United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5117 **September Term 2011**

1:11-cv-00766-ABJ

Filed On: May 14, 2012

Christopher Van Hollen, Jr.,

Appellee

v.

Federal Election Commission and Hispanic Leadership Fund,

Appellees

Center for Individual Freedom,

Appellant

Consolidated with 12-5118

BEFORE: Henderson,* Rogers,** and Griffith, Circuit Judges

O R D E R

Upon consideration of the emergency motions for stay pending appeal, or in the alternative to expedite the briefing of the appeal; the combined opposition thereto; and the replies, it is

ORDERED that the emergency motions for stay pending appeal be denied. Appellants have not satisfied the stringent requirements for a stay pending appeal. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). It is

FURTHER ORDERED that the appeal be expedited and calendared for oral

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* Circuit Judge Henderson would grant the stay.

** Statement of Circuit Judge Rogers, joined by Circuit Judge Griffith, is attached.

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argument on the first appropriate date in September 2012, following completion of briefing. See 28 U.S.C. § 1657(a); D.C. Cir. Rule 47.2. The following briefing schedule and format shall apply:

Appellants' Joint Opening Brief (not to exceed 14,000 words)	June 20, 2012
Appendix	June 20, 2012
Appellee's Brief (not to exceed 14,000 words)	July 20, 2012
Appellants' Joint Reply Brief (not to exceed 7,000 words)	August 3, 2012

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Cheri Carter
Deputy Clerk

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ROGERS, *Circuit Judge*, with whom GRIFFITH, *Circuit Judge* joins: For the following reasons, the emergency motion for a stay pending appeal of the district court's order vacating the regulation promulgated by the Federal Election Commission in 2007, 11 C.F.R. § 104.20(c)(9) is denied. Appellants-intervenors have failed to make a "strong showing that [they are] likely to succeed on the merits" or to demonstrate that they "will be irreparably injured absent a stay." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation marks and citation omitted). Furthermore, the potential harm to appellee-plaintiff Van Hollen and the public interest factors in considering a request for a stay, *see id.*, fall on the side of denying the stay.

As a threshold matter, as the district court held, Van Hollen, a sitting Member of the House of Representatives who has stated his intention to seek reelection, has informational standing to challenge the FEC regulations. *See FEC v. Aikins*, 524 U.S. 11 (1998); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008); Van Hollen declaration ¶¶ 3-5 (Jun. 29, 2011). On the merits, intervenors fail to demonstrate a strong likelihood that the district court erred in interpreting, pursuant to *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), the plain text of section 201 of the Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 434(f)(2)(E) & (F), which requires that disclosures "*shall* contain . . . the names . . . of *all* contributors who contributed an aggregate amount of $1,000 or more to the person" purchasing "electioneering communications." 2 U.S.C. § 434(f)(2)(F) (emphasis added); *see also*, *id.* § (f)(2)(E) (regulating disbursements from segregated bank accounts).

Intervenors' chief contention is that a *Chevron* step one analysis is inappropriate because the legal landscape upon which Congress acted was altered when the Supreme Court struck — in *FEC v. Wis. Right to Life, Inc.* ("*WRTL*"), 551 U.S. 449 (2007), and later in *Citizens United v. FEC*, 130 S. Ct. 876 (2010) — a separate provision of BCRA, section 203, 2 U.S.C. § 441b, which banned corporate and union expenditures on "electioneering communications." Congress could not, intervenors contend, have expected that corporations and unions would be required to disclose all contributors because it had prohibited "electioneering communications" spending by corporations and unions. Congress, however, included a severability provision in BCRA, demonstrating an awareness that provisions of the statute may be held unconstitutional. *See* 2 U.S.C. § 454. The Supreme Court, in turn, has rejected the view that it gives "dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context," explaining in *Alexander v. Sandoval*, 532 U.S. 275, 287-88 (2001) (internal quotation marks and citation omitted), that the Court had "never accorded dispositive weight to context shorn of text. In . . . interpreting statutes [], legal context matters only to the extent it clarifies text." *Id.* at 288 (internal citations omitted). In light of the severability clause, nothing in the plain text of section 201 suggests Congress did not mean what it said — that section 201's

disclosure requirement applies to all contributors regardless of their subjective purpose in contributing. Moreover, prior to enactment of BCRA, all corporations were not barred from making "electioneering communications." *See McConnell*, 540 U.S. at 211 (citing *FEC v. Mass. Citizens for Life,* 479 U.S. 238 (1986)).

Intervenors' other contentions fare no better. Although the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. 92-225, defines "contribution" as payments "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8), this definition was enacted by a different Congress and is intended to reach a narrower scope of conduct. By definition, "electioneering communications" include more than just communications for the purpose of influencing elections for Federal office, *see id.* § 434(f)(3); *WRTL*, 551 U.S. at 457, and so understood, FECA's definition is inapplicable to BCRA § 201. And the ordinary meaning of "contribute" does not turn on purpose. (The hypothetical posed by counsel for plaintiff-appellee Van Hollen regarding a contribution to the Do-Re-Mi Music Festival is illustrative. *See* Hearing Tr. Jan 11, 2012 at 22-23, *Van Hollen v. FEC*, Case No. 11-0766, 2012 WL 1066717, at *15 n.12 (D.D.C. Mar. 30, 2012)). Although intervenors point to dictionaries referencing purpose, "the sort of ambiguity giving rise to *Chevron* deference is a creature not of definitional possibilities, but of statutory context." *New York v. EPA*, 443 F.3d 880, 884 (D.C. Cir. 2006) (internal quotation marks and citations from this court and the Supreme Court omitted). Congress was clear that *all* contributors of $1,000 or more are covered. *See* 2 U.S.C. § 434(f)(2)(F); *see also id.* (f)(2)(E). In a different subsection governing statements by non-political committees, enacted as part of FECA, Congress demonstrated that it knew how to limit its word choice based on the actor's purpose. *See id.* § (c)(2)(C) (requiring "the identification of each person who made a contribution . . . for the purpose of furthering an independent expenditure" to be disclosed). By contrast, in BCRA Congress evinced a clear intent *not* to limit section 434(f)(2)'s reach, and instead to cover *all* contributors of $1,000 or more.

This difference does not create a "structural absurdity," as intervenors contend. "A statutory outcome is absurd if it defies rationality[;] . . . an outcome so contrary to perceived social values that Congress could not have intended it." *Landstar Express Am. v. Fed. Maritime Comm'n*, 569 F.3d 493, 498-99 (D.C. Cir. 2009) (internal quotation marks and citations omitted). Congress could have rationally concluded that organizations expressly advocating for or against specific candidates are more ascertainable and accountable, and thus opted for greater disclosure of funding sources for more nebulous organizations that do not expressly advocate for or against specific candidates. The Supreme Court has already rejected intervenors' constitutional arguments, *see Citizens United*, 130 S. Ct. at 914-16, and the proffered evidence – e.g., the Solicitor General's brief – does not show that the Supreme Court's holding was limited by the

regulation vacated by the district court.

The Supreme Court's decision in *Citizens United* resolves the final three factors – whether intervenors will be irreparably harmed absent a stay, the potential harm to Van Hollen, and where the public interest consideration falls. Intervenors provided no evidence that their contributors "would face threats, harassment, or reprisals if their names were disclosed," *Citizens United*, 130 S. Ct. at 916, and thus they fail to demonstrate how the disclosure requirements "prevent [them] from speaking," *id.* at 914 (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). In any event, they are free to create a separate "electioneering communications" bank account funded by U.S. citizens or permanent residents if they wish to protect the anonymity of those who contribute for a purpose other than funding "electioneering communications," *see* 2 U.S.C. § 434(f)(2)(E). To the extent Van Hollen would be hampered, in the absence of full disclosure, in effectively responding to groups sponsoring "electioneering communications" mentioning him by name, a stay would cause him substantial harm. The Supreme Court upheld BCRA § 201, acknowledging that the public interest is best served by access to more, not less, information: "Disclosure [requirements are] justified . . . on the ground that they [] help citizens make informed choices in the political marketplace." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citations omitted); *see also SpeechNow.Org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).