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NEWSLETTER

Wiley Rein LLP Wins *Van Hollen* Appeal, Vindicates First Amendment Rights in Advance of the 2012 Election

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On September 18, 2012, a federal appeals court in Washington, DC overturned a lower court ruling that had effectively silenced certain kinds of speech within 30 days of a primary or 60 days of a general election. The unanimous opinion from the three-judge appellate court overruled a March 30, 2012, decision by the U.S. District Court, which mandated that organizations disclose many of their general donors as a condition of speaking out about government policies in certain ways during these pre-election periods. Wiley Rein LLP represented the named appellant in the case, *Center for Individual Freedom v. Van Hollen*, and Wiley Rein attorney Thomas W. Kirby argued the case before the appellate court. Wiley Rein attorneys Jan Witold Baran, Caleb P. Burns and Andrew G. Woodson joined Mr. Kirby on the briefs.

The *Van Hollen* case concerned the Federal Election Commission's (FEC) authority to promulgate a regulation interpreting an electioneering communication disclosure requirement in the Bipartisan Campaign Reform Act of 2002 (BCRA). (An electioneering communication is a broadcast, cable or satellite communication that refers to a clearly identified candidate for Federal office, is made within 30 days of a primary election or 60 days of a general election and also is geographically targeted to the relevant electorate.) In 2007, citing both constitutional concerns and administrative burdens, the FEC promulgated a regulation construing BCRA to require tailored disclosure by entities making electioneering communications of donations that were "made for the purpose of furthering electioneering communications"—*i.e.*, funds earmarked by the donor

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for electioneering communications or given in response to a solicitation indicating that such funds would be used for electioneering communications. Two election cycles later, and despite the fact that none of his allies had raised this argument during the 2007 rulemaking, Representative Christopher Van Hollen (D-MD) filed suit in federal court, arguing that BCRA clearly and unambiguously prohibited the FEC from interpreting the statute in this manner. In Representative Van Hollen's view, Congress had so clearly intended to require broad-based and invasive disclosure of essentially all general donors to organizations that funded electioneering communications that the FEC had no legal authority to limit disclosure to contributions for the purpose of supporting electioneering communications.

The appellate court rejected this categorical position, explaining that the text of the statute did not "foreclos [e] any regulatory construction of the statute by the FEC." In particular, the court noted that significant changes to the legal landscape since the passage of BCRA—including the Supreme Court's recognition of the rights of corporations to make unlimited electioneering communications in *Citizens United v. FEC*, 558 U.S. 310 (2010)—meant that Congress likely had not even considered the question, much less formed a position on the scope of disclosure requirements post-*Citizens United*. Accordingly, the FEC was acting within its authority to promulgate a regulation on how the electioneering communication disclosure statute should be applied.

Because the FEC did not participate in the appeal (due to a 3-3 partisan deadlock among the commissioners on whether to authorize an appeal), the matter has been remanded back to the district court for further proceedings. In the months ahead, both the FEC and the district court will consider certain issues identified by the appellate court, including whether the regulation complies with other legal principles not addressed in the district court's opinion. In the interim, however, the FEC's 2007 regulation is now back in effect in advance of the general election this November.