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)

RESPONSE BY APPELLANT CENTER FOR INDIVIDUAL FREEDOM TO PETITION FOR REHEARING EN BANC

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Dated: April 5, 2016

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GLOSSARY

APA	Administrative Procedure Act
CFIF	Center for Individual Freedom
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
JA	Joint Appendix

INTRODUCTION

The Panel Opinion is a straightforward application of deferential agency review under the Administrative Procedure Act (APA) and step two of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). It creates no conflict and resolves no issue of exceptional importance that warrants en banc review. Fed. R. App. P. 35(a). The Petition should be denied.

A provision in the Federal Election Campaign Act (FECA) requires the disclosure of "all contributors who contributed" $1,000 or more to a speaker that spends more than $10,000 on electioneering communications (issue advertisements). 52 U.S.C. § 30104(f)(2)(F). The Federal Election Commission (FEC) implemented the statute by requiring disclosure of those who contribute the required sums "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). In 2012, this Court held at *Chevron* step one that the statutory language may be construed to include this purpose requirement. *CFIF v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012). The Panel Opinion simply holds at *Chevron* step two and under APA review that the FEC reasonably adopted that permissible purpose-based construction of the statute.

Petitioner disagrees with the FEC's decision. He seeks disclosure of the identity of *every* individual who sent $1,000 or more to a corporation or labor union that spends $10,000 on electioneering communications even if the donor

does not support the message communicated (and regardless of whether the individual even knows about the message). The Panel held that the FEC had good reasons for rejecting this approach. The statute supports a purpose-based construction. It refers to a "contribution" as a donation "by any person for the purpose of influencing any election for Federal office." Op. at 10 (quoting 52 U.S.C. § 30101(8)(A)(i)). A related and unchallenged FECA provision also supports the construction. For nearly forty years, it has limited disclosure for express advocacy to those who give "for the purpose of furthering" the advertisement. *Id.* at 12 (quoting 52 U.S.C. § 30104(c)(2)(C)). And there are policy reasons for a purpose-based construction. Broader disclosure—the Panel and the FEC recognized—would impose costly recordkeeping and reporting burdens on corporations and labor unions, mislead the public about who, in fact, supports the advertisements, and threaten donor privacy. *See id.* at 19-28.

The Panel's straightforward and deferential agency review does not merit further consideration. The Petition's contrary position rests on mischaracterizations of the Panel Opinion and unfounded claims of importance. For example, the Petition claims that the Panel's APA holding depended solely on a donor-privacy rationale, when it did not, and faults the rationale for conflicting with Supreme Court precedent, which it does not. It also claims that the Panel acknowledged it was parting from Circuit precedent. To the contrary, the Panel

specifically and accurately distinguished that precedent. And the Petition ignores the practical limitations of any decision when claiming "exceptional importance." Petitioner does not dispute, and does not challenge, the parallel purpose-based limitation on express advocacy disclosures. As a result, a reversal (even if justified) would not result in greater disclosure. It would only induce speakers to shift from implied to express advocacy, which will continue to be governed by the purpose-based disclosure standard that the FEC adopted here. The Petition should be denied.

BACKGROUND

At issue is the FEC's implementation of a reporting provision for "electioneering communications," which requires those who spend more than $10,000 on electioneering communications to publicly disclose both the spending and "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more" since the first day of the previous calendar year. 52 U.S.C. § 30104(f)(2)(F). A "contribution" is a payment "made by any person for the purpose of influencing any election for Federal office." *Id.* § 30101(8)(A).

When the statute was enacted in 2002, only unincorporated entities and individuals could fund electioneering contributions. *See* Op. at 5-6. But the landscape changed in 2007, when the Supreme Court held that corporations and unions could also make electioneering communications that were not the

"functional equivalent of express advocacy." *FEC v. Wisc. Right To Life, Inc.*, 551 U.S. 449, 465 (2007).

The FEC initiated a rulemaking to determine, among other things, the disclosures required of corporations and labor unions that make electioneering communications. *See* JA37. It proposed two alternatives: (1) disclosure of every donor of the required amounts, regardless of purpose, or (2) no donor disclosure at all. JA37-38. The Notice also offered a middle course, seeking comment on whether the Commission should limit the reporting requirement to "funds that are donated for the express purpose of making electioneering communications." JA37.

The FEC received twenty-seven comments and held two days of hearings. *See* Op. at 7. The agency then adopted the middle-ground approach, requiring disclosure of those who contribute "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). The bipartisan vote was 4-1, with three Democratic Commissioners and one Republican Commissioner voting in favor of the regulation (one seat was vacant). *See* Dist. Ct. Dkt. #17, at VH1130.

The FEC concluded that Congress had not "spoken directly to this issue" because it enacted the statute at a time when corporations and labor unions could not fund electioneering communications. JA301. But the FEC also noted that Congress had spoken in a different, but related context. "[E]xpress advocacy" (advertisements that advocate the election or defeat of an identified candidate by

using explicit magic words such as "vote for") has, for nearly forty years, triggered disclosure of those who make qualifying contributions "for the purpose of furthering" the communication. 52 U.S.C. § 30104(c)(2)(C); *see* JA311.

The FEC decided to incorporate this express advocacy disclosure standard into the implied advocacy context for at least three reasons. *First*, purpose-based disclosure "appropriately provides the public with information about those persons who actually support the message conveyed." JA311. Additional disclosure could mislead the public, as corporate "investors, customers, and donors do not necessarily support the corporation's electioneering communications," nor do members who pay labor union dues. *Id.*

Second, purpose-based disclosure provides relevant information "without imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to [electioneering communications]." *Id.* Witnesses "testified that the effort necessary to identify those persons who provided funds totaling $1,000 or more to a corporation or labor organization would be very costly and require an inordinate amount of effort." *Id.*

Third, purpose-based disclosure is a "narrowly tailored" approach that balances interests in disclosure against First Amendment interests in "individual donor privacy." JA301. The FEC recognized that "nonprofit organizations and

their donors have privacy interests and that some donors request to remain anonymous," but concluded that the "carefully designed reporting requirements" would "not create unreasonable burdens on the privacy rights of donors." *Id.*

Petitioner challenged the FEC's decision with this lawsuit, arguing that the purpose requirement was an impermissible construction of the statute and was arbitrary and capricious. The district court ruled for Petitioner at *Chevron* step one, but this Court reversed. *See CFIF v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012). The Court did "not agree . . . that the words 'contributors' and 'contributed' . . . cannot be construed to include a 'purpose' requirement. . . . Therefore, the District Court erred in disposing of this case under *Chevron* Step One." *Id.* at 110-11. The Court remanded for the district court to consider "the parties' arguments on whether [the regulation] is reasonable, and thus entitled to deference under *Chevron* Step Two" and "whether the regulation survives arbitrary and capricious review under *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)." *CFIF*, 694 F.3d at 111-12.

On remand, the district court again vacated the regulation. JA404-50. The Panel reversed. Applying step two of *Chevron*, the Panel held that the FEC's regulation reflected "more than just a permissible" choice; it was "a persuasive one." Op. at 11-12. The Panel further held that the FEC's explanation for its

regulation was sufficient to meet the "low hurdle" imposed by the APA on an agency to "adequately explain its action." Op. at 16-18.

ARGUMENT

I. THE PANEL OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The Petition argues that the Panel Opinion creates a conflict with Supreme Court precedent, relying on the Panel's APA analysis of one rationale that the FEC used to support its regulation. Pet. at 7-9. Petitioner does not take issue with the Panel's application of the Supreme Court precedent that drove its APA decision—*State Farm*, which requires the Court to uphold a regulation when the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *See* Op. at 18-19 (quoting 463 U.S. at 43). And Petitioner does not dispute any of the other rationales that the Panel found sufficient to adequately explain the FEC's decision on APA review. *Id.* at 18-28. Instead, Petitioner only picks at the Panel's discussion about the FEC's donor-privacy rationale. Were there flaws in that non-case-determinative analysis, they would not warrant en banc review. But, there were no flaws.

First, the Petition's claim of conflict depends on a mischaracterization of the Panel Opinion. Petitioner asserts that the Panel found that "the FEC had to 'tailor the disclosure requirements to satisfy constitutional interests in privacy' because

any broader rule would harm First Amendment rights." Pet. at 7 (citing Op. at 24, 26, 27). Not so. The Panel instead found only that the FEC appropriately considered First Amendment privacy rights when determining the extent of the required disclosure. It explained that the FEC, which regulates core constitutionally protected activity, has a unique mandate to be sensitive to First Amendment concerns, Op. at 24, and that its "concerns about the competing interests in privacy and disclosure were legitimate" given the Supreme Court's "vigorous protect[ion of] the public's right to speak anonymously," *id.* (citing *Talley v. California*, 362 U.S. 60, 64 (1960)). And it found that the FEC adequately explained how its "tailoring was an able attempt to balance the competing values that lie at the heart of the campaign finance laws." *Id.* at 27.

The question before the Panel was not whether the FEC *must* adopt the regulation it did, or even whether the FEC *could* have required more disclosure consistent with the First Amendment. The question instead was whether, on the facts of this case, the FEC rationally adopted and reasonably explained the challenged regulation. Op. at 18-28. By acknowledging the tension between disclosure and privacy—and pointing to the FEC's middle-ground resolution of that tension—the Panel confirmed the need to defer to the agency in this case. It created no new First Amendment law or "conflict" that warrants en banc review.

Second, the Petition incorrectly implies that the Panel's decision is based on "only dissents." Pet. at 7. In fact, the Panel relied on at least five Supreme Court decisions that support the FEC's decision to consider privacy interests and balance them with a tailored disclosure requirement. Op. at 24-27; *see also Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) ("The Court has subjected these [disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."); *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (A "disclosure regime [must] bear[] a sufficient relationship to . . . 'shed[ding] the light of publicity' on campaign financing."); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 163 (2002) ("[T]here must be a balance between these [governmental] interests and the effect of the regulations on First Amendment rights."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make . . . disclosures she would otherwise omit."); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment" and must "survive exacting scrutiny.").

Finally, the Petition claims the FEC did not rely on the Panel's privacy rationale. Pet. at 8-9. But Petitioner admits the FEC *did* explain that its regulation

was "narrowly tailored to address many of the commenters' concerns regarding individual donor privacy." *Id.* at 8; *see also* Op. at 23; JA301. Petitioner also fails to dispute that the Panel pointed to other rationales for the regulation—that it is consistent with the statute's definition of "contribution," parallels the disclosure requirement that applies to express advocacy, avoids the unnecessary and costly recordkeeping and reporting burdens that unfettered disclosure would impose, and provides the electorate with the information needed (the identity of those who support the electioneering communications) without misleading them into thinking that others (customers, shareholders, union members) also support that message. Op. at 9-28. The Panel rightly found the FEC's statement of reasons was adequate. Certainly, there is no conflict with Supreme Court precedent.

II. THE PANEL OPINION IS CONSISTENT WITH CIRCUIT PRECEDENT.

The Petition argues that the Panel's resolution of the *Chevron* and APA claims creates a conflict with one of this Court's many campaign finance decisions, *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). Pet. at 10. It does not.

First, the Petition wrongly claims that the Panel created a conflict with *Shays* by holding that a statute's purpose should not be considered at step two of the *Chevron* analysis. *Id.* at 10-11. The Panel wrote the exact opposite: "[A] statute's purpose is *relevant* to *Chevron*'s Step Two inquiry." Op. at 15 (emphasis in original). The Panel also considered the statutory purposes here. *Id.* at 13-16.

The Panel disagreed with Petitioner's argument that Congress had only one statutory purpose—maximum disclosure above all else. *Id.* at 14. It explained that the fact Congress intended "more robust disclosure does not mean Congress wasn't also concerned with . . . the conflicting privacy interests that hang in the balance." *Id.* Petitioner thus presents a mere disagreement over the purposes of the statute—and not an issue about the role of statutory purpose in the *Chevron* analysis. The Panel was clear: the regulation "easily clears the *Chevron* Step Two hurdle" because it is "consistent with [the statute]'s text, history, *and purposes.*" *Id.* at 16 (emphasis added).

Second, the Petition has no basis for its claim that the Panel failed to distinguish *Shays* and instead "acknowledged that *Shays* supports the district court's decision." Pet. at 10-11. The Panel considered *Shays* at length and distinguished it from this case. Op. at 13-16. In *Shays*, there was a direct conflict between the "fundamental purpose" of the statutory provision (to "prohibit" soft money) and a regulation, which allowed "candidates to evade—almost completely—[the statute's] restrictions on the use of soft money." 528 F.3d at 925 (citing *McConnell*, 540 U.S. at 177 n.69). Here, the Panel explained, there is no comparable singular statutory purpose of "disclosure at all costs." Op. at 13-15. While the statute calls for "broader disclosure," it also "limits disclosure in a number of ways." *Id.* at 14-15. And the Congressional record shows "Congress

'took great care in crafting . . . language to avoid violating the important p[]rinciples in the First Amendment.'" *Id.* at 14 (quoting 147 Cong. Rec. S3033 (daily ed. Mar. 28, 2001) (statement of Sen. Jeffords)). This case thus presents several purposes that are "far more nuanced" than merely maximizing disclosure. *Id.* at 15. The regulation appropriately—and consistent with *Shays*—balances those various purposes in requiring disclosure of those who give "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9); Op. at 16.

Finally, the Petition incorrectly faults the Panel for contradicting "the precedent on which [*Shays*] drew," which also calls for the invalidation of agency action that "'frustrate[s] the policies Congress was seeking to effectuate.'" Pet. at 11-12 (quoting *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988)). This argument also depends on Petitioner's mistaken assertion of a singular statutory purpose requiring unfettered disclosure. But even Petitioner's counsel conceded the statute here does "not call for unbounded disclosure." Op. at 14 n.4. The Panel Opinion thus conforms to the Circuit precedent that Petitioner cites. Because the FEC was "interpreting a statute embodying conflicting demands," it should be upheld if "the agency's interpretation [is] 'compatible' with Congressional purposes." *Cont'l Air Lines, Inc.*, 843 F.2d at 1451-52. The FEC— not this Court—has the authority and

responsibility "to decide the exact trade-off among conflicting goals that 'best promotes' the Congressional 'goal' in question." *Id.* at 1451. The Panel correctly upheld the FEC's middle-ground, tailored approach to disclosure as reasonable and properly explained. Op. at 14-16. No Circuit conflict warrants further review.

III. THE PETITION DOES NOT PRESENT AN ISSUE OF "EXCEPTIONAL IMPORTANCE."

The Petition finally argues that review is needed to correct a "wrong result" in an "exceptionally important case." Pet. at 12. But there is no "wrong result." And even if there were, the Petition does not, and cannot, show that any error is so "exceptionally important" that it justifies en banc review.

First, the Petition argues that the Panel reached the "wrong result" because it upheld a 2007 regulation the FEC decided not to promulgate in 2003. *Id.* at 13-14. But an agency may change policy if "the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency believes it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The FEC amply met this standard. The 2007 rulemaking responded to the Supreme Court's decision in *Wisconsin Right to Life*, which, for the first time, allowed corporations and labor unions to fund electioneering communications. JA301. This change created "good reasons" to promulgate a purpose-driven disclosure requirement to address issues created by the new precedent. *See, e.g.*, JA301, 311-12.

Second, the Petition argues that the Panel reached the "wrong result" because the FEC rejected alternate approaches, such as one that would have "clarif[ied] that shareholders and customers are not 'donors'" or one that would have paired more disclosure with an option to pay for electioneering communications out of a purpose-specific segregated bank account—and disclose only those individuals who gave to that account. Pet. at 13-14. But an agency "need not consider every alternative proposed nor respond to every comment made." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013). Here, the first alternative was not viable because it did not resolve issues surrounding non-profit corporations. Op. at 22-23. And the second alternative was also unsuitable, as the FEC cited evidence that segregated bank accounts are often not a "meaningful alternative" to general-treasury spending. JA311.

Finally, Petitioner asserts this Petition has "exceptional[] importan[ce]" because the Panel Opinion "cripples" and "facilitate[s] evasion" of the disclosure that is a "centerpiece" of the statute. Pet. at 12, 15. It does not. The statute does not require unbounded disclosure. *See, e.g.*, Op. at 14 n.4. The Panel Opinion merely affirms the FEC's reasonable decision to draw the same line for implied advocacy as Congress drew for express advocacy. *See* JA311.

That parallel line-drawing negates Petitioner's claim that any error here has "exceptional importance." Pet. at 12-15. Petitioner has not challenged the

statute's purpose-based disclosure limitation that applies to express advocacy—which has existed for nearly forty years. And corporations and labor unions may now fund express advocacy. So, a reversal here will not lead to the unbounded disclosure that Petitioner seeks; it instead will induce speakers to shift from electioneering communications to express advocacy, where the purpose-based disclosure standard remains. Groups made such a switch after the district court vacated the regulation and while the first appeal was pending. *See* CFIF Br. at 29 (Apr. 10, 2015) (citing authority). Petitioner acknowledged that speakers would retain this ability to adhere to the purpose-based disclosure requirement even if the regulation here is vacated. *See* Van Hollen Br. at 35 (May 11, 2015). A Petition about a Panel Opinion that, if reversed, will have no significant practical effect is not a petition of "exceptional importance."

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Rehearing.

Respectfully submitted,

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April 5, 2016

ADDENDUM: RULE 26.1 STATEMENT

Pursuant to Circuit Rule 26.1, CFIF certifies that no publicly held company has a ten-percent-or-greater ownership interest in CFIF and that CFIF has no parent companies as defined in the Circuit Rule. CFIF is a non-partisan, non-profit § 501(c)(4) organization whose mission is to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution.

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2016, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Thomas W. Kirby
Thomas W. Kirby