UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 12-5117

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]

APPELLANT CENTER FOR INDIVIDUAL FREEDOM'S REPLY TO PLAINTIFF-APPELLEE VAN HOLLEN'S OPPOSITION TO INTERVENORS' "EMERGENCY MOTIONS" FOR STAY

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

Defendant-Appellant Center for Individual Freedom ("CFIF") submits this Reply to Plaintiff-Appellee Van Hollen's Opposition to Intervenors' "Emergency Motions" for Stay ("Opposition"). CFIF first responds to the Opposition's arguments and then addresses two recent developments noted in the Opposition.

At the threshold, however, CFIF stresses the Opposition's failure to deny that Congressman Van Hollen could have sued in 2007 but delayed for 3½ years and two election cycles, then proceeded on a schedule likely to disrupt the 2012 elections. Given Plaintiff's unexplained delay in presenting a novel question with broad significance, the orderly course is to grant a stay and allow the 2012 election to proceed with the FEC's 2007 regulation in place. The merits dispute can then be resolved. If any regulatory adjustments become necessary, the FEC can consider them during a non-election year.[2]

I. The Opposition Fails to Refute CFIF's Likelihood of Success.

The Opposition is notable for what it does not say. First, it does not deny that the district court's ruling compels greater disclosures by corporations engaging in certain issue speech than when making independent expenditures for express candidate advocacy. The Opposition also does not deny that this result is absurd, but rather says (at 9) that the absurdity "was created by Congress, not the District

[2] The Opposition makes no claim that expedited briefing is a workable alternative to a stay. Indeed, it objects that CFIF's suggested briefing schedule is "unreasonabl[e]." Opp. at 15. Because expedited briefing would not prevent extensive injury and could lead to greater disruption of the election, a stay is the preferred remedy here.

Court."[3] But that is the question to be determined, and the fact that the district court's ruling yields an absurd result favors another construction. *EDF v. EPA*, 82 F.3d 451, 468 (D.C. Cir. 1996) (per curiam) (applying "a more flexible" statutory reading); *see also United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

Second, the Opposition does not deny that some dictionaries define "contribute" in terms of the giver's purpose, as did the FEC's regulation.[4] The Opposition (at 7) says the district court correctly preferred other definitions to define "contributors who contribute," the key statutory phrase that describes who must be disclosed. But conflicting dictionaries indicate "the statute is open to interpretation," *Nat'l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 418 (1992), and that "alone suggests an ambiguity that fatally undermines [a resolution at] step one" of *Chevron*, *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 39 (D.C. Cir. 2009) (conflicting definitions of "contribute" preclude a Step One

[3] The Opposition (at 9 n.1) inaccurately asserts that the disclosure of independent expenditures for express advocacy is "not as limited as [CFIF] contend[s]." But the Opposition reaches this conclusion only by misstating the relevant statutory provision, which requires the disclosure of "contributions" – not "contributors" as Van Hollen suggests. 2 U.S.C. § 434(c)(1). "Contributions" are explicitly defined as transfers of value made "for the purpose of influencing any election for Federal office." *Id.* § 431(8)(A)(i) (emphasis added). The statutory disclosure provision itself reinforces this "purpose" element by again stating that disclosures are limited to persons who have contributed "for the purpose of furthering an independent expenditure" for express candidate advocacy. *Id.* § 434(c)(2)(C).

[4] *See* CFIF Emergency Mot. for a Stay at 12 & n.5; *see also* American Heritage Dictionary of the English Language, at 399 (5th ed. 2011) ("contribute" means to "give or supply in common with others; give to a common fund or for a common purpose") (emphasis added); Microsoft Encarta College Dictionary, at 313 (2001) ("contribute" means "to give money to something, such as a fund or charity, for a specific purpose, especially along with others") (emphasis added).

decision); *see also Medina v. Gonzales*, 404 F.3d 628, 634-35 (2d Cir. 2005).[5] That is doubly true since the district court's definition created an absurdity.

Third, the Opposition identifies no evidence Congress ever evaluated the First Amendment burdens that would result from demanding sweeping disclosures from ordinary corporations and labor unions. Nor does the Opposition deny that the FEC's 2007 rulemaking found that the disclosures Plaintiff seeks here would impose unreasonable and unnecessary burdens on political speakers. The Opposition asserts (at 8) that the FEC's evaluation and findings had no basis in the First Amendment. But the FEC's Notice of Proposed Rulemaking raised "concerns about . . . First Amendment rights," 72 Fed. Reg. 50261, 50262 (Aug. 31, 2007), comments were submitted on that issue, and the FEC's Explanation & Justification explained the regulation was "narrowly tailored" to apply in a "constitutional way," 72 Fed. Reg. 72899, 72901 (Dec. 26, 2007). The Opposition ignores these statements, just as it ignores the recent federal district court decision from West Virginia holding a similar disclosure law unconstitutional.

The Opposition contends that *Citizen United* removed constitutional doubt by ruling the disclosure statute facially constitutional. The Opposition does not

[5] Neglecting other dictionaries identified by CFIF, the district court (at 26) singled out one definition of the verb "contribute" from one dictionary that supported its conclusion, calling that the only "relevant" definition. But even that dictionary provided an alternative definition that includes a purpose requirement. *See* Oxford English Dictionary, (2d ed. 1989) (online version 2012) (contribute means to "give or furnish along with others towards bringing about a result; to lend (effective agency or assistance) to a common result or purpose") (emphasis added).

deny, however, that the Solicitor General relied on the unchallenged regulation in describing the statute's limited effect to the Supreme Court. *See* CFIF Emergency Mot. for a Stay at 13 & n.8. The Opposition says the Supreme Court cited only the statute, but it offers nothing to show that the Court construed the statute differently than the Solicitor General.

Fourth, the Opposition does not deny that both the courts and the FEC can and should apply the doctrine of constitutional avoidance. The Opposition says the unreasonable burdens found by the FEC may not violate the First Amendment because tailored and adequately justified disclosure statutes may require comparable disclosure and still be constitutional. However, (a) Congress never tailored the underlying statute for application to ordinary corporations and labor unions, and (b) burdens on political speech are irreparable injury even if such injury sometimes may be justified.

Lastly, the Opposition does not deny that, if the Step One ruling fails, the regulation will survive at Step Two. CFIF thus has a strong likelihood of success on appeal.

II. The Opposition Understates and Misstates the Irreparable Harm to CFIF.

The Opposition proffers no evidence to refute the FEC's 2007 findings that compelling broad disclosures would unreasonably burden speech by corporations such as CFIF or to counter the declarations to that effect submitted by CFIF.

The urgency of the injury is obvious. Over the next two months, Congress will consider bills and formulate legislative strategy on many fronts, including comprehensive tax reform, health care, and reducing regulatory burden. *See, e.g.*, Jonathan Strong, *A Time For Election Year Agendas*, Roll Call, Feb. 29, 2012. These issues are of particular concern to CFIF. During this same period, 24 states will hold congressional primaries, including California, New York, and Texas.[6] Absent a stay, CFIF will be unable to broadcast its issue speech in those states during the 30-day pre-primary windows. *See* Ex. C to CFIF Emergency Mot. for a Stay (Decl. of Jeffrey L. Mazzella), ¶¶ 4, 7. That is irreparable injury.[7]

III. The Opposition Misconstrues the Public Interest.

The Opposition makes no claim that Plaintiff's interest in a stay differs from that of the general public. Nor does it deny the public interest favors protecting core speech until the necessity of doing so is clearly established. The Opposition argues the imminent election establishes a countervailing interest, but that is backwards. Free speech is more important near elections.

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[6] *See* FEC, *2012 Presidential and Congressional Primary Dates in Chronological Order*, (Mar. 30, 2012), *available at* http://www.fec.gov/pubrec/fe2012/2012pdates.pdf.

[7] The Opposition asserts (at 10-11) that CFIF does not face violence or other reprisals. As CFIF demonstrated at length in its Reply to Plaintiff's Opposition to Motion for Stay Pending Appeal (Dist. Doc. 58), however, compelled disclosures, in themselves, are substantial First Amendment burdens. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 60, 64 (1976) (collecting authority); *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010).

Courts "should consider the proximity of a forthcoming election and the mechanics and complexities of [the] election laws" when assessing the timing of judicial relief. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The "interest in proceeding with the election [under the existing rules] increases in importance as resources are committed and irrevocable decisions are made," *Perry v. Judd*, No. 12-1067, 2012 WL 120076, at *9 n.2 (4th Cir. Jan. 17, 2012) (citing *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980)). With the election season already well-advanced, organizations like CFIF have long since "begun to organize their [advertising] campaigns, to raise funds, and to spend those funds in reliance on the" law in existence prior to the district court's order. *Johnson v. Mortham*, 915 F. Supp. 1529, 1534 (N.D. Fla. 1995) (internal quotations omitted); *see also* Ex. D to CFIF Emergency Mot. for a Stay, ¶3 (CFIF plans to speak during the present election period). A "stay pending appeal will mitigate the likelihood of confusion [during the election cycle]" and give the FEC "time to implement new procedures that may be required and to communicate those procedures to the stakeholders in [the] political process." *Miller v. Brown*, 465 F. Supp. 2d 584, 597 (E.D.Va. 2006).

Thus, the Supreme Court has handed down its major campaign finance decisions either during non-election years, *see FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (June 25, 2007); *McConnell v. FEC*, 540 U.S. 93 (Dec. 10,

2003), or, in special circumstances, by January of an election year, *see Citizens United v. FEC*, 130 S. Ct. 876 (Jan. 21, 2010); *Buckley v. Valeo*, 424 U.S. 1 (Jan. 30, 1976). The timing of *Citizens United* is particularly illuminating. In June of 2009, the Supreme Court set a second round of argument for a special September session, leading "many election-law specialists [to expect] a prompt decision."[8] But Senator Edward Kennedy (D-Mass.) passed away and a nationally significant special election was called for January 19, 2010. The Court adjourned for its winter recess without ruling. *See* Joan Biskupic, *"Why the Delay" on Supreme Court's Campaign-Finance Case?*, USA Today, Dec. 29, 2009. Then, less than 48 hours after the Massachusetts polls closed, the Court issued the *Citizens United* opinion.

Van Hollen also argues that a stay would "thwart Congress's plain intent in enacting" 2 U.S.C. § 434(f)(2) to compel expansive donor disclosures. Opp. at 13. That argument really goes to the contested merits, but in any event it is wrong. The district court's ruling rested on the unforeseen meaning of statutory text.

The disclosure provisions of section 434(f)(2) were added to the Bipartisan Campaign Reform Act of 2002 ("BCRA") via the so-called "Snowe-Jeffords" Amendment. When first introduced in 1998, Senator Snowe explained the

[8] *See* Adam Liptik, *Court Keeps Campaigns in Suspense*, N.Y. Times: The Caucus Blog, (Dec. 14, 2009), *available at* http://thecaucus.blogs.nytimes.com/2009/12/14/court-keeps-campaigns-in-suspense.

provision did not create "invasive disclosure rules" but only compelled identification "of contributors who donated more than $500 toward the ad." 144 Cong. Rec. S997, S998 (daily ed. Feb. 25, 1998) (emphasis added).[9] She highlighted a statement by an academic – "who was instrumental in developing [the disclosure] provision" – explaining that "Snowe-Jeffords . . . requires disclosure of large contributions designated for such ads." 147 Cong. Rec. S3022, S3027-28 (daily ed. Mar. 28, 2001) (emphasis added). She also cited a statement by the Brennan Center for Justice that disclosures would be limited to "individuals who contributed more than $500 towards the ad," mirroring the existing reporting of "sources and amounts [for] independent expenditures" (i.e., express advocacy). 144 Cong. Rec. S10145, S10152 (daily ed. Sept. 10, 1998) (emphasis added).[10] Thus, a stay would protect the public's interest in free speech and would not thwart any expressed congressional intent to compel sweeping disclosures. At most, it would briefly defer unintended speech burdens under an ambiguous statute.

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[9] The version of the Snowe-Jeffords Amendment debated in 1998 is materially similar to the version enacted as part of the BCRA in 2002, with the exception that the disclosure threshold for contributors in 1998 was $500 rather than $1,000. *Compare* Amendment No. 1647 to the Paycheck Protection Act, S. 1663, 105th Cong. § 200(d)(2)(F) (1998), *with* Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434(f)(2)(F).

[10] As previously explained, *see supra* at n.3, the disclosure requirements for independent expenditures are limited to funds given "for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(C). *See also* 11 C.F.R. § 109.10(e) (longstanding FEC regulation provides that reports must include identity of each person "who made a contribution in excess of $200 . . . for the purpose of furthering the reported independent expenditure").

IV. Developments Since CFIF's Motion Was Filed.

The Opposition notes two developments that occurred after CFIF moved for a stay from this Court: (1) the district court denied CFIF's request for a stay pending appeal; and (2) the FEC filed a notice stating it would not appeal.[11] The district court's stay order added little to its merits opinion, although the court clarified that it had vacated the 2007 rule and resurrected an earlier regulation. The Opposition does not question that the district court's merits ruling is a final, appealable order.[12] Nor does it question CFIF's right to appeal that decision.[13]

On April 27, a partisan 3–3 deadlock led the FEC to give notice it would not appeal. *See* Ex. F. The three Republican commissioners favored appeal. They

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[11] The district court's opinion denying the stay is attached to the Opposition as Exhibit A. The FEC's notice of intent not to appeal is attached as Exhibit F to this reply, the statement by the three Republican commissioners supporting an appeal is attached here as Exhibit G, and the statement by the two Democratic commissioners opposing an appeal is attached as Exhibit H.

[12] This is not a situation in which a remand without vacatur has no immediate practical effect. Neither the Opposition nor the district court question that such a judgment is final and appealable by private intervenors. *See Smoke v. Norton*, 252 F.3d 468, 472 (D.C. Cir. 2001) (Henderson, J., concurring); *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 137 (D.C. Cir. 2006); *In re St. Charles Pres. Investors, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990). Nor do the Opposition or the district court question the standing demonstrated in CFIF's intervention papers.

[13] An "intervenor may appeal from all interlocutory and final orders that affect him." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376 (1987) (internal quotation and citation omitted); *see also Int'l Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338 (1945) (an intervenor with Article III standing may appeal); *Nat'l Black United Fund, Inc. v. Devine*, 667 F.2d 173, 177 n.18 (D.C. Cir. 1981) (private intervenor entitled to appeal invalidated regulations where agency did not appeal); *Port of N.Y. Auth. v. Baker, Watts & Co.*, 392 F.2d 497, 498 (D.C. Cir. 1968) (intervenor entitled to appeal invalidated agency regulations where agency did not pursue its appeal).

issued a detailed statement explaining that the district court ruling suffered from "internal contradictions" that would lead to "absurd results" and would create "a maze of uncertainty for many advocacy groups wishing to exercise their First Amendment rights." *See* Ex. G at 1, 2. They concluded that the decision below deprived speakers of adequate guidance and confronted them with a "*murky, counterintuitive . . . Alice in Wonderland-like experience*." *Id.* at 7. Two of the three Democratic commissioners offered a cursory explanation for opposing an appeal. *See* Ex. H. Their statement did not endorse the district court's ruling but merely asserted that the decision did "not have sufficient weakness" to justify "the costs of prolonged defensive litigation." *Id.* at 1. They did not deny that speakers faced uncertainty but professed to "welcome the opportunity to work with our colleagues" to revise the FEC regulations. *Id.* at 2. The statement did not explain what action was anticipated or on what timetable, nor did it hint at why the partisan deadlock will ease as the 2012 election advances. This type of "uncertainty about enforcement" is a situation that "counsels . . . in favor of temporarily preserving the status quo" pending appeal. *Nat'l Ass'n of Mfrs. v. NLRB*, No. 12-5068 (D.C. Cir. Apr. 17, 2012).

CONCLUSION

CFIF respectfully requests that this Court issue a stay pending appeal.

May 2, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May 2012, I caused a copy of the foregoing APPELLANT CENTER FOR INDIVIDUAL FREEDOM'S REPLY TO PLAINTIFF-APPELLEE VAN HOLLEN'S OPPOSITION TO INTERVENORS' "EMERGENCY MOTIONS" FOR STAY to be served on the following counsel through this Court's electronic filing system and/or by electronic mail:

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