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 OF APPELLANT HISPANIC LEADERSHIP FUND

Dated: April 10, 2015

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Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1) the Hispanic Leadership Fund ('HLF') submits this Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

The Center for Individual Freedom ('CFIF'), HLF, Christopher Van Hollen, Jr., and the Federal Election Commission, were all parties before the district court. HLF and CFIF were defendant-interveners before the district court, while the FEC was a defendant and Christopher Van Hollen, Jr., was the plaintiff. Before this Court, CFIF and HLF appear as Appellants while Christopher Van Hollen, Jr., and the FEC are Appellees.

HLF understands that at least one entity will file an *amicus curiae* brief in this appeal. No *amicus curiae* briefs were filed with the district court. In the first appeal before this Court, Nos. 12-5117 & 12-5118, the following persons filed *amicus* briefs on behalf of Appellants: 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.

Additionally, the following persons filed *amicus* briefs on behalf of Appellees: 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, Progressive United, and Sunlight Foundation.

Pursuant to Circuit Rule 26.1, HLF certifies that no publicly-held company owns ten percent or more of HLF. Furthermore, HLF itself has no parent company as that term is defined in the Circuit Rules. HLF is a non-profit entity, organized under the laws of 501(c)(4) of the Internal Revenue Code. The organization is dedicated to strengthening working families by promoting common sense public policy solutions rooted in free enterprise, limited government, and individual freedom. HLF educates the public on public policy issues such as taxes, the economy, small businesses, education, regulation, immigration, border security, and the right to life. The organization advocates for public policy solutions that strengthen working families through grassroots activities such as mailings, phone calls, and advertisements.

B. Rulings Under Review

HLF's appeal arises from a memorandum opinion and order that United States District Court Judge Amy Berman Jackson issued on November 25, 2014, Dkt. Nos. 99 (order) and 100 (opinion). As of the date of this filing, Judge

Jackson's opinion is not published in the federal reporter. Both the opinion and order are reproduced in HLF's Statement Of Underlying Decision From Which Appeal Arises, filed on February 23, 2015.

C. Related Cases

This Court has previously issued an opinion in this case and it is reported at *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (case no. 12-5117 & 12-5118). HLF is not aware of any other related case as defined by Circuit Rule 28.

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GLOSSARY OF ABBREVIATIONS

AFL-CIO:	**American Federation of Labor-Congress of Industrial Organizations**
AFSCME:	**American Federation of State, County, and Municipal Employees**
ATA:	**American Taxpayers Alliance**
AFJ:	**Alliance for Justice**
ALG:	**Americans for Limited Government**
BCRA:	**Bipartisan Campaign Reform Act**
CFIF:	**Center For Individual Freedom**
EC:	**Electioneering Communication**
FECA:	**Federal Election Campaign Act**
FEC:	**Federal Election Commission**
HLF:	**Hispanic Leadership Fund**
IE:	**Independent Expenditure**
IRS:	**Internal Revenue Service**
JA:	**Joint Appendix**
NEA:	**National Education Association**
NPRM:	**Notice of Public Rulemaking**
SEIU:	**Service Employees International Union**
***WRTL II*:**	***FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007).**

INTRODUCTION

In the wake of the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ('*WRTL II*'), the Federal Election Commission ('FEC') was required to navigate in uncharted waters. This included developing regulations for corporate and union-funded political speech that was prohibited prior to *WRTL II*. The FEC needed to promulgate regulations that satisfactorily sailed between the Scylla of the Bipartisan Campaign Reform Act ('BCRA') and the Charybdis of the First Amendment. Prior to disembarking, the FEC sought comment on—among other things—what a corporation or labor union was required to disclose when making a newly-permitted electioneering communication from its general treasury funds. *Notice of Proposed Rulemaking* 72 Fed. Reg. 50261, 50271 (Aug. 31, 2007) (JA-37). The FEC then proposed limiting the disclosure requirement to those donors who donated $1,000 annually "[f]or the express purpose of making electioneering communications." *Id*.

In response, the FEC received 27 comments. Included were comments from several labor unions and nonprofits concerned that the proposed rule requiring disclosure of all donors who donated $1,000 annually was: (1) burdensome and costly, requiring broader disclosure than what the Department of Labor requires of labor unions and what the IRS requires of non-profits, a point uncontroverted in the record; (2) and misleading to the public because the disclosure of all donors

who donated $1,000 annually was not substantially related to the goals of BCRA. Ultimately, several commenters urged the FEC to adopt a standard similar to the independent expenditure disclosure provision requiring the disclosure of donors who donated for the purpose of furthering the reported communications. The FEC did precisely this.

The district court wrongly analyzes the factual record and wrongly applies the *State Farm* standard. These erroneous premises guided the district court to its erroneous conclusion that the FEC acted arbitrarily and capriciously.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. HLF timely filed its notice of appeal on January 12, 2015 (JA-17), from the District Court's order vacating 11 C.F.R. § 104.20(c)(9) and entered November 25, 2014. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

STANDING

This Court has previously ruled that HLF has standing because the district court's vacating of the FEC's regulation has directly harmed both interveners in this case. *See Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110 (D.C. Cir. 2012).

STATEMENT OF THE ISSUES

1. This Court has already ruled that Congress's electioneering communication disclosure statute is susceptible to multiple interpretations. Under *Chevron* and *State Farm*, did the FEC act reasonably when, after receiving comments expressing concern that its draft rule could require the burdensome and costly disclosure of an organization's investors and members, the FEC, in response to the same commenters requests, enacted a disclosure regulation that paralleled the independent expenditure disclosure statute requiring the disclosure of those who donated for the purpose of furthering electioneering communications?

2. The First Amendment permits the public disclosure of an organization's donors only where the government provides a sufficiently important interest, and the disclosure requirements bear a substantial relation to the interest stated. Under this Court's precedent in *AFL-CIO v. Federal Election Commission*, 333 F.3d 168 (D.C. Cir. 2003), does the District Court's order vacating the FEC's 2007 regulation impose an impermissible burden on the First Amendment rights of organizations, burdens that the district court failed to consider?

STATUTES AND REGULATIONS

HLF adopts and incorporates by reference the addendum that CFIF submits with its Opening Brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Congress's power to regulate federal election activity to prevent corruption or the appearance thereof, *Buckley v. Valeo*, 424 U.S. 1, 13, 26 (1976), is tempered by the First Amendment's guarantee that "Congress shall make no law... abridging the freedom of speech...." U.S. Const. amend. I. Congress's power intersects with the touchstone of American constitutional government, namely, the right to free, unregulated expression of political ideas in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14. The challenge posed to every court since *Buckley* is to balance free speech rights concerning political issues, an area where First Amendment freedoms are at their broadest, and the legislature's ability to regulate political speech to prevent corruption or the appearance of corruption. *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008).

i. FECA And The Supreme Court's Construction In *Buckley*.

In *Buckley*, the Court limited FECA's reach when applied to entities, like HLF, whose central purpose is something other than influencing elections. For example, while the Court applied an expansive definition of "contribution" to candidates, political committees, and party committees, when it came to other organizations and individuals, the term "contribution" was limited to those contributions "[e]armarked for political purposes." *Buckley*, 424 U.S. at 78.

The Supreme Court similarly circumscribed FECA's disclosure provisions. The original disclosure provision was inserted "[t]o achieve "total disclosure" by reaching "every kind of political activity…." *Id*. at 76. Congress "[w]ished to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process," *Id*. at 78, and to nurture a fully informed electorate and achieve maximum deterrence of corruption. *Id*. at 76. Congress also sought to prevent persons from routing financial support to candidates in ways that would escape FECA's reach. *Id*. Finally, the disclosure provision applied to "every person" who made contributions, expenditures, or both. *Id*. at 77. Congress had imposed on entities other than political committees a disclosure requirement that was triggered when the entity spent more than $100 on expenditures and which required the disclosure of all contributors who contributed in excess of $100 annually. *Id*. at 157-60.

The Supreme Court interpreted the disclosure provision in a manner that furthered the goals of Congress. *Id*. at 78. The Court recognized that, as applied to non-political committee entities, the disclosure provision sought information that in relation to the FECA "[m]ay be too remote." *Id*. at 79-80. The Court construed the disclosure provision to require only the disclosure of those funds that are "[u]nambiguously related to a campaign", *i.e.*, those funds that expressly advocate the election or defeat of a clearly identified federal candidate. *Id*. at 79-80. To interpret the disclosure provision more broadly would risk capturing speech that was merely issue advocacy and not campaign related. *Id*. at 79.

In subsequent cases, the Supreme Court continued to limit disclosure provisions to contributors whose contributions are unambiguously campaign related. *See, e.g.*, *FEC v. Mass. Citizens for Life, Inc*., 479 U.S. 238, 253-55, 263 (1986) (holding that a separate segregated fund is not a viable option because it is burdensome and costly to establish, so much so that groups may think their speech is simply not worth the trouble, and holding that certain nonprofits, like HLF, can make independent expenditures from their general treasury funds and must only disclose those contributors who contributed for the purpose of furthering the reported independent expenditure). The Supreme Court has previously rejected the disclosure requirements that Congressman Van Hollen seeks to impose through litigation. Van Hollen's requirements are also unreasonable.

ii. BCRA Extends FECA's Corporate And Labor Union Independent Expenditure Prohibition To Electioneering Communications.

"[F]ederal campaign finance law is complex, and BCRA is no exception." *Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005). "[D]esigned to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections[]" *McConnell v. FEC*, 540 U.S. 93, 132 (2003), BCRA sought to close the 'soft money loophole' and regulate "sham" issue advertisements as federal campaign activity. *Id*. at 131-132. Issue advertising was not captured under FECA because FECA was construed to apply only to communications that used words expressly advocating the election or defeat of a candidate. *Buckley*, 424 U.S. at 43-44 n.52. To expand the scope of regulation to include advertising that did not contain express advocacy, BCRA prohibited "[c]orporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections." *McConnell*, 540 U.S. at 132. BCRA introduced the term "electioneering communication" to regulate broadcast communications that merely refer to a clearly identified federal candidate within thirty days of a primary, or within sixty days of a general election. 52 U.S.C. § 30104(f)(3)(A). BCRA prohibited corporations and labor unions from using their general treasury funds to make independent expenditures. *Id*. § 30118.

Therefore, only individuals or unincorporated entities could lawfully make electioneering communications.

To accompany this new electioneering communications regime, Congress established an electioneering communications disclosure statute that required all persons – other than corporations and labor unions – who were still permitted to "[m]ake[] a disbursement for the direct costs of producing and airing electioneering communications..." to file disclosure reports within 24 hours of spending more than $10,000. *Id*. § 30104(f)(1). For the narrow class of "persons" still lawfully permitted to make electioneering communications, Congress required the disclosure of the names and addresses "[o]f all contributors who contributed an aggregate amount of $1,000 or more..." in the previous calendar year. *Id*. § 30104(f)(2)(F).

The term 'contribution' itself contains a purpose element, namely that it is given for the purpose of influencing an election. *Id.* § 30101(8)(A)(i) Electioneering communications, by contrast are not express advocacy. *Id*. § 30104(f)(3)(B)(ii). The FEC discovered this discrepancy and proposed to substitute the words 'contributor who contributed' for 'donor who donated' because Congress could not have intended donations to non-political committee entities to count as contributions subject to FECA's limits. *See* Bipartisan Campaign Reform Act of 2002; Reporting, 67 Fed. Reg. 64555, 64560-61 (Oct. 21, 2002). Congress's

choice of words alone required the agency to fill the gap between election spending and non-election spending.

iii. BCRA's Disclosure Statute Sponsors Intended A Purpose Requirement.

Similar to Congress's goals in crafting the FECA, *Buckley*, 424 U.S. at 78, with BCRA, Congress was determined to "shine[] sunlight on the undisclosed expenditures for sham issue advertisements", 147 Cong. Rec. S3022-05, S3034 (March 28, 2001) (statement by Sen. Jeffords) (quoted at JA-446), and further determined to "[u]nveil the masquerade" 147 Cong. Rec. S3070, 3074 (daily ed. March 29, 2001) (statement of Senator Snowe). But Congress was restrained, even "modest"[1] in its approach. As part of the "Snow-Jeffords Amendment" to BCRA, Senator Snowe placed into the record an academic's analysis of her amendment explaining that it "requires disclosure of large contributions *designated for such ads*." 147 Cong. Rec. S3005, 3038 (emphasis added); *see also* 144 Cong. Rec. S994, S998 (daily ed. Feb. 25, 1998) (explaining that in a materially similar bill where the sole difference was the reporting threshold—$500 as opposed to $1,000—the electioneering communications disclosure regime would not create

[1] Defendant-Intervenors' Excerpts of Br. of Defs. At I-118, *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C.) ('Defendant-Intervenors' Brief in *McConnell*') *available at* http://campaignfinance.law.stanford.edu/case-materials/mcconnell-v-fec/.

"invasive disclosure rules that require the disclosure of entire membership lists."). Senator Snowe further explained that the disclosure provision was drafted narrowly to avoid abridging First Amendment rights. *See* 144 Cong. Rec. S972-01, S973 (daily ed. Feb 25, 1998).

None of the legislative comments that the district court highlighted in its opinion, are to the contrary. The quotes are merely aspirational, opining on the virtues of disclosure in general, namely an informed electorate. *See* (JA-446) (quoting Senators Jeffords and Feinstein). There is no indication in the legislative history that any senator demanded disclosure any broader than the disclosure required of independent expenditures. This demonstrates that Congress intended what the FEC implemented.

iv. *WRTL II* Causes A Gap In The Statute.

In *WRTL II*, the Supreme Court determined that Congress violated the First Amendment when it made it a federal crime for corporations and labor unions to broadcast advertisements that merely referred to a clearly identified federal candidate close in time to an election, but where that advertisement was not the functional equivalent of express advocacy. *WRTL II*, 551 U.S. at 455-56.

In doing so, the Supreme Court removed the blanket prohibition on corporate and labor union-funded electioneering communications, expanding the class of persons who could make electioneering communications. The Supreme

Court's *WRTL II* opinion does not discuss disclosure. Thus, the Supreme Court's decision created a situation never contemplated in BCRA – the disclosure requirements applicable to corporate and labor union-funded electioneering communications. As this Court previously observed:

> Indeed, it is doubtful that, in enacting 2 U.S.C. § 434(f), Congress even anticipated the circumstances that the FEC faced when it promulgated 11 C.F.R. § 104.20(c)(9). *It was due to the complicated situation that confronted the agency in 2007* and the absence of plain meaning in the statute that the FEC acted pursuant to its delegated authority under 2 U.S.C. § 437d(a)(8) to fill "a gap" in the statute.

Van Hollen, 694 F.3d at 111 (emphasis added). In light of *WRTL II*, the FEC was confronted with the challenge of applying BCRA's disclosure rules to speech that BCRA intended to prohibit altogether.

Four years after the FEC's electioneering communication disclosure regulation went into effect, and after the Courts, the agency and the Solicitor General argued over these same provisions in *Citizens United*, Congressman Chris Van Hollen brought this lawsuit to attempt to obtain through litigation what Congress declined to do following *Citizens United*.

B. The Proceedings Below

HLF adopts and incorporates by reference CFIF's description of the proceedings below.

SUMMARY OF THE ARGUMENT

1. **The FEC Used Its Broad Rulemaking Powers To Fill A Gap That Congress Did Not Contemplate When It Enacted The Disclosure Statute**.
2. **The FEC's Electioneering Communication Disclosure Regulation Is Reasonable And Not Arbitrary And Capricious**. This is because the FEC was making an inherently predictive judgment about speakers who, until *WRTL II*, could not speak in elections. Furthermore, the FEC examined the major policy issues raised, made a rational connection between the evidence in the record and the choice it made.
3. **The District Court Wrongly Views The Holdings Of *McConnell* And *Citizens United*.** The electioneering disclosure statute was presented to these Courts as requiring the disclosure only of those donors who donated with the purpose of funding the electioneering communication. The Court similarly interpreted the statute as containing a purpose element.

4. **The District Court Misapplies The *State Farm* Standard And Improperly Analyzes The Record**. The district court wrongly asserts that none of the commenters requested the language the FEC adopted. In fact, several commenters did make such requests; the district court claims that the FEC lacked evidence for its justifications of its adopted regulation. In fact, the FEC had sufficient evidence supplied from commenters to support its justification. The FEC was also making predictive judgments which are entitled to "particularly deferential treatment."

5. **The FEC's Regulation Does Not Frustrate The Purpose Of Congress**. In fact, the regulation is compatible with the comments of the electioneering communication disclosure statute's sponsors.

6. **The FEC Was Required To Add A Purpose Requirement To Avoid Constitutional Infirmities**. The FEC has a duty to promulgate regulations that avoid needlessly infringing the constitutional rights of speakers. As several commenters noted, requiring the disclosure of all donors who donated $1,000 or more to a non-political committee entity is not substantially related to the information sought. The FEC tailored the disclosure statute to avoid needlessly infringing the First Amendment.

STANDARD OF REVIEW

When reviewing a district court's grant of appellee's motion for summary judgment and denial of appellant's cross-motion for summary judgment, this Court reviews those rulings *de novo*. *See Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008). This Court also reviews the district court's application of the *Chevron* and *State Farm* standards *de novo*. *See Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 814 (D.C. Cir. 2002).

ARGUMENT

This Court previously rejected the district court's contention that BCRA's text is clear and rejected the contention that "Congress spoke plainly [and] did not delegate authority to the FEC to narrow the disclosure requirement through agency rulemaking." *Van Hollen*, 694 F.3d at 110 (quoting *Van Hollen v. FEC*, 851 F. Supp. 2d 69, 89 (D.D.C. 2012)). In fact, this Court declared that "[t]he statute is anything but clear," especially after the Supreme Court's *Citizens United* and *WRTL II* decisions. *Id*. This Court held that Congress did not have "[a]n intention on the precise question at issue" and that "[i]t is doubtful that...Congress even anticipated the circumstances that the FEC faced when it promulgated" the disclosure regulation. *Id.* at 111. Due to the "[c]omplicated situation that confronted the agency in 2007," the FEC was left with the task of filling an unanticipated gap. *Id*.

This Court instructed the district court to "[a]llow the parties to present arguments on [Van Hollen's] claims that the regulation cannot survive review under *Chevron* Step Two or *State Farm*[.]" *Id*. at 112.

A. *Chevron* and *State Farm* Standards Of Review

The FEC is "[p]recisely the type of agency to which deference should presumptively be afforded." *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). A court must uphold the FEC's interpretation of the statute so long as it is a permissible construction of the statute. *See White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1234-35 (D.C. Cir. 2014). Because the FEC is interpreting a statute it is entrusted to administer, courts must give the FEC's interpretation considerable weight. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). This Court may not substitute its own construction of the statute in place of the FEC's reasonable interpretation. *Id*. Even if the parties or this Court develop interpretations that are deemed more reasonable, this Court cannot substitute its more reasonable judgment for the FEC's reasonable judgment. *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998).

The analyses under the *Chevron* and *State Farm* standards overlap and are both narrow. *See Chamber of Commerce of the U.S. v. FEC*, 76 F.3d 1234, 1235 (D.C. Cir. 1996); s*ee also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (U.S. 1983) (stating that the standard is narrow). The standard

is 'highly deferential' and presumes the validity of the regulation, a presumption that is rebutted only where the agency "[f]ailed to consider relevant factors or made a clear error in judgment. *See Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). The standard is "[n]ot particularly demanding" and requires only that the agency describe "[w]hat major issues of policy were ventilated...and why the agency reacted to them as it did." *Republican National Committee v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996).

What distinguishes the two standards is that *Chevron* asks whether the agency's *interpretation* of the statute is reasonable, whereas *State Farm* asks whether the agency's *actions* underlying the regulation were reasonable. *See Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000).

I. THE FEC USED ITS BROAD RULEMAKING POWERS TO FILL A GAP THAT CONGRESS DID NOT CONTEMPLATE WHEN IT ENACTED THE DISCLOSURE STATUTE.

Exercising its "broad" rulemaking authority, *RNC*, 76 F.3d at 404, the FEC faced this "complicated situation" requiring it to "fill a gap in the statute" *Van Hollen*, 694 F.3d at 111, which required the Commission to navigate between Congress's statutory demands and the First Amendment.

A. The NPRM Sought Comment On Disclosure Including Whether The FEC Should Insert A Purpose Requirement.

The FEC issued a Notice of Public Rulemaking ('NPRM') that sought comment on—among other things— how a corporation or labor union, when using its general treasury funds to make previously prohibited electioneering communications, should determine which receipts qualify as reportable donations, and whether the FEC should include a purpose element in the disclosure regulation. (JA-37). Commenters had sufficient notice that disclosure was part of the subject matter to be discussed in the rulemaking. *See* 5 U.S.C. § 553(b).

The Commission proposed two alternatives. In Alternative 1, the FEC proposed new language permitting corporations and labor unions to use their general treasury funds to make electioneering communications and subject those communications to disclosure. (JA-29-30). In Alternative 2, the FEC proposed exempting *WRTL II* communications from the definition of electioneering communications, which would have the effect of exempting such communications from the electioneering communications disclosure requirements. (JA-30). In Alternative 1, the FEC sought to revise its reporting rules, and *expressly* sought comment on how a labor union or corporation should determine which receipts to report when making electioneering communications with general treasury funds. Specifically, the FEC asked whether the regulation "[s]hould limit the donation

reporting requirement to funds that are donated *for the express purpose of making electioneering communications*." (JA-37).

B. The Submitted Comments Express Support For A Purpose Requirement.

Twenty-seven organizations submitted comments in response to the FEC's NPRM. (JA-300).

The American Taxpayers Alliance ('ATA'), the Americans for Limited Government ('ALG'), both non-profit corporations, and Independent Sector, an umbrella entity representing over 600 non-profits, (JA-97), filed comments exhorting the FEC to protect donor privacy. (JA-99,139). ATA and ALG expressed concerns that if Alternative 1 were implemented, donors would refuse to donate $1,000 or more annually. (JA-139). Similarly, Independent Sector warned the FEC that the daunting complexity of its reporting regulation would cause most nonprofits to abstain from speaking during the 30/60 day windows. (JA-99). All three contended that Alternative 1's disclosure provision violated the First Amendment. (JA-99,139).

The AFL-CIO, the American Federation of State, County, and Municipal Employees ('AFSCME'), the National Education Association ('NEA'), and the Service Employees International Union ('SEIU'), submitted a joint comment on behalf of more than 15 million labor union members and approximately 60 labor

organizations, (JA-156 n.1), in which they urged that if the FEC adopted Alternative 1, the FEC clarify that it did not require disclosure of membership dues and other business related income. (JA-163). The labor unions argued that it would be misleading to the public and burdensome to the unions to require the disclosure of the names and addresses of all union members who donated $1,000 or more annually. (*Id.*). The unions warned that Alternative 1 would be burdensome because it would require them to adhere to reporting regulations far broader than the Department of Labor's regulations that require the disclosure of all receipts from a particular source of $5,000 or more annually. (*Id.*); *see also* (JA-206). The proposed regulation would mislead the public because broad membership reporting bears "no meaningful relationship to the EC spending itself..." (JA-163); *see Buckley*, 424 U.S at 79-80. Finally, the unions dismissed the separate segregated fund option because it undermines the very holding of *WRTL II*. (JA-163); *see MCFL*, 479 U.S. at 252-53.

Representing several nonprofit entities, (JA-143) (listing names of its members), the Alliance for Justice ('AFJ'), raised similar concerns. Acknowledging that Congress did not provide guidance on this precise issue, (JA-146), AFJ addressed how labor unions and corporations could determine which receipts constituted reportable donations. (JA-152). AFJ noted that the general treasuries of nonprofits contain membership dues, admission fees, and proceeds

from subscriptions and sales of educational materials. (JA-153). AFJ suggested that the FEC require disclosure of the sources of those funds listed on Line 1 of the nonprofit's Form 990, referring to gifts, grants, and contributions. (*Id*.).

Like the labor unions, AFJ argued that disclosure of all sources of revenue was burdensome to the nonprofit and misleading to the public. (*Id*.). The disclosure proposed under Alternative 1 would be far broader and enormously burdensome, in light of the existing requirements under IRS rules that nonprofit organizations disclose only those donors who donated $5,000 or more. (JA-153, n.8). AFJ argued that, consistent with BCRA's purposes and the First Amendment, the FEC should adopt the same disclosure standard for electioneering communications that is applied to independent expenditures. (JA-153-54).

During the Commission's hearings, labor union representatives urged the Commission to adopt the independent expenditure disclosure standard for the electioneering communication disclosure regulation. (JA-204) (Lawrence Gold) ("[R]egulations for reporting of independent expenditures provides an appropriate model."); (JA-243-44) (Michael Trister) ("What we argue is that the distinction ought to be made between earmarked and non-earmarked. That is exactly what Congress did on reporting IEs...Congress essentially said, we are extending the IE reporting to ECs."); (JA-435) (Jessica Robinson) ("[T]he easiest way to address [concerns that the term donor could be applied to membership dues] is to require

reporting *only for those people who earmark funds to be used for WRTL II type communications*...") (emphasis added). This method simplifies the disclosure requirements and provides clarity as to what unions must report. (JA-203-04, JA-435). This method further respected the fact that neither BCRA nor FECA require a non-political committee to report non-electoral activity. (JA-203-04). It would be insufficient to merely exempt membership dues because then a non-profit could avoid the disclosure regulation by demanding expensive membership dues. (JA-213, JA-228-29). It also prevented absurd results. One witness testified that a labor union paid $150 a week for a radio program and, if a candidate's name were mentioned during the broadcast within the particular timeframe, the FEC could subject the union to the disclosure requirements. (JA-207).

C. **The Final Rule**

The Commission adopted its final rule after receiving 27 comments and hearing testimony from 15 witnesses. (JA-300).

The Commission rejected Alternative 2, and adopted a revised version of Alternative 1. (JA-301). While all commenters agreed that the FEC should not require corporations and labor unions to disclose the sources of all funds that constituted their general treasuries, the precise requirement for disclosure was the subject of disagreement. (JA-310). The FEC described the various positions taken by the commenters. (JA-310-11). The Commission explained that some

commenters argued that labor unions should not be required to report membership dues and that separate segregated fund option were not a viable alternative, (JA-311), as well as expressing concern that the original disclosure provision in Alternative 1 would require disclosure broader than what the Department of Labor requires of unions and what the IRS requires of nonprofits. (JA-311).

The Commission decided to depart from the disclosure standard proposed in Alternative 1 and instead adopt a standard that paralleled the existing independent expenditure disclosure standard. Under the standard adopted, corporations and labor union are required to disclose donors who donated $1,000 or more annually for the purpose of furthering electioneering communications. (JA-311); *American Federation of Labor v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (stating that it is expected that the final rule will differ from the proposed rule because the point of notice and comment rulemaking is that the adopted rule will be different and improved from the proposed rule).

The Commission justified its disclosure rule on four grounds.

First, because the general treasury funds of labor unions and corporations consist of investors, purchasers, donations, and membership dues, the sources of these funds do not necessarily support the entity's electioneering communications. (JA-311). Consistent with the policy of BCRA, the final rule provides the public with the same amount of information the public obtains with respect to

independent expenditures; does not mislead the public with the identities of donors who are unrelated to the electioneering communication; and does not burden corporations and labor unions with the herculean task of compiling all sources of $1,000 or more in the previous year and then determining which donors to report. (JA-311).

Second, the Commission acknowledged that the efforts required to identify those donors who donated $1,000 or more are costly and burdensome because then the FEC would impose a disclosure regulation far broader than those disclosure regulations imposed by the Department of Labor and the IRS. (JA-311). *MCFL*, 479 U.S. at 252-53 (acknowledging reporting burdens); *Citizens United v. FEC*, 558 U.S. 310, 337-38 (2010) (same).

Third, to preserve the constitutionality of the electioneering communications disclosure statute, the Commission justified its final rule stating that it is "[n]arrowly tailored to address many of the commenters' concerns regarding individual donor privacy." (JA-301)

Fourth, the rule responds to several comments, particularly from labor unions, that the Commission clarify what is to be reported. (JA-163, 205, 435). The rule provides clarity because it explicitly states that disclosure is requires only of those donors who "specifically designated" their contribution for electioneering communications those funds received in response to a solicitation. (JA-311).

The agency more than satisfied its requirements to thoroughly describe "[w]hat major issues of policy were ventilated...and why the agency reacted to them as it did." *RNC*, 76 F.3d at 407.

D. The FEC's Electioneering Communication Disclosure Regulation Is Reasonable And Not Arbitrary And Capricious.

The FEC was tasked with filling a gap, *Van Hollen*, 694 F.3d at 111, and to make predictive judgments about how speakers would now operate within a campaign finance system that, prior to *WRTL II*, were prohibited from speaking. 52 U.S.C. § 30118. The FEC was also tasked with promulgating a regulation that respected the guarantees of the First Amendment.

In response to comments from representatives of approximately 15 million labor union members, 60 labor organizations, and several nonprofit organizations, the FEC adopted an electioneering disclosure regulation that paralleled the independent expenditure disclosure statute. (JA-311 n. 22); (JA-156 n. 1) (JA-143). These representatives of millions of persons informed the agency that requiring disclosure of all donors who donated $1,000 or more annually would be more burdensome and costly than disclosing similar receipts to the Department of Labor for labor unions and the IRS for nonprofits. (JA-153 n.8) (JA-163) (JA-311).

The FEC rightly contended that this standard for the electioneering communications disclosure regulation supported the policies of BCRA. (JA-311);

see, e.g., 147 Cong. Rec., S3005 at 3038 (Senator Snowe) (requiring disclosure of "[l]arge contributions *designated for such ads*") (emphasis added); 144 Cong. Rec. at S998; 144 Cong. Rec. at S973. An agency's interpretation of a statute is reasonable if it is compatible with Congress's goals. *See Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988).

An agency's interpretation of a statute is reasonable, even if the justification given is less than clear, so long as the agency can make a rational connection between the facts found and choice made. *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 285-86 (1974). Here, the FEC referenced the evidence supplied from the labor union commenters and the nonprofit commenters—disclosure burdens greater than what the IRS and Department of Labor require, and need for clarity as to what must be reported— and came to the conclusion that the independent expenditure disclosure provision provided the appropriate model. (JA-311; JA-311 n.22).

Furthermore, the judgments the Commission made, especially as applied to corporations and labor unions, were predictive judgments since, prior to *WRTL II*, Congress prohibited corporations and labor unions from using their general treasury funds to make independent expenditures or electioneering communications. All that must be shown to uphold an agency's predictive judgment is that the judgment is logical and based on some evidence. *See Nuvio*

Corp. v. FCC, 473 F.3d 302, 306-07 (D.C. Cir. 2006) ("Predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential treatment.") (internal quotation marks omitted); *See Sorenson Communications Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014). (stating that agency predictive judgments are entitled to deference so long as that judgment is based upon some evidence and logic and not sheer speculation).

The Commission relied on evidence the nonprofits and labor unions supplied, namely that disclosure of all donors who donated $1,000 or more annually constituted an "enormous" a burden greater than disclosures to the Department of Labor and the IRS. (JA-311). The Commission also relied on these comments for evidence that the proposed rule was not properly tailored. *Id*. In both cases, the evidence was uncontroverted. *See Agape Church, Inc. v. FCC & United States*, 738 F.3d 397, 410 (D.C. Cir. 2013) (no abuse of discretion where petitioners did not submit evidence contradicting evidence in the record);

Finally, the Commission's regulation is reasonable because it avoided a constitutional defect, namely, that the FEC, like Senator Snowe's amendment, properly tailored the regulation so as to avoid mandating the disclosure of misleading and remote information. *See AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (striking down regulation requiring the disclosure of subpoenaed information at the conclusion of an investigation because regulation "[f]ailed to

undertake this [constitutional] tailoring."); (JA-311); *see Buckley*, 424 U.S. at 79-80.

The FEC had sufficient evidence to support its predictive judgment. *See Sorenson Communications*, 755 F.3d at 708. The FEC further provided a rational connection between the facts found and the choice it made. *See Bowman Transp.*, 419 U.S. at 285-86. Nothing further is required.

i. The District Court Wrongly Views The Holdings Of McConnell And Citizens United.

First, the district court seems to impose a requirement that since *WRTL II* did not discuss disclosure, disclosure could not be an issue for rulemaking. (JA-422). In fact, given the "complicated situation" facing the agency, it was impossible for the agency not to consider disclosure, and avoiding the subject would have violated the Commission's duty "[t]o engage in informed rulemaking" which requires that an "[a]gency must consider varying interpretations and the wisdom of its policy *on a continuing basis*" if it had not acted. *RNC*, 76 F.3d at 406 (*quoting Chevron*, 467 U.S. at 863-64) (emphasis added). As the NPRM and subsequent comments made clear, disclosure as applied to the general treasury funds of labor unions and corporations was an issue requiring discussion.

Second, although true that the electioneering communication disclosure statute was facially upheld in *McConnell*, 540 U.S. at 195-96, the disclosure statute

that the interveners presented to the *McConnell* district court differs significantly from the statute the Plaintiffs here presented to the district court.

Both the interveners and the congressional sponsors in *McConnell* described the electioneering communications disclosure statute as "just the types of rules that FECA has long imposed on 'independent expenditures' that 'expressly advocat[e];'"[2] *see also* Brief of Congressional Sponsors (adopting Defendants brief describing the disclosure statute as modest, imposing similar requirements previously upheld, and "merely impos[ing] the same type of disclosure obligations [as FECA's] well established disclosure requirements for independent expenditures.").[3]

The interveners' and sponsors' briefs had their intended impact. The Supreme Court described the electioneering communication disclosure statute as 'comparable' to the independent expenditure disclosure statue. *McConnell*, 540 U.S. at 197 n.81. The Court even explained that the EC disclosure statute was "less

[2] Defendant-Intervenors' Brief in *McConnell Supra* n.1at I-96.
[3] Final Brief of BCRA Congressional Sponsors at I-84-85 & n.320 (adopting brief of Defendants at 174, available at http://www.democracy21.org/uploads/%7b61EA29B5-66EE-459C-A964-EB55A54A316A%7d.PDF), *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C.), *available at* http://www.democracy21.org/uploads/%7b127BB9C3-9D65-4A05-B74B-821EDC4382BC%7d.PDF

intrusive" than the IE disclosure provision because the EC reporting threshold is $1,000 whereas the IE threshold is $200. *Id*.

Third, and for similar reasons, the district court confuses the Supreme Court's holding in *Citizens United* concerning the constitutionality of the electioneering communications disclosure provision. The district court in *Citizens United* viewed the disclosure provision as requiring the disclosure of those donors who contribute $1,000 or more "[f]or the purpose of furthering electioneering communications." *See Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (three-judge court). The Solicitor General then advised the Supreme Court that the electioneering disclosure provision required the disclosure of "[a]ny large contributions *earmarked* to underwrite it." Brief for Appellee at 30, 39, *Citizens United v. FEC*, 558 U.S. 310 (2010), No. 08-205 (emphasis added). The Supreme Court viewed the donor disclosure requirement as similarly narrow, only requiring disclosure of "certain contributors." *Citizens United*, 558 U.S. at 366. The Supreme Court appears to have upheld the very interpretation of the electioneering communication statute as expressed in the FEC's regulation.

The district court is wrong in its contention that because the Supreme Court has upheld the constitutionality of the disclosure *as that statute was represented to it*, both before and after the FEC's promulgation of the contested rule, the FEC could not seek comment on the statute's application to entities that never before

could make electioneering communications. Consistent with its duty to consider its policies on a continuing basis, *RNC*, 76 F.3d at 406, and given the 'complicated situation,' *Van Hollen*, 694 F.3d at 111, the FEC rightly exercised its 'broad' rulemaking power and sought comment on how the donor disclosure requirements in the electioneering communication statute should apply to corporations and labor unions.

ii. The District Court Misapplies The State Farm Standard And Improperly Analyzes The Record.

The district court erroneously concludes that the record does not support the regulation. Its conclusion—that the FEC acted unreasonably—is built upon this faulty premise.

First, the district court wrongly asserts that the Commission received no comments or heard testimony addressing or requesting the language the Commission ultimately adopted. *See* (JA-423-24). In fact, commenters across the political spectrum requested that the Commission adopt the same standard used for the independent expenditure disclosure statute. *See* (JA-152-54) (AFJ); (JA-163, 204) (labor unions); (JA-243-44). Even the district court's own opinion cited Ms. Robinson requesting that disclosure be limited to those who *earmark* funds for electioneering communications. (JA-435).

The FEC adopted the longtime standard used for disclosure under the independent expenditure statute. *See* (JA-311 n.22) (explicitly stating that the purpose requirement in the electioneering communications statute is derived from the independent expenditure disclosure statute). As the record demonstrates, several commenters requested the standard the FEC adopted.

Second, the district court wrongly asserts that the Commission waited until after the notice and comment period to add a purpose requirement to the regulation. (JA-422). In fact, the NPRM explicitly seeks comment on whether the Commission should add a purpose requirement to the donor disclosure regulation. *See* (JA-37); *see also American Federation of Labor*, 757 F.2d at 338.

Third, the district court contends that after searching the comments there is no data or specific material in the transcripts to support the Commission's finding that disclosure of persons who contributed $1,000 or more to corporations or labor unions would be both costly and burdensome. (JA-444) (citing JA-311).

Because BCRA prohibited labor unions and corporations from doing what the Supreme Court in *WRTL II* then permitted them to do—use general treasury funds to make electioneering communications—the FEC could not ascertain precisely how many labor unions would be burdened by compliance. The FEC was making an inherently predictive judgment, a judgment that is entitled to deference.

See Nuvio Corp. 473 F.3d at 306-07; *Sorenson Communications Inc.*, 755 F.3d at 708.

In fact, the joint labor union comment noted that if the Commission adopted Alternative 1, labor unions would have to, for the first time, file electioneering communication disclosure reports, reports that are far broader than what labor unions are already required to report to the Department of Labor. (JA-163); (JA-204); *see also* (JA-311) (justifying its final rule on this basis). Similarly, AFJ noted that the proposed regulations would require disclosure far more burdensome than the IRS's 990 disclosure requirement. (JA-153); (JA-311). *See Citizens United*, 558 U.S. at 337-38 (holding that it is burdensome and expensive to establish and administer a PAC). Because there is nothing in the record that contradicts the concerns of the labor unions and nonprofits, the FEC rightfully credited their concerns. *See Agape Church*, 738 F.3d at 410.

Furthermore, data on electioneering communication spending supports the FEC's prediction. *See* FEC Electioneering Communications Table 1[4] Between January 1, 2012 and March 30, 2012—the date the district court issued its opinion

[4] *Available at* http://www.fec.gov/press/summaries/2012/tables/ec/EC1_2012_24m.pdf; Although this is post promulgation data, courts permit it where the agency makes predictions and the subsequent data supports the prediction. *See Amoco Oil Co. v. EPA*, 501 F.2d 722, 731 n.10 (D.C. Cir. 1974)

vacating the FEC's electioneering communication disclosure rule—26 electioneering communications were publicly distributed. Between March 30, 2012 and September 18, 2012—the date this Court reversed and remanded the district court—only five electioneering communications were publicly distributed, two were from the Mayors Against Illegal Guns Action fund.[5] Between September 18 and December 31, 2012, 63 electioneering communications were publicly aired. For comparison, between March 30, 2010 and September 18, 2010, 90 electioneering communications were publicly aired.[6] The district court's interpretation imposes an unconstitutional burden on speech. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (holding that where many people prefer to avoid the burden of vindicating their free speech rights through litigation and choose to abstain from speaking, both the individual and society are harmed because the speech is missing from the public square).

Fourth, the district court objects that there is no evidence in the record about how many labor unions or corporations "[n]ow covered by the regulatory regime would be affected by the burdens involved with compliance..." (JA-444). This is both legally nondispositive and factually inaccurate.

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[5] *Id.*
[6] *Id.*

The lack of evidence in the record as to the *precise* number of labor unions or corporations affected is not dispositive. *See Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (rejecting challenge to agency alleging that agency "failed to put a precise number on the benefit of data collection in preventing future financial crises..." because an agency is not required to "measure the immeasurable."). More fundamentally, as stated *supra*, the FEC made a predictive judgment, based on the evidence supplied to the FEC, as to how many entities the regulation would impact. All that must be shown to uphold an agency's predictive judgment is that the judgment is logical and based on some evidence. *See Sorenson Communications Inc.* 755 F.3d at 708.

The district court's comment is incorrect because the labor union commenters supplied such evidence of how many people the FEC's regulation would impact. (JA156 n.1) (noting that the joint comment represented more than 15 million labor union members and approximately 60 labor organizations); (JA-227-28) (stating that AFSCME has members whose dues would require their disclosure on electioneering communication reports). The labor union comment further adduced evidence concerning the burdens of reporting if disclosure included the reporting of membership dues. *See, e.g.*, (JA-163, 206, 435).

In this testimony, the representatives of the labor unions told the Commission that the burdens and costs of compliance "would be especially great"

and would be the "literal price for undertaking ECs" because the proposed electioneering communication disclosure provision was far broader than what labor unions report to the Department of Labor. (JA-163). This Court should credit these concerns because nothing in record contradicts them. *Agape Church*, 738 F.3d at 410. The FEC's predictive judgment is based on logic and some evidence and should be accorded deference and upheld. *Sorenson Communic'ns Inc.*, 755 F.3d at 708; *Nuvio Corp*. 473 F.3d at 306-07.

Fifth, the district court claims that the Commission did not supply data concerning what the costs of compliance would be. (JA-444). First, and most basic, Congress does not require that the agency conduct "rigorous, quantitative economic analysis" of the costs of its rules. *See Inv. Co. Inst.*, 720 F.3d at 379 (holding that where Congress wants rigorous economic analysis, it enacts the requirement in the agency's enabling act).

Furthermore, "The scope and the degree of detail required…[in the Explanations and Justifications] should depend in part on the scope and degree of detail in the comments." 1 Richard J. Pierce, *Administrative Law Treatise*, § 7.4 (page 443) (4th ed. 2002). None of the comments provided the precise costs of compliance, nor could they since labor unions and corporations could not speak prior to *WRTL II*. Rather, both nonprofit groups (JA-153), and the labor unions (JA-163, 206) noted that a disclosure regime requiring the disclosure of all donors

who donated $1,000 or more annually would be far broader and burdensome than what the IRS requires of nonprofits or what is required on reports to the Department of Labor. The FEC is entitled to conclude from this uncontroverted evidence that promulgating its original rule would be costly and burdensome for labor unions and nonprofits. *See Indus. Union Dep't, AFL-CIO v. API,* 448 U.S. 607, 656 (1980) (permitting an agency, based on data available to it, to make conservative assumptions in formulating its policy); *see also New York v. United States EPA,* 413 F.3d 3, 31 (D.C. Cir. 2005) (ruling that incomplete data is not dispositive because the agency is then required to exercise its judgment in drawing a conclusion from the facts found to its policy choice and further ruling that "[t]he fact that the evidence in the record may also support other conclusions [does not] prevent us from concluding that [the agency's] decisions were rational and supported by the record."); *Agape Church*, 738 F.3d at 410.

Additionally, and most importantly, the FEC could not have obtained data on the costs because, as is stated *supra*, this was an inherently predictive judgment about entities that were previously prohibited from speaking. Thus, the FEC could not precisely determine the compliance costs. But the labor unions and corporations predicted that their costs would be "enormous" and "burdensome" because of their other reporting obligations, to the IRS for nonprofits and the Department of Labor for labor unions. (JA-153, 163). The FEC concluded that

requiring labor unions and corporations, including some nonprofits to disclose all donors who donated $1,000 more annually would be costly and burdensome (JA-311), must be given deference. *American Pub. Communs. Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) (holding that reviewing courts cannot "[r]equire an agency to enter precise predictive judgments on all questions as to which neither its staff nor interested commenters have been able to supply certainty[]."); *Nuvio Corp.* 473 F.3d at 306-07. Their predictions were, however, ratified after the district court vacated the rule in 2012.[7]

The FEC analyzed the comments it received, made a rational connection between the facts found and the choice it made, and logically moved from those facts to its policy conclusion. The FEC clears *Bowman*'s low bar. *See Inv. Co. Inst.*, 720 F.3d at 377.

Sixth, the district court claims that there was no evidence to support the Commission's conclusion that "[i]ndividuals contributing more than $1,000 [annually] to a non-profit" would not necessarily agree with the non-profit's electioneering communications. (JA-444).

The Supreme Court in *Buckley* held that *as a matter of law*, contributions are merely expressions of *general* support for a candidate or group and do "[n]ot

[7] *See supra* n. 4.

communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21. Thus, when the candidate or group uses those funds to speak, that speech is the speech of the candidate or group's, not the contributor's. *Id*. If a contribution constituted the contributor's speech, it could not constitutionally be limited. *Id*. at 46-48 (declaring FECA's expenditure limitations unconstitutional).

Additionally, the Commission received comments from nonprofit organizations informing the Commission that not all general supporters necessarily agree with the content of specific electioneering communications. (JA-153). It is misleading to require disclosure because the result depicts a connection between a financial supporter and specific speech where none exists. (*Id*.).

Given *Buckley*'s rule that contributions do not convey the underlying speech of the contributor; that nonprofits are informing the agency of this fact; that Congress only required the disclosure of those contributors who contributed for the purpose of funding the independent expenditure, 52 U.S.C. § 30104(c)(2)(C); and given the FEC's expertise in this area, the agency can make a conservative assumption in interpreting that data that general donors to nonprofits may not necessarily agree with each and every specific electioneering communication the nonprofit makes. *See Indus. Union Dep't, AFL*-CIO, 448 U.S. at 656; *see also New York*, 413 F.3d at 31.

The FEC satisfied its light burden. (JA-311); *RNC*, 76 F.3d at 407. The FEC made a rational connection between the facts found—Supreme Court pronouncements that general contributors do not necessarily agree with specific speech and nonprofit commenters informing the agency of this fact—and its policy judgment, namely requiring the disclosure of those donors who donated $1,000 annually for the express purpose of funding electioneering communications. *State Farm*, 463 U.S. at 43. Nothing more is required. *See Bowman Transp., Inc.*. 419 U.S. at 285-86.

Seventh, the district court claims that the FEC lacked evidence that nonprofits receive donations that exceed $1,000 annually. From the comments received, however, the Commission knew that nonprofits are required to disclose to the IRS on its 990 contributions of $5,000 or more in a calendar year, (JA-153); that if the FEC adopted its proposed rule, the accounting burdens would be enormous, which could only be true if AFJ, or one of its affiliates had donors who donated $1,000 annually, (*Id*.); and that donors would cease donating $1,000 or more annually if the FEC adopted its proposed disclosure regulation (JA-139). From this information, the FEC knew that there were donors who donated $1,000 or more annually. Furthermore, because of the FEC's expertise, it is a basic assumption, based upon the evidence before the FEC, that nonprofits receive

donations of $1,000 annually from single donors. *See Indus. Union Dep't, AFL-CIO*, 448 U.S. at 656; *see also New York*, 413 F.3d at 31.

Eighth, the district court claims that the record lacked an explanation for "[w]hy the segregated bank account was not a suitable solution for any of the problems that were identified." (JA-445). In fact, the labor unions provided this very obvious explanation. To require labor unions and corporations to speak through a separate segregated fund would "[u]ndermine the very holding of *WRTL II* itself…" (JA-163), which held that corporations and labor unions could use their general treasury funds to make electioneering communications. *WRTL II*, 551 U.S. at 481. Furthermore, it is also constitutionally deficient for the district court to say that the burdens and costs of reporting could be avoided by assuming the costs and burdens of establishing a separate segregated fund. *See MCFL*, 479 U.S. at 252-54; *Citizens United*, 558 U.S. at 337-38. The FEC understood that the separate segregated fund option was not a "[m]eaningful alternative" (JA-163). Instead the 'alternative' merely traded the burdens and costs of having to disclose all donors who donated $1,000 or more annually for the burdens and costs of establishing and administrating a separate segregated fund.

iii. The FEC's Regulation Does Not Frustrate The Purpose Of Congress.

An agency's regulation is not arbitrary and capricious so long as the agency's regulation is "[*r*]*ationally* related to the goals of the statute." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (emphasis added). This means that the agency need not adopt a regulation that *best* promotes the goals of Congress, a statute is reasonable simply so long as it is compatible with the goals of Congress. *See Continental Air Lines*, 843 F.2d at 1453. Rather, a regulation frustrates the policy of Congress where the regulation contravenes the unambiguous intent of Congress. *See Shays*, 414 F.3d at 99 ("Insofar as such statements may relate to political or legislative goals independent from any electoral race--goals like influencing legislators' votes or increasing public awareness--we cannot conclude that Congress unambiguously intended to count them as expenditures (and thus as 'contributions' when coordinated)." (internal quotation marks omitted). Furthermore, *Chevron* Step Two by definition means that Congress's intent on the precise issue has eluded the reviewing court. *See Continental Air Lines*, 843 F.2d at 1449.

First, the district court cites comments from the legislative history for the proposition that Congress somehow intended the broad disclosure the district court prefers, namely the disclosure of all members of labor unions who contribute

$1,000 or more annually. (JA-446). But the comments the district court cites are general and merely exhort the virtues of disclosure. (*Id*.) (citing Sen. Jeffords wanting to "shine sunlight on undisclosed expenditures" and Senator Feinstein lamenting that attack ads "[c]ome and no one knows who is actually paying for them."). *See Continental Air Lines*, 843 F.2d at 1451 ("[W]e are persuaded that the 'compatibility with Congressional purposes' prong of Chevron analysis must be carried out with assiduous care [to avoid] judicial unwinding of deals struck in Congress.").

HLF nevertheless highlighted specific comments, demonstrating that Congress merely sought the disclosure of "[l]arge contributions *designated for such ads*." 147 Cong., Rec. S3005 at 3038 (emphasis added). The district court adduced no citations from the legislative history that contradicted these statements. At the very least, the legislative history is ambiguous on what precisely must be disclosed. *Compare* Comments of Michael Trister (JA-243-44) (Congress intended to impose same disclosure regime on electioneering communications as it did for independent expenditures); *and* Comments of AFJ (JA-153) (noting that a purpose requirement "[i]s more consistent with the purposes of statute.); *with* (JA-446). The FEC's interpretation is, at the very least, compatible with Congress's goals and is *certainly* rationally related to the goals of Congress. *Continental Air Lines*, 843 F.2d at 1453; *AT&T Corp.*, 525 U.S. at 388.

Third, the district court erroneously contends that the FEC's regulation "[h]as the potential to swallow the rule entirely." (JA-447). If HLF receives no donations designated for electioneering communications, and HLF makes more than $10,000 worth of electioneering communications, HLF is still required to report the following to the FEC:

1. That HLF aired the electioneering communication in question;
2. The person or persons who shared direction or control over the activities of HLF, or the person who executed a contract to make the electioneering communication;
3. The identification of the person who has custody of HLF's books and accounts;
4. The identification of each person who received a disbursement of $200 or more during the reporting period in connection with the electioneering communication;
5. All clearly identified candidates referenced in the electioneering communication; and
6. The disclosure date.

11 C.F.R. §104.20(c)(1-6).

In this hypothetical, the public still discovers who "actually paid" for the advertisement and much more.

Fourth, since 2007, four separate sessions of Congress have met and Congress has not amended the electioneering communications statute. *See Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983) (holding that legislative acquiescence is appropriate where the issue is one that Congress is familiar—tax law there, campaign finance law here—and Congress has since attempted to amend the statute and has failed). Congressman Van Hollen attempted to amend the disclosure requirements, and failed. *See* H.R. 5175, 111th Cong. § 211(b)(1)(B) (2010).

Fifth, to agree with the district court would mean that Congress both intended to specify the disclosure required for communications that it prohibited and that the disclosure should be broader than the disclosure required for independent expenditures. Congress could not have intended broader disclosure for speech that is by definition, not express advocacy, 52 U.S.C. § 30104(f)(3)(A), than the disclosure required for independent expenditures. *Id*. § 30101(17)(A); *id*. § 30104(c)(2)(C). Interpreting the electioneering communications disclosure statute in this manner produces absurd results. *See Halbig v. Burwell*, 758 F.3d 390, 402 (D.C. Cir. 2014) ("Our obligation to avoid adopting statutory constructions with absurd results is well-established."). This is especially true here where the FEC has established a reasonable interpretation of the disclosure statute

providing meaning to the term contribution, a term of art containing a purpose element. *See* 52 U.S.C. § 30101(8)(A).

II. THE FEC WAS REQUIRED TO ADD A PURPOSE REQUIREMENT TO AVOID CONSTITUTIONAL INFIRMITIES.

The FEC has a duty to "[a]ttempt to avoid unnecessarily infringing First Amendment interests." *AFL-CIO*, 333 F.3d at 179; *see also Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 665-66 (S.D. W. Va. 2011) (holding that West Virginia's electioneering communications statute was constitutional only if interpreted to mandate disclosure of those supporters who gave $5,000 or more annually for the purpose of funding the funds for the electioneering communication).

The labor unions and AFJ noted that the FEC's proposed disclosure rule would mislead the public and disserve First Amendment interests. (JA-153, 160 and 163). In the final rule, the Commission noted that requiring disclosure of all donors who donated would require the reporting of information that is not related to the electioneering communication. (JA-311). ATA, ALG, and Independent Sector also warned that donors would cease donating $1,000 or more annually and entities may cease speaking if the proposed regulation were implemented (JA-99, 139). Their predictions proved prescient because during the time the FEC's rule was vacated, electioneering communications nearly ceased. As was stated *supra* at

32-33, only five electioneering reports were filed between March 30, 2012 and September 18, 2012. By contrast, during that same time period in 2010, 90 such reports were filed.[8] The district court's interpretation imposes an unconstitutional burden. *Cf. Hicks*, 539 U.S. at 119.

Disclosure statutes are upheld where the government provides a sufficiently important interest and the information sought is substantially related to the interest. interest. *Buckley*, 424 U.S. at 64. Despite Congress's intent to achieve "full disclosure", *id.* at 76, *Buckley* narrowly construed the challenged disclosure statute when applied to groups like HLF whose major purpose is not the election or defeat of candidates requiring only that they disclose their contributors who contributed $200 or more annually to further the entity's independent expenditures. *Id*. at 79-80; *MCFL*, 479 U.S. at 252-53, 264; *Buckley v. Am. Constitutional Law Found*., 525 U.S. 182, 201-04 (1999) (holding that Colorado's disclosure requirement of paid petition circulators is unconstitutional because it is not substantially related to the interests advanced by Colorado); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872-74 (8th Cir. 2012) (*en banc*) (declaring unconstitutional Minnesota's registration and reporting requirements for entities that make only independent expenditures).

[8] *See supra* n.4.

Here, it is unconstitutional to require the disclosure of information that is not substantially related to the electioneering communication. First, electioneering communications by labor unions and non-profit and for-profit corporations cannot be coordinated with the candidate because that would constitute an in-kind contribution to the candidate, an illegal contribution. *See* 52 U.S.C. § 30118 (prohibiting corporate and labor union contributions); 11 C.F.R. § 109.21(b) (treating coordinated expenditures as in-kind contributions). This situation is more analogous to the petition circulators in *American Constitutional Law Foundation*, 525 U.S. at 203-04, where there the risk of *quid pro quo* corruption was remote. Similarly, here, there is no risk of corruption or the appearance thereof because no money is flowing to the candidate. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-1442 (2014).

Second, disclosing all donors who donated $1,000 annually to an entity is not substantially related to the interests of discovering who is paying for the electioneering communication. *Buckley*, 424 U.S. at 79-80, 158-60.

Similarly, to prevent the electioneering communications statute from capturing information that is too remote from the interests sought, the FEC interpreted the statute to only require disclosure of those donors who donated $1,000 or more annually for the purpose of furthering the electioneering communications. (JA-311).

CONCLUSION

For the foregoing reasons, and the reasons articulated in CFIF's brief, incorporated into this brief by reference, this Court should reverse the district court's judgment.

Dated: April 10, 2015

Respectfully submitted,

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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 9,833 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.

/s/ Jason Torchinsky
Jason Torchinsky

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.

Dated: April 10, 2015

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