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 OPPOSITION TO
INTERVENORS' MOTIONS FOR STAY PENDING APPEAL

Plaintiff Chris Van Hollen respectfully submits this memorandum of points and authorities in opposition to motions for stay pending appeal filed by intervenors Hispanic Leadership Fund ("HLF") and the Center for Individual Freedom ("CFIF").

Intervenors must meet a heavy burden to justify the "extraordinary remedy" of a stay pending appeal. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (*per curiam*); *see also In re Special Proceedings*, --- F. Supp. 2d ----, No. 09-0198, 2012 WL 859578, at *1 (D.D.C. Feb. 27, 2012) (denying stay of order denying motion to permanently seal the report regarding the prosecution of Senator Stevens). Intervenors fail to meet their burden as to each of the four factors that this Court must consider in determining whether to grant a stay: (1) their appeals have little chance of success on the merits; (2) they have not shown irreparable harm absent a stay; (3) a stay would substantially injure the other parties interested in the proceeding; and (4) the public interest weighs heavily against a stay. *See In re Special Proceedings*, 2012 WL 859578, at *1 (citing *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749 (2009)). Indeed, in many of the cases intervenors cite, the courts declined to issue a stay.

See, e.g., *id*.; *see also Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90 (D.D.C. 2011); *Pan Am Flight 73 Liaison Grp. v. Dave*, 711 F. Supp. 2d 13 (D.D.C. 2010), *aff'd*, 639 F.3d 1102 (D.C. Cir. 2011).

I. THE COURT PROPERLY VACATED THE REGULATION UNDER *CHEVRON* STEP ONE

A. The Court Granted Plaintiff's Motion For Summary Judgment That Requested Vacatur

The necessary premise of the intervenors' motions is that the Court has vacated the challenged regulation, 11 C.F.R. §104.20(c)(9). Plaintiff agrees with that premise. The Court's Order and accompanying Memorandum Opinion granted Plaintiff's motion for summary judgment without qualification, citing Docket Number 20. (*See* Dkt. Nos. 47, 48, 49.) In that motion, Docket Number 20, Plaintiff expressly moved 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. . . . [and] to retain jurisdiction until the Court's judgment is satisfied." (Van Hollen Motion for Summary Judgment [Dkt. No. 20] at 35-36.) The Court denied defendant FEC's cross-motion for summary judgment, which had asked the Court not to vacate the challenged regulation if the Court found it unlawful. (*See* FEC Motion for Summary Judgment [Dkt. No. 25] at 43.) It follows that the Court granted the relief requested in Plaintiff's motion—remand with vacatur—and denied the FEC's request not to vacate the regulation.

B. Vacatur Is The Appropriate Remedy When A Court Invalidates An Agency Regulation Under *Chevron* Step One

As CFIF recognized in its motion for summary judgment, vacatur is presumptively appropriate when a court concludes that a regulation fails under *Chevron* Step One. (*See* Dkt.

No. 33 at 20 (citing *Emily's List v. FEC*, 581 F.3d 1, 25 (D.C. Cir. 2009); *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990))); *see also Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78-79 (D.D.C. 2010) (citing cases for proposition that "both the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA"); *but see Shays v. FEC ("Shays I")*, 337 F. Supp. 2d 28, 130 (D.D.C. 2004).

Indeed, remand without vacatur would produce an entirely illogical result. *See, e.g.*, *Fox Television Stations, Inc., v. FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002) (affirming vacatur of rule where low probability that Commission would be able to justify retaining the rule and disruption caused by vacatur would not be substantial); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1086 (D.C. Cir. 2001) (vacating agency action where government had failed to defend its action on prior remand); *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997) (vacating rule where there was little prospect of agency being able to readopt the regulation with a more adequate explanation). In light of the Court's *Chevron* Step One ruling, the FEC cannot on remand simply offer a new rationale for the stricken regulation, 11 C.F.R. § 104.20(c)(9); it must promulgate new disclosure regulations consistent with the Court's order and the plain language of the Bipartisan Campaign Reform Act ("BCRA").

Thus, vacatur was the appropriate remedy here.

II. THE PUBLIC INTEREST WILL BE HARMED BY A STAY

The public interest is a uniquely important consideration in evaluating a request for the extraordinary remedy of a stay pending appeal. *See In re Special Proceedings*, 2012 WL 859578, at *5*; see also Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 77 (D.D.C. 2008) (denying stay pending appeal of decision that requirements under Lobbying Disclosure Act were constitutional). As the Court recognized, the stricken regulation "does not comport with the

Congressional purpose and intent behind campaign finance legislation: to expose the parties behind the communications to the light." (Mem. Op. [Dkt. No. 48] at 28 n.13.) Granting a stay and allowing the unlawful regulation to remain in place would thwart what the Court correctly found was Congress's plain intent in enacting BCRA § 201, codified at 2 U.S.C. § 434(f), thereby depriving the public of crucial information to which it is entitled under the law.

As the record reflects and defendant FEC has conceded, the disclosure mandated in plain language by BCRA § 201 has sunk to an all-time low. In 2010, persons making electioneering communications disclosed the sources of less than 10 percent of their $79.9 million in electioneering communication spending. *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. The ten persons that reported spending the most on electioneering communications (all of them not-for-profit corporations) disclosed the sources of a mere five percent of the money spent. *Id*. Of these ten not-for-profit corporations, only three disclosed any information about their funders. *Id*.

Longstanding Supreme Court precedent recognizes the strong public interest in campaign finance disclosure. As the Court held in *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), disclosure requirements "deter actual corruption and avoid the appearance of corruption." For such reasons, the Court has consistently upheld campaign finance disclosure provisions, such as BCRA § 201. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010); *McConnell v. FEC*, 540 U.S. 93, 201-02, 124 S. Ct. 619 (2003); *Buckley*, 424 U.S. at 67. Indeed, the Court has said that the disclosure requirements of BCRA § 201 serve an important public function because they provide the electorate with information about the sources of election-related spending and help citizens "make informed choices in the political marketplace." *Citizens United*, 130 S. Ct. at 914

(quoting *McConnell*, 540 U.S. at 197 (internal quotation marks omitted)). The Court in *Citizens United* specifically noted the problems that result when groups run ads "while hiding behind dubious and misleading names." *Id.*[1] Contrary to what the intervenors argue, disclosure requirements "do not prevent anyone from speaking," but they do serve the interests of "transparency," accountability, and promoting informed decision-making by voters. *Id.*[2]

III. INTERVENORS' HAVE NOT MET THEIR HEAVY BURDEN IN SEEKING THE EXTRAORDINARY REMEDY OF A STAY PENDING APPEAL

A. Likelihood Of Success On The Merits

The intervenors have not persuasively demonstrated that they have a substantial likelihood of success on appeal. CFIF and HLF largely rehash the same arguments the Court rejected in its fully and correctly reasoned March 30, 2012 Memorandum Opinion. Repetition has not made those arguments any stronger. Because the intervenors have provided "no new information, authority, or analysis," there is "no basis to conclude" that they have demonstrated a sufficient probability of success on the merits. *In re Special Proceedings*, 2012 WL 859578, at

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[1] CFIF erroneously argues that there is a substantial likelihood that an appellate court could find that the holding in *Citizens United* does not dispose of the First Amendment arguments it has presented because, it is contended, *Citizens United* applies only to the disclosure requirements as limited by the FEC regulation. There is no express or implied support for that contention in the Supreme Court's opinion. When the Court referred to disclosure of "certain contributors," it cited the statute, 2 U.S.C. § 434(f)(2), not the regulation, 11 C.F.R. § 104.20(c)(9). *Citizens United*, 130 S. Ct. at 914. The statute already contains a limitation warranting the phrase "certain contributors" by only requiring disclosure of those that give $1,000 or more (or under the segregated account option—those that give $1,000 or more to that account). *See* 2 U.S.C. § 434(f)(2)(E) & (F). Nor did the Government's brief contend that BCRA § 201's constitutionality turned in any way on the loophole-opening effect of the challenged regulation. Brief for Appellee, No. 08-205, 2009 WL 406774, at *40-41 (Feb. 17, 2009).

[2] Polls show that the public overwhelmingly supports disclosure for outside spending groups. For example, according to a *New York Times* article on a *New York Times/CBS News* poll released on October 28, 2010, Americans overwhelmingly "favor full disclosure of spending by both campaigns and outside groups." *See* Megan Thee-Brenan, *Americans Want Disclosure and Limits on Campaign Spending*, *available at* http://thecaucus.blogs.nytimes.com/2010/10/28/americans-want-disclosure-and-limits-on-campaign-spending/.

*2. Rather than refuting intervenors' arguments by repeating what is already in the record, Plaintiff respectfully relies on his briefs and argument on the cross-motions for summary judgment and the reasoning in the Court's opinion.

CFIF argues that the presence of a novel question of law weighs in favor of finding that it has satisfied its burden of demonstrating a substantial likelihood of reversal on appeal. (CFIF Mot. at 2.) While the Court noted that this case presents "what appears to be the novel question of whether an agency may promulgate regulations that narrow a statutory provision for the stated purpose of curing a perceived ambiguity or change in the statute's reach that was created by new legal precedent" (Mem. Op. at 1), the Court did not say that the question was a close one. Rather, it found that the question was readily answered by application of the *Chevron* doctrine. (*See, e.g.*, *id*. at 2, 19, 31.)

B. Irreparable Harm

To justify the extraordinary remedy of a stay, a showing of irreparable harm is crucial. *See Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985); *F.T.C. v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81, 86 (D.D.C. 2010) (denying stay where defendant failed to identify clearly irreparable harm), *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011). CFIF claims that compliance with the disclosure requirements would impose a heavy burden and result in "First Amendment harm." (CFIF Mot. at 8.) But the Supreme Court has rejected such arguments. Disclosure requirements might be unconstitutional as applied to a specific organization but only if that organization has demonstrated "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United,* 130 S. Ct. at 916. Neither CFIF nor HLF has made such a factual showing. (*See* Mem. Op. at 30.) Thus, the intervenors fail to show how they will be irreparably harmed by denial of a stay. A stay would simply allow them to continue violating the plain language of BCRA § 201.

C. Harm To Other Interested Parties

Plaintiff, on the other hand, will suffer harm if the Court stays its mandate. *See Shays v. FEC ("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). Plaintiff and the rest of the voting public will be harmed because disclosure of important campaign-related information mandated by the plain language of BCRA will not be made. (*See* Mem. Op. at 12; *see also* Declaration of Representative Chris Van Hollen [Dkt. No. 20-1] at ¶ 5.)

D. The Public Interest

As addressed, *see supra* Section II, a stay would injure the public interest by depriving the citizenry of relevant and useful election-related information which serves important and accepted First Amendment values.

CONCLUSION

For these reasons, intervenors' motions for stay should be denied.

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