UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, and CENTER FOR INDIVIDUAL FREEDOM, Defendant, and HISPANIC LEADERSHIP FUND, Defendant.	Civ. A. No. 1:11-cv-00766 (ABJ)

DEFENDANT CENTER FOR INDIVIDUAL FREEDOM'S MOTION FOR STAY PENDING APPEAL

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Defendant Center for Individual Freedom, Inc. ("CFIF") respectfully requests this Court to stay its March 30, 2012, order (Doc. No. 47), as revised by its Amending Order (Doc. No. 49) and elaborated upon in its Memorandum Opinion (Doc. No. 48), pending final resolution of the appeal in this matter. CFIF is committed to pursuing an appeal, is discussing the notice of appeal with its co-defendants, and will file or join in such notice within the next week. Defendant Hispanic Leadership Fund supports CFIF's motion. Defendant FEC has not indicated its position. Plaintiff Van Hollen does not consent to a stay but has agreed to respond to the motion by Friday, April 13, 2012.

In support of its motion, CFIF states as follows:

LEGAL STANDARD

In determining whether to grant a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). *See also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 & n.1 (D.C. Cir. 1977); D.C. Cir. Rule 8(a)(1).

All "four factors have typically been evaluated on a sliding scale," *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (internal quotation marks omitted),[1] but the first two factors are the most important, *see Nken*, 129 S. Ct. at 1761.[2] The "[p]robability

[1] Although *Davis*, 571 F.3d at 1291, involved a preliminary injunction, the test for "a stay or injunction pending appeal is essentially the same." *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 & n.5 (D.D.C. 2005).

[2] Following the Supreme Court's decision in *Winter v. NRDC*, 555 U.S. 7 (2008), courts have been "unclear whether the 'sliding scale' is still controlling" or whether a somewhat different test applies. *In re Special Proceedings*, Misc. No. 09-0198, 2012 WL 859578, at *1

of success" element also "is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa." *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985). *See also CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 159 (D.D.C. 2009) (same).

To find a "strong showing" of likely success, a district court need not conclude that its ruling is probably wrong.[3] The movant "must show more than a mere possibility of success on appeal," *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 97 (D.D.C. 2010), but it is sufficient to show that "serious legal questions" present "a fair ground for litigation," *id.*; *Al-Adahi v. Obama*, 672 F. Supp. 2d 81, 83 (D.D.C. 2009) (quoting *Holiday Tours*, 559 F.2d at 844).

The presence of "novel and weighty" questions "squarely favors" a finding that the movant has satisfied the first element, *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 56 (D.D.C. 2009), as does litigation where the reviewing court is the "first court to interpret" a law, *Pan Am*

(D.D.C. Feb. 27, 2012). *See also Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (discussing circuit split); *Davis*, 571 F.3d at 1292. *But see Pan Am Flight 73 Liaison Grp. v. Dave*, 711 F. Supp. 2d 13, 34 (D.D.C. 2010) (continuing to apply "sliding scale" analysis after *Winter*). This Court need not decide the issue, however, because CFIF's showing independently satisfies each of the four factors.

[3] *See, e.g.*, *Al-Adahi*, 672 F. Supp. 2d at 83 (Kessler, J.) ("While the Court believes that the Memorandum Opinion speaks for itself in terms of how the case should be decided, it is true that it deals with complicated issues that represent 'fair ground for litigation and thus for more deliberative investigation.'") (citation omitted); *CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 161 (D.D.C. 2009) (Kollar-Kotelly, J.) ("although the Court cannot agree with CREW that there is a substantial likelihood that it will prevail on the merits of its appeal, the Court recognizes that the question . . . is a close one, and is not easily resolved by reference to the limited body of D.C. Circuit case law addressing the" general issue) (internal quotation marks omitted); *CREW v. Office of Admin.*, 565 F. Supp. 2d 23, 28 (D.D.C. 2008) (Kollar-Kotelly, J.) (a "court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, [ ] may grant a stay even though its own approach may be contrary to the movant's view of the merits.") (citation omitted); *Nader v. Butz*, 60 F.R.D. 381, 386 (D.D.C. 1973) (Jones, J.) (in granting stay, "the Court does not retreat from its earlier view [of what] is required under present law[, but rather] recognizes that the public interest will best be served by a fair and orderly disposition of the public controversy surrounding" the constitutional question).

Flight 73 Liaison Group v. Dave, 711 F. Supp. 2d 13, 37 (D.D.C. 2010) (explicitly finding that a "fair ground for litigation" exists). *See also In re Any and All Funds or Other Assets in Brown Bros. Harriman & Co. Account No. 8870792 in the Name of Tiger Eye Invs. Ltd.*, Civ. A. No. 08–mc–0807, 2009 WL 613717, at *1 (D.D.C. Mar. 10, 2009) (holding same). Moreover, the combination of a "novel" legal question and "irreparable harm" caused by a disclosure requirement justify a stay pending appeal, even where other factors cut against the stay. *Ctr. For Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003).

Where First Amendment rights are at stake, a substantial likelihood of success on the merits typically establishes all four elements necessary for preliminary relief, including the element of irreparable injury. *See Phelps-Roper v. Nixon*, 509 F.3d 480, 488-89 (8th Cir. 2007) (reversing denial of preliminary relief); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (collecting authority). This is because any loss of precious First Amendment freedoms is irreparable injury as a matter of law, *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *In re Sealed Case*, 237 F.3d 657, 665 (D.C. Cir. 2001) (public disclosure makes legal issues "effectively unreviewable"); *Branch v. FCC*, 824 F.2d 37, 40 (D.C. Cir. 1987) (quoting and applying *Elrod*),[4] and members of the public and the Government both share a vital interest in protecting First Amendment rights from threat. *See Phelps-Roper*, 509 F.3d at 485-86; *PETA v. Gittens*, 215 F. Supp. 2d 120, 134 (D.D.C. 2002); *Connection Distrib. Co.*, 154 F.3d at 288. Thus, a likelihood of success on a First Amendment claim generally satisfies all four preliminary injunction factors.

[4] This irreparable injury further lowers the necessary showing of the likelihood of success as explained previously in *Cuomo v. NRC*, 772 F.2d 972 (D.C. Cir. 1985), and *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 593 F. Supp. 2d 156, 159 (D.D.C. 2009).

The primary election season is well underway. Like many other organizations, CFIF has made plans to communicate its message to citizens in reliance on the existing rule. Staying the Court's March 30, 2012, order would preserve the status quo for all parties pending appellate review and, indeed, for thousands of other parties that, perforce, planned for this election on the basis of the FEC regulation issued in 2007 and not previously challenged. *See, e.g.*, *CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 161 (D.D.C. 2009) ("[u]nder this Circuit's precedent, [the] Court must consider the significance of the change from the status quo which would arise in the absence of a stay") (citing *Cuomo*, 772 F.2d at 976).

In this case, all four factors favor a stay, as CFIF now shows.

ARGUMENT

I. AN APPEAL HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS.

Several threshold factors indicate this is a case that presents a fair ground for litigation, including the following:

- First, as the Court's Memorandum Opinion points out (at 1-2), this case presents a "novel question" that no "authority . . . directly addresses." When the controlling rule must be divined from first principles, there always is more room for differing legal judgments.
- Second, the Memorandum Opinion turns on the conclusion that a specialized agency misconstrued the clear meaning of its own statute. Although agency views do not control at *Chevron* Step One, the fact that the FEC's considered judgment conflicts with the Court's is empirical evidence that informed opinion may differ, showing a fair ground for appellate review.

- Third, the Memorandum Opinion does not rest on factual findings or discretionary rulings to which an appellate court will owe deference. Instead, an appeal will involve unrestricted *de novo* evaluation of the controlling questions of law.

In addition to those threshold considerations, the Memorandum Opinion identifies a series of serious legal questions for appeal. *Baker*, 810 F. Supp. 2d at 97; *Al Maqaleh*, 620 F. Supp. 2d at 56. The Court wrestled with the difficult legal issues in preparing its lengthy Memorandum Opinion. Among those issues are the following:

- The statute defines "contribution" in terms of the giver's purpose, yet the Court ruled (Mem. Op. at 23-25) that the statute clearly does not allow a similar meaning for the terms "contributor" and "contributes" because the FEC chose not to rely upon the statutory definition in an earlier rulemaking or in this case. However, as CFIF showed in its summary judgment briefing, (i) an intervening Defendant is entitled to raise and rely on the statutory ambiguity,[5] and (ii) the FEC's rulemaking views do not affect whether the statute has a clear meaning and whether the challenged regulation may be invalidated at *Chevron* Step One.[6]

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[5] Having been granted intervention, CFIF now "becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985).

[6] Step One of the *Chevron* analysis turns on the statute's text, not on a term first employed in a subsequent regulation. The key phrase is the language of the statute: "contributors who contributed." Although "contributor" and "contributed" are not defined in the statute, they draw from the same root as "contribution." Courts regularly give the same meaning to noun and verb forms of the same term, *see, e.g.*, *United States v. Granderson*, 511 U.S. 39, 46 (1994), and the statute defines "contribution" in terms of the giver's relevant purpose – *i.e.*, "for the purpose of influencing any election for federal office." 2 U.S.C. § 431(8)(A)(i). The Supreme Court also has consistently referred to those who make a "contribution" under the statute as "contributors." *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (a "contribution" shows the "contributor's support" for a particular "candidate and his views"). Thus, a "contributor who contributed" is one who made a "contribution" as defined by the statute, which requires an election-influencing purpose.

- The Court ruled (Mem. Op. at 26-27) that the dictionary meaning of contributor and contribution means only putting money in a common pot without regard to the reason behind the donation. But giving for a common purpose is one meaning authorized by standard dictionaries, including the dictionary cited by Plaintiff.[7] This dictionary definition, of course, would reinforce the statutory meaning of "contributor" and "contributes" as just discussed.
- The Court ruled (Mem. Op. at 27-29) that constitutional considerations were not before the Court because the FEC had no authority to engage in constitutional adjudication. But the doctrine of constitutional avoidance is a traditional tool of statutory construction that the courts should apply in deciding whether the statute clearly forbade the FEC regulation.[8] If the courts find a statutory ambiguity on that basis, they would not invalidate a regulation resolving the ambiguity. At Step One of *Chevron*, it would not matter whether the agency identified that ambiguity.
- The Court also ruled (Mem. Op. at 29-30) that *Citizens United v. FEC*, 130 S. Ct. 876 (2010), eliminated any constitutional concerns about speech burdens imposed

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[7] *See* Concise Oxford English Dictionary 310 (11th ed. 2004) (to "contribute" is "to give in order to help achieve something.") (emphasis added); Webster's Third New Int'l Dictionary 496 (2002) ("contribute," *i.e.*, "to give or grant in common with others (as to a common fund or for a common purpose): give (money or other aid) for a specified object.") (emphasis added).

[8] The doctrine of constitutional avoidance is a traditional tool for ascertaining congressional intent at Step One of *Chevron* and provides a reasonable Step Two basis for agencies to exercise their discretion to minimize constitutional concerns. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988); *AFL-CIO v. FEC*, 333 F.3d 168, 175-79 (D.C. Cir. 2003) (constitutional avoidance may apply at either step of the inquiry in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)); *Diouf v. Napolitano*, 634 F.3d 1081, 1086 n.7 (9th Cir. 2011) (the doctrine is a "cardinal principle" of construction) (citation omitted); *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the doctrine reveals congressional intent). In this case, applying the constitutional avoidance doctrine at either step yields the same answer: the FEC's interpretation of the statute must be upheld to avoid serious First Amendment concerns raised by Plaintiff's construction.

by the statutory disclosure requirements or the accompanying regulation at issue here. However, an appellate judge could conclude that *Citizens United* was addressing the statutory disclosure requirements as limited by the FEC regulation and did not even consider, much less approve, the much broader and more burdensome disclosure obligations that result from the statutory construction adopted by this Court.[9]

- For the reasons discussed at oral argument,[10] if the Court were to reach *Chevron* Step Two, it is extremely likely that the FEC's regulation would be upheld. Thus, when viewed as a whole, CFIF's "probability of success" on its summary judgment motion is particularly strong.
- Under the Court's ruling, the disclosures required of an organization making electioneering communications are actually broader and more invasive than if the organization were making independent expenditures to expressly advocate the election or defeat of a candidate. *Compare* 2 U.S.C. § 434(c)(2)(C) *with* 2 U.S.C.

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[9] Citing the very FEC regulation at issue here, the Government's brief in *Citizens United* explained that disclosure was limited to "the amount spent on the advertisement and any large contributions earmarked to underwrite it." Brief for Appellee at 30, 39, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), *available at* http://fec.gov/law/litigation/citizens_united_sc_08_fec_brief.pdf (emphasis added); *see also id.* at 30 (noting that Citizens United only disclosed funds "made or pledged for the purpose of furthering the production or public distribution of" the electioneering communication). Rather than question its validity, *Citizens United*, 130 S. Ct. at 914, 916, held that the required disclosure of "certain contributors" – i.e., those contributing large, "earmarked" amounts as explained by the Government – was a constitutional and "effective disclosure" regime. Brief for Appellee, *Citizens United v. FEC*, at 39.

[10] "[THE COURT]: Well, I think the fundamental question I have to answer here is the question I started with at the beginning, which is the Chevron I question, because I think that question is ultimately, while I understand that your Chevron I arguments also go to your Chevron II objection to the statute, once you get to Chevron II your burden is much higher because of the level of deference. So the Chevron I decision is close to being the outcome determinative decision, or it may very well be the outcome determinative decision." Tr. at 73:1-10 (emphasis added).

> § 434(f)(2)(F). An appellate judge might think it is highly unlikely that Congress intended to require heightened disclosures from organizations whose speech is less connected to an election, and even if it did, Congress has not justified such differential treatment.

In sum, this case called upon the Court to exercise its judicial judgment to resolve a series of legal issues that provide "a fair ground for litigation" and review by the Court of Appeals. The ultimate question was, as the Memorandum Opinion observed, novel and not directly addressed by any precedent. In these circumstances, it would suggest no lack of confidence in its own ruling for this Court to acknowledge that the legal issues here present "serious legal questions" that provide a "fair ground" for appeal. *Baker*, 810 F. Supp. 2d at 97 (citing *Holiday Tours*, 559 F.2d at 844).

II. THE STAY WILL PREVENT IRREPARABLE HARM.

The Memorandum Opinion recognizes (at 7) that the FEC adopted the challenged regulation because "compliance with the disclosure requirements would impose a heavy burden on corporations and labor organizations." Those burdens result in First Amendment harm. *See* Electioneering Commc'ns, 72 Fed. Reg. 72899, 72901 (Dec. 26, 2007). Vacating the FEC regulation will, of course, expose CFIF and other speakers to that "heavy burden" if they engage in the core political speech that triggers the statute.

The FEC's view is fully supported by the Supreme Court. In *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), the Court held that compelled disclosures of the type required by the underlying statute "can seriously infringe on . . . the First Amendment." *See also Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 & n.6, 357 (1995). Speech about how we are governed and who governs us "occupies the highest rung . . . of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131

S. Ct. 1207, 1215 (2011) (citation omitted); *see also Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters"); *Liberty Lobby, Inc. v. Person*, 390 F.2d 489, 491 (D.C. Cir. 1968) ("[E]very person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."). The First Amendment does not merely forbid outright bans. Instead, if a "statute's practical effect may be to discourage [such] protected speech," that is "sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality opinion); *see also AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003); *Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986).

The right is not absolute, but in its seminal *Buckley* decision, the Supreme Court held that, because "compelled disclosure, in itself, can seriously infringe on . . . the First Amendment," disclosure laws such as those at issue here must survive "exacting scrutiny," 424 U.S. at 64. Such exacting scrutiny demands "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66); *see also Doe*, 130 S. Ct. at 2811.

Because the primary election season already is under way, injury to speech and associational rights already is occurring. CFIF and similar organizations that will not accept the threatened disclosure burdens cannot plan for speech that, unless relief is granted, will be self-censored and suppressed. *See* Decl. of Jeffrey A. Mazzella Supporting Mot. to Intervene, at ¶¶ 4, 7.[11] At worst, they stand silent. *Id.* at ¶ 7. At best, they are forced to divert resources that would have been devoted to electioneering communications to secondary messages and means of

[11] The Declaration of Jeffrey A. Mazzella Supporting [the] Motion to Intervene was originally listed on the Docket as Doc. No. 15-1. The document also is attached to this motion for the Court's convenience.

communication. *See id.* ¶ 3 (explaining that CFIF has a history of speaking out through print, telephone, and Internet communications, types of media not covered by the federal statute); Decl. of Jeffrey L. Mazzella Supporting Mot. for Stay Pending Appeal, at ¶ 3 (explaining that CFIF will now be forced to use forms of media "not as effective in communicating CFIF's messages").

Importantly, these First Amendment burdens were not evaluated by Congress and determined to be justified. To the contrary, when the underlying statute was adopted, ordinary corporations and labor unions were thought to have no right to engage in the types of speech that would trigger disclosure. Only in *Citizens United* did the Supreme Court make clear that such speech is as fully protected by the First Amendment as the speech of individuals.

Although the Court ruled (Mem. Op. at 23-28) that the plain language of the statute requires sweeping application, it did not find that Congress actually intended and evaluated the resulting burdens on constitutionally protected speech. The FEC is the only element of government to have evaluated the burdens of sweeping disclosure, and it found them to be unreasonable and excessive. Of course, the question of whether the FEC was legally authorized to implement its conclusion will be contested on appeal. But the fact remains that the only element of government to assess the burdens associated with sweeping application of the statute found those burdens to be serious and unjustified.

The Memorandum Opinion says (at 29-30) that *Citizens United* approved the disclosure statute and said that it served justifying purposes. However, as noted above, *see supra* at n.9, the Court was speaking of the statute as limited by the regulation that this Court now has ruled invalid. *See* Brief for Appellee at 30, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), *available at* http://fec.gov/law/litigation/citizens_united_sc_08_fec_brief.pdf (citing 11 C.F.R. § 104.20(c)(9) in explaining that disclosure was limited to funds "made or pledged for

the purpose of furthering the production or public distribution of" the electioneering communication). *Citizens United* did not purport to evaluate the burdens that the statute would inflict in the absence of the regulation or to find that such burdens are justified.

In short, the challenged regulation was intended to and did protect the core political speech of CFIF and other corporations and labor unions from serious burdens associated with disclosure. Unless the ruling invalidating that regulation is stayed, that injury will continue to occur and core speech and related association will be suppressed. Such First Amendment injury is irreparable as a matter of law.

III. A STAY WILL NOT HARM CONGRESSMAN VAN HOLLEN.

Congressman Van Hollen's claimed injury is that he "likely will be subjected to attack ads or other 'electioneering communications' financed by anonymous donors." Doc. 1, ¶ 11. But "Van Hollen is in a safe district in blue Maryland, removing any worries about re-election." Matt Mackowiak, *Mackowiak: The Political Winners of 2011*, Roll Call, Dec. 29, 2011, *available at* http://www.rollcall.com/news/matt_mackowiak_political_winners_2011-211282-1.html. *See also* Courtney Pomeroy, *Van Hollen, Timmerman Pick Up 8th District Victories*, Frederick News-Post, April 4, 2012 (noting that the 8th District is heavily Democratic, with 228,653 registered Democrats and only 126,169 registered Republicans). Indeed, Congressman Van Hollen has won re-election the past four election cycles with no less than 73% of the vote, thus making it very unlikely that outside organizations will make electioneering communications that reference Congressman Van Hollen.[12] There is therefore little likelihood that Plaintiff Van Hollen will be harmed by a stay.

[12] *See* Md. State Bd. of Elections, 2010 General Election Official Results, Representative in Congress, Congressional District 08, *available at* http://elections.state.md.us/elections/2010/results/General/StateResults_office_008_district_08.html; Md. State Bd. of Elections, Official 2008 Presidential General Election Results for

Moreover, in his capacity as a federal officeholder, Congressman Van Hollen also has an interest in assuring that First Amendment rights are fully respected and implemented. *See* U.S. Const. art. VI. This interest would further offset any claim of personal injury by Plaintiff Van Hollen.

IV. THE PUBLIC INTEREST FAVORS GRANTING A STAY.

There "is a very strong public interest in ensuring that fundamental constitutional issues are fully aired and carefully considered by the courts." Emergency Mot. for Stay Pending Appeal, *In the Matter of the Search of Rayburn House Office Bldg. Room Number 2113, Washington, D.C. 20515*, No. 06-3105 (D.C. Cir. July 20, 2006), available at http://www.scotusblog.com/archives/Jeff%20emergency%20stay%20mtn.pdf. This is because a "weighty public interest [exists] in ensuring that constitutional rights are vindicated," *Al Maqaleh v. Gates*, 620 F. Supp. 2d at 57, and "there can be no public interest in enforcing an unconstitutional law," *Nat'l Black Police Ass'n v. Dist. of Columbia Bd. of Elections and Ethics*, 858 F. Supp. 251, 263 (D.D.C. 1994). *See also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights"); *PETA*, 215 F. Supp. 2d at 134 ("the public interest favors a preliminary injunction whenever First Amendment rights have been violated"). The public interest is equally "served

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Congressional District 08, Representative in Congress, *available at* http://elections.state.md.us/elections/2008/results/general/congressional_district_08.html; Md. State Bd. of Elections, Official 2006 Gubernatorial General Election Results for Representative in Congress, *available at* http://elections.state.md.us/elections/2006/results/general/office_Representative_in_Congress.html; Md. State Bd. of Elections, 2004 Presidential General Official Results, County Breakdown, Representative in Congress, *available at* http://elections.state.md.us/elections/2004/general/congress.html.

by ensuring that [a party's] First Amendment rights are not infringed before the constitutionality of [a] regulation has been definitively determined," particularly where "Congress did not specifically contemplate the First Amendment implications when formulating its statute, much less whether the statute . . . might violate [the First Amendment]." *R.J. Reynolds Tobacco Co. v. FDA*, Civ. Case No. 11-1482, 2011 WL 5307391, at *10 (D.D.C. Nov. 7, 2011). Thus, the public interest factors also weighs decidedly in CFIF's favor.

CONCLUSION

For all of the reasons discussed above, the Court should grant Defendant CFIF's motion for a stay pending appeal.

April 5, 2012

Respectfully submitted,

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