UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 1:11-cv-00766 (ABJ)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Chris Van Hollen, by his undersigned counsel, and pursuant to Fed. R. Civ. P. 56, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2201, and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C), respectfully moves this Court for a summary judgment declaring that 11 C.F.R. § 104.20(c)(9) promulgated by the Federal Election Commission is "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law" and "in excess of [the Commission's] statutory jurisdiction, authority, or limitations," and vacating and remanding 11 C.F.R. § 104.20(c)(9) to the Commission for further proceedings consistent with the Court's judgment.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment; the Declaration of Chris Van Hollen; the Declaration of Fiona J. Kaye and accompanying exhibits; and the complete administrative record, filed by the Commission on June 21, 2011 (Dkt. No. 17). Plaintiff's requested relief is set forth in the accompanying Proposed Order.

Plaintiff respectfully requests oral argument on this motion.

Dated this 1st day of July, 2011.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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Plaintiff Chris Van Hollen respectfully submits this memorandum of points and authorities in support of his motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and this Court's order dated May 18, 2011.

PRELIMINARY STATEMENT

This lawsuit challenges, under the Administrative Procedure Act, 5 U.S.C. §§ 551-706, a regulation the defendant Federal Election Commission ("FEC") promulgated in December 2007—11 C.F.R. § 104.20(c)(9). That regulation is inconsistent with and is eviscerating a critical disclosure provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. BCRA requires all persons, including corporations and labor organizations, that pay for "electioneering communications" to disclose "*all* contributors of $1,000 or more." The challenged FEC rule, by contrast, provides that corporations and labor organizations need identify only some (or even none) of those contributors—those who have announced a "purpose of furthering electioneering communications." Thus, contrary to the plain language and purpose of BCRA, the challenged FEC regulation permits corporations and labor organizations to pay for "electioneering communications" without disclosing the sources of such funding.

As the FEC should have considered and foreseen, "savvy campaign operators" have exploited the loophole created by § 104.20(c)(9) "to the hilt," *Shays v. FEC*, 528 F.3d 914, 927-28 (D.C. Cir. 2008) ("*Shays III*") (internal quotation marks omitted). As the Commission has admitted in this proceeding, persons (including corporations and unions) making "electioneering communications" disclosed the sources of the money they were spending for less than 10 percent of their $79.9 million in "electioneering communication" spending during the 2010 election cycle. Defendant Federal Election Commission's Answer ("Answer"), Dkt. No. 16, ¶ 30. By all accounts, this situation will worsen considerably in the 2012 election cycle as far more

expenditures will be made using funds provided by undisclosed sources, absent action by the Court.

STATEMENT OF THE CASE

A. History Of The Challenged Regulation

1. *Congress Enacts The Bipartisan Campaign Reform Act of 2002*

The Supreme Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), struck down as unconstitutional provisions of the Federal Election Campaign Act that capped the amount of "expenditures" individuals and political committees could make to support or oppose federal candidates. 424 U.S. at 23-38. In doing so, the Court first held that, to avoid vagueness problems, the term "expenditure," when referencing disbursements by persons other than candidates and political committees, could apply only to disbursements for communications that used "express advocacy" terms such as "vote for," "vote against," and "elect." *Id*. at 44, n.52. These express advocacy terms came to be known as "magic words"; expenditures that did not use magic words came to be known as "issue ads."

Subsequently, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1978) ("*MCFL*"), the Court similarly construed the then long-standing statutory ban on corporate and union expenditures[1] to apply only to disbursements for express advocacy communications. *See id.* at 249 ("[A]n expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). Following that ruling, corporations, unions, and other groups began to spend large sums on purported "issue ads" that avoided the use of "magic words" but praised or criticized federal candidates during the campaign season. *McConnell v. FEC*, 540 U.S. 93, 128 n.20 (2003) ($135 to $150 million was spent in the 1996 campaign on multiple broadcasts of

[1] *See* Tillman Act, ch. 420, 34 Stat. 864 (1907); War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167 (1943); Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (1947).

about 100 ads). By the 2000 election, campaign expenditures on such "issue ads" exceeded $500 million. *See id*. ("130 groups spent over an estimated $500 million on more than 1,100 different ads.").

Viewing these and other developments, Congress concluded that the campaign finance system had suffered a complete "meltdown." *Shays v. FEC*, 414 F.3d 76, 81-82 (D.C. Cir. 2005) ("*Shays I*"). In response, Congress enacted BCRA. *Id*. at 82. BCRA defined a new category of campaign spending called "electioneering communications," which includes any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office, is made within 30 days before a primary election or 60 days before a general election in which the identified candidate is seeking office, and in the case of Congressional and Senate candidates is geographically targeted to the relevant electorate. BCRA § 201, 2 U.S.C. § 434(f)(3). BCRA both banned corporations and unions from spending their treasury funds for "electioneering communications," and required all persons who make "electioneering communications" to disclose the sources of the funding they use for such expenditures.

BCRA required disclosure of contributors to persons making "electioneering communications," and provided two disclosure options, BCRA § 201, 2 U.S.C. § 434(f)(2):

> (E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals …, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more …. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.
>
> (F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

The first option allows persons making "electioneering communications" to establish a segregated bank account to receive funds given by individuals and to disclose the identity of all individuals who contributed $1,000 or more to that account. 2 U.S.C. § 434(f)(2)(E). The second option requires disclosure of all contributors of $1,000 or more to the person making the "electioneering communication." 2 U.S.C. § 434(f)(2)(F).[2]

2. *The FEC Promulgates Regulations To Implement BCRA*

Until the FEC in 2007 promulgated the regulation challenged here (11 C.F.R. § 104.20(c)(9)), its regulations implementing BCRA tracked § 434(f) and required any person making disbursements for "electioneering communications" to make, among others, the following disclosures:

> (7) If the disbursements were paid exclusively from a segregated bank account … the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or
>
> (8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section …, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

[2] Senator Jeffords, who played a key role in drafting the legislation, said: "We deter the appearance of corruption by shining sunlight on the undisclosed expenditures for sham issue advertisements. Corruption will be deterred when the public and the media are able to see clearly who is trying to influence the election. In addition our provisions will inform the voting public of who is sponsoring and paying for an electioneering communication." 147 Cong. Rec. S3034 (Mar. 28, 2001). Senator Snowe said, "What we are saying is disclose who you are. Let's unveil this masquerade. Let's unveil this cloak of anonymity. Tell us who you are. Tell us who is financing these ads to the tune of $500 million in this last election. The public has the right to know. We have the right to know." 147 Cong. Rec. S3074 (Mar. 29, 2001). And Senator Feinstein commented, "The attacks come and no one knows who is actually paying for them. I believe this is unethical. I believe it is unjust. I believe it is unreasonable and it must end." 147 Cong. Rec. S3238 (Apr. 2, 2001).

11 C.F.R. § 104.20(c) (effective Feb. 3, 2003, to Dec. 25, 2007).

The FEC promulgated the "segregated bank account" disclosure provision at subparagraph (7) with corporations in mind. The FEC recognized that under *MCFL* a subset of section 501(c)(4) groups that had ideological, not business, purposes and that raised their funds only from individuals ("qualified non-profit corporations") were exempt from the ban on corporate spending for "electioneering communications." *See* 11 C.F.R. § 114.10 (defining qualified non-profit corporations). Accordingly, the Commission proposed a disclosure regime for "section 501(c)(4) corporations that meet the conditions for *MCFL* groups." FEC, Notice of Proposed Rulemaking, 67 Fed. Reg. 51131-01, 51137-38 (Aug. 7, 2002); *see also* FEC, Notice of Final Rulemaking, 68 Fed. Reg. 404-01, 413 (Jan. 3, 2003). As initially proposed, the FEC regulations "would have permitted only [qualified non-profit corporations] to use segregated bank accounts." 68 Fed. Reg. at 413. However, commenters "urged that this option be made available to all persons who make electioneering communications, and not just [qualified non-profit corporations]." *Id.*

In considering this disclosure regime for certain non-profit corporations, the Commission expressly rejected "administrative burden" objections, because "electioneering communications are not subject to disclosure until disbursements related to them exceed $10,000" and then, only the identities of persons contributing $1,000 or more need be disclosed. *Id.* The FEC found that these corporations could "reduce their reporting obligations by using separate bank accounts," *id.*, a reference to the (c)(7) option (which tracked § 434(f)).

The FEC's disclosure provision at subparagraph (8) was designed to eliminate any doubt that "all persons who make electioneering communications would be required to disclose their donors who donate $1,000 or more in the aggregate during the prescribed period, if they do not

use segregated bank accounts." 68 Fed. Reg. at 414. As the FEC explained in its notice, "BCRA at 2 U.S.C. 434(f)(2)(F) specifically mandates disclosure of this information." *Id.*

The Commission also explained that its regulations used the term "donor" rather than the term "contributor," which appears in 2 U.S.C. § 434(f), to make clear that funds given to persons, including corporations, who make "electioneering communications" are not "contributions" as that term is defined at 2 U.S.C. § 431(8).[3] The Notice of Final Rulemaking stated:

> The Commission sought comment on whether amounts given to persons who make disbursements for electioneering communications are contributions subject to the limitations, prohibitions, and reporting requirements of the Act. In the new reporting provisions for electioneering communications in BCRA, the statute uses the terms "contributor" and "contributed," but it does not use the term "contribution." 2 U.S.C. 434(f)(2)(E) and (F). BCRA uses the more general "disbursement" more frequently. 2 U.S.C. 434(f)(2)(A), (B), (C), (E), and (F). Nor does BCRA amend the definition of "contribution." *See* 2 U.S.C. 431(8).… Based on this analysis, the Commission proposed to treat funds given to persons who make electioneering communications as "donations."

68 Fed. Reg. at 413; *see also* 67 Fed. Reg. at 51139 (proposing that "funds provided to persons that are *not* political committees would not be 'contributions'").

3. *The Supreme Court Invalidates Much Of BCRA's Ban On Corporate "Electioneering Communications"*

In 2007, the Supreme Court held in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), that BCRA's prohibition against corporate spending on "electioneering

[3] Defining "contribution" to include (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose. 2 U.S.C. § 431(8)(A).

communications" was unconstitutional as applied to corporate expenditures for advertisements that did not constitute "express advocacy" or the functional equivalent of express advocacy. *Id*. at 469-70.[4] After *WRTL*, federal law did not prohibit corporations and labor organizations from making disbursements for "electioneering communications" unless they constituted "express advocacy" or its "functional equivalent." *WRTL* did not draw into doubt the constitutionality of the statutory disclosure requirements for "electioneering communications" that *WRTL* had made permissible.

4. *The FEC Proposes To Amend The Challenged Regulation*

On July 18, 2007, The James Madison Center for Free Speech filed a Petition for Rulemaking, asking the FEC to implement *WRTL*'s holding that the prohibition on corporation and labor organization "electioneering communications" cannot be constitutionally applied to so-called "genuine issue ads."[5] The Petition requested no change to the FEC regulations that implemented the statutory disclosure requirements for "electioneering communications."

[4] As introduced, BCRA included an exception to the general ban on corporate "electioneering communications" for non-profit 501(c)(4) and 527(e)(1) organizations, subject to the disclosure regime of § 434(f)—the so-called "Snowe-Jeffords Amendment." *See* 147 Cong. Rec. S2433 (Mar. 19, 2001) (bill reported by title); *id.* at S2446 (Snowe-Jeffords provision discussed) (Mar. 19, 2001), codified as 2 U.S.C. § 441b(c)(2). Senator Wellstone's subsequent amendment added a clause to the statute, providing that the Snowe-Jeffords exception for 501(c)(4) corporations and Section 527 groups would *not* apply. *See* 147 Cong. Rec. S2845 (Mar. 26, 2001), codified as 2 U.S.C. § 441b(c)(6); *accord* FEC, Notice of Proposed Rulemaking, 67 Fed. Reg. 51131-01, 51137 (Aug. 7, 2002). Thus, unless and until the "Wellstone Amendment" was deemed unconstitutional, only *MCFL* corporations could make "electioneering communications" under BCRA. However, the Court's ruling in *WRTL* enabled all corporations to make "electioneering communications" that were not express advocacy or its functional equivalent.

[5] Petition for Rulemaking Adding a "Genuine Issue Ad" Exemption to "Electioneering Communication" & Repealing 11 C.F.R. § 100.22(b) from James Bopp Jr., General Counsel, and Richard E. Coleson, Counsel, James Madison Center for Free Speech, dated July 18, 2007, Dkt. No. 17-2 [VH0095-VH0103].

The following day the FEC announced a rulemaking to incorporate the *WRTL* decision into the Commission's regulations. Press Release, FEC, Commission to Conduct Rulemaking Following Supreme Court Ruling (July 19, 2007).[6] Although the *WRTL* plaintiffs had not challenged the disclosure requirements and the James Madison Center had not raised the issue of disclosure in its petition, the FEC proposed to revisit "the rules governing reporting of electioneering communications" as part of its Notice of Proposed Rulemaking. 72 Fed. Reg. 50261-01, 50262 (Aug. 31, 2007). The FEC acknowledged that BCRA required corporations and labor organizations to report "'the name and address of *each* donor who donated an amount aggregating $1,000 or more' to the corporation or labor organization during the relevant time period" (emphasis added). *Id.* at 50271. Despite this, the FEC solicited public comment on the following question: "Should the Commission limit the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications?" *Id.*

The FEC received 25 responses. Senators McCain, Feingold, and Snowe, and Representative Shays, who had sponsored BCRA, submitted joint comments.[7] They noted that the disclosure requirements had not been challenged in *WRTL* and that because the Court in *McConnell* upheld those requirements against a facial challenge, *McConnell* "remains the governing law on the question of whether the requirements can constitutionally apply to electioneering communications, including the *WRTL* ads and any similar ads."[8] BCRA's sponsors stressed that one of the main purposes of the legislation was to ensure that the public was informed of the identity of persons financing "electioneering communications."

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[6] *Available at* http://www.fec.gov/press/press2007/20070719rule.shtml.

[7] Comment from Senator John McCain, Senator Russell Feingold, Senator Olympia Snowe, and Representative Christopher Shays, dated Oct. 1, 2007, Dkt. No. 17-2 [VH0368-VH0374].

[8] *Id.* at VH0371.

Citizens United submitted comments claiming that reporting the name and address of each $1,000 donor would "likely prove difficult, if not impossible."[9] Citizens United continued: "The difficulties of compliance would be most acute where revenues are generated through sales, investment capital or a combination thereof, which is generally the case with a commercial business. At the very least, this particular reporting requirement would *probably* impose such a high burden that it would in practical effect amount to a ban on the ads for some businesses" (emphasis added).[10] Citizens United did not address the segregated account option, did not provide any facts to support its assertions about burdensomeness, and did not address whether non-profits that did not engage in a "commercial business" would encounter the predicted difficulties. Nor did Citizens United explain why the sources of sales revenue or other business income would be considered "contributors" within the meaning of BCRA or "donors" under the FEC's existing regulation.

The FEC held hearings in October 2007.[11] The Commissioners acknowledged that *McConnell* had upheld the disclosure provisions and that the *WRTL* plaintiffs had not challenged the disclosure requirements. Some witnesses argued that the requirements were burdensome because they could require that corporations and labor organizations disclose the names of individuals who provided funds at any time to those entities, including funds from dues-paying

[9] Comment from Michael Boos, Vice President & General Counsel, Citizens United, dated Oct. 1, 2007, Dkt. No. 17-2 [VH0297-VH0323], VH0312.

[10] *Id.* at VH0312-VH0313.

[11] FEC Hearing Transcripts, In the matter of Electioneering Communications, Notice 2007-16, dated Oct. 17, 2007, Dkt. No. 17-2 [VH0491-VH0791]; Hearing Transcripts, In the matter of Electioneering Communications, Notice 2007-16, dated Oct. 18, 2007, Dkt. No. 17-2 [VH0792-VH0977].

members of a union and unrestricted donations to an organization; other witnesses emphasized that BCRA's segregated account option should alleviate any burden concerns.[12]

5. *The FEC Promulgates The Challenged Regulation*

On December 26, 2007, the FEC promulgated revised regulations that significantly modified the "electioneering communications" reporting requirements for corporations and labor organizations. Specifically, the FEC added paragraph (c)(9) to 11 C.F.R. § 104.20, which provides that when corporations and labor organizations make expenditures above a certain threshold amount for "electioneering communications" that are not made out of a segregated account, they must disclose the following information:

> If the disbursements were made by a corporation or labor organization … the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was *made for the purpose of furthering electioneering communications.*

FEC, Final Rule and Explanation and Justification on Electioneering Communications ("E & J"), 11 C.F.R. Part 104, 114, 72 Fed. Reg. 72899-01, 72913 (Dec. 26, 2007) (emphasis added).

The FEC's E & J stated that the Commission "has decided to depart from the rules proposed in the NPRM and instead to require corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering [electioneering communications] made by that corporation or labor organization pursuant to 11 CFR 114.15." *Id.* at 72911. The FEC gave two reasons: (1) to limit identification of persons who gave money to "those persons who actually support the message conveyed by the [electioneering communications]," and (2) to avoid "imposing on corporations

[12] *Id.* at VH0658, VH0835-37, VH0895-96.

and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members." *Id.*

With respect to its first rationale, the FEC explained that corporations and labor organizations may have sources of funds other than donations. Shareholders, customers, and union members, for example, may exchange money for shares, products, and membership. These persons, the FEC said, may not support the corporation's or labor organization's "electioneering communications":

> A corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission. These investors, customers, and donors do not necessarily support the corporation's electioneering communications. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications.

Id.

With respect to its "burden" rationale, the FEC explained that witnesses had testified at the hearing that compliance with the proposed rules would be costly and require "inordinate" effort:

> Furthermore, witnesses at the Commission's hearing 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. Indeed, one witness noted that labor organizations would have to disclose more persons to the Commission under the [electioneering communication] rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act.

Id.

Relying on these rationales, the FEC determined that "the policy underlying the disclosure provisions of BCRA is properly met by requiring corporations and labor organizations to disclose and report only those persons who made donations for the purpose of funding [electioneering communications]." The Commission did not articulate what "the policy underlying the disclosure provisions of BCRA" is; did not identify any statutory text that supported its conclusion; and did not otherwise explain its abrupt about-face from the rules it had issued in 2003. Nor did the Commission explain how funds received in the course of business from customers or shareholders in exchange for products or stock could possibly be considered donations within the meaning of the existing rules.

The FEC stated in a footnote that the "for the purpose of furthering" standard set forth in 11 C.F.R. § 104.20(c)(9) was *not* drawn from BCRA, but rather from the reporting requirements that apply to "independent expenditures" under FECA, *i.e.*, 2 U.S.C. § 434(c)(2)(C) (providing that persons other than political committees must file statements disclosing "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made *for the purpose of furthering an independent expenditure*" (emphasis added)). The FEC did not explain why a standard enacted as part of FECA should be adopted to implement a provision of BCRA with different statutory language that made no reference to the contributor's purpose and that applied to "electioneering communications."[13]

[13] On April 21, 2011, Plaintiff Van Hollen filed a petition for rulemaking requesting that the FEC revise its regulation implementing § 434(c)(2)(C), namely, 11 C.F.R. § 109.10(e)(1)(vi). FECA also requires the disclosure of "each … person … who makes a contribution" of more than $200 to the person making the independent expenditure. 2 U.S.C. § 434(b)(3)(A); *see id.* § 434(c)(1). These two overlapping statutory disclosure requirements for independent expenditures require broader disclosure than the FEC's existing regulation requires. The FEC has not yet acted on the Van Hollen petition.

6. *The Supreme Court Affirms The Public Interest In BCRA's Disclosure Provisions In* Citizens United

In 2010, the Supreme Court held that 2 U.S.C. § 441b was facially unconstitutional, clearing the way for corporations and labor organizations to use their general treasury funds to make even "electioneering communications" that contain express advocacy or its functional equivalent. *Citizens United v. FEC*, 130 S. Ct. 876 (2010). By a vote of 8-1, however, the Court rejected petitioner's as-applied challenge to BCRA § 201—the disclosure provision at issue here—reasoning that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 915. The Court reasoned that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.… [T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916.

B. Statement Of Facts[14]

1. *Disclosure Of Contributors Before And After The Challenged Regulation*

In the 2004 and 2006 election cycles after BCRA's enactment and prior to the Supreme Court's decision in *WRTL*, the public received almost full disclosure of the donors to groups making "electioneering communications."[15] In the 2008 election cycle—after *WRTL* and the promulgation of the challenged regulation—disclosure fell considerably.[16] In the 2010 cycle, it dropped even further. In 2010, persons making "electioneering communications" disclosed the sources of less than 10 percent of their $79.9 million in "electioneering communication"

[14] When reviewing an agency's decision under the APA, a court may consider information outside the administrative record to determine "whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." *National Treasury Emps. Union v. Hove*, 840 F. Supp. 165, 168 (D.D.C. 1994) (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)), *aff'd*, 53 F.3d 1289 (D.C. Cir. 1995). The D.C. Circuit has recognized that it is appropriate for courts to consider information not formally part of the administrative record in a number of circumstances, including in relevant part here: where evidence arising after the agency action shows whether the decision was correct or not. *See Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). Here, the record of non-disclosure following the agency's action demonstrates that its standard has led to widespread evasion of the statute, *see infra* 14-15, which is relevant for assessing whether the FEC's construction of the statute is reasonable. Courts have clarified that *Esch* applies in four situations—if the plaintiff has shown that the agency (1) acted in bad faith in reaching its decision, (2) engaged in improper behavior in reaching its decision, (3) failed to examine all relevant factors, or (4) failed to adequately explain its grounds for decision. *See, e.g.*, *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 45 (D.D.C. 2009) (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997)). Here, the Commission failed to consider the factor of whether or not the regulation would undermine BCRA.

[15] *See Outside Spending*, CENTER FOR RESPONSIVE POLITICS, "Outside Spending by Disclosure, Excluding Party Committees," *available at* http://www.opensecrets.org/outsidespending/index.php (chart showing 94.4 percent "full disclosure" in 2004 and 86.4% in 2006); *see also* Taylor Lincoln, *Disclosure Eclipse*, PUBLIC CITIZEN, at 3 (Nov. 18, 2010) *available at* http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf (reporting Center for Responsive Politics' findings).

[16] *See Outside Spending*, "Outside Spending by Disclosure, Excluding Party Committees," (chart showing 68.4% percent "full disclosure" in 2008); *see also* Lincoln, *Disclosure Eclipse* at 3.

spending. Answer ¶ 30.[17] The ten "persons" that reported spending the most on "electioneering communications" (all of them claiming tax-exempt status under 501(c) or 527) disclosed the sources of a mere five percent of the money they spent. *Id.* ¶ 30. Of these ten "persons," only three disclosed any information about their funders. *Id.* The public record reflects little or no disclosure of the numerous contributors to non-profit corporations that made substantial "electioneering communications" in the 2010 congressional races. *Id.* ¶ 31.[18]

2. *Disclosure Of Contributors In The 2012 Election Cycle*

Looking ahead, the U.S. Chamber of Commerce, a section 501(c)(6) corporation, which expended over $30 million on "electioneering communications" in 2010 and disclosed none of its contributors, stated that it will continue to make "electioneering communications" and that it will continue *not* to disclose any of its contributors. *See* Answer ¶ 32.[19] Crossroads GPS, a 501(c)(4) corporation which expended $1.1 million on "electioneering communications" in 2010 and disclosed none of its contributors, announced that it and its affiliated 527 political organization, American Crossroads, intend to raise a combined total of $120 million for the 2012

[17] In 2010, all of the top ten spenders on "electioneering communications" were either "501(c)" or "527" organizations. *See Outside Spending*, CENTER FOR RESPONSIVE POLITICS, "2010 Outside Spending, by Groups," *available at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=E&chrt=D (electioneering communications filter).

[18] *See* Declaration of Fiona J. Kaye in Support of Plaintiff's Motion for Summary Judgment ("Kaye Declaration"), Exhibit A (chart listing amounts spent on electioneering communications by outside groups in 2010 election cycle). *See also id.* Exhibits B-K (sample FEC Form 9 filings by top ten spenders).

[19] *U.S. Chamber Plans to Continue Practice of Not Disclosing Contributors*, BNA MONEY AND POLITICS REPORT, Jan. 13, 2011 (attached as Exhibit L to the Kaye Declaration).

election, almost twice as much as the two organizations raised for the 2010 mid-term cycle.[20] Moreover, new high profile groups are forming to exploit the perceived advantage in raising funds for "electioneering communications" from hidden sources. The newly-formed Priorities USA has declared its intention to raise funds from hidden donors, citing a need to keep pace with organizations such as Crossroads GPS. As The New York Times reported, "the group's entrée into the early 2012 contest all but ensures that the presidential race will be awash in cash from undisclosed corporate and labor sources with huge stakes in Washington policy making."[21]

ARGUMENT

I. JURISDICTION

This action arises under the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 2 U.S.C. §§ 431 *et seq.*, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiff has standing under *FEC v. Akins*, 524 U.S. 11 (1998), because he is not receiving disclosure of information mandated by BCRA. *Id.* at 21 ("A plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." (citing *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989)); *see also Shays III*, 528

[20] Brody Mullins, *2012 Election Spending Race Heats Up*, WALL ST. J., Mar. 1, 2011, at A5 (attached as Exhibit M to the Kaye Declaration). The Crossroads GPS website promotes its policy to shield its donors from public disclosure, stating on the contribution form page, "Crossroads GPS's policy is to not provide the names of its donors to the general public." Crossroads GPS, "Contribute," https://www.icontribute.us/crossroadsgps (attached as Exhibit N to the Kaye Declaration).

[21] Jim Rutenberg, *Now, Liberals Offer Donors A Cash Cloak*, N.Y. TIMES, Apr. 30, 2011, at A1 (attached as Exhibit O to the Kaye Declaration).

F.3d at 923. The reporting requirement under 11 C.F.R. § 104.20(c)(9) allows a corporation or labor organization to spend millions of dollars on "electioneering communications" without disclosing the identity of a single donor, because the corporation or labor organization need only claim that its donors did not announce the "purpose" of their contributions. As a result, Plaintiff is not receiving the full, accurate, and timely disclosures required under BCRA. *See* Declaration of Representative Chris Van Hollen in Support of Motion for Summary Judgment ("Van Hollen Decl.") ¶ 5. This injury is traceable to the FEC because it is caused by the Commission's regulation. *See Shays III*, 528 F.3d at 923. Plaintiff's injury would be redressed were this Court to invalidate the rule and to require the FEC to promulgate a regulation in keeping with BCRA's reporting requirements.

Plaintiff also has "competitor standing" as an elected Member of Congress and as a candidate for re-election. *See Shays I*, 414 F.3d at 87. Plaintiff and his campaign opponents are and will be regulated by FECA and BCRA, including 2 U.S.C. § 434(f). Plaintiff suffers legal harm because the challenged regulation "illegally structures a competitive environment" in which he must defend a "concrete interest"—retention of elected office. *Id.* (brackets omitted). The challenged regulation infringes Plaintiff's interest in participating in elections untainted by BCRA-banned practices because it allows corporations and labor organizations to hide the sources of funds they use to pay for "electioneering communications." *See* Van Hollen Decl. ¶ 4. The FEC caused the injury by promulgating the regulation, and Plaintiff's injury would be redressed by a favorable ruling from this Court.

II. STANDARD OF REVIEW

The Court should review this challenge to the FEC's disclosure regulation under the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "asking first whether Congress has spoken directly ... to the precise question at

issue, and second, if it has not, whether the agency's interpretation is 'reasonable.'" *Shays I*, 414 F.3d at 96 (internal quotation marks and citations omitted). In addition, because the challenged regulation constitutes "final agency action under the APA," the Court should determine whether it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)).

At *Chevron* Step One, the Court employs "the traditional tools of statutory construction, including examination of the statute's text, legislative history, and structure, as well as its purpose," *id*. at 105 (citation omitted), to determine whether Congress has addressed the issue arising from the challenge to the agency's regulation. At *Chevron* Step Two—reached only if the Court determines that the statute is ambiguous with respect to the issue presented—the Court determines whether the agency's regulation is based on an impermissible or unreasonable construction of the statute. *See id.* at 96-97. Applying the analytically similar "arbitrary and capricious" standard under the APA, the Court determines whether the agency has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). If the agency has changed its position, it must satisfactorily explain why it has done so. *See id.* at 41-42; *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

III. THE CHALLENGED REGULATION FAILS AT *CHEVRON* STEP ONE

A. BCRA Unambiguously Requires Disclosure Of "*All* Contributors"

Under the statutory disclosure scheme, a person making an "electioneering communication" has the option to set up a separate account for funds donated by individuals, out of which it funds its "electioneering communications" and discloses the names of the donors of

$1,000 or more. If the person making "electioneering communications" eschews the separate account option, it must disclose the names of "all contributors" of $1,000 or more. But the challenged regulation permits a corporation to identify only some or even no contributors of the funds that it uses to make "electioneering communications." As a practical matter, by requiring disclosure only of donors who give with a certain announced "purpose," the regulation does not require disclosure of *any* contributors, let alone "all," because a corporation or labor organization will rarely have, and can readily avoid having, evidence of the contributor's intent to further "electioneering communications," especially where both parties prefer not to disclose the names and addresses of "all contributors." The record furthermore confirms that under this regulation almost no contributors are being disclosed. *See supra* 14-15. A regulation that requires less than the statute requires is contrary to law. *See Shays I*, 414 F.3d at 82 (citing 2 U.S.C. § 438(e)).

1. *The Challenged Regulation Is Contrary To The Plain Language Of The Statute*

Two terms in Section 434(f) of BCRA are at issue here: "all" and "contributors." We address each in turn.

The term "all" is hardly ambiguous. "All" means all. "All" means the whole number, or every member of a set or group. It does not mean "some" or "part." Webster's Third New Int'l Dict. 54 (2002) (defining "all" as "that is the whole amount or quantity of"); *accord* Concise Oxford English Dict. 34 (11th ed. 2004) (defining "all" as "the whole quantity or extent of"); *see, e.g.*, *Public Citizen v. FTC*, 869 F.2d 1541, 1553 (D.C. Cir. 1989) (invalidating, at *Chevron* Step One, an agency regulation that created an exception to a statute requiring a warning label on advertising for "any smokeless tobacco product" (quoting 15 U.S.C. § 4402(a)(2)). Because § 434(f)(2)(F) requires disclosure of "all contributors" to a separate bank account or (at its

option) to the organization as a whole, every person who fits the definition of "contributor" (and donates $1,000 or more during the relevant period) must be identified.

The term "contributors" likewise is not ambiguous. It means a person who gives money without expectation of service or property or legal right in return. *See* Webster's Third New Int'l Dict. 496 (defining "contribute" as "to give or grant in common with others"); *see also* Concise Oxford English Dict. 310 (defining "contribute" as "to give in order to help achieve or provide something").[22]

The Commission reached precisely this conclusion in 2003, when it first promulgated regulations to implement BCRA. The FEC's original interpretation of the term "contributor" as a person who makes a donation was correct. *See* FEC, Notice of Proposed Rulemaking, 68 Fed. Reg. 404-01, 413 (Jan. 3, 2003). The essential attribute of a donation is that it arrives with no strings attached; the donor's purpose, motive, or reason for making the donation is not relevant for ascertaining whether the person has given more than she receives in return, if anything. A person who gives money to a non-profit corporation but has no opinion about how the non-profit uses the money is still a "contributor." Likewise, a person who gives money to a non-profit but does not know whether the non-profit makes "electioneering communications" is still a "contributor."

The Commission in 2003 expressly addressed the question whether "contributors" were only persons who make "contributions" under FECA. *See* FEC, Notice of Proposed Rulemaking, 67 Fed. Reg. 51131-01, 51139 (Aug. 7, 2002). It concluded, correctly, that the

[22] *Cf. Hernandez v. C.I.R.*, 490 U.S. 680, 690 (1989) ("'gifts'" are payments "'made with no expectation of a financial return commensurate with the amount of the gift'" (interpreting Internal Revenue Code § 170 regarding itemized deductions of charitable contributions)); *United States v. American Bar Endowment*, 477 U.S. 105, 118 (1986) ("The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration.").

term was not so limited—that "contributors" are all persons who make "donations," 68 Fed. Reg. at 413, and phrased its regulations accordingly. As the FEC then recognized, applying FECA's definition of "contribution" to BCRA's disclosure provisions would not make sense. The definition of "electioneering communications" includes communications that are *not* made "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A), especially as that term has been narrowed by judicial interpretation; *see id.* § 434(f)(3); *WRTL*, 551 U.S. at 457 (drawing line between "issue advocacy" and "express advocacy" and noting that "BCRA's definition of 'electioneering communication' is clear and expansive."). Because FECA's general definition of "contribution" conflicts with BCRA's specific definition of "electioneering communication," it cannot be made part of § 434(f)(2).

In the case of a corporation or union which does not make "electioneering communication" disbursements out of a separate bank account, the challenged regulation, 11 C.F.R. § 104.20(c)(9), does not require disclosure of "all contributors." Instead, it engrafts an announcement-of-purpose requirement that is not found in the statute and that conflicts with BCRA's plain-English requirement that a corporation or labor organization disclose "all contributors." 2 U.S.C. § 434(f)(2)(F). Specifically, the regulation provides that a person making a "statement of electioneering communication," 11 C.F.R. § 104.20(c), who opts not to establish a segregated account for funding "electioneering communications" need not disclose a contributor who otherwise meets the statutory requirements unless the contributor has somehow announced that it made the contribution "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).

2. *The Challenged Regulation Is Contrary To The Context Of The Statute*

The plain meaning of the words that appear in § 434(f)(2)(F) is sufficient to answer the *Chevron* Step One inquiry by determining that the FEC has exceeded its authority and

promulgated a regulation that is contrary to law. The statutory context in which these words appear adds further support.

Congress used the phrase "for the purpose of furthering" in the FECA provision requiring disclosure of contributors of $200 or more to persons making "independent expenditures," 2 U.S.C. § 434(c),[23] but Congress did not include that or any comparable language in the BCRA provision applying to disclosure of contributors of $1,000 or more to persons making "electioneering communications," 2 U.S.C. § 434(f). The absence of the phrase "for the purpose of furthering" in § 434(f)(2)(F) is significant because Congress could have adopted the language of § 434(c), but chose not to do so. *Cf. FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985) (noting, in context of canon of construction that provisions in *pari materia* must be construed together, "that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject"). To hold that § 434(c) and § 434(f) have the same meaning would run contrary to the presumption that the drafters of BCRA were aware of FECA, in addition to the language of each provision. *Id.*

3. *The Challenged Regulation Is Contrary To The Purpose Of The Statute*

Because the challenged regulation foreseeably encourages and facilitates evasion of BCRA's disclosure requirement, it is manifestly contrary to the intent of Congress in enacting BCRA. *See Shays I*, 414 F.3d at 106 (holding, at *Chevron* Step One, that FEC's regulation was invalid because it facilitated circumvention of the statute). As in *Shays I*, a corporation can avoid complying with the challenged disclosure regulation with nothing more than a wink of an eye.

[23] Section 434(c) requires persons other than political committees who make independent expenditures in excess of $250 to file a statement identifying persons "who made a contribution in excess of $200 … which was made *for the purpose of furthering an independent expenditure*." 2 U.S.C. § 434(c)(2)(C) (emphasis added). *See also id.* § 434(c)(1) (requiring disclosure of "each … person … who makes a contribution" of $200 or more to the person making the independent expenditure).

See id. at 103 (observing that under FEC's definition of the word "solicit," a candidate could state that "it's important for our state party to receive at least $100,000 from each of you" without having "asked" for money (internal quotation marks omitted)); *id.* at 106 ("The FEC's definitions fly in the face of [BCRA's] purpose because they reopen the very loophole that terms were designed to close.").

Here, Congress sought to shine light on whose money was behind "electioneering communications." *See supra* 3-4. It recognized that persons who finance "electioneering communications" often stand to benefit economically from the election or defeat of a candidate or acceptance or rejection of a bill, and that voters are in a better position to evaluate such communications when the identity of the financier has not been cloaked. *See supra* 4, n.2. So did the Supreme Court. *See Citizens United*, 130 S. Ct. at 915 ("[T]he public has an interest in knowing who is speaking about a candidate shortly before an election."). The FEC's regulation plunges the financing of "electioneering communications" back into darkness: after promulgation of 11 C.F.R. § 104.20(c)(9), virtually all disclosure ceased. *See supra* 14-15. To maintain that Congress delegated authority to the FEC to bring about this result would be absurd indeed. *See Shays I*, 414 F.3d at 106; *Shays III*, 528 F.3d at 925.

B. BCRA's Disclosure Provision Addresses The Question Whether A Corporation Or Labor Organization May Decline To Identify Contributors Who Do Not Manifest A "Purpose" To Further "Electioneering Communications"

The FEC may argue that Congress did not address the precise question raised by this lawsuit because BCRA, as initially enacted, did not permit corporations and labor organizations to make "electioneering communications" out of general treasury funds. Any such argument is flawed.

Congress demonstrably *did* expect certain corporations to make "electioneering communications" and disclose contributors accordingly. The statutory disclosure provisions at issue here—2 U.S.C. § 434(f)(2)(E), (F)—were part of the "Snowe-Jeffords Amendment" to BCRA, which also included a provision that created an exception for section 501(c)(4) non-profit corporations from the general prohibition on electioneering expenditures by corporations. 2 U.S.C. § 441(b)(c)(2). This exception would allow section 501(c)(4) non-profit corporations to make "electioneering communications." Thus, at the time the disclosure provisions were added to the legislation, they were specifically designed to apply to non-profit corporations.

Subsequently, another provision was added to the legislation—2 U.S.C. § 441(b)(c)(6) (the "Wellstone Amendment")—that functionally struck the exception from the spending ban for section 501(c)(4) corporations, thus once again making those non-profit corporations subject to the ban. The disclosure provisions, however, were left in place.

Congress constructed the legislation in this fashion in the event the Wellstone Amendment was declared unconstitutional under the Supreme Court's decision in *MCFL*, which held that section 501(c)(4) corporations with certain characteristics could not constitutionally be subject to a prohibition on spending their corporate funds for campaign expenditures (and therefore, also, presumably for "electioneering communications"). Ultimately, the FEC took the position that such *MCFL* corporations were exempt from the corporate spending ban on "electioneering communications," 11 C.F.R. §§ 114.2(b)(3), 114.10, a position which the Supreme Court agreed with in *McConnell*. 540 U.S. at 210-211.

Nonetheless, both Congress and the FEC were well aware of the Supreme Court's holding in *MCFL* that certain qualified non-profit corporations would be able to make "electioneering communications." The FEC drafted regulations designed specifically for

qualified non-profit corporations; indeed, its Notice of Final Rulemaking explained that 11 C.F.R. § 104.20(c)(7) was initially designed for qualified non-profit corporations *only*, showing that it anticipated at least some corporations would be subject to BCRA's disclosure requirements. *See* 68 Fed. Reg. at 413. Moreover, when the disclosure provisions were first added to the legislation, they were intended to apply to all section 501(c)(4) corporations, not just *MCFL* corporations. The FEC acknowledged this possibility as well, and noted that "in the absence of the Wellstone amendment, the Snowe-Jeffords provision by itself would have allowed all incorporated tax-exempt organizations that are described in 26 U.S.C. 501(c)(4), and political organizations described in 26 U.S.C. 527, to make electioneering communications, provided their funds do not come from corporations or labor organizations." 67 Fed. Reg. at 51138. Thus, the disclosure provisions in the statute, which on their face apply to "every person" which makes an "electioneering communication," were intended by Congress to apply to corporations as well.

C. The FEC's Statutory Interpretation Exceeds The Commission's Authority

The FEC has acted beyond the scope of its regulatory authority because § 434(f) does not expressly or impliedly authorize the Commission to create exceptions or to alleviate the administrative "burden" on the corporations and unions subject to BCRA's contribution reporting requirements. Congress directed the FEC to "promulgate regulations to *carry out* this Act and the amendments made by this Act that are under the Commission's jurisdiction," BCRA § 402(c)(1), 116 Stat. 81, 113 (emphasis added); *see also* 2 U.S.C. § 437d(a)(8) (providing that the FEC has power "to make, amend, and repeal such rules … as are necessary to *carry out* the provisions of this Act" (emphasis added)). BCRA does not say that the FEC may permit persons who find compliance to be burdensome to not comply; it says that a person making "electioneering communications" must identify "*all* contributors" to a separate account from

which disbursements for "electioneering communications" are made, or "all contributors" to the spender. 2 U.S.C. § 434(f)(2)(E) & (F) (emphasis added).

In promulgating the challenged regulation, the FEC did not identify any statutory text or legislative history that purportedly justified its conclusion that "all contributors" meant "some contributors," who have made certain professions. The challenged regulation does not interpret the statutory terms "all" or "contributors"; nor has the FEC identified any perceived ambiguity that its regulation is designed to resolve. Instead, it engrafts an announcement-of-purpose requirement based on its own policy judgment. *See* FEC, Final Rule and Explanation and Justification on Electioneering Communications, 11 C.F.R. Part 104, 114, 72 Fed. Reg. 72899-01, 72911 (Dec. 26, 2007). Because "burden" is not among the "factors deemed relevant by the Act," *Shays I*, 414 F.3d at 97 (internal quotation marks and citation omitted), the FEC's regulation based on those factors exceeds its statutory authority and constitutes an impermissible construction of the statute.

In fact, Congress expressly and preemptively addressed the "burden" issue in two ways. First, it provided for the segregated account option. 2 U.S.C. § 434(f)(2)(E). Second, it exempted contributors who contributed an aggregate amount of less than $1,000 from the disclosure requirement. *See id.* § 434(f)(2)(E), (F). Thus, Congress addressed the "burden" issue in statutory language that is clear, and left the agency no implied authority to create additional exceptions. *See Shays I*, 414 F.3d at 114 ("By promulgating a rigid regime, Congress signals that the strict letter of its law applies in all circumstances ….").

Contrary to law, the FEC has engaged in "impermissible second-guessing of Congress's calculations," *id.*, by making its own determinations about how to achieve the "policy" objectives "underlying the disclosure provisions of BCRA." 72 Fed. Reg. at 72911. The FEC

did not have this authority. *See Shays I*, 414 F.3d at 114 (no authority to create exceptions based on agency's conclusion "that the acknowledged benefits are exceeded by the costs" (quoting *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989))).

The Court of Appeals' decision in *Public Citizen* is instructive. In that case, the Court considered whether the FTC had exceeded its authority under the Comprehensive Smokeless Tobacco Health Education Act, which required producers and distributors of smokeless tobacco products "to include health warnings on all smokeless tobacco packages, as well as in advertisements for the product." *Public Citizen*, 869 F.2d at 1542. The FTC promulgated a regulation exempting "utilitarian objects … such as pens, pencils, clothing, or sporting goods" from the Act's warning requirements. *Id.* The regulatory exemption was plainly contrary to the language of the statute and the regulation could only be upheld if the agency had implied authority to create exceptions. It did not, for "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits," and the agency had failed to show that the burden of requiring warning labels would "yield a gain of trivial or no value." *Id.* at 1556 (internal quotation marks and citations omitted). As in *Public Citizen*, the statute at issue in this case forecloses the agency's interpretation at *Chevron* Step One, and just as clearly, it does not grant the agency discretion, express or implied, to consider the burden on persons to whom the statute applies.

IV. THE CHALLENGED REGULATION ALSO FAILS AT *CHEVRON* STEP TWO AND IS ARBITRARY AND CAPRICIOUS

If the Court were to conclude that BCRA's disclosure requirements are "ambiguous" with respect to the question here at issue, the Court would reach *Chevron* Step Two and would inquire whether the challenged regulation is based on a "permissible construction" of the statute. *See, e.g.*, *American Bar Assoc. v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("[W]e will then uphold

the agency's interpretation of the ambiguous statute if that interpretation is 'permissible,' that is, if it is 'reasonable.'"). At *Chevron* Step Two, an agency's construction of a statute that it is entrusted to administer is entitled to deference. *See Chevron*, 467 U.S. at 844; *Shays I*, 414 F.3d at 97 ("[A]t *Chevron* Step Two [the Court] defer[s] to the agency's interpretation as long as it is based on a permissible construction of the statute." (quoting *Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004) (internal quotation marks omitted))). Thus, if the Court determines that Congress did not "actually have an intent" with respect to the challenged regulation, the question is not whether the FEC's regulation represents the best possible means of "reconciling conflicting policies," but whether the FEC has made a "reasonable policy choice." *Chevron*, 467 U.S. at 844, 845.

The inquiry at *Chevron* Step Two "overlaps with the arbitrary and capricious standard, for whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable," *Shays I*, 414 F.3d 96 (internal quotation marks, citation, and brackets omitted), and courts frequently consider the *Chevron* Step Two and APA inquiries together. We address both standards in this Part, and show that the FEC's interpretation of the statute and the regulation that it promulgated based on such interpretation are impermissible and unreasonable under *Chevron* and the APA.

A. The FEC's Statutory Interpretation Is Impermissible And Unreasonable Because It Is Based On Arbitrary And Irrational Assumptions

Even if BCRA granted the FEC authority to circumscribe the scope of the statute's reach, common sense and all available evidence contradict the agency's assumed (but not found) fact that complying with BCRA would be unduly burdensome for corporations and labor organizations. The FEC's burden rationale is so implausible that it cannot be the product of agency expertise, *see State Farm*, 463 U.S. at 43.

The FEC failed to make any fact-based findings or articulate any persuasive reasons why it believed that complying with BCRA would impose an unacceptable burden on corporations and labor organizations that outweighed the benefits of promoting disclosure—Congress's plain objective. The FEC did not articulate which factors affect the cost of compliance, the magnitude of the impact that each such factor would have, or whether factors relating to cost would affect few or many—or any—organizations that make "electioneering communications." Instead, it relied on the testimony of a few self-interested "witnesses" who testified at the rulemaking hearing that compliance would be "very costly" and "require an inordinate amount of effort." 72 Fed. Reg. at 72911.[24] The FEC did not present any data or facts in its E & J to support this assertion or to quantify the cost and effort involved. *See Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003) (when making predictions or extrapolations from the record, an agency "must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions" (citation omitted)); *National Gypsum Co. v. EPA*, 968 F.2d 40, 43 (D.C. Cir. 1992) (holding that agency action was arbitrary and capricious where its "inferences [were] nothing more than unsupported assumptions").

The self-serving, factually unsupported, and conclusory testimony of witnesses who do not wish to disclose who is funding an organization's "electioneering communications" is a manifestly insufficient basis for the FEC's sweeping conclusion that BCRA would otherwise impose a "significant burden of disclosing the identities of … vast numbers of customers,

[24] The Commission apparently accepted at face value and attached significance to one witness's testimony that "labor organizations would have to disclose more persons to the Commission under the [electioneering communications] rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act." *Id.* FECA and the LMRDA are different statutes, serving different purposes and addressing disclosure in different contexts. Moreover, the FEC vastly exaggerates the scope of disclosure required here; most union dues are under $1,000 and thus do not need to be disclosed.

investors, or members." 72 Fed. Reg. at 72911. *See, e.g.*, *Shays III*, 528 F.3d at 928-29 (affirming ruling that FEC's revised regulation was arbitrary and capricious where the Commission implemented changes based on complaints that "the regulation was unnecessarily cumbersome" without supporting "its decision with reasoning and evidence").

Nor does any rational basis exist to *infer* that carrying out BCRA as enacted by Congress and interpreted by the Supreme Court would *necessarily* create intolerable burdens for corporations or labor organizations.

First, corporations and labor organizations that make "electioneering communications" could avoid the entire burden the FEC cited by taking the simple step of establishing a segregated account pursuant to § 434(f)(2)(E), and using that account to pay for "electioneering communications." Persons who give money to such an account would be self-defining, so there would be no potential burden on shareholders, customers, and the like. Moreover, a corporation that spends $10,000 or more on "electioneering communications"—the minimum threshold for triggering the disclosure requirements—is in a poor position to complain that the negligible overhead and accounting costs of maintaining a separate bank account are too burdensome. The FEC's failure to consider the segregated account option was arbitrary and capricious.

Second, the sources of investment and sales revenue are plainly not "contributors" within the meaning of the Act (or "donors" under the FEC's prior rule). The FEC irrationally assumed that corporations and unions could not readily distinguish persons making "donations" from customers or shareholders purchasing products or stock. *See* 72 Fed. Reg. at 72911 (stating that without the "purpose" requirement, corporations and labor organizations would have to disclose

"vast numbers of customers, investors, or members").[25] That reasoning is insupportable: businesses, non-profit groups, labor organizations, and individuals routinely differentiate among sources of funds, including donations, as a matter of both internal accounting and reporting to government authorities such as the Internal Revenue Service ("IRS").[26]

The FEC's assumption that disclosing the names and addresses of "all contributors who contributed an aggregate amount of $1,000" or more to a non-profit corporation or labor organization during the relevant period would be unduly burdensome is also irrational. As anyone who has contributed money to a non-profit group knows, the recipient organization records names and addresses so that it can solicit additional donations. The idea that a non-profit corporation does not have a readily accessible record of the names and addresses of its largest donors—those who give $1,000 or more—is absurd. Providing these names and addresses as required by § 434(f)(2)(F) would impose no more than a modest burden, let alone the "significant burden" that the FEC identifies as a justification for its regulation.

Rather than adopt an "announcement-of-purpose" test that invites and has demonstrably fostered circumvention of BCRA's disclosure requirement, the FEC could have addressed this supposed burden problem in one of two ways (or a combination of both). First, it could have defined what is *excluded* from the disclosure requirement by promulgating a regulation providing that investment revenue, sales revenue, loan proceeds, and the like are not "donations."

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[25] The FEC explained, incorrectly, that BCRA should not be construed to include donations to a non-profit corporation in the form of "membership dues" unless the donor made some additional showing of support, apart from the donation, for the corporation's "electioneering communications." *See* 72 Fed. Reg. at 72911; *see also infra* 32.

[26] In fact, the E & J recounts a proposal by one commenter to align disclosure requirements with IRS criteria. 72 Fed. Reg. at 72911 ("[O]ne commenter argued that disclosure by nonprofit corporations should be limited to those amounts listed on line 1 of the corporation's IRS Form 990, which includes '[c]ontributions, gifts, grants, and similar amounts received' by an organization exempt from income tax[.]" (first brackets in original)).

Alternatively, the FEC could have defined which sources of funds were *included, i.e.*, qualify as donations. For example, the FEC could have borrowed from the IRS's definition of "voluntary contributions" as "payments, or the part of any payment, for which the payer (donor) does not receive full retail value (fair market value) from the recipient (donee) organization."[27] The FEC did not say why it did not even consider these commonsense alternatives or comparable objective tests in favor of a demonstratively unworkable subjective-intent test.[28] This was arbitrary and capricious.

Third, the FEC assumed that dues-paying members of non-profit groups and labor organizations "may not necessarily support the organization's electioneering communications." 72 Fed. Reg. at 72911. But § 434(f)(2)(F) requires disclosure of "all contributors," not only those contributors who manifest particularized support for line-items on a corporation's list of disbursements. The FEC's assumption is also irrational, inasmuch as people do not pay dues to organizations whose mission or purpose they do not endorse, and organizations are not likely to make "electioneering communications" that undermine their mission or purpose. The more reasonable assumption is that persons who give money to a non-profit corporation do so because they support the corporation's activities, including its "electioneering communications."

Fourth, full disclosure had been required without a "purpose" exception for four years under the FEC's original rule. The Commission then pulled an abrupt about-face in 2007 and failed to offer the required justification for why the change was necessary. The Commission's

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[27] 2010 Instructions for Form 990 Return of Organization Exempt From Income Tax 34, *available at* http://www.irs.gov/pub/irs-pdf/i990.pdf.

[28] In *WRTL*, for example—the decision that the FEC sought to implement in promulgating the challenged regulation—the Court observed that a First Amendment test that depends on the speaker's intent "'would invite costly, fact-dependent litigation.'" 551 U.S. at 468 (quoting FEC's brief).

hypothesized burdens and ambiguities are *especially* unconvincing given that the rule had been in effect for some time and the FEC was unable to point to any *actual* burdens or actual real-world problems under the original rule. *See State Farm*, 463 U.S. at 41-42; *Fox TV Stations*, 129 S. Ct. at 1811.

B. The FEC's Statutory Interpretation Is Impermissible And Unreasonable Because It Frustrates The Policy of BCRA To Promote Disclosure

"At *Chevron* step two and under the APA, courts must reject administrative constructions of a statute that frustrate the policy that Congress sought to implement." *Shays III*, 528 F.3d at 925 (citation omitted). The challenged regulation frustrates the intent of Congress by inviting corporations and labor organizations to evade—almost completely—BCRA's reporting requirements for "electioneering communications." The Court's reasoning in *Shays III* is analogous and controlling here. In *Shays III*, the FEC's regulation would have permitted coordinated communications outside of the "90/120-day window" because it relied on a "functionally meaningless" express advocacy standard that turned on whether an ad used "magic words." *See id.* ("more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words"). The regulation permitted donors to circumvent the statute with nothing more than a "wink or nod." *Id*. (internal quotation marks omitted). The challenged regulation has the same unlawful effect: so long as the donor stops short of explicitly communicating a purpose to fund "electioneering communications" to the person making such communications, the donation need not be disclosed. Under these circumstances, "the hard lesson of circumvention" teaches that widespread evasion of the statute is all but guaranteed. *Id.* at 927 (internal quotation marks and citation omitted).

V. THE COURT SHOULD DECLARE THAT THE CHALLENGED REGULATION IS UNLAWFUL, VACATE IT, AND DIRECT THE FEC TO PROMULGATE A REVISED REGULATION WITH REASONABLE EXPEDIENCY

The Court has authority to enter a declaratory judgment, vacate the challenged regulation, and remand to the FEC for further proceedings consistent with the Court's judgment. *See* 28 U.S.C. § 2201 (declaratory judgment); 5 U.S.C. § 706(2)(A) (authorizing reviewing court to "hold unlawful and set aside agency action, findings, and conclusions …"); *National Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated …." (internal quotation marks and citation omitted)); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("set aside means 'to annul or vacate'" (quoting Black's Law Dictionary (8th ed. 2004))).

Vacatur is warranted here to ensure timely compliance with this Court's order. *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (questioning "the wisdom of the open-ended remand without vacatur"); *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) ("A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such.").

Furthermore, experience teaches that the Court should retain jurisdiction until the Court's judgment is satisfied. The *Shays* litigation is illustrative. In 2004, this Court invalidated "some fifteen rules" promulgated by the FEC, a ruling that was—to the extent appealed by the FEC—affirmed "in all respects." *Shays I*, 414 F.3d at 79 (describing district court proceedings). Following the decision and affirmance in *Shays I*, the FEC initiated rulemaking proceedings and either promulgated a revised regulation or revised its explanation for the prior regulation. Many of the revised regulations did not comply with BCRA or the APA either. *See Shays III*, 508 F.

Supp. 2d 10, 71 (D.D.C. 2007), *aff'd in part, rev'd in part*, 528 F.3d 914 (D.C. Cir. 2008). The Court of Appeals upheld one of the revised rules, but rejected "the balance of the regulations as either contrary to the Act or arbitrary and capricious." *Shays III*, 528 F.3d at 917. It remanded those regulations "in the hope that, as the nation enters the thick of the fourth election cycle since BCRA's passage, the Commission will issue regulations consistent with the Act's text and purpose." *Id.* This history supports the conclusion that the public interest would be served if the Court upon remand were to exercise its unquestioned power to retain jurisdiction.

That was in 2008. The Nation is about to enter its *sixth* election cycle—and its *third* presidential election—since BCRA was enacted, and the need for regulations that carry out BCRA's disclosure provisions is more acute than ever. *See supra* 14-16. The absence of proper disclosure harms both Plaintiff and the public. *See Shays I*, 340 F. Supp. 2d 39, 52 (D.D.C. 2004) ("The existence of loopholes and unfaithful regulations constitutes a daily injury to both [plaintiffs'] interests and the clearly articulated intent of Congress."), *aff'd* 414 F.3d 76 (D.C. Cir. 2005); *id.* at 54 ("The public interest is best served by enforcing Congress's intended campaign finance system expeditiously in order to assuage the harms produced by the Commission.").

Accordingly, we urge this Court to vacate the challenged regulation; direct the FEC to "instigate proceedings" and promulgate revised regulations in accordance with this Court's order with "reasonable expediency," *id.* at 52; and retain jurisdiction to ensure that the FEC timely implements the Court's order.

CONCLUSION

For the reasons stated, we respectfully urge the Court to grant Plaintiff's motion for summary judgment; declare that the challenged regulation, 11 C.F.R. § 104.20(c)(9), is contrary to law and arbitrary and capricious; vacate the challenged regulation; and direct the FEC to

promulgate a revised regulation consistent with this Court's ruling and declaratory judgment with reasonable expediency. We also respectfully urge the Court to retain jurisdiction until the Court's judgment is satisfied.

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Respectfully submitted,

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