ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-5016 & 15-5017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER VAN HOLLEN, JR.,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

CENTER FOR INDIVIDUAL FREEDOM,
Intervenor-Defendant-Appellant,

HISPANIC LEADERSHIP FUND,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia
No. 1:11-cv-00766-ABJ (Hon. Amy Berman Jackson)

REPLY BRIEF FOR APPELLANT CENTER FOR INDIVIDUAL FREEDOM

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
CFIF	Center for Individual Freedom
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
JA	Joint Appendix

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the addendum to our opening brief.

SUMMARY OF ARGUMENT

Section 30104(f)(2)(F) of the Federal Election Campaign Act (FECA) provides that speakers who spend more than $10,000 on electioneering communications must report to the Federal Election Commission (FEC) "all contributors who contributed" $1,000 or more. 52 U.S.C. § 30104(f)(2)(F). This Court held in 2012 that Section 30104(f)(2)(F), facially and using traditional tools of statutory interpretation, permits a purpose-based disclosure standard. JA385. In other words, the Commission can reasonably instruct speakers to disclose only those sources of revenue actually intended to bankroll electioneering communications.

Recycling his *Chevron*-step-one arguments, plaintiff Van Hollen nonetheless asserts that 11 C.F.R. § 104.20(c)(9)—the FEC's purpose-based interpretation—breaks with statutory text and structure. Those theories were rejected on the first appeal, however, and they cannot be rehabilitated. Similarly, Van Hollen claims that the rule frustrates Congress's purpose, but, like the district court, he wrongly elevates disclosure above all other legislative objectives. Even as envisioned by Van Hollen, moreover, congressional policy would not be better served by striking the Commission's purpose-based standard; it is undisputed that no other interpretation will yield meaningfully greater disclosure.

Van Hollen's arbitrary-and-capricious theories are equally flawed, all premised on substituting his own view of the record for the agency's. Because the Commission's decision followed from reasoned decisionmaking, the Court should reverse the district-court judgment on this score also.

ARGUMENT

I. The FEC Permissibly Determined that Corporations and Unions Making "Electioneering Communications" Must Report Only Those Sources of Revenue Given to Fund Electioneering Communications.

A. The FEC's rule is a reasonable interpretation of the Federal Election Campaign Act.

1. The rule is consistent with FECA's text.

Using "traditional tools of statutory construction," this Court held in 2012 that "the words 'contributors' and 'contributed'" in Section 30104(f)(2)(F) can "be construed to include a 'purpose' requirement." JA385. Like the district court, Van Hollen tries to will away that decision. He again argues that the reference to "*all* contributors" in Section 30104 permits "no limitation other than the threshold amount." Br. 28; Van Hollen Br. at 37, *CFIF v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (No 12-5117). Yet that cannot be squared with this Court's controlling decision.

Van Hollen now suggests that the problem with the Commission's "'purpose' test" is that it is too "narrow" to be supported by FECA's text. Br. 28. But that new argument is undeveloped and would subvert his entire theory of the

case. Van Hollen has unfailingly argued that Section 104.20(c)(9) should be vacated not because the purpose standard is wrong but because it exists at all. "[T]he language Congress enacted rules out a purpose requirement," he claims. Van Hollen Br. at 36, *Van Hollen*, 694 F.3d 108 (title case altered). This Court was right to reject that argument at *Chevron* step one, and Van Hollen cannot resurrect it now.

2. The rule fits with FECA's structure and legislative history.

FECA's structure reinforces the reasonableness of the Commission's interpretation. The Commission modeled Section 104.20(c)(9) on the related provisions that apply to express advocacy. This makes good sense. The Supreme Court has said the express-advocacy provisions satisfy "[t]he state interest in disclosure." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (*MCFL*). The Bipartisan Campaign Reform Act (BCRA) simply brought electioneering communications "'within the scope of [those] longstanding source and disclosure rules.'" CFIF Br. 4 (citation omitted).

a. Van Hollen's primary response is that the express-advocacy provision (Section 30104(c)(2)(C)) references donor purpose while the sibling provision for electioneering communications does not. Because Congress "included no such [purpose] limitation" for electioneering communications, he says, it must have

"act[ed] intentionally and purposely" to forestall a purpose-based standard. Br. 30-31 (citation omitted).

This is just another repackaged *Chevron*-step-one theory. *See* Van Hollen Br. at 28-29, *Van Hollen*, 694 F.3d 108. And "[w]hatever its general force," this canon has little purchase "in an administrative setting … ." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 211 (D.C. Cir. 2013) (citation omitted). "When interpreting statutes that govern agency action," this Court has "consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion.'" *Catawba Cnty., N.C. v. E.P.A.*, 571 F.3d 20, 36 (D.C. Cir. 2009) (per curiam) (citation omitted). "[T]hat Congress spoke in one place but remained silent" elsewhere "'rarely if ever'" justifies invalidating an agency's interpretation. *Id.* Tellingly, not one of the decisions Van Hollen cites involved *Chevron*-step-two review.

Section 30104 gives proof to the wisdom of these principles. While Van Hollen insists Section 30104(f)(2)(F) must have meant to prohibit a purpose-based standard, he does not explain why lawmakers would demand unprecedented disclosure for non-express political speech while preserving less intrusive requirements for explicit electoral advocacy. Van Hollen Br. 33-34. A more

reasonable construction is that Congress's silence as to donor purpose "signal[ed] permission rather than proscription." *Catawba Cnty., N.C.*, 571 F.3d at 36.

In fact, the Court has been down this road before, in *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999). In that *Chevron* case, the Court found it "highly persuasive" that a "neighboring part" of the statute codified the interpretive approach at issue, *id.* at 906. Despite thin distinctions, Van Hollen admits the necessary import of *Carlin*'s analysis: that "language in one section of a statute" can reasonably "inform" an agency interpretation of "related language in another section of the statute." Br. 31.

b. BCRA's sponsors agreed. Both before and after BCRA's enactment, they made clear that the disclosure provisions for electioneering communications were "just the types of rules" that have long applied to express advocacy. CFIF Br. 21-23 (collecting authority). Van Hollen writes off these representations as "selectively cite[d]," Br. 31 n.16, but the decade-long pattern of statements speaks for itself.

Doubling down, Van Hollen contends that the legislative history actually "refute[s]" the FEC's effort to fashion complementary rules for the two categories of speech. Br. 33. But legislative history does not "refute" agency interpretations at *Chevron* step two. *See Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012). In any case, Van Hollen misportrays BCRA's enactment history. Although

the disclosure provisions of federal campaign-finance law may have been "widely perceived to be ineffective" (Br. 33), it was not because the law required too little disclosure from speakers already within its compass (express-advocacy speakers). Rather, lawmakers wanted to expand the law to cover other types of speech, beyond just express advocacy. Van Hollen Br. 33; CFIF Br. 4. That is why, on the day BCRA passed the Senate, Senator McCain announced that the amendments would extend to electioneering communications "the same laws that have long governed" express advocacy. 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002). Read in full, the legislative history gives no indication that Congress intended to decouple Section 30104(f)(2)(F) from its express-advocacy counterpart.

c. Likewise without merit is Van Hollen's argument that Section 104.20(c)(9) is statutorily impermissible because it differs from the FEC's 2003 rulemaking. Br. 32-33. That rulemaking addressed reporting by natural and unincorporated persons and qualified nonprofit corporations, at the time the only speakers who could make electioneering communications. CFIF Br. 6, 11 n.1. Because the FEC foresaw that those speakers might report their "entire donor base," 67 Fed. Reg. 65,190, 65,209 (Oct. 23, 2002), Van Hollen argues that the more tailored standard for corporate and labor-union speakers fails *Chevron* step two.

That is not correct. Foremost, Van Hollen errs in claiming that inconsistency is grounds for invalidating an agency interpretation under the *Chevron* framework. "[I]nconsistency bears on whether the Commission has given a reasoned explanation for its current position"—an Administrative Procedure Act (APA) question—but "not on whether its interpretation is consistent with the statute." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 n.4 (2005).

Nor does the APA expose an agency's change in policy "to more searching review." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). Rather, "[i]t suffices that the new policy is permissible under the statute, that there are good reasons for it," and that the agency believes the new approach to be better, "which the conscious change of course adequately indicates." *Id.* at 515. Here, the Commission consciously implemented the disclosure rule for corporations and unions, aware it would differ from the rule governing other types of speakers. The Commission acknowledged "the current reporting rules for individuals, unincorporated entities, and qualified nonprofit corporations making [electioneering communications]." JA310; JA301 (similar). In the Commission's judgment, however, basing the law for corporations and unions on the express-advocacy standard "properly met" "the policy underlying the disclosure provisions of BCRA … ." JA311.

That the FEC did not simultaneously extend this policy to the universe of potentially regulated speakers does not change matters. Van Hollen Br. 32. For one thing, no participant in the rulemaking requested such a comprehensive overhaul. CFIF Br. 11. This is understandable; the 2007 rulemaking responded to a Supreme Court decision that affected corporations and unions only. JA300; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL II*). In the evolving field of campaign-finance law, the Commission thus did not need to "apply the policy reasoning in the [2007 rulemaking] to all types" of regulated parties. *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 1002. This is especially true of rules targeting corporations and unions, since (in 2007 at least) those entities occupied a unique place in FECA. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (explaining that "differing structures and purposes" justify "[t]he differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other").

3. The rule does not frustrate Congress's purpose.

The Commission's interpretation also honors Congress's purpose. In light of the "constitutional" concerns voiced during the rulemaking, JA301, the Commission weighed the burdens of compelled disclosure against the state interests to be served—"exactly the kind of agency balancing of various policy

considerations to which courts should generally defer." *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 408 (D.C. Cir. 1996).

a. Like the district court, Van Hollen maintains that the Constitution has no place in the Commission's policy judgment. That is incorrect. To start, the Commission did not "disclaim[]" FECA's constitutional dimensions by failing to "cite the First Amendment." Br. 46. Notwithstanding the lack of a Bluebook reference to "U.S. CONST.," there is no question First Amendment considerations predominated. JA301. *WRTL II*—the rulemaking's impetus—was a "First Amendment opinion[]" after all. 551 U.S. at 481 (Opinion of Roberts, C.J.).

Contrary to Van Hollen's view, moreover, the Supreme Court's decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, did not take the First Amendment off the table for Section 30104(f)(2)(F). Br. 47-48. Neither opinion suggested—much less held—that the Commission could implement that provision without tailoring means to end. *McConnell*, for example, upheld Section 30104(f)(2) against a facial challenge. 540 U.S. at 197-99. "Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack … ," *WRTL II*, 551 U.S. at 476 n.8 (Opinion of Roberts, C.J.), meaning that *McConnell* did not settle all First Amendment issues for all time, *McConnell*, 540 U.S. at 199.

Nor does *Citizens United* change matters (not least because it postdates the challenged rule by more than two years). The plaintiff in that case—a corporation making electioneering communications—claimed First Amendment immunity from any disclosure law whatsoever. Br. for Appellant at 51, *Citizens United v. FEC*, 558 U.S. 310 (No. 08-205). The Court rejected that argument but nowhere purported to mark the metes and bounds of Section 30104(f)'s reporting program. 558 U.S. at 368-70. Instead, all parties accepted that if the statute could constitutionally apply to the plaintiff, it would operate as construed by FEC rules—including Section 104.20(c)(9). Br. for Appellant at 3, *Citizens United*, 558 U.S. 310; Br. for Appellee at 30, 39, *Citizens United*, 558 U.S. 310. The point is not that the Supreme Court was "misled" in *Citizens United*, Van Hollen Br. 48, but that the Court considered only *whether*—not *how much*—disclosure could be demanded of electioneering-communication speakers. Like *McConnell*, *Citizens United* does not negate the Commission's duty to account for the Constitution in administering Section 30104(f)(2)(F).

Distilled, Van Hollen's real complaint is that the First Amendment should not matter when it comes to coerced disclosure; the Commission should have dismissed all burdens as irrelevant and held disclosure an end-point interest in itself. Br. 38-39. On the burden side, Van Hollen maintains that "Congress did not authorize the FEC to consider the issue of 'burden' or to promulgate regulations

that take 'burden' into account." JA324 (complaint); Van Hollen Mot. for Summ. J. 26 (Dist. Ct. Dkt. 20) ("'[B]urden' is not among the 'factors deemed relevant by the Act.'"). The district court embraced that idea unreservedly—"Congress did not call for narrow tailoring; it called for just the opposite"—but it is plainly wrong. JA447. When Congress has not spoken directly, the FEC must always "tailor" its policies "to avoid unnecessarily burdening … First Amendment rights … ." *AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003).

As for state interests, Van Hollen argues that, because Congress must have wanted more disclosure, unlimited disclosure is necessary. But Congress did not (and constitutionally could not) pursue disclosure "to the *n*th degree." *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012). In the context of independent political speech, the government's interests extend only so far as disclosure "helps voters to define more of the candidates' constituencies." *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (per curiam). The Supreme Court's decision in *MCFL*—which Van Hollen cites for the opposite proposition (Br. 39)—illustrates the point. 479 U.S. at 262; *see infra* 12.

Van Hollen nonetheless claims a "broader" state interest, one reaching *any* "sources of funding of electoral messages" regardless of whether the data informs voter decisionmaking. Br. 38. Yet that proves too much: If it were true, business customers, investors, and union members—all "sources of funding"—could expect

to see their names on FEC reports. Even Van Hollen thinks that is a bridge too far. Br. 42. But having conceded that the line between material and immaterial revenue data must be drawn somewhere, he fails to explain why setting the line at donor purpose was not a reasonable policy choice. *Cf. Nat'l Shooting Sports Found., Inc.*, 716 F.3d at 214 ("An agency has 'wide discretion' in making line-drawing decisions … ." (citation omitted)).

b. Van Hollen's claims of "massive evasion" are equally flawed. Br. 25, 45-46. Indeed, the Supreme Court rejected this same theory in the related context of express-advocacy reporting. *MCFL*, 479 U.S. at 262. Like Van Hollen, the Commission in *MCFL* argued that the express-advocacy disclosure laws "would open the door to massive undisclosed political spending." *Id.* The Supreme Court "s[aw] no such danger." *Id.* Disclosing those "contributors who ... intended to influence elections," the Court said, "provide[s] precisely the information necessary to monitor [a speaker's] independent spending activity and its receipt of contributions." *Id.*

More fundamentally, Van Hollen still does not dispute that no other interpretation of Section 30104(f)(2)(F) will achieve meaningfully greater disclosure than the FEC's rule did. As CFIF has discussed, the parallel, purpose-based standard governing express advocacy remains "unaffected by the *Van Hollen* litigation." Kenneth Doyle, *D.C. Circuit Panel Set to Hear Arguments In Political*

Ad Disclosure Case on Sept. 14, Bloomberg BNA Money and Politics Report (June 6, 2012). Thus, victory for Van Hollen promises little if any greater disclosure. As they did after the district court's first judgment, electioneering-communication speakers will instead "switch[] to running explicitly political ads" and continue reporting only their election-specific backers. Matea Gold, *Appeals Court Ruling Lets Donors Stay Secret*, The Spokesman-Review (Sept. 19, 2012).

After four rounds of briefing, two district-court hearings, and one appellate argument, Van Hollen still has no answer to this hard truth. Beyond tarring speakers' "motivations," he offers only that his lawsuit's futility should not excuse the FEC's "unreasonable interpretation." Br. 35. That misses the point. Even showing that an "agency's approach fails best to promote Congress' purposes" is not enough to invalidate an interpretation at *Chevron* step two. *Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (citation and emphasis omitted). Van Hollen falls short even of that mark. Without *any* interpretation that promises "be[tter] to promote Congress' purposes," *id.*, Van Hollen comes nowhere close to establishing that Section 104.20(c)(9) frustrates congressional policy.[1]

[1] As discussed in CFIF's opening brief (at 27-28), Van Hollen and the district court also erred in framing Congress's purpose to begin with. Van Hollen does not address this point.

B. The FEC's rule is the product of reasoned decision-making.

The district court also should not have invalidated Section 104.20(c)(9) as arbitrary and capricious under the APA. In promulgating the rule, the FEC sought to tailor the privacy and administrative burdens associated with forced disclosure to the state interests to be served. In the Commission's judgment, its course "properly met" the "policy underlying the disclosure provisions of BCRA," JA311, and the district court should not have upset that decision. Van Hollen nonetheless repeats the district court's primary errors. Inverting the presumption of regulatory validity, he ignores Circuit precedent and holds the Commission to impossible standards of explanatory detail and empirical proof.

1. Like the district court, Van Hollen faults the Commission for taking account of burdens on the regulated community without calculating "what such costs entail, the magnitude of their impact, or how many entities those costs might affect." Br. 39. This sets the bar too high. "[A]n agency need not—indeed cannot—base its every action upon empirical data." *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005). Rather, the APA calls only for "a concise general statement of … basis and purpose," 5 U.S.C. § 553(c), which "certainly does not require the agency to supply specific and detailed findings and conclusions of the kind customarily associated with formal proceedings," *In re*

Surface Mining Regulation Litig., 627 F.2d 1346, 1353 (D.C. Cir. 1980) (citation omitted).

That standard is met here. The Commission detailed the "privacy interests" and administrative burdens that informed its choice to balance the costs of disclosure against competing state interests. JA301, JA311. Its statement "[i]ndicate[d] the major issues of policy that were raised … and explain[ed] why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve." *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987). This is not a close question. Reviewing the Commission's explanatory statement in its first ruling, the district court identified all the relevant policy considerations with ease. JA353.

There is likewise no merit to Van Hollen's contentions that the Commission's "'burden' rationale" lacked factual support. Br. 39. Van Hollen complains that the commenters who addressed the issue—all "self-serving"—offered limited "facts, data, or examples." Br. 41. This argument suffers from numerous difficulties. Foremost, Van Hollen invites this Court to serve as primary factfinder, even though factual support for an informal rulemaking is reviewed only for "substantial evidence." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (explaining that arbitrary-and-capricious standard incorporates substantial-evidence inquiry).

That standard is met if a "'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (citation omitted). Here, numerous commenters wrote and testified about the burdens that would follow from untailored disclosure laws—heightened compliance costs, reduced donor support, and intrusion on supporters' associational privacy. CFIF Br. 8-9, 33-37. The FEC's concerns about the burdens of forced disclosure were amply supported.[2]

Moreover, notwithstanding Van Hollen's allusion to "facts" and "data," Br. 41, "[t]he APA imposes no general obligation on agencies to produce empirical evidence," *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). That is particularly true where, as here, an agency addresses "'legislative' and policy questions." *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1093 n.11 (D.C. Cir. 1979). Given the nature of the rulemaking, "[t]he Commission was entitled to rely on … representations by parties who were uniquely in a position" to offer insights on the costs of overbroad disclosure laws. *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1125 (D.C. Cir. 1984) (per curiam).

Van Hollen's qualms about commenters' "self-serving" motives are similarly misplaced. Br. 41. Unavoidably, most commenters in rulemakings are

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[2] Van Hollen insists that the Commission "was not free" to recognize First Amendment associational interests at all. Br. 41 n.18. That is wrong. *Supra* 9-12; CFIF Br. 23-26.

interested parties, and this is not a case where the agency accepted submissions "uncritically." *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1125. To the contrary, the Commission rejected the regulatory alternative advocated by many "commenters who expressed concerns about … burdens." JA427; JA301. At base, "an agency's credibility decision normally enjoys almost overwhelming deference … ," *Sasol N. Am. Inc. v. N.L.R.B.*, 275 F.3d 1106, 1112 (D.C. Cir. 2002), and both Van Hollen and the district court erred in substituting their own views for those of the Commission.

Of course, all this distracts from a more obvious point: Van Hollen's tacit concession that nothing in the administrative record controverted the material on which the Commission relied. Br. 41 n.19. This imbalance in the record is highly relevant. The notice-and-comment process depends on interested parties' "bring[ing] relevant information quickly to the agency's attention." *Chamber of Commerce of U.S.*, 412 F.3d at 142 (citation omitted). Without any "contradictory evidence," *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002), the Commission was entitled to rely on its expertise and to credit stakeholder comments about the burdens of mandated disclosure, CFIF Br. 36-37.

2. For similar reasons, the Commission did not misstep in trying to align Section 104.20(c)(9) with those sources of revenue most closely tied to electioneering communications. Van Hollen again presumes a stricter standard of

review. In his view, the Commission propounded insufficient "evidence" and "findings" to establish that general-support donors might not intend to underwrite the electioneering communications of nonprofit organizations. Br. 37. But that argument fails for reasons already discussed: Stakeholders addressed this issue explicitly, CFIF Br. 10, and no commenters disagreed.

In any case, the point is self-evident and could have been the subject of "informed conjecture" even without record support. *Chamber of Commerce of U.S.*, 412 F.3d at 142. *MCFL*, Van Hollen's lone authority, does not counsel otherwise. As his quoted passage makes clear, so-called *MCFL* corporations were unique *because* they were "political organization[s]." *MCFL*, 479 U.S. at 261. It makes sense that people who give to a political organization mean to bankroll the organization's "political purposes." *Id.*

Distorting that premise, Van Hollen extrapolates that all (or "most") not-for-profit organizations thus "share[] political purposes" with their donor bases writ large. Br. 37-38. That does not follow. Recall the American Cancer Society, for example. CFIF Br. 14-15. Or consider National Public Radio, whose institutional donors and pledging listeners certainly do not share a homogenous political purpose. *E.g.*, *NPR Annual Report 2014*, http://www.npr.org/about/annualreports/FY14_annualreport.pdf. Van Hollen's logic does not square even with *MCFL* itself. Notwithstanding its political-advocacy program, even Massachusetts

Citizens for Life did not need to report *all* its donors—just those who "intended to influence elections." 479 U.S. at 262.

3. Van Hollen advances a number of other arguments, all unconvincing. *First*, Van Hollen says the FEC should have better analyzed the segregated-account alternative. Again, this holds the Commission to a false standard. An agency "need not consider every alternative proposed nor respond to every comment made." *Nat'l Shooting Sports Found., Inc.*, 716 F.3d at 215. And the availability of segregated bank accounts was not a "significant problem[] raised by the comments." *Id.* For example, while one commenter testified that the accounts "shouldn't be undervalued," JA215, Van Hollen points to none who said the alternative must operate to the exclusion of the purpose-based disclosure standard later adopted. For obvious reasons, purpose-specific bank accounts are often not a "meaningful alternative" to general-treasury spending, JA311—a point the Commission noted but Van Hollen ignores, Br. 45; CFIF Br. 38 (discussing last-minute nature of electioneering-communication decisions). In fact, one of the few commenters who mentioned segregated accounts conceded that "[t]here might very well be a basis" for a purpose standard. JA255.

Second, Van Hollen assumes the Commission could "simply [have] clarif[ied]" which types of revenue were subject to reporting. Br. 43. But as the rulemaking illustrated, codifying categories of exempt revenue was hardly a

"significant and viable" solution. *Nat'l Shooting Sports Found., Inc.*, 716 F.3d at 215. Not only that, such a civil-code approach would have answered none of the constitutional objections of donors who did not intend to fund electioneering communications. CFIF Br. 40.

Van Hollen disregards these shortcomings, but his brief drives home the point. It is still a puzzle, for example, why he would exempt dues payments to labor unions (organized under 26 U.S.C. § 501(c)(5)) at the same time he would demand reporting of dues payments to trade associations (§ 501(c)(6)) and to civic leagues (§ 501(c)(4)) as well as general-support donations to charities (§ 501(c)(3)). Br. 42-43; CFIF Br. 39. Given the potential for these arbitrary distinctions, it is not surprising that the lead commenter to mention a codification approach also gave a nod to the purpose-based standard ultimately adopted. JA164 ("[W]hatever public purposes are served by … disclosure are served by revealing only the actual 'contributors' or 'donors' for that purpose.").

Third, Van Hollen argues that the FEC unreasonably promulgated Section 104.20(c)(9) because *WRTL II* did not "require[]" the agency to do so. Br. 36. Even though "*WRTL II* did not pass on FECA's reporting laws," CFIF Br. 32, the Commission acted reasonably in responding to "changed factual circumstances," *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981.

II. The FEC's Notice-and-Comment Process Was Sound.

Finding little support in *Chevron* and the APA, Van Hollen salts his footnotes with more forgiving standards. Setting aside the irregularity of these arguments, *CTS Corp. v. E.P.A.*, 759 F.3d 52, 64 (D.C. Cir. 2014), all are unavailing. For example, Van Hollen contends that the notice-and-comment "chronology" has an "impact upon ... the *State Farm* analysis." Br. 41 n.19 (quoting district court). But this Court disapproves couching "procedural challenge[s]" as "objection[s] to the reasoning underlying the substance of the Rule and not to the notice-and-comment process by which the Rule was promulgated." *Mary V. Harris Found. v. F.C.C.*, 776 F.3d 21, 27 (D.C. Cir. 2015).

Van Hollen also says it is "questionable" whether *Chevron* deference applies at all. Br. 26 n.13. If this remark qualifies as argument, it is forfeited by failure to properly raise it in the district court or on appeal, *Petit*, 675 F.3d at 782; it is barred by law of the case, *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995); JA385-86; and it is foreclosed by precedent, *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456 (D.C. Cir. 1991).

III. This Court Should Reverse the District Court's Remedial Order.

Because the FEC acted reasonably, this Court need not reach the issue of remedy. If the Commission's only error was not providing adequate explanation under the APA, however, Circuit law counsels remand without vacatur. This Court

has already reversed the district court's *Chevron*-step-one ruling, and Van Hollen still cannot identify any alternative interpretation that would better effectuate his vision of congressional intent. It is at least likely, therefore, that the same rule would be achievable on a remand.

Van Hollen asks this Court to review the district court's summary vacatur for abuse of discretion. Br. 49. But because the district court "gave no reasons at all" for its decision, there is nothing to review. *Primas v. District of Columbia*, 719 F.3d 693, 699 (D.C. Cir. 2013). In the ordinary course, that might counsel remand to the district court for explanation. *Id.* The question having been fully briefed in both courts, however, judicial economy would favor this Court's putting the matter to rest. *Cf. Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008).

The issue is all the more pressing because vacatur would leave the regulated community without guidance while magnifying constitutional concerns. Van Hollen assumes that the district-court judgment "restored the prior 2003 version of the regulation." Br. 50. Yet that is not correct, since the court vacated only one part of the 2007 amendments while leaving other, interlocking changes to the "2003 version" untouched. JA311. Nor would the pre-2007 regulations answer the constitutional problems that attend an intrusive disclosure regime unmoored from election-related state interests. CFIF Br. 43-44.

Van Hollen's fallback argument is that the regulation causes harm by not achieving "full disclosure." Br. 51. But this is another way of saying that the rule "does not go far enough," which is hardly "affirmative harm" counseling vacatur. CFIF Br. 44 (citation omitted). In any event, Van Hollen does not dispute that removing Section 104.20(c)(9) promises little, if any, added disclosure. In keeping with the rest of his case, vacating the rule would breed confusion and constitutional doubt while achieving none of the policy goals Van Hollen imputes to Congress.

CONCLUSION

For the reasons discussed above and in CFIF's opening brief, the district court's judgment should be reversed. CFIF adopts the Hispanic Leadership Fund's opening and reply briefs under Fed. R. App. P. 28(i).

Respectfully submitted,

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May 26, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations set forth in this Court's February 26, 2015 order because it contains 4,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 26, 2015

/s/ Thomas W. Kirby
Thomas W. Kirby

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Thomas W. Kirby
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