UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, and CENTER FOR INDIVIDUAL FREEDOM, 917-B King Street Alexandria, Virginia 22314 Intervenor-Defendant.	)	Civ. A. No. 1:11-cv-00766 (ABJ)

MOTION TO INTERVENE OF
CENTER FOR INDIVIDUAL FREEDOM

The Center for Individual Freedom ("CFIF") hereby respectively moves for leave to intervene as a defendant. The Complaint in this case identifies CFIF by name, alleges that CFIF relies on unlawful regulations of the Federal Election Commission ("FEC") in exercising its First Amendment rights, but does not give CFIF the party status necessary for it to respond in order to protect its interests.

- Because CFIF is subject to and benefits from the regulation the Complaint seeks to invalidate with respect to its electioneering communications, and because the relief sought by the Complaint would directly and substantially burden CFIF's constitutionally protected right of free speech, CFIF has standing to intervene.

- Because CFIF claims legally protected interests that may as a practical matter be impaired or impeded by the relief sought, no existing party adequately represents its interests, and this motion is timely, CFIF is entitled to intervene as of right. Fed. R. Civ. P. 24(a)(2).
- Additionally, because CFIF has claims and defenses in common with the main action, permissive intervention is proper. Fed. R. Civ. P. 24(b)(1)(B).

CFIF's proposed Answer to the Complaint is attached.[1]

Introduction and Background

Plaintiff Congressman Chris Van Hollen seeks to invalidate a regulation, 11 C.F.R. § 104.20(c)(9), promulgated by the FEC pursuant to § 201 of the Bipartisan Campaign Reform Act ("BCRA"), which is codified at 2 U.S.C. § 434(f). According to his Complaint:

- The FEC adopted the regulation to limit the "burden on corporations" resulting from the exercise of their First Amendment right "to make expenditures for 'electioneering communications'" established by *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). (Compl. ¶¶ 1, 18, 23, 25.)
- The regulation "allow[s] corporations, including non-profit corporations, and labor organizations to keep secret the sources of donations they receive and use to make 'electioneering communications.'" (Compl. ¶ 1.)
- "[A]s a result of the regulation . . . Center for Individual Freedom, a § 501(c) corporation, spent $2.5 million in electioneering communications in the 2010

[1] CFIF conferred with Plaintiff and Defendant concerning this Motion. Counsel for Plaintiff refused consent. Counsel for Defendant declined to consent at this time and said Defendant would submit its final position to the Court. Plaintiff and Defendant have stipulated to proceed directly to motions for summary judgment based on the administrative record. *See* Dkt. No. 9, at 1-2. To ensure literal compliance with Rule 24 and Local Rule 7, CFIF attaches a proposed Answer, but it likewise is willing to proceed directly to summary judgment.

congressional elections, and disclosed none of its contributors." (Compl. ¶ 31; original emphasis.)[2]

- The Court should go beyond invalidating the regulation (e.g., as a claimed abuse of discretion) to declare that it is "contrary to law," order the FEC to take "further action consistent with such declaration," and "retain jurisdiction over this matter to monitor the FEC's timely and full compliance with this Court's judgment." (Compl. ¶ 37.) Thus, the Complaint seeks a mandatory injunction, with the extraordinary element of continuing judicial oversight, that would require the FEC not merely to amend its regulations but also compel it to implement BCRA § 201 in ways that would directly and substantially burden CFIF's public advocacy.[3]

Putting aside matters of characterization, tone, and legal conclusion, the Complaint's factual allegations relating to CFIF are generally accurate.[4] CFIF engages in public advocacy, including "electioneering communications" (i.e., broadcast speech in specified pre-election periods that mention federal candidates but do not expressly advocate their election or defeat, as more fully defined at 2 U.S.C. § 434(f)(3)(A)). In particular, during the 2010 congressional elections, CFIF exercised core First Amendment rights established by *WRTL* and expanded by

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[2] Although the Complaint here uses "contributors" to include "donors," this conflation ignores a settled legal distinction. The term "contribution" is defined by statute, 2 U.S.C. § 431(8)(A), and FEC regulation, 11 C.F.R. §§ 100.51-100.56, to mean only certain types of donations.

[3] Where a plaintiff chooses to seek extensive relief, a court "must consider whether such a result would harm the interests of the intervenor-applicants," even if such relief would be unusual. *County of San Miguel v. MacDonald*, 244 F.R.D. 36, 47 n.16 (D.D.C. 2007).

[4] At the pleading stage, a movant may rely on allegations. *Id.* at 45 n.15 (collecting authority). However, in addition to its proposed Answer, CFIF also attaches the Declaration of Jeffrey L. Mazzella attesting to the key facts on which this Motion rests.

Citizens United v. FEC, 130 S. Ct. 876 (2010), to spend and publicly report to the FEC approximately $2.5 million for electioneering communications that addressed issues of public importance and mentioned congressional candidates. The challenged FEC regulation authorized CFIF to speak in that fashion without risking disclosure of its sources of funding. Such disclosures would have directly and substantially burdened CFIF's core First Amendment rights in ways the challenged regulation is designed to prevent. As the Complaint implies by relying on CFIF's alleged conduct to justify prospective relief, CFIF plans to engage in similar speech in the future, provided that it continues to be protected by the challenged regulation.

The Complaint asserts that disclosing funding sources would not severely burden "most if not all corporations." (Compl. ¶ 25.) However, the Supreme Court has held categorically that such disclosure requirements are sufficiently burdensome to trigger First Amendment protection and subject the requirements to "exacting" judicial scrutiny. *Citizens United*, 130 S. Ct. at 914; *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (explaining that "we have repeatedly found that compelled disclosure, *in itself*, can seriously infringe" First Amendment rights and "must survive exacting scrutiny") (emphasis added). Moreover, such disclosures would be a severe burden for CFIF, which receives a substantial portion of its funds on condition that the donors will not be identified. CFIF frequently has litigated in federal court to protect its right to speak freely and without such burdens. *See infra* at 6.

CFIF Has A Right To Intervene

Federal policy favors the participation of "as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (noting "the greater impetus to intervention that inheres in administrative cases."). Over the years, federal intervention rules have been re-written "to liberalize the right to intervene in federal actions." *Nuesse*, 385 F.2d at 701. *See infra* at 6-9.

The present Rule 24(a) provides that "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." In implementing the Rule, courts consider four key factors. *See Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 12-13 (D.D.C. 2010); *County of San Miguel v. MacDonald*, 244 F.R.D. 36, 46-48 (D.D.C. 2007). The four factors are:

Timeliness: A motion to intervene must be timely. CFIF is moving to intervene at the very threshold of the case, before the administrative record has been compiled and before the FEC's response to the Complaint is due. By any test its motion is timely.

Interest: To intervene of right, the movant must identify a concrete interest that has some legal protection. CFIF has such a concrete interest in the protection it receives from the challenged regulation. *See Ctr. for Biological Diversity v. EPA*, No. 10-00985, 2011 WL 1346965, at *4-5 (D.D.C. Apr. 11, 2011) (beneficiaries of an existing regulation may intervene to defend it); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733-34 (D.C. Cir. 2003) (beneficiary of agency determination may intervene to defend it); *County of San Miguel*, 244 F.R.D. at 44-45 (same). The Complaint acknowledges and indeed relies upon this interest of CFIF's. (Compl. ¶ 31.)

Moreover, the regulation is designed to avoid undue burdens on CFIF's core First Amendment right to free speech. The Complaint recognizes that the First Amendment protects corporate electioneering communications. (Compl. ¶¶ 17-18.) Although the Complaint downplays the disclosure burden it seeks to impose, it acknowledges that the FEC expressed concern for that burden in crafting the regulation. (Compl. ¶ 23.) Moreover, the Supreme Court

has held that compelled disclosure of funding sources is a substantial burden on speech that is forbidden unless exacting judicial scrutiny is satisfied. *Citizens United*, 130 S. Ct. at 914-15; *Buckley*, 424 U.S. at 64.

CFIF repeatedly has litigated to protect its core speech from disclosure and other burdens. *See, e.g.*, *CFIF v. Carmouche*, 449 F.3d 655, 658 (5th Cir. 2006); *CFIF v. Ireland*, No. 1:08-00190, 2008 WL 1837324, at *7 (S.D.W.Va. Apr. 22, 2008); *CFIF v. Corbett*, No. 07-2792, 2008 WL 2190957, at *1 (E.D. Pa. May 5, 2008); *CFIF v. Madigan*, No. 1:10-cv-04383 (N.D. Ill. filed Jan. 18, 2011). These cases demonstrate that CFIF has a substantial interest in minimizing such burden that it is entitled to protect, and has acted to protect, through litigation. Similarly here, CFIF seeks to preserve concrete, legally protected interests under the First Amendment.[5]

Impairment of Interest/Standing: A movant also must show that the outcome of the litigation may cause some practical impairment of its interests.[6] However, the impairment need not be substantial, and even "stare decisis principles" adverse to the movant that could result from the case may "supply the practical disadvantage that warrants intervention as of right." *Nuesse*, 385 F.2d at 702; *see Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992) (relying on *Nuesse* to hold that a substantial *stare decisis* impact justifies intervention). Here, the threat of impairment is substantial and direct. Far from merely establishing adverse precedent, the

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[5] First Amendment interests regularly are found to be a proper predicate for intervention. *See, e.g.*, *Tarzai v. Oshry*, No. 2: 10-cv-793, 2011 WL 1326271 (S.D. Ohio Apr. 4, 2011); *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1160 (W.D. Wash. 2010); *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library*, 24 F. Supp. 2d 552, 556 (E.D. Va. 1998); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 411-12 (1979); *Younger v. Harris*, 401 U.S. 37, 39-40 (1971).

[6] The practical impairment required by the Rule does not mean that the intervenor must be legally bound by the case, and the ability to challenge an adverse result by separate litigation does not defeat intervention. *Nuesse*, 385 F.2d at 702 (noting that the present rule seeks to avoid a "fragmented" approach to litigation); *County of San Miguel*, 244 F.R.D. at 47.

Complaint seeks an order invalidating a regulation that applies to and protects CFIF with respect to disclosure and an order compelling the FEC to implement BCRA § 201 in a way that will render unlawful future conduct by CFIF that the regulation currently allows. That is more than a sufficient practical impairment to give CFIF the right to intervene. *See County of San Miguel*, 244 F.R.D. at 44-45; *Fund for Animals*, 322 F.3d at 731-33.[7]

Meeting the interest requirements of Rule 24(a)(2) also typically establishes standing. *See Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008). Conversely, establishing standing typically demonstrates the interest necessary for intervention of right. *County of San Miguel*, 244 F.R.D. at 46 (collecting authority). In this case, CFIF has standing because it: (a) faces a concrete injury-in-fact if the regulation is invalidated; (b) the injury will be traceable to such invalidation; and (c) the injury will be avoided if the regulation is upheld. *See id.* at 44 (stating elements of standing and collecting authority); *Ctr. for Biological Diversity*, 2011 WL 1346965, at *2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (stating elements of standing and noting that a litigant whose conduct is an object of the contested administrative action satisfies those elements); *Military Toxics Project v. E.P.A.*, 146 F.3d 948, 954 (D.C. Cir. 1998) (stating that where companies "are directly subject to the challenged Rule, and they benefit [from it]," they have "standing to intervene" as defendants). Just as CFIF has standing to challenge state statutes that impose disclosure burdens on its core speech, it has standing here to oppose the similar threat posed by the Complaint.[8]

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[7] *Compare Ctr. for Biological Diversity v. EPA*, No. 10-00985, 2011 WL 1346965, at *5 (D.D.C. Apr. 11, 2011) (explaining the "key difference" between cases finding a right to intervene to protect benefits from an agency "determination [that] had already been made" and cases finding no right to intervene to oppose an action to require an agency to consider whether or not to make a future determination that might or might not be adverse to the movant.) Here, CFIF seeks to preserve the benefits of an existing regulation.

[8] Indeed, CFIF's standing is far clearer and more concrete than the speculative interests asserted by Plaintiff Van Hollen. Plaintiff asserts that he "faces personal, particularized, and

Inadequacy of Representation: Finally, Rule 24 requires consideration of whether the existing parties to the case will adequately represent the would-be intervenor's interests. The American legal tradition favors allowing parties to litigate their own interests, rather than requiring them to rely on others. *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880 (2008) (cautioning against expansive concepts of virtual representation). Thus, the "burden [is] on those opposing intervention to show the adequacy of the existing representation." *Nuesse*, 385 F.2d at 702. Representation is presumed to be inadequate "unless it is clear that the party will provide adequate representation." *Fund for Animals*, 322 F.3d at 735-36 (quoting *United States v. AT&T*, 642 F.2d 1285, 1293 (D.C. Cir. 1980)).[9] If adequacy of representation is contested, a "minimal" potential for inadequacy will justify intervention. *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972); *Dimond v. D.C.*, 792 F.2d 179, 192 (D.C. Cir. 1986) (test is "not onerous").

Because the litigation interests of regulatory agencies typically differ from the interests of the entities they regulate, the D.C. Circuit has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736;

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concrete injury from" the challenged regulation. (Compl. ¶ 10.) But he does not identify any specific conduct he has engaged in or will engage in that was or is subject to the challenged regulation. Nor does he identify any specific past injury flowing from the regulation, much less how the lack of disclosure harms in a concrete way. He speculates that in potential future political campaigns, he possibly might be attacked by unspecified ads whose donors may not be disclosed because of the regulation, with the result that he possibly could be unable to respond to such hypothetical attacks by "drawing to the attention of the voters . . . the identity of persons who fund such ads," assuming that were a strategy he chose. (Compl. ¶ 11.) But electioneering communications are core political speech and one need not know the identity of those who funded a particular communication in order to respond to its *substance*. Indeed, the alleged need to know the particular identity of the donors is more closely related to possible threats of reprisal, harassment, or intimidation than any ability to respond in substance to the message at issue. *See Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010). He similarly speculates that he might in the future have some interest as a voter or citizen in disclosures withheld because of the challenged regulation. (Compl. ¶ 11.)

[9] A "shared general agreement" and "tactical similarity of . . . present legal contentions . . . does not assure adequacy of representation." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (collecting authority; quotation marks omitted).

County of San Miguel, 244 F.R.D. at 48 (collecting authority); *Atl. Sea Island Group LLC v. Connaughton*, 592 F. Supp. 2d 1, 7 (D.D.C. 2008); *Natural Res. Def. Council*, 561 F.2d at 912 (finding that because EPA is "broadly concerned with implementation and enforcement" while intervenors "are more narrowly focussed on the proceedings that may affect their industries," "EPA representation may not be adequate" and intervention of right was thus allowed).

Although CFIF supports retention of this particular FEC rule at issue, the general divergence of interests between the FEC and CFIF is acute. The FEC's "business is to censor" and otherwise regulate core First Amendment speech. *Citizens United*, 130 S. Ct. at 896; *see also AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) ("Unique among federal regulatory agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity."). CFIF, by contrast, stands foursquare against censorship and speech regulation, contending that every aspect of the FEC's activities, which all implicate core First Amendment activity, must be scrutinized under the First Amendment and permitted only if stringent constitutional standards are met. For example, CFIF contends here that the FEC was not merely allowed by BCRA to limit disclosure burdens on corporate speech, but that the First Amendment requires the FEC to craft the challenged regulation to impose no greater burden than necessary. (Proposed Answer ¶ 24.) The FEC did not make that argument in its Explanation and Justification for the challenged regulation. Nor does the FEC share CFIF's conviction that the First Amendment limits virtually all its actions.[10]

[10] In fairness, it often is difficult to be certain of the FEC's institutional views. The agency is comprised of six commissioners, three from each major political party, and it requires four affirmative votes to take any action. *See* 2 U.S.C. § 437c(c). The commissioners repeatedly have deadlocked 3-3, with the result that whatever the status quo happens to be at the point of a required vote prevails by default. *See* "Pattern of FEC Deadlocks Continues in Cases Involving Website, Disclaimers," *BNA Money & Politics Report* (June 6, 2011). The commissioners as a group do not attempt to provide ongoing oversight of agency litigation and the commissioners have deadlocked along party lines over whether to appeal adverse rulings. *See* Attachment to the Testimony of Trevor Potter, President and Gen. Counsel, Campaign Legal Ctr., Before the

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The Complaint here singles out CFIF by name, describing its core First Amendment activities, and asserting that they are contrary to federal statute. It seeks to invalidate the regulation on which CFIF has relied and to compel the FEC to implement an understanding of BCRA § 201 that will directly and substantially burden CFIF's core First Amendment rights. CFIF is entitled to intervene in this action to defend its interests, which are squarely at issue in this litigation.

Permissive Intervention

Although CFIF is entitled to intervene as of right, permissive intervention also is justified.[11] CFIF contends that the challenged regulation is legally authorized and valid. Thus, its position shares common questions of law and fact with the main case. Because CFIF's motion is timely, that commonality is sufficient. *See, e.g.*, *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 9-10 (D.D.C. 2007); *Duke Energy Field Servs. Assets, L.L.C. v. FERC*, 150 F. Supp. 2d 150, 153 (D.D.C. 2001). Moreover, CFIF brings to this action a different and important perspective – that of the speech-regulated community. In an action such as this that seeks to establish broad principles burdening the exercise of our most fundamental democratic rights, broad participation is particularly appropriate.

Senate Comm. on Rules and Admin., July 14, 2004, available at http://www.campaignlegalcenter.org/attachments/FEC_PROCEEDINGS/1271.pdf (last visited June 13, 2011).

[11] Where intervention of right is granted, the Court need not address permissive intervention. *See Fund for Animals*, 322 F.3d at 731.

Conclusion

For these reasons, CFIF respectfully submits that it should be granted leave to intervene as a party defendant and to file the attached Answer.

June 16, 2011

Respectfully submitted,

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