ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 14, 2012
CASE NOS. 12-5117 & 12-5118

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

Center for Individual Freedom,
Defendant-Appellant,
and
Hispanic Leadership Fund,
Defendant-Appellant,
v.

Chris Van Hollen,
Plaintiff-Appellee,
and
Federal Election Commission,
Defendant-Appellee.[1]

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR DEFENDANT-APPELLANT CENTER FOR INDIVIDUAL FREEDOM

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August 3, 2012

[1] The Federal Election Commission ("FEC") deadlocked on the question of whether to authorize an appeal to this Court.

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GLOSSARY OF ABBREVIATED TERMS

BCRA	Bipartisan Campaign Reform Act of 2002, 116 Stat. 81
BCRA § 201	The electioneering communication disclosure provision at issue, codified at 2 U.S.C. § 434(f)(2)(F)
CFIF	Center for Individual Freedom
CFIF's Brief	Opening Brief of Appellant Center for Individual Freedom
FEC or Commission	Federal Election Commission
FECA	Federal Election Campaign Act of 1971
HLF	Hispanic Leadership Fund
J.A.	Joint Appendix
March 30, 2012 Order	Judge Amy Berman Jackson's March 30, 2012 Order, as amended, that is the subject of this appeal
Mem.Op.	Judge Amy Berman Jackson's Memorandum Opinion accompanying the March 30, 2012 Order
Plaintiff's Brief	Brief for Appellee Chris Van Hollen
2007 Regulation	The disclosure regulation vacated by the district court, 11 C.F.R. § 104.20(c)(9)
2003 Regulation	The predecessor to the 2007 regulation, which can be found at 11 C.F.R. § 104.20(c)(8) (2003)

INTRODUCTION AND SUMMARY OF ARGUMENT

CFIF's Brief showed (at 23), and Plaintiff's Brief does not dispute, that this appeal is to be decided *de novo*, giving no deference to the district court's ruling. Plaintiff's burden is to establish that the FEC's presumptively valid 2007 Regulation should be struck down. Plaintiff's Brief does not carry that burden.

The 2007 Regulation requires corporations and labor unions spending more than a small amount on electioneering communications to identify and disclose contributors who contribute for the purpose of supporting such speech. This objective test requires disclosure of those whose donations are linked to the recipient's communications, either because they give in response to solicitations to support such speech or because the donations are designated for that use. *See* CFIF Brief at 13-14.

Plaintiff's Brief confirms that the 2007 Regulation requires the same scope of disclosure for electioneering communications that Congress requires for express candidate advocacy. Plaintiff's Brief does not deny that the district court's judgment has actually led to fewer disclosures as many speakers add express advocacy to what otherwise would be regulated as electioneering communications. *See id.* at 33-34. As was just reported:

> Groups that previously reported electioneering communications recently have shifted gears to avoid disclosure requirements. Some … have begun filing

> reports of "independent expenditures" for message[s] explicitly calling for votes for or against candidates….
>
> FEC rules for such independent expenditures were not affected by the Van Hollen litigation, meaning that ads explicitly intended to intervene in campaigns are now subject to a lower disclosure standard than electioneering communications.

Kenneth Doyle, *FEC Issues Guidelines on Disclosure of Donors Funding Electioneering Ads*, Bloomberg BNA Money & Politics Report, July 30, 2012. These reports can be confirmed by inspection of judicially noticeable FEC files available on-line at http://www.fec.gov. Alternatively, many groups have ceased engaging in electioneering communications altogether. *See* CFIF Brief at 36-37.

The district court's judgment imposed greater disclosure burdens on electioneering communications – both those that can constitute implied candidate advocacy and those that do not – than on express candidate advocacy.[2] This has silenced and distorted core speech toward express candidate advocacy and its less burdensome disclosure obligations. Plaintiff's Brief never explains why Congress would want to produce this absurd result.

Plaintiff's primary theory of invalidity, and the sole ground adopted by the district court, relies on an analysis under Step One of *Chevron U.S.A., Inc. v.*

[2] References in this brief to "implied candidate advocacy" in connection with electioneering communications simply acknowledge the observations in *McConnell v. FEC*, 540 U.S. 93, 206 (2003), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 476 n.8 (2007) ("*WRTL II*"), that electioneering communications can – but do not always – imply support for candidates.

NRDC, 467 U.S. 837 (1984). Plaintiff's Brief (at 24-25) acknowledges that, to sustain this theory, Plaintiff must show that BCRA's disclosure provision imposes a "clear" and "unambiguous[]" statutory command that the 2007 Regulation violates. Plaintiff purports to find the necessary clear command in the statutory phrase "contributors who contributed" by stretching its meaning to apply to every donation received by a corporation or labor union that makes an electioneering communication. Yet Plaintiff's Brief does not deny any of the following facts that undercut this conclusion:

- The disclosure provision is part of a statute that defines "contribution" to require giving "for the purpose of influencing" specific advocacy. 2 U.S.C. § 431(8)(A);
- The statutory definition of "contribution" itself reflects a standard dictionary definition – i.e., giving for a particular purpose. CFIF Brief at 29-30 & n.32;
- The key terms "contributors" and "contribute" are closely related forms of the word "contribution," connoting one who makes a contribution and the act of making a contribution;
- The disclosure provision's purpose is to inform the public of the identities of persons financially supporting the electioneering communications that trigger disclosure. *Id.* at 6, 35;

- Requiring disclosure of donations unrelated to supporting specific electioneering communications tends to obscure the information the disclosure provision seeks to provide. *Id.* at 12, 41;
- The legislative history contains no statement that the disclosure provision would or should demand greater disclosures from those making electioneering communications than from those engaged in express candidate advocacy, and the congressional sponsors represented that the disclosure requirements were intended to be the same for both types of speech. *Id.* at 6-7, 35;
- From 2002 through 2011, the disclosure provision was reviewed by the FEC, a three-judge district court, the Solicitor General, and eight sets of commenters opposing the 2007 Regulation, and none articulated the supposedly clear statutory meaning Plaintiff now asserts. *Id.* at 15-16, 26 n.27;
- In addition to a bipartisan majority of the FEC, the three-judge district court and the Solicitor General explicitly construed the statute to contemplate the same disclosures as the 2007 Regulation. *Id.* at 25-27 & n.27; and
- The FEC found that including disclosures of the sources of donations not made to support regulated speech would needlessly and significantly

burden core First Amendment speech – an analysis Congress never made. *Id.* at 4-5, 21, 38-39.

Of course, Plaintiff's Brief offers countervailing arguments. For example, it observes (at 35-36) that the defined word "contribution" is not precisely the same as the statutory terms "contributors" and "contribute," and would pose difficulties if imported literally. It says (at 29) the purpose element of the 2007 Regulation is a loophole that undermines disclosures Congress desired. It says (at 34) that the district court's interpretation of the disclosure provision in *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (*per curiam*), *aff'd in relevant part*, 130 S. Ct. 876, was not a strict holding. And so on.

Plaintiff's arguments are addressed in detail below, and CFIF submits they are untenable. But even if they are given maximum credence, the strongest conclusion they could support is that the disclosure provision's meaning is arguable and uncertain. Yet anything less than clarity is fatal to Plaintiff's *Chevron* Step One theory, which is the sole basis of the district court ruling. Thus, the appealed judgment must be reversed.

Plaintiff's Brief also offers (at 42-48) – but does not strongly press – a *Chevron* Step Two theory, claiming that the FEC's adoption of the 2007 Regulation was arbitrary and unreasonable. Although this alternative theory was fully briefed and argued, the district court did not embrace it, nor should this Court.

The FEC gave a reasonable explanation of its decision in light of the statute, the legislative purpose, and the record before it. Plaintiff identifies no comments the FEC did not fairly address, nor does it show that the rulemaking record precluded the FEC's views.

Because the 2007 Regulation was at least permissible and rational, if not actually required by statute, the judgment vacating it should be reversed and Plaintiff's challenge should be dismissed with prejudice.

I. Plaintiff's Brief Fails to Establish the Clear and Unambiguous Statutory Meaning His *Chevron* Step One Theory Requires.

A. Compelling Empirical Evidence Demonstrates That Plaintiff's Proposed Statutory Construction Is Not Clear and Unambiguous.

Plaintiff's *Chevron* Step One claim faces a serious empirical difficulty. From 2002 through 2011, the disclosure provision was repeatedly reviewed by a bipartisan group of FEC Commissioners and those who supported additional campaign finance regulation, but neither saw the supposedly clear and unambiguous meaning Plaintiff now asserts. *See* CFIF Brief at 13 & n.14. To the contrary, BCRA's congressional sponsors represented that the electioneering communication disclosure provision "merely impos[es] the same type of [purpose-based] disclosure obligations" applicable to express advocacy. *Id.* at 7. Moreover, in *Citizens United*, the three-judge district court and the Solicitor General's Supreme Court brief both construed the disclosure provision as consistent with the

2007 Regulation. CFIF Brief at 25-26 & n.27. The Supreme Court affirmed that aspect of the district court's ruling, describing the disclosure provisions in similar but more general terms. *Id.*

Plaintiff's Brief responds (at 34-35) that the precise meaning of the disclosure provision was not squarely at issue in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and the Supreme Court's language, viewed in isolation, could have several meanings. Even if that is so, it would be surprising if three judges on the district court, the Solicitor General, and the congressional sponsors of BCRA itself all failed to perceive a provision's clear meaning when they wrote about it. Furthermore, the meaning of the disclosure provision was directly at issue in the FEC rulemaking, yet neither the commissioners nor the eight sets of comments opposing the 2007 Regulation perceived a statutory barrier.[3]

These considerations may not be determinative of what the disclosure provision means. But they certainly provide compelling empirical evidence that the statutory meaning is not clear, a conclusion that is confirmed by the arguments Plaintiff offers.

[3] Although the 2003 Regulation adopted the disclosure standard Plaintiff supports, it did so as a matter of interpretive judgment rather than an explicit statutory command. *See Bipartisan Campaign Reform Act of 2002 Reporting; Coordinated and Independent Expenditures; Final Rules*, 68 Fed. Reg. 404, 412-13 (Jan. 3, 2003).

B. The Statutory Language and Structure Are Consistent with the 2007 Regulation.

Plaintiff's Brief points out (at 25-27) that dictionaries can define the key statutory terms "contributor" and "contribute" as giving without expectation of a return. But Plaintiff never refutes the showing in CFIF's Brief (at 29-30) that dictionaries also provide other definitions that require giving for a particular or common purpose, a meaning fully consistent with the 2007 Regulation. Simply stated, the ordinary meaning of the statute's key words is not what Plaintiff has suggested because those words incorporate the purpose element contained in the definition of "contribution."[4]

Plaintiff's Brief cannot deny that BCRA's disclosure provision is part of FECA, which defines "contribution" as giving for a specified purpose. Plaintiff's Brief argues (at 35) that BCRA's terms – "contributors" and "contribute" – are not precisely the same word as "contribution," but it does not deny they all are forms of the same word, and their meaning depends on the meaning of "contribution." Plaintiff suggests no meaning for "contributors" other than persons who make contributions.

[4] At best, the presence of conflicting dictionary definitions suggests ambiguity. *See Catawba Cnty. v. EPA*, 571 F.3d 20, 39 (D.C. Cir. 2009) ("Dueling over dictionary definitions [of the word "contribute"] is pointless, for it fails to produce any plain meaning of the disputed word.") (internal quotation marks and citation omitted). As explained throughout CFIF's briefing, however, all of the other factors illustrate why CFIF is entitled to prevail at Step One.

Plaintiff's Brief says (at 36) that courts do not always give all forms of a defined statutory term the same meaning, but it considerably overstates its key case, *FCC v. AT&T*, 131 S. Ct. 1177, 1181 (2011). There, the Court rejected a claim that by defining a noun "Congress necessarily defined the adjective form." *Id.* (emphasis by Court). The Court pointed out that the definitions of "corn" and "crank" do not define "corny" and "cranky." *Id.* Similarly, it held that "personal" was not defined by a statutory specification that "person" included corporations. *Id.* at 1181. But the Court stressed that "[a]djectives typically reflect the meaning of corresponding nouns" and that statutory "context … certainly may include the definition of related words." *Id.* at 1181-82. Because the meaning of "contributor" is closely tied to the concept of "contribution," and the terms serve similar functions, the statutory definition is important context here.

Plaintiff's Brief says (at 36-37) that, by using the words "contributor" and "contribute," rather than "contribution," Congress clearly called for a different meaning. But that argument can always be made where only one of several forms of a word is defined. Plaintiff's Brief cannot explain why Congress used such similar and closely related words for such similar purposes if it intended for the definition to be disregarded.

Plaintiff's Brief asserts (at 29) that the statutory meaning reflected in the 2007 Regulation "reopen[s] the very loophole the terms were intended to close."

But the loophole BCRA sought to close was the ability to avoid regulation applicable to express candidate advocacy by resorting to implied candidate advocacy. *See* Plaintiff's Brief at 48-49. Plaintiff's Brief offers nothing to show Congress was dissatisfied with the scope of disclosure laws that applied to express advocacy. To the contrary, the sponsors of BCRA said the new law merely subjected electioneering communications to the same disclosure burdens that FECA long had imposed on express advocacy. CFIF's Brief at 6-7.

Finally, Plaintiff's Brief (at 27-28) relies on *expressio unius est exclusio alterius* to suggest that Congress's inclusion of a purpose element in FECA's disclosure provision for express candidate advocacy is evidence of congressional intent to exclude a similar purpose requirement in BCRA. But "[s]cholars have long savaged [this] canon" of construction, labeling it "an especially feeble helper in an administrative setting." *Cheney R. Co., Inc. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990); *see also id.* at 69 (collecting other authority). Instead, courts "have consistently recognized that a congressional mandate in one section and silence in another [suggests] a decision not to mandate any solution in the second context" but "to leave the question to agency discretion." *Catawba Cnty.*, 571 F.3d at 36 (internal quotation omitted). That "Congress spoke in one place but remained silent in another, as it did here, rarely if ever suffices for the direct answer that *Chevron* Step One requires." *Id.*

In short, the statutory language and structure easily harmonize with the 2007 Regulation, and certainly do not clearly and unambiguously forbid it.

C. Legislative History Cuts Against Plaintiff's Interpretation.

According to Plaintiff's Brief (at 5-6), the legislative history shows the disclosure provision seeks to inform voters "who is trying to influence the election[,] … who is sponsoring and paying for [the ads,] … who is financing these ads[, and] … who is actually paying for them." This purpose clearly calls for identifying persons who give in response to solicitations to support such ads or who earmark their giving for that purpose, which is what the 2007 Regulation requires. By contrast, disclosing donors who manifest no support for such speech or who specifically give for unrelated purposes is too remote from such a purpose.

Indeed, mixing in disclosures of donations that reflect no support of a speaker's ads obscures the very information the provision seeks to provide. For example, a restaurant may donate to support a non-profit corporation's project to feed the homeless. If the non-profit corporation which, like many, is a multi-purpose organization, also makes electioneering communications supporting a candidate's proposals for mortgage assistance, Plaintiff's theory would compel disclosures falsely suggesting the restaurant supported the mortgage assistance ads. In promulgating the 2007 Regulation, the FEC made just this distinction. *See* 72 Fed. Reg. 72,911.

These problems also are readily apparent in the hypothetical from Plaintiff's Brief (at 27) that originated during argument in the district court. Plaintiff's counsel asserted that if he gave money "to the Do-Re-Mi Music Festival," then, whether his subjective motive was love of music, desire for publicity, or to please a fund-raiser, "I'm still a contributor." The district court found this hypothetical persuasive, J.A. 160, but it has significant and illuminating shortcomings.

First, counsel's hypothetical gift was earmarked to provide support for the Do-Re-Mi Music Festival itself. Thus, the situation is analogous to giving to a specific ad campaign, rather than for the general support of a corporation engaged in many activities. Such targeting would establish an objective purpose to support the speech and, hence, would require disclosure under the 2007 Regulation.

Second, the hypothetical fails to say why "contributors" to the Festival are being identified. This matters. Suppose the Festival was a project of Corporation, Inc. and that, after receiving counsel's generous contribution to fund the Festival, the corporation later decided to launch a series of electioneering communications promoting positions counsel did not support, or even found abhorrent, but that still triggered application of BCRA's disclosure provision. According to Plaintiff's Brief (at 5-6), the purpose of disclosure would be to reveal "who is trying to influence the election[,] … who is sponsoring and paying for [the ads,] … who is financing these ads[, and] … who is actually paying for them." For

those purposes, counsel would not be a "contributor" of Corporation, Inc. because his support of the Festival was not support for the ads.

In short, all that the Do-Re-Mi Music Festival hypothetical shows is that the word "contributor" has several meanings and that its inherent ambiguity must be resolved by consideration of other traditional tools of statutory construction.[5]

Plaintiff's Brief further states (at 28-29) that the disclosure provision's purpose requires disclosing all donations to avoid circumvention and because any money that flows to a speaker helps finance its ads in some sense. But Plaintiff's Brief offers no evidence that Congress intended such a strained and attenuated meaning or intended to deny the FEC discretion to implement a regulation to balance many competing considerations, including those raised here by Plaintiff. Nor does Plaintiff's Brief acknowledge the First Amendment issues that would arise from imposing broad burdens on core speech. *See infra* at 15-18.

The legislative history shows that Congress wanted to inform voters who was paying for electoral advocacy, implied and express. Plaintiff's brief cites no history of dissatisfaction with statutory provisions requiring disclosure only of

[5] Furthermore, the hypothetical does not address any constitutional concerns, nor does it take into account the pre-existing statutory definition of "contribution." And although counsel's hypothetical was skillfully constructed, other hypotheticals easily are imagined that point the other way. Suppose a moderator of a town meeting, after praising Corporation, Inc. for its successful recent campaign to preserve local green space, said: "Will the Corporation, Inc. contributors please rise so we can thank them with a round of applause." Would counsel think that his earlier contribution to the Do-Re-Mi Music Festival clearly and unambiguously authorized him to stand and be thanked? CFIF suggests that the term "contributors" means donors to the green space project.

donations for the purpose of supporting express candidate advocacy. Indeed, congressional sponsors said the disclosure provision subjected implied candidate advocacy through electioneering communications to the same disclosure standards as express advocacy. CFIF Br. at 7, 35. The disclosure provision does not clearly command the FEC to determine otherwise.

D. Plaintiff's Interpretation Creates an Absurdity.

Plaintiff's Brief does not deny that the district court's adoption of its position has simply led many speakers to insert a few words of express candidate advocacy into issue ads that would have otherwise qualified as electioneering communications. Nor does Plaintiff's Brief attempt to show that the purposes of FECA, as amended by BCRA, require such a topsy-turvy result.

Plaintiff's Brief asserts (at 12 n.4) that CFIF cannot properly mention the absurd consequences that have resulted from the judgment adopting Plaintiff's statutory construction if CFIF continues to object to Plaintiff's assertions about post-promulgation effects of the 2007 Regulation. But the two situations are very different. For purposes of determining what the law is, this Court may take notice of any information it finds helpful. *See* Fed. R. Evid. 201, *Advisory Committee Note* (discussing notice of so-called "legislative facts"). On the other hand, the FEC was required to base its regulation on the administrative record before it, and that judgment may not be impeached by assertions about extra-record facts that

neither the agency nor other interested parties have had the opportunity to develop in a rulemaking context.[6]

Plaintiff's Brief says (at 24-25) that only a strong showing of absurdity can vary a statute's "plain meaning." That is so. But where, as here, a statute requires interpretation, courts strive to avoid absurd or incongruous results. CFIF Br. at 34. This Court should resist the notion that Congress clearly and unambiguously commanded such a result.

E. Plaintiff's Interpretation Needlessly Raises Constitutional Issues.

Plaintiff's Brief does not dispute that *Chevron* Step One analysis must take account of the presumption that Congress does not raise needless constitutional issues. Instead, Plaintiff's Brief argues (at 38-41) that the settled lawfulness of disclosure requirements in the campaign finance context eliminates any ground for constitutional concern.

But all of the cases cited in Plaintiff's Brief recognize that compelled disclosures constitute a First Amendment burden that must be justified under exacting judicial scrutiny. This includes an assessment of whether the particular

[6] Neither of the cases Plaintiff cites as a basis for supplementing the record supports his position. The cited portions of the first case, *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), are mere dicta, *see, e.g.*, *Earthworks v. U.S. Dep't of Interior*, 279 F.R.D. 180, 185-86 (D.D.C. 2012), and "of limited 'probative value,'" *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 n.3 (Fed. Cir. 2009). Plaintiff's second case, *IMS, P.C. v. Alvarez*, 129 F.3d 618 (D.C. Cir. 1997), actually rejected an attempt to supplement the record, reaffirming that "*ex post* supplementation of the record [is generally] not consistent with the prevailing standards of agency review."

speech burdens that are imposed sufficiently advance the statute's justifying interests. CFIF Br. at 36-37, 41. Yet, Plaintiff's Brief makes no showing that Congress ever evaluated the benefits and burdens of imposing on ordinary corporations and labor unions a requirement to disclose all donations they receive, including those with no relation to the speech that triggers the disclosure requirement.

Plaintiff's Brief argues (at 32) that Congress knew that the disclosure provision might be held to apply to a few so-called *MCFL* corporations and, therefore, contemplated application of the disclosure provision to all corporations. But CFIF's Brief demonstrated (at 5 n.4) that the named sponsor of the so-called "Wellstone Amendment" was emphatic that *MCFL* corporations were not exempt from the prohibition on electioneering communications. Moreover, the Supreme Court created the *MCFL* exemption for entities that were formally incorporated but were so different from ordinary corporations that they could not be regulated as corporations. *See FEC v. Massachussets Citizens for Life, Inc.*, 479 U.S. 238, 254-55, 259 (1986). Thus, even if Congress had evaluated the potential impact the disclosure provision might have had on the tiny number of *MCFL* entities – and it did not – the burdens threatened to ordinary corporations and labor unions were not evaluated.

Plaintiff's Brief does not deny that the Supreme Court's holding in *WRTL II* – i.e., that ordinary corporations and labor unions were entitled to make electioneering communications – came as a surprise to Congress. It argues (at 33-34), however, that because the disclosure provision was broad enough to include ordinary corporations and labor unions, it must be read to have that reach, regardless of what Congress expected, citing *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). But that is a red herring. The question here is not whether the disclosure provision applies to corporations and labor unions; CFIF agrees that it does. Instead, the primary issue is whether Congress ever actually assessed the burdens and benefits of that unforeseen and previously prohibited application. Plaintiff's Brief makes no attempt to show that such an assessment ever occurred.

Plaintiff's Brief argues (at 10, 38, 48) that the burden of unlimited disclosure must not be significant since the FEC continues to require such disclosures with respect to individuals and partnerships. This overlooks, however, the differences in resulting burden shown in the 2003 and 2007 Rulemakings. As CFIF's Brief showed (at 8-9), during the 2003 Rulemaking the expected subjects of BCRA's disclosure provision – individuals and unincorporated groups – made no showing that unrestricted disclosure would burden them. By contrast, corporations and labor unions made an extensive showing of burden during the 2007 rulemaking,

CFIF Brief at 12-13, and the FEC found these burdens to be unnecessary and significant enough to warrant an adjustment to the original regulation, *id.* at 14-15.

Plaintiff's construction of the disclosure provision would require the FEC to impose burdens that (a) Congress never evaluated and (b) the FEC found were significant and needless. This would raise First Amendment questions that are easily avoided by reading the statute to allow the FEC leeway to evaluate such burdens and tailor them.

* * *

When the statutory definition, the legislative history, the structural absurdity, and avoidance of constitutional doubt are given proper weight, the electioneering communication disclosure provision clearly contemplates consideration of purpose when identifying who must be disclosed. At the very least, the provision is unclear and ambiguous. Thus, Plaintiff's *Chevron* Step One argument fails and the judgment based on that argument must be reversed.

II. The 2007 Regulation Was Reasonable and Rational.

Plaintiff's Brief asserts (at 42-47) that, even if the meaning of the disclosure provision were unclear or ambiguous, the 2007 Regulation would be so arbitrary and unreasonable as to be invalid. Plaintiff's burden is challenging because the FEC merely subjected implied candidate advocacy to the same disclosure

requirements that Congress itself, in the same statute and for similar purposes, specified for express candidate advocacy.

CFIF's Brief (at 42) pointed out that the FEC's district court papers provide an extensive explanation of its rulemaking and proposed that because a deadlock has deprived the Court of agency briefing, it would be desirable for this Court to consider those filings. Plaintiff's Brief does not object to this proposal. Given the comprehensive presentation by the FEC, CFIF's discussion need not be extensive.

Plaintiff's Brief asserts (at 29), that this decision perpetuated a "loophole" that the disclosure provision was intended to close. As discussed above (at 10), however, there is no evidence Congress regarded the existing disclosure standard as a loophole. Instead, BCRA's sponsors said their purpose was to subject electioneering communications to the same disclosure requirements as express advocacy. CFIF Brief at 6-7, 35.

Plaintiff's Brief asserts (at 48-49) that it should have been "foreseeable" that the result of requiring disclosures for the purpose of supporting electioneering communications would be circumvention. It phrases its argument this way because, unable to point to substantial support in the rulemaking record, it seeks to open the door to post-promulgation experience. Of course that is improper, as CFIF's Brief (at 40) already demonstrated. *See also supra* at 15 n.6.

Moreover, Plaintiff's presentation is simplistic and untenable, assuming that a broader disclosure requirement inevitably produces more disclosure. Yet the district court's demand for broader disclosures in connection with all electioneering communications – including those that do not even imply express advocacy – has either silenced such advocacy or prompted a shift to express advocacy.

On the question of disclosure burden, Plaintiff makes no claim the FEC overlooked record evidence that any burden would be slight. Instead, Plaintiff's Brief asserts (at 43-44) that the FEC's entire burden rationale was premised on a requirement that payments from "corporate customers, shareholders, and/or lenders" must be reported. Plaintiff fails to point out, however, that the FEC also considered payments from "donors" and reached the same conclusion that their payments are unlikely to show support for electioneering communications. 72 Fed. Reg. 72,911. The FEC likewise recognized that digging through all sources of general treasury funds, including funds from "donors," to identify those few that arguably might be disclosable would "be very costly and require an inordinate amount of effort." *Id.* Instead, the FEC found that the statutory disclosure requirements were "properly met by requiring corporations and labor organizations to disclose and report only those persons who made donations for the purpose of

funding ECs." *Id.* Having failed to recognize the FEC's actual analysis, Plaintiff's Brief entirely fails to show that the analysis was contrary to the rulemaking record.

Plaintiff also argues that the issue of burden is illusory because any corporation or labor union can establish a separate fund to support electioneering communications and report only the sources of donations to that fund. The Supreme Court has been highly resistant, however, to the notion that such a separate fund provision eliminates burdens on the ability of a speaker to use its own general funds. *See, e.g., Citizens United*, 130 S. Ct. at 897-98.

One obvious reason is that the use of such a separate fund can require substantial delay in a context that moves very swiftly and calls for nimble responses. *See, e.g., Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968); *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 523 (D.C. Cir. 2010); *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Under Plaintiff's approach, a corporation that decides an electioneering communication is called for must consult a lawyer, set up a fund, solicit contributions to that fund, and then speak. By that time, the occasion for the desired speech may well have passed. Moreover, both Plaintiff (at 46-47) and the district court (J.A.153) have stated that this option is only available to funds received from individuals; corporate funds may not be placed into the separate account, though they are entirely lawful.

Finally, Plaintiff's Brief argues (at 48) that, unless the burdens for corporations and labor unions are illusory, the FEC must have acted arbitrarily in failing to establish a purpose-based standard for individuals and unincorporated groups. But such groups made no showing that they faced burden during the proceeding that led to the 2003 Regulation or thereafter. By contrast, during rulemaking leading to the 2007 Regulation, corporations and labor unions demonstrated the burdens they faced, and the FEC responded. It was not arbitrary for the FEC to fail to reach out to fix other provisions that, so far as appeared, were not broken.

A bipartisan majority of the FEC evaluated the rulemaking record and made a considered judgment of how to achieve the disclosure required by the statute without imposing needless burdens on speech. They made a common-sense judgment that had the imprimatur of Congress, which had established a purpose-based standard for similar disclosures relating to express advocacy. That is all the law requires.

CONCLUSION

Plaintiff has not carried his burden. The Court should reject Plaintiff's claims and declare the 2007 Regulation valid under *Chevron* Steps One and Two or, alternatively, vacate the district court's decision and remand the case for

evaluation under *Chevron* Step Two. Given the few weeks that remain before the November election, the Court should consider acting as soon as possible.

August 3, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the limitation of the Court's May 25, 2012, Order because this brief contains 5,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit R. 32(a)(1).

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

/s/ Thomas W. Kirby
Thomas W. Kirby
Counsel for Defendant-Appellant CFIF

Date: August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August 2012, I caused a copy of the foregoing REPLY BRIEF FOR DEFENDANT-APPELLANT CENTER FOR INDIVIDUAL FREEDOM to be served on the following counsel through this Court's electronic filing system and/or by electronic mail:

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