oct. 1, 2007) (Dkt. No. 17-4, VH0438, VH0444); FEC Hearing Transcripts, In the matter

Plaintiff seeks to avoid this problem by asserting that, for a time during statutory drafting, Congress contemplated disclosures by the unique subset of corporations described in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). There is considerable doubt that is so.[17] In any event, the central rationale for the *MCFL* exception was that such entities were entirely unlike the ordinary corporations and labor unions that could engage in electioneering communications after *WRTL*. *Id.* at 263 (*MCFL* corporations are "more akin to voluntary political associations").

Moreover, *MCFL* status was defined very narrowly and there were very few such entities. *See* Brief of Family Research Council et al. as *Amicus Curiae* Supporting Appellee at 10, *WRTL*,

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of: Electioneering Communications, Notice 2007-16 (dated Oct. 17, 2007) (Dkt. No. 17-5, VH0642). As one observed, "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." Comment from the AFL-CIO, AFSCME, NEA, and SEIU (dated Oct. 1, 2007) (Dkt. No. 17-4, VH0457) (emphasis in original). As a result, it "is unclear whether, and if so how, Congress would want to apply the reporting requirements with respect to the full range of corporations and labor organizations which may now pay for electioneering communications under some circumstances." Comment from the Alliance for Justice (VH0438). FEC Commissioner Ellen Weintraub – a self-described "big advocate of transparency and disclosures" – vocalized potential concerns that "Congress may not have thought through what it was going to mean for [corporations and unions] to have disclosure because they were not anticipating that these entities would be able to make electioneering communications." FEC Hearing Transcript (dated Oct. 17, 2007) (VH0499).

[17] Congress adopted the "Wellstone Amendment," codified at 2 U.S.C. § 441b(c)(6), that "applied § 441b's expenditure ban to all nonprofit corporations" equally. *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010). The Wellstone Amendment did "not, on its face, exempt MCFL organizations from its prohibition." *McConnell*, 540 U.S. at 211; *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 803 (D.D.C. 2003), *aff'd in part*, *rev'd in part on other grounds*, 540 U.S. 93 (2003) (Leon, J.) (noting that the Government "concede[s] that Section 204 does not contain an exemption for MCFL organizations"), *id.* at 373 (Henderson, J.) ("The Wellstone Amendment (BCRA section 204) prevents any [*MCFL*] corporation, from the ACLU to the NRA to MCFL itself, from making a disbursement for any electioneering communication."). For his part, Senator Wellstone explained that his amendment directly challenged the rationale underlying *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), and maintained that *MCFL*'s fundamental premise was now invalid. *See* 147 Cong. Rec. S3042 (daily ed. Mar. 28, 2001). Senator McConnell, who voted for the Wellstone Amendment, viewed it "as another unconstitutional ornament we could put on this tree." Nancy Gibbs and Karen Tumulty, *A New Day or a False Dawn?*, Time, Mar. 31, 2001, available at http://www.time.com/time/nation/article/0,8599,104589,00.html. Likewise, Senators McCain, Feingold, and John Edwards opposed the amendment because it lumped *MCFL* organizations "in with unions and for-profit corporations, [creating] a very serious constitutional problem because the U.S. Supreme Court has already specifically addressed that issue." 147 Cong. Rec. S2883 (daily ed. Mar. 26, 2001) (statement of Sen. Edwards). *See also id.* at S3047-48 (daily ed. Mar. 28, 2001) (statement of Sen. DeWine) ("As long as the Wellstone amendment stays in the bill, clearly this bill is going to be held to be unconstitutional" under *MCFL*.).

551 U.S. 449 (collecting and citing FEC data). Also, there was no evidence that any disclosure burdens imposed on them would be similar to those that would be experienced by corporations and labor unions generally. Indeed, when the FEC was first implementing the electioneering communication disclosure requirement in 2003, the FEC noted the virtual absence of burden concerns from *MCFL* entities and chose not to address the subject in the final rule. *See Bipartisan Campaign Reform Act of 2002 Reporting; Coordinated and Independent Expenditures; Final Rules*, 68 Fed. Reg. 404, 413 (Jan. 3, 2003). Requiring broad disclosures from ordinary corporations and labor unions engaging in forbidden speech would be a very different kettle of fish, and Congress never addressed, let alone intended, that burden. *See* FEC Mem. at 18.

Second, Congress will not be assumed to burden speech casually. Congress may not impose disclosure burdens on core speech based on a "simple interest in providing voters with additional relevant information." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995). Nor may the government omit a tailoring analysis to ensure that an associated disclosure requirement would be "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Buckley*, 424 U.S. at 80-81. Only clear, affirmative evidence could show an unambiguous intent to impose an untailored burden. *See infra*, Section 4 (discussion of constitutional avoidance).

Third, the fact that Congress recently "considered and rejected" during the debate on the DISCLOSE Act the broad disclosure requirement Plaintiff seeks here is evidence that such a requirement was not originally intended. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131-32 (2000); *Dart v. United States*, 961 F.2d 284, 286 (D.C. Cir. 1992) ("The legislative history . . . erases any doubt about Congress's intent: Congress rejected a bill that would have

[provided the relief sought].”). Congress is the body that should impose the fundamental changes sought by Plaintiff. *See Brown & Williamson*, 529 U.S. at 159; *see also Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001). What Congress has just rejected should not be imposed by a litigation end-run based on hitherto unperceived meanings in legislation from a decade ago.

Thus, Plaintiff cannot prevail at Step One, and the FEC’s compelling defense of its discretion precludes Plaintiff from prevailing at Step Two, if the Court reaches that point.

**4. The FEC’s Construction Is Necessary to Save the Statute from Constitutional Invalidity.**

First Amendment considerations also require that the FEC’s construction of the statute be upheld. The rule that serious constitutional doubts must be avoided if possible is not merely a prudential practice of the courts. It also is a traditional tool for ascertaining congressional intent at Step One of *Chevron* and provides a reasonable Step Two basis for agencies to exercise their discretion to minimize constitutional concerns.[18] Here, not only would Plaintiff’s construction raise serious First Amendment questions – it would render the statute unconstitutional.

**(a) Plaintiff has the burden of showing that applying the statute to require broad disclosures from corporations and labor unions satisfies exacting scrutiny.**

Plaintiff’s reference (at 8) to the fact that *McConnell* held that the statutory disclosure requirements are facially valid does not meet his First Amendment burden. As *WRTL* made clear, those who seek to apply a facially valid statute to circumstances not directly considered

[18] *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. Trades Council*, 485 U.S. 568, 575 (1988); *AFL-CIO v. FEC*, 333 F.3d 168, 175-79 (D.C. Cir. 2003) (constitutional avoidance may apply at either step of the inquiry in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *Diouf v. Napolitano*, 634 F.3d 1081, 1086 n.7 (9th Cir. 2011) (the doctrine is a “cardinal principle” of construction); *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the doctrine reveals congressional intent). In this case, applying the constitutional avoidance doctrine at either step yields the same answer: the FEC’s interpretation of the statute must be upheld to avoid serious First Amendment concerns raised by Plaintiff’s construction.

and approved by precedent must justify the specific application. 551 U.S. at 465 (although the electioneering communication provision was "facially valid," government had burden of justifying application not addressed in prior case); *see also Citizens United*, 130 S. Ct. at 915-16 (government satisfied its burden).

*McConnell* did not validate Plaintiff's position because, when it was decided, the disclosure statute did not burden corporate or labor unions because they were flatly forbidden to engage in electioneering communications. *McConnell* did not discuss what burdens were proper for then-unlawful speech. Now that such an application is possible, Plaintiff has the burden of justification, and the burden has not been met. Moreover, and as discussed in more detail below, implementing Plaintiff's position would also render the statute unconstitutionally vague.

Plaintiff's failure to demonstrate the constitutionality of applying the statute to corporations and labor unions has two important implications for this case. First, the presumption that Congress intends to avoid constitutional doubts bolsters the Step One analysis and confirms the Step Two reasonableness of the FEC's position. Second, the First Amendment forbids this Court to grant any remedy that would have the effect of applying an untailored and vague statute to chill core speech.

**(b) The burdens Plaintiff seeks to impose on core speech trigger exacting scrutiny.**

Because "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government," "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (quoting *Buckley*, 424 U.S. at 14 (per curiam) (citations and quotations omitted)). And, as the Supreme Court recently clarified, "'this is no less true because the speech comes from a corporation rather than an

individual.'" *Citizens United*, 130 S. Ct. at 904 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)). Plaintiff thus seeks to burden core speech.

Conditioning the right to core speech on disclosure of supporters and financing is, in itself, a significant speech burden, even if those disclosed do not face harassment. *Buckley*, 424 U.S. at 64; *see Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (collecting examples). The burden that "compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest," even if the "deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley*, 424 U.S. at 64-65. The Supreme Court has, accordingly, "subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). "[S]ubstantial relation" requires careful tailoring of the benefit to the harm.[19]

**(c) Exacting scrutiny is not satisfied here.**

Plaintiff's proposed interpretation of the electioneering communication disclosure requirement cannot meet this "exacting scrutiny."

**First, the disclosure requirement would be far too broad and untailored to bear a "substantial relation" to any "important governmental interest."** The Supreme Court upheld the original independent expenditure disclosure requirements in the Federal Election Campaign Act of 1971 by limiting their application only to those contributions that are "campaign related"

[19] *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004); *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 347 (1995) ("exacting scrutiny" requires burdens to be "narrowly tailored"); *Larson v. Valente*, 456 U.S. 228, 230, 251 (1982) ("registration and reporting requirements" were facially invalid because defenders "failed to demonstrate [law] is 'closely fitted'"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (even restrictions on commercial speech must not "burden substantially more speech than is necessary"); *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000) ("does not burden more speech than is necessary").

because, absent this interpretation, "the relation of the information sought to the purposes of the Act may be too remote." *Buckley*, 424 U.S. at 80. In other words, disclosure was tailored to reach only "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.*; *see also Citizens United*, 130 S. Ct. at 914 (upholding disclosure requirement "based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending") (quoting *Buckley*, 424 U.S. at 66). Only by limiting the disclosure obligation in this manner could the Supreme Court ensure that the "requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Buckley*, 424 U.S. at 81. Requiring disclosure of sources of funds in the general treasury of a corporation or union without a connection to elections fails this test. *See* FEC Mem. at 30-36.

**Second, the heavy burden Plaintiff's proposed disclosure requirement would impose on corporations and unions is not justified.** "[R]eporting and disclosure requirements are more burdensome for multi-purpose organizations . . . than for political action committees whose sole purpose is political advocacy." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003).[20] As the FEC concluded, "to identify those persons who provided funds totaling $1,000 or more to a corporation or labor union would be very costly and require an inordinate amount of effort." Final Rule and Explanation and Justification on Electioneering Commc'ns, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007). Furthermore, it would raise serious "concerns regarding individual donor privacy" protected by the First Amendment. *Id.* at

[20] Returning to *MCFL* corporations discussed in Section 3, *supra*, they are not similarly situated to other corporations or labor unions from a First Amendment perspective under this same rationale. Just as those who contribute to political action committees do so to advance the organization's political mission, those who contribute to an *MCFL* corporation "are fully aware of its political purposes, and in fact contribute precisely because they support those purposes . . . . Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor." *MCFL*, 479 U.S. at 260-61. The same cannot be said of multi-purpose corporations and labor unions.

72901.[21] A West Virginia district court reviewing an analogous state law recently found that demanding this level of disclosure would be "quite burdensome on those entities and may discourage" individuals "from associating with and giving to the entity as a consequence." *Ctr. for Individual Freedom, Inc. v. Tennant*, Civ. A. No. 1:08-cv-00190, 2011 WL 2912735, at *49 (S.D.W.Va. July 18, 2011).

Here, Congress never considered whether a massive disclosure requirement of this kind was justified because it did not foresee that this issue would arise. FEC Mem. at 18-19. In the 2007 rulemaking, the FEC found that the broad disclosures now demanded by Plaintiff were not justified. 72 Fed. Reg. at 72911. Plaintiff does not show from that record that the FEC erred.

In any event, such a sweeping and unfocused disclosure regime could not even conceivably "bear a sufficient relationship to the interest of providing the electorate with meaningful information as to who is speaking in electioneering communications." *Tennant*, 2011 WL 2912735, at *49. As the FEC found, "[a] corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation's products and services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission." 72 Fed. Reg. at 72911. Accordingly, "[t]he practical effect of requiring such expansive disclosure is not only to

[21] Multiple commenters raised these concerns during the 2007 rulemaking, objecting to any proposal that would conflict with "established First Amendment principles" by requiring disclosure of an organization's entire donor list, or at least a significant portion thereof. Comment from the Alliance for Justice (VH0445). Quoting from *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981), one commenter explained that the "[r]eporting of donors represents 'the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association.'" Comment from the American Taxpayers Alliance and Americans for Limited Government (dated Oct. 1, 2007) (Dkt. No. 17-3, VH0422). This same theme was incorporated into other submissions, which stressed that "[t]he constitutionality of a statute that implicates First Amendment rights must be examined by considering both whether and to what extent it serves the actual governmental interests that underlay its enactment." Comment from the AFL-CIO, AFSCME, NEA, and SEIU (VH0458) (emphasis in original). For many, donor disclosure requirements "present[ed] significant privacy concerns that [simply were] not outweighed by the government interests in disclosure." Comment by Independent Sector (dated Oct. 1, 2007) (Dkt. No. 17-3, VH0365).

compel a flood of information, but a flood of information that is not necessarily relevant to the purpose the [statute] purportedly serves: to provide the electorate with information as to who is speaking." *Tennant*, 2011 WL 2912735, at *49. Indeed, "a large swath" of those who provide corporate or union general treasury funds may "not support an organization's electioneering communications" or "even be aware that the organization is engaging in electioneering communications." *Id*. In short, the disclosure obligation that Plaintiff incorrectly insists is required by the statute "adds little value to the disclosure scheme that exists . . . and does so at great cost to the vitality and ability to speak of corporations and organizations." *Id*. Such a disclosure requirement is incompatible with the First Amendment. In contrast, the FEC's reasonable construction of the law "does not overreach and bears a substantial relation to the information-providing purpose it serves." *Id*.

**Third, and last, the statute would be impermissibly vague under Plaintiff's proposed construction.** "[T]he most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

If a law "threatens to inhibit . . . free speech," it must meet a "more stringent vagueness test" than just the "fair notice" that due process requires of all laws. *Buckley*, 426 U.S. at 40-41, 79; *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010). This is because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked," and precious speech thus is suppressed. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (internal quotations

omitted); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Also, statutory vagueness prevents legislators from carefully weighing First Amendment costs. *See Grayned*, 408 U.S. at 109 n.5; *Garner v. Louisiana*, 368 U.S. 157, 200, 202 (1961) (Harlan, J. concurring).

Yet Plaintiff asks this Court to deprive CFIF and others of the guidance provided by the FEC regulation, to reject the understanding justified by the statute's language, structure, and purpose, and to leave speakers subject to a statutory provision under which some but not all sources of general treasury funds would need to be disclosed. The only guide Plaintiff suggests is that "donations" – a term that does not appear anywhere in the statute – must be disclosed and "investment revenue, sales revenue, loan proceeds, and the like" need not be disclosed. Pl. Mem. at 31. But undefined terms such as "donations" and phrases such as "and the like" do not provide speakers engaged in sensitive First Amendment activity with sufficient guidance. Unable to predict how enforcers later will classify a myriad of funding sources, this uncertainty will lead corporations and labor unions to stand silent, depriving the public of core First Amendment speech.

Federal courts should "not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (citations and quotations omitted). Because Plaintiff's proposed construction would require the Court to strike down the statute as violating the First Amendment for the reasons just discussed, Plaintiff's construction should be rejected.

**5. Any Remedy Must Avoid Aggravating Speech Burdens.**

For the reasons discussed above and those stated by the FEC, the Court should deny Plaintiff's motion for summary judgment and grant summary judgment dismissing the Complaint with prejudice. Such relief is required by law and is consistent with the First Amendment.

If the Court were to conclude that the regulation fails under the Administrative Procedure Act for some remediable procedural defect in its enactment or for a lack of factual support, the regulation should remain in effect pending remand to the agency for further proceedings. FEC Mem. at 43-45; *see, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). On the other hand, if the Court concludes that the regulation fails under *Chevron* because it is contrary to the statute, vacatur of the regulation – with the right of an immediate appeal – would be the appropriate remedy. *See, e.g.*, *Emily's List v. FEC*, 581 F.3d 1, 25 (D.C. Cir. 2009); *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990). However, vacating the regulation would invite application to corporations and labor unions of a statute that is void for lack of tailoring and for vagueness. Before granting such a remedy, the Court should declare that such an application of the statute would violate the First Amendment unless and until a new regulation redresses the First Amendment violations.

**CONCLUSION**

For these reasons, the Court should grant Defendants' motion for summary judgment.

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Respectfully submitted,

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