ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 12, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5085

NATIONAL ASSOCIATION OF MANUFACTURERS,

Plaintiff-Appellant,

v.

HONORABLE JEFFREY TAYLOR, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR LEGISLATIVE DEFENDANTS-APPELLEES NANCY ERICKSON AND LORRAINE C. MILLER

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A. Parties and Amici

This appeal arises from a civil action in the district court, No. 08-CV-208. The plaintiff-appellant is the National Association of Manufacturers. The defendants-appellees are United States Attorney Jeffrey Taylor, Secretary of the Senate Nancy Erickson, and Clerk of the House of Representatives Lorraine C. Miller. No parties have intervened, either below or in this Court.

Wisconsin Manufacturers and Commerce, Inc., WMC Issues Mobilizations Council, the Iowa Association of Business and Industry, and the National Paint and Coatings Association have appeared as amicus curiae and filed a brief in support of plaintiff-appellant. The Campaign Legal Center, Democracy 21, and Public Citizen filed an amicus curiae brief in the district court supporting defendants-appellees, and have noticed their intent to file an amicus curiae brief in support of defendants-appellees in this appeal. The Citizens for Responsibility and Ethics in Washington also filed an amicus curiae brief in the district court supporting defendants.

B. Ruling Under Review

The ruling under review on this appeal, issued by District Judge Colleen Kollar-Kotelly on April 11, 2008, denied the National Association of Manufacturers' motion for judgment on the pleadings and dismissed the complaint. *National Association of Manufacturers v. Jeffrey Taylor, et al.*, — F. Supp. 2d —, 2008 WL 1390606 (D.D.C.).

C. Related Cases

This case was before this Court under the same case number on the National Association of Manufacturers' emergency motion for an injunction and stay pending appeal, filed on April 17, 2008. The Court denied that motion on April 21, 2008. This case was also before the Chief Justice of the United States (as Circuit Justice for the D.C. Circuit), No. 07A848, on the National Association of Manufacturers' emergency application for an injunction and stay pending appeal, filed on April 21, 2008. That application was denied that same day.

There are no related cases pending in this Court or in any other court.

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TABLE OF AUTHORITIES

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

Legislative Materials:

Miscellaneous:

GLOSSARY OF ABBREVIATED TERMS

App.	Appendix
FRLA	Federal Regulation of Lobbying Act ("FRLA"), title III of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 301-311, 60 Stat. 812, 839-42
HLOGA	Honest Leadership and Open Government Act of 2007 ("HLOGA"), Pub. L. No. 110-81, 121 Stat. 735
LDA	Lobbying Disclosure Act of 1995 ("LDA"), Pub. L. No. 104-65, 109 Stat. 691, codified at 2 U.S.C. §§ 1601-1612.
NAM	National Association of Manufacturers
NAM's Br.	Brief for Plaintiff-Appellant the National Association of Manufacturers

STATEMENT OF JURISDICTION

Plaintiff-appellant asserted jurisdiction below under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction, under 28 U.S.C. § 1291, over this appeal from the April 11, 2008 Order dismissing the complaint. Plaintiff-appellant filed a notice of appeal on April 16, 2008.

STATEMENT OF ISSUES

This appeal presents two issues:

1) Whether the District Court correctly held that 2 U.S.C. § 1603(b)(3), as amended by section 207 of the Honest Leadership and Open Government Act of 2007 ("HLOGA"), Pub. L. No. 110-81, 121 Stat. 735, does not violate the First Amendment on its face or as applied to the NAM; and

2) Whether the District Court correctly held that 2 U.S.C. § 1603(b)(3), as amended by section 207 of HLOGA, is not unconstitutionally vague.

STATUTES

The Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691, as amended by HLOGA, 2 U.S.C. §§ 1601-1614, is set forth in an addendum bound herewith. The NAM challenges amended section 1603(b)(3), and the definition of lobbying activities in section 1602(7), which are reproduced at pages 9a and 4a, respectively.

STANDARD OF REVIEW

The District Court's denial of the NAM's motion for judgment on the pleadings and its dismissal of the complaint as a matter of law is subject to *de*

novo review. *See Schuler v. PriceWaterhouseCoopers, LLP*, 514 F.3d 1365, 1370 (D.C. Cir. 2008).

STATEMENT OF THE CASE

A. Introduction

Congress has attempted for over 60 years to address the substantial pressure that organized interests employing professional lobbyists seek to exert on the public policy process. First in 1946, and again in 1995, Congress enacted comprehensive statutes requiring disclosure of lobbying contacts with government officials. Such disclosure sheds light on the organized interests that expend significant funds in trying to influence the legislative process and other government decisionmaking. Requiring the disclosure of lobbying activities serves two vital government interests – (1) providing information to the public and public officials about who is paying for and directing lobbying efforts and (2) avoiding the appearance of corruption.

In the Lobbying Disclosure Act of 1995, Congress mandated that registered lobbyists' employers ("registrants") disclose not only their client, but also any organizations that significantly fund the lobbying activities of their client and that "in whole or in major part" plan, supervise, or control those lobbying activities. *See* 2 U.S.C. § 1603(b)(3) (2000). Such disclosure sought to prevent evasion of the law's requirements by organizations shielding their lobbying activities behind another entity such as a coalition or association. After over a decade of experience under section 1603(b)(3), Congress amended

that provision as part of lobbying and other ethics reforms in HLOGA to augment disclosure of organizations that engage in an association's or coalition's lobbying activities. Specifically, HLOGA § 207 amended 2 U.S.C. § 1603(b)(3) to require disclosure of organizations that significantly fund the lobbying activities of an association or coalition and "actively participate[] in the planning, supervision, or control" of those lobbying activities.

The National Association of Manufacturers ("NAM") brought this suit claiming that 2 U.S.C. § 1603(b)(3), as amended, violates the First Amendment and is unconstitutionally vague. Although lobbying disclosure has been required for over 60 years, and disclosure of organizations substantially involved in a client's lobbying activities for over a decade, the NAM contends that mandatory disclosure of member organizations that significantly fund and "actively participate[] in the planning, supervision, or control" of an association's lobbying activities imposes an impermissible burden on its First Amendment rights. The NAM also argues that the terms "lobbying activities" and "actively participates" are so vague as to render amended section 1603(b)(3) unconstitutional.

The NAM's legal claims were rejected by the court below and should fare no better on appeal. Over 50 years ago, the Supreme Court upheld lobbying disclosure against a First Amendment challenge, concluding that the modest burdens that disclosure imposes are far outweighed by the vital national interest in preserving the integrity of our governmental processes. *United States*

v. Harriss, 347 U.S. 612, 625-26 (1954). The current lobbying regime requires just such disclosures, and the challenged provision merely ensures that organizations cannot evade disclosure by hiding their lobbying activities behind other entities, particularly associations and coalitions that lobby on behalf of their members. The NAM presents no basis under the First Amendment for prohibiting Congress from requiring disclosure of organizations that lobby through associations just as it requires disclosure of organizations that employ or retain their own lobbyists.

In addition, the terms "lobbying activities" and "actively participates" as used in the challenged provision are not unconstitutionally vague as they are sufficiently clear that an ordinary person can understand what actions subject an organization to disclosure.

Accordingly, this Court should affirm the District Court's dismissal of the NAM's complaint.

B. Plaintiff-Appellant's Allegations

Plaintiff NAM "is a non-profit trade association [that] promote[s] trade, advocate[s] for economic growth, and represent[s] the interests of its members" before Congress and the executive branch. Compl. ¶ 4 [Appendix ("App.") 2]. The NAM has "over 11,000 corporate members whose interests are allied with America's manufacturing sector." *Id.* ¶ 14 [App. 7]. The NAM's members "participate in a number of committees and a wide range of related activities to define and advance the NAM's goals." *Id.* Although its website and other

publicly available materials "identify some members, including firms represented on its board and in other leadership positions," the NAM does not list publicly all its members. *Id.* ¶ 4 [App. 3].

Many of the NAM's activities involve contacts with the federal government "to advance and protect" the interests of its members, and the NAM employs approximately 35 persons who regularly engage in such lobbying. *Id.* ¶ 15 [App. 8]. The NAM's lobbying often addresses issues such as "global warming, nuclear power, or labor relations," which, the NAM alleges, can "provoke responses beyond civil debate." *Id.* ¶ 16 [App. 8]. The NAM claims that "[t]aking policy positions that are unpopular with other groups may lead to boycotts, political pressure, shareholder suits, or other forms of harassment" and "can even make a company a litigation target." *Id.* Because of this potential, the NAM alleges that its "members . . . will wish to avoid linkage to the association's lobbying activities on particular issues." *Id.* ¶ 17 [App. 8]. And, "members that are concerned about the possibility of disclosure" linking them with the NAM's lobbying "will limit their support for and participation in the NAM to the extent necessary to avoid the risk of being named in the NAM['s lobbying] reports." *Id.* ¶ 19 [App. 9]. The NAM further alleges that concern over having to make disclosures under amended section 1603(b)(3) causes it to "self-censor to avoid initiating lobbying activities that members will be unwilling to support at the risk of disclosure, or that may expose members to undesired disclosure." *Id.* ¶ 20 [App. 9-10].

The NAM claims that section 1603(b)(3), as amended by HLOGA § 207, violates the First Amendment and is unconstitutionally vague on its face and as applied to the NAM. *Id.* ¶ 26 [App. 12-13].

C. Proceedings Below

HLOGA was signed into law in September 2007, and the first quarterly lobbying reports under HLOGA § 207's new standard were due on April 21, 2008. The NAM filed this suit on February 6, 2008, along with a motion for a preliminary injunction. The court, with the parties' agreement, converted the preliminary injunction motion to a motion for judgment on the pleadings, with the understanding that if the court denied the NAM's motion, it would dismiss the complaint with prejudice. *See* Memorandum Opinion ("Mem. Op.") at 2 [App. 65]. Defendant Taylor and the Legislative Defendants filed briefs in opposition, and the NAM filed a consolidated reply. On April 11, the court issued an opinion and order rejecting the NAM's constitutional challenge and dismissing the complaint. Order and Mem. Op. [App. 63, 64].

D. The District Court's Decision

Relying on well-established Supreme Court precedent upholding requirements for lobbying disclosure, *United States v. Harriss*, 347 U.S. 612 (1954), and disclosure of campaign contributions, *Buckley v. Valeo*, 424 U.S. 1 (1976), and *McConnell v. F.E.C.,* 540 U.S. 93 (2003), the District Court held that the disclosure requirement in section 1603(b)(3) as amended by HLOGA § 207 is narrowly tailored to serve two compelling government interests, and

thus, did not violate the First Amendment.[1] The court found that "the interest in providing Congress and the electorate with information regarding 'who is being hired, who is putting up the money, and how much' . . . is properly described as compelling." Mem. Op. at 29 [App. 92] (quoting *Harriss*, 347 U.S. at 625). The court also "easily conclude[d] that the interest in avoiding the appearance of corruption is a compelling one." *Id.* at 30 [App. 93].

The court explained that "'the specific disclosure provision at issue here . . . furthers these interests by ensuring that the LDA's reporting requirements are not easily circumvented.'" *Id.* at 31 [App. 94] (quoting Legislative Defendants' Opposition at 24). The court found that this provision was the product of careful congressional consideration regarding the need to close a loophole in lobbying disclosure, *id.* at 33-34 [App. 96-97], that it required disclosure of "precisely the information" that the Supreme Court "found to be the valid purpose of lobbying disclosures," *id.* at 34 [App. 97] (citing *Harriss*, 347 U.S. at 625), and that "the harms [it] aims to remedy in fact exist and that [it] will materially reduce those harms." *Id.* at 38 [App. 101]. The court concluded that amended section 1603(b)(3) was narrowly tailored to the harms it addresses and that no less restrictive alternative exists that would be "almost equally effective." *Id.* at 39-40 [App. 102-03].

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[1] While the court applied strict scrutiny in rejecting the First Amendment claim, it expressly refrained from deciding whether strict scrutiny was required. Mem. Op. at 27 n.11 [App. 90].

The court also found that the terms "lobbying activities," which has been part of the LDA for over a decade, and "active participation" were "sufficiently 'easily understood and objectively determinable,' . . . as to provide the NAM and other organizations like it with fair and clear notice of what § 207 requires of them." *Id.* at 55 [App. 118] (quoting *McConnell*, 540 U.S. at 194). Thus, the Court rejected the vagueness challenge, both facially and as applied to the NAM.[2]

E. Proceedings Since the District Court's Decision

As the first quarterly lobbying report required under amended section 1603(b)(3) was due April 21, 2008, the NAM sought an emergency injunction pending appeal, first from the District Court, which denied it with a detailed opinion on April 18, *see* Order and Memorandum Opinion [App. 121, 122], and then from this Court, which denied it on April 21. The NAM then applied to Chief Justice Roberts, as Circuit Justice for the D.C. Circuit, for an emergency injunction on April 21, and its application was denied that same day.

Having failed to secure an injunction pending appeal, the NAM submitted its quarterly lobbying report on April 21, but its filing did not contain

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[2] The court noted that while the NAM asserted an as-applied vagueness challenge in its complaint, it offered no distinction in the statute's application to it as opposed to other associations and coalitions, except for the allegation that complying with the statute is particularly burdensome for the NAM. Mem. Op. at 45-46 [App. 108-09]. The court held that, as the statute is not unconstitutionally vague on its face, "it is not rendered vague as applied to the NAM simply because it may be more costly for the NAM than for other registrants to comply with its requirements." *Id.* at 56 [App. 119].

the disclosures required by amended section 1603(b)(3). Rather, nine days after the report was due, the NAM amended its filing to disclose 65 member organizations that met the conditions of amended section 1603(b)(3) for the first quarter of 2008.

STATUTORY BACKGROUND

The District Court's opinion sets forth in detail the background and operation of amended section 1603(b)(3). Mem. Op. at 4-16 [App. 67-79]. For economy, the Legislative Defendants-Appellees respectfully refer the Court to that discussion and provide an overview here.

A. Congress First Enacted Broad Lobbying Disclosure in 1946

Congress first required broad lobbying disclosure in the Federal Regulation of Lobbying Act ("FRLA"), title III of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 301-311, 60 Stat. 812, 839-42. The FRLA required persons engaged for pay for the "principal purpose" of attempting to influence the passage or defeat of legislation in Congress to register with the Clerk of the House and the Secretary of the Senate, disclosing:

> their name and address; the name and address of the client for whom they work; how much they are paid and by whom; all contributors to the lobbying effort and the amount of their contribution; an accounting of all monies received and expended, specifying to whom the money was paid and for what purposes; the names of any publications in which the lobbyist has caused articles or editorials to be published; and the particular legislation they have been hired to support or oppose.

H.R. Rep. No. 104-339, pt. 1, at 2 (1995). The Act established criminal penalties for violations. *See* Pub. L. No. 79-601, § 310, 60 Stat. 842.

In 1954, the Supreme Court upheld the constitutionality of the FRLA in *United States v. Harriss*, 347 U.S. 612 (1954). After construing the Act to avoid a vagueness-based due process claim, the Court rejected a First Amendment challenge, holding that the statute "do[es] not violate . . . [the] freedom to speak, publish, and petition the Government." *Id.* at 625.

Experience with the FRLA revealed that the law "failed to ensure the public disclosure of meaningful information about individuals who attempt to influence the conduct of officials of the Federal government," H.R. Rep. No. 104-339, at 5, and efforts to reform the Act's disclosure requirements began not long after its passage and continued into the 1990s. *See* 141 Cong. Rec. 20007 (1995); Mem. Op. at 7 [App. 70]. In 1991 and 1992, the Senate Subcommittee on Oversight of Government Management held hearings on the law's shortcomings and considered legislation reforming lobbying disclosure. *See The Federal Lobbying Disclosure Laws: Hearings Before the Subcomm. on Oversight of Gov't Management of the Senate Comm. on Governmental Affairs*, 102^{d} Cong., S. Hrg. 102-377 (1991), and *S. 2279, The Lobbying Disclosure Act of 1992: Hearings Before the Subcomm. on Oversight of Gov't Management of the Senate Comm. on Governmental Affairs*, 102^{d} Cong., S. Hrg. 102-609 (1992). Among other issues, the Subcommittee received testimony that indicated that some organizations circumvent disclosure requirements by concealing their identities behind the lobbying activities of coalitions or associations. *See* S. Hrg. 102-609, at 34 (statement of Ann McBride, Sr. V.P.,

Common Cause), at 83 (statement of Thomas M. Susman, Chair, ABA Section of Admin. Law and Regulatory Practice).

B. Congress Requires More Robust Disclosure: The Lobbying Disclosure Act of 1995

To address the FRLA's shortcomings, Congress passed the LDA. As the District Court explained, Mem. Op. at 8-9 [App. 71-72], the LDA established more robust lobbying disclosure requirements, including expanding coverage to contacts with congressional staff and senior executive officials in addition to Members of Congress, broadening the definition of lobbyist, requiring semi-annual reporting of lobbying activities by registrants, and creating civil penalties for violations. *See* Pub. L. No. 104-65, §§ 3, 4, & 7.

In particular, the LDA required registrants to disclose "the name, address, and principal place of business of any organization, other than the client, that –

> (A) contributes more than $10,000 toward the lobbying activities of the registrant in a semiannual period . . . ; and
>
> (B) in whole or in major part plans, supervises, or controls such lobbying activities.

Id. § 4(b)(3), 2 U.S.C. § 1603(b)(3).[3] The LDA defined "lobbying activities" as "lobbying contacts and efforts in support of such contacts, including preparation

[3] The LDA made clear that the term "organization" did not include individuals. *Id.* § 3(13), 2 U.S.C. § 1602(13). In addition, Congress provided that "[n]othing in [the LDA] shall be construed to prohibit or interfere with – (1) the right to petition the Government for the redress of grievances; (2) the right to express a personal opinion; or (3) the right of association – protected by the first amendment to the Constitution." *Id.* § 8(a), 2 U.S.C. § 1607(a).

and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." *Id.* § 3(7), 2 U.S.C. § 1602(7). The LDA directed the Secretary of the Senate and the Clerk of the House to "provide guidance and assistance on the registration and reporting requirements of this Act and develop common standards, rules, and procedures for compliance with this Act." *Id.* § 6(1), 2 U.S.C. § 1605(1).[4]

C. Further Reform: The Honest Leadership and Open Government Act of 2007

While the LDA substantially increased the number of individuals and organizations registering with the Secretary and Clerk and improved the information disclosed in lobbyist filings, Mem. Op. at 11 [App. 74], efforts continued to refine the LDA's disclosure provisions to eliminate loopholes, including disclosure of organizations that actively participate in lobbying coalitions and associations. *See id.* (citing proposed legislation).

In 2007, Congress passed HLOGA, which contained reforms addressing congressional ethics rules, post-employment restrictions, gifts and travel restrictions, and lobbying disclosure. As to disclosure of organizations involved in lobbying by associations and coalitions, HLOGA § 207 amended the existing

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[4] The guidance issued by the Clerk and the Secretary interpreted the term "in major part" in section 1603(b)(3) to "mean[] in substantial part . . . . In general, 20 percent control or supervision should be considered 'substantial' for purposes of these sections." Pre-HLOGA LDA Guidance (applicable before Jan. 1, 2008), § 2, http://www.senate.gov/legislative/common/briefing/lobby_disc_briefing.htm.

provision, 2 U.S.C. § 1603(b)(3), in two ways. First, it changed the monetary threshold for contributions of the organization to the client's lobbying activities from $10,000 in a semiannual period to $5,000 in a quarter, to harmonize with new quarterly reporting periods for registrants established by HLOGA § 201. In addition, the statute made clear that such contributions could be to the registrant or the client. Second, HLOGA § 207 modified the level of an organization's participation in lobbying activities that triggers disclosure from "in whole or in major part plans, supervises, or controls such lobbying activities," to "actively participates in the planning, supervision, or control of such lobbying activities."[5] Thus, amended section 1603(b)(3) requires registrants to disclose:

> [T]he name, address, and principal place of business of any organization, other than the client, that –
>
> > (A) contributes more than $5,000 to the registrant or the client in the quarterly period to fund the lobbying activities of the registrant; and,
> >
> > (B) actively participates in the planning, supervision, or control of such lobbying activities.

Section 207 of HLOGA further amended section 1603(b)(3) to provide that, if an organization meeting the disclosure requirement of that section "is listed on the client's publicly accessible Internet website as being a member of or contributor to the client," then that organization need not be disclosed in the

[5] HLOGA did not change the definition of "lobbying activities." Mem. Op. at 13 n. 4 [App. 76].

registrant's filing unless it meets the higher participation threshold of "in whole or in major part," and not just "actively participates."[6]

Following HLOGA's enactment, the Secretary and Clerk issued guidance on this provision, including examples of what constitutes active participation in lobbying activities:

> participating in decisions about selecting or retaining lobbyists, formulating priorities among legislative issues, designing lobbying strategies, performing a leadership role in forming an ad hoc coalition, and other similarly substantive planning or managerial roles, such as serving on a committee with responsibility over lobbying decisions.

Guidance eff. Jan. 1, 2008, http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf at 4. The guidance also provides contrasting examples of participation that is only passive and does not trigger disclosure:

> merely donating or paying dues to the client or registrant, receiving information or reports on legislative matters, occasionally responding to requests for technical expertise or other information in support of the lobbying activities, attending a general meeting of the association or coalition client, or expressing a position with regard to legislative goals in a manner open to, and on a par with that of, all members of a coalition or association – such as through an annual meeting, a questionnaire, or similar vehicle.

Id.[7]

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[6] The first quarterly reports under HLOGA § 207's new disclosure threshold, which applies to LDA filings covering activity after January 1, 2008, HLOGA § 215, were due on April 21. HLOGA § 201(a)(1)(B).

[7] The guidance clarifies that "[m]ere occasional participation, such as offering an *ad hoc* informal comment regarding lobbying strategy to the client or registrant, in the absence of any formal or regular supervision or direction of (continued...)

SUMMARY OF ARGUMENT

The District Court correctly rejected the NAM's First Amendment and vagueness challenges to 2 U.S.C. § 1603(b)(3), as amended by HLOGA § 207.

1. Although the legal standard for First Amendment challenges to disclosure requirements is not clearly established, whether analyzed under the contours of *United States v. Harriss*, the decisions in *Buckley v. Valeo*, 424 U.S. 1, and *McConnell v. F.E.C.*, 540 U.S. 93, regarding disclosure requirements allegedly burdening political speech, or strict scrutiny standards, amended section 1603(b)(3) does not violate the First Amendment.

2. In *Harriss*, the Supreme Court rejected a First Amendment challenge to a law requiring disclosure of lobbyists and their clients and the amount of money spent lobbying to influence the passage or defeat of legislation through "direct communication with Congress." 347 U.S. at 622-23. Recognizing that "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal," *id.* at 625, the Court approved of Congress' requiring disclosure by lobbyists to illuminate the attempts by organized groups to influence the legislative process. The Court noted that "Congress has not

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[7](...continued)
lobbying activities, does not constitute active participation if neither the organization nor its employee has the authority to direct the client or the registrant on lobbying matters and the participation does not otherwise exceed a *de minimis* role." *Id.*

sought to prohibit these pressures," but only to require disclosure of "a modicum of information" regarding "who is being hired, who is putting up the money, and how much." *Id.* Amended section 1603(b)(3)'s required disclosures fall safely within the scope of disclosures approved in *Harriss*. Accordingly, that decision fully supports the constitutionality of the disclosure provision challenged here.

3. Amended section 1603(b)(3) also survives First Amendment challenge under both the *Buckley/McConnell* and the strict scrutiny tests. The disclosure required by that section serves the vital governmental interests of (a) providing the public and public officials with necessary information to evaluate the influences on government decisionmaking from lobbying interests and (b) shining sunlight on lobbying activities to protect against the appearance of corruption. *See Buckley*, 424 U.S. at 67-68. Amended section 1603(b)(3) effectuates these interests by ensuring that the LDA's disclosure provisions are not easily circumvented by organizations conducting lobbying activities through a coalition or association. This provision is closely tailored to this purpose as it requires disclosure of organizations that significantly fund and actively participate in planning, supervising, or controlling lobbying activities of an association, but neither bans nor limits lobbying by associations.

Balanced against the substantial governmental interests served by the challenged disclosure are modest burdens on the NAM's member organizations. The NAM failed to offer below any evidence of an actual threat of harassment

or retaliation against its member organizations arising from disclosure of their participation in the NAM's lobbying activities. Indeed, the primary injury that the NAM claims its member organizations would suffer if disclosed under amended section 1603(b)(3) arises from the linking of an organization to lobbying on a particular controversial issue – but that putative injury is no different from any harm disclosure already imposes on organizations that employ or hire lobbyists themselves (outside of any association or coalition). *Harriss* found that burden on First Amendment rights was justified by the governmental interests advanced by lobbying disclosure. Accordingly, amended section 1603(b)(3) passes scrutiny under any applicable First Amendment test.

4. The statute's definition of "lobbying activities" is not unconstitutionally vague on its face or as applied to the NAM. "Lobbying activities" is defined to include lobbying contacts with senior public officials and efforts supporting such contacts, including planning and research that is intended, when performed, for use in lobbying contacts. 2 U.S.C. § 1602(7). It is clear from that definition that research and background work done to support lobbying contacts are lobbying activities; research and background work done for other purposes, and later used in lobbying contacts, are not. The definition is not so vague that "a person of ordinary intelligence" cannot understand what conduct is covered. *Buckley*, 424 U.S. at 77. Similarly, the ordinary person can understand the meaning of the term "actively participates," which Congress

used to distinguish and exclude from disclosure those organizations with only a passive role in an association's lobbying activities – *e.g.*, mere donors or recipients of information and reports.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT 2 U.S.C. § 1603(b)(3), AS AMENDED BY HLOGA § 207, DOES NOT VIOLATE THE FIRST AMENDMENT

The applicable legal standard for analyzing the NAM's First Amendment claim is unclear, as "the relevant case law does not readily reveal the level of scrutiny that is properly applied to § 207's disclosure requirement." Mem. Op. at 26-27 [App. 89-90]; *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) ("Supreme Court has been less than clear as to the proper level of judicial scrutiny we must apply in deciding the constitutionality of disclosure regulations"). While the court below applied strict scrutiny – and found that amended section 1603(b)(3) satisfied that standard – it did so under this Court's teaching that "'[i]f the [statute] can withstand strict scrutiny there is no need to decide the issue,'" Mem. Op. at 27 [App. 90] (quoting *Blount v. S.E.C.*, 61 F.3d 938, 943 (D.C. Cir. 1995)), and specifically refrained from deciding whether strict scrutiny was required. *Id.* at 27 & n.11 [App. 90].[8]

[8] Although the NAM insists that strict scrutiny applies whenever core First Amendment rights are burdened, Brief for Plaintiff-Appellant the National Association of Manufacturers ("NAM's Br.") at 25, the Supreme Court in *McConnell* stated that "[i]t is thus simply untrue in the campaign finance (continued...)

Three possible standards could apply to the NAM's First Amendment claim – all of which support dismissal of the NAM's claims. First, the challenged provision can be tested against the closest precedent: the Supreme Court's ruling in *United States v. Harriss*, 347 U.S. 612 (1954), upholding lobbying disclosure against a similar First Amendment challenge. In that case, which reviewed the constitutionality of the LDA's predecessor, the FRLA, the Supreme Court found that requiring lobbyists to disclose information about "who is being hired, who is putting up the money, and how much," *Harriss*, 347 U.S. at 625, "maintain[s] the integrity of a basic governmental process," *id.*, and "do[es] not offend the First Amendment." *Id.* at 626. Disclosure requirements congruent with those approved in *Harriss* do not violate the First Amendment. *Cf. Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (testing lobbying disclosure law "[a]gainst the standard of *Harriss* and its progeny").

Second, the NAM's First Amendment claim can be analyzed under the Supreme Court's decisions in *Buckley* and *McConnell* regarding disclosure requirements alleged to burden political speech. *Buckley* stated that compelled disclosures that impinge on privacy of association under the First Amendment "must survive exacting scrutiny." 424 U.S. at 64. Under that standard, the required disclosure must "directly serve substantial governmental interests," *id.*

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[8](...continued)
context that all burdens on speech necessitate strict scrutiny review." 540 U.S. at 140 n.42 (internal quotation marks and citation omitted).

at 68, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *id.* at 64 (internal footnotes and citations omitted), and the governmental interest must be sufficiently important to justify any burden on individual rights from disclosure. *Id.* at 68; *see also McConnell*, 540 U.S. at 190-92 (applying *Buckley* to disclosure requirements).[9]

This Court has applied *Buckley* in evaluating disclosure requirements:

> When facing a constitutional challenge to a disclosure requirement, courts . . . balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the disclosure requirement to serve its interests.

AFL-CIO v. F.E.C., 333 F.3d 168, 176 (D.C. Cir. 2003) (citing *Buckley*, 424 U.S. at 64-68; *Block v. Meese*, 793 F.2d 1303, 1315-16 (D.C. Cir. 1986)).[10]

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[9] Contrary to the NAM's assertion that *Buckley*'s "exacting scrutiny" is the same as "strict scrutiny," NAM's Br. at 28, the court below noted, in accord with other courts, that *Buckley*'s "'exacting' scrutiny standard appears to be somewhat more lenient than the strict scrutiny standard." Mem. Op. at 43 [App. 106]. *See also North Carolina Right to Life Committee Fund v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008) ("The plaintiffs argue that 'exacting scrutiny' in [the campaign finance] context is equivalent to strict scrutiny (requiring narrow tailoring to a compelling state interest), but this argument is inconsistent with *Buckley* and subsequent cases."); *California Pro-Life Council*, 328 F.3d at 1101 n.16.

[10] The *Buckley* standard "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the (continued...)

Third, strict scrutiny could be applied to amended section 1603(b)(3)'s disclosure requirements. *Cf. Minnesota State Ethical Practices Bd. v. National Rifle Ass'n*, 761 F.2d 509, 511 (8th Cir. 1985) (requiring that lobbying disclosure laws further compelling state interest). Strict scrutiny requires that the challenged provision be narrowly tailored to further a compelling governmental interest and be the least restrictive means of accomplishing that interest. Mem. Op. at 27 [App. 90]. The NAM argues that strict scrutiny applies because amended section 1603(b)(3) places a burden on political speech. NAM's Br. at 23-27.

As demonstrated here, whether evaluated under the standard in *Harriss*, the less-than-strict scrutiny applied in *Buckley* and *McConnell*, or strict scrutiny as was done below, section 1603(b)(3), as amended, does not violate the First Amendment.

A. *United States v. Harriss* Establishes the Constitutionality of Amended Section 1603(b)(3)

The Supreme Court in *United States v. Harriss*, 347 U.S. 612, rejected a First Amendment challenge to the FRLA's lobbying disclosure provisions. The Court found that requiring disclosure of lobbyists and their clients, and the amount of money spent to influence the passage or defeat of legislation through "direct communication with Congress," *id.* at 622-23, "d[id] not violate the freedoms guaranteed by the First Amendment – freedom to speak, publish, and

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[10](...continued)
integrity of the political process." *McConnell*, 540 U.S. at 137.

petition the Government." *Id.* at 625.[11] The Court explained that "full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate . . . the myriad pressures to which they are regularly subjected." *Id.* at 625. Without the information needed to unmask the attempts of organized groups to influence the legislative process, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* The lobbying disclosure provisions Congress enacted, the Court found, were "designed to help prevent" such an "evil" influence on the legislative process. *Id.*

Further, the Court noted, the law did not ban any speech or petitioning:

> Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much.

Id. In requiring lobbying disclosure, Congress used its power "to maintain the integrity of a basic governmental process," *id.*, and did so "in a manner restricted to its appropriate end." *Id.* at 626. Thus, the Court held that the lobbying disclosure provisions "do not offend the First Amendment." *Id.*

All 50 states and the District of Columbia require disclosure of lobbying activities, General Accounting Office, Information on States' Lobbying

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[11] *Harriss* rejected a vagueness challenge to the FRLA after interpreting the Act to apply only to attempts to influence the passage of legislation through direct communication with Members of Congress. *See* 347 U.S. at 621-23.

Disclosure Requirements, No. B-0129874 (GAO/GGD-97-95R, May 2, 1997), *available at* http://archive.gao.gov/paprpdf1/158621.pdf, and courts have consistently applied *Harriss* to uphold these laws against First Amendment challenges. *See Florida League of Professional Lobbyists*, 87 F.3d at 460. ("Several other courts have similarly interpreted *Harriss* and have rejected broad constitutional attacks on lobbying disclosure requirements," and citing cases); *Minnesota State Ethical Practices Bd.*, 761 F.2d at 511-12 ("In light of *Harriss*, we think the State of Minnesota has a compelling interest in requiring lobbyists to register their activities."); *Comm'n on Indep. Colls. & Univs. v. N.Y. Temporary State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 497-99 (N.D.N.Y. 1982) (upholding New York lobbying law).

Amended section 1603(b)(3) falls well within the scope of lobbying disclosure approved in *Harriss*. Since 1995, the LDA has required disclosure of direct lobbying contacts with senior public officials and activities supporting those contacts. HLOGA § 207, which refined section 1603(b)(3)'s disclosure threshold to cover organizations that significantly fund and actively participate in the planning, supervision, or control of another entity's lobbying activities, does nothing more than require disclosure of "who is being hired, who is putting up the money, and how much." *Harriss*, 347 U.S. at 625. Under the LDA, if an organization itself hires a lobbyist and expends $5,000 on lobbying activities in a quarter, the organization must be disclosed. The NAM does not argue – nor could it under *Harriss* – that requiring such disclosure violates the First

Amendment. Section 1603(b)(3), as amended, merely prevents the same organization from circumventing the lobbying disclosure laws by channeling its funds and participation in lobbying activities through another entity, such as an association or coalition. The challenged provision, therefore, falls squarely within the contours of disclosure upheld in *Harriss*.[12]

The NAM maintains that *Harriss* does not support amended section 1603(b)(3)'s constitutionality because *Harriss* upheld a narrower statute. Specifically, the NAM argues that the Court in *Harriss* interpreted the FRLA's lobbying disclosure requirements to reach only "direct communications with members of Congress on pending or proposed legislation," NAM's Br. at 32, whereas the LDA "applies to communications with a vastly broader array" of public officials, including congressional staff and Executive officials, as well as activities supporting direct lobbying contacts. *Id.* at 33.

Yet, the differences between the statutes do not make the holding in *Harriss* inapplicable here. *Harriss*'s focus on the lobbying of Members of Congress, as opposed to senior Executive officials, was not based on any rule of constitutional law but on the terms of the statute, as the FLRA required

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[12] In *Buckley*, the Court used similar reasoning to uphold restrictions on campaign volunteers paying for incidental expenses (such as food and beverages for campaign events or their own travel expenses), finding that when volunteers pay for such expenses "[t]he ultimate effect is the same as if the person had contributed the dollar amount to the candidate . . . ." 424 U.S. at 36-37. Consequently, "[i]f, as we have held, the basic contribution limitations are constitutionally valid, then surely these provisions" are also constitutional. *Id.* at 36.

disclosure of lobbying for passage or defeat of legislation by Congress. *See Harriss*, 347 U.S. at 614 n.1, 620-21.[13] Nothing in *Harriss* suggests that the Court would have ruled differently had the lobbying disclosure statute at issue there also applied to contacts with senior Executive officials, as the LDA does. Certainly the NAM is not arguing that amended section 1603(b)(3)'s disclosure requirement is constitutional as applied to lobbying activities related to contacts with Members of Congress, but unconstitutional as applied to lobbying of the Executive.

In addition, while the LDA requires disclosure of activity beyond direct communication with government officials (such as planning and research in support of lobbying contacts), the statute in *Harriss* likewise covered some activities leading to, but not themselves, direct communication with covered officials. Specifically, the FRLA, as interpreted by the Court, required disclosure of efforts by lobbyists to pressure Members "through an artificially stimulated letter campaign." *Harriss*, 347 U.S. at 620; *see also id.* at 630 (Douglas, J., dissenting) (noting that Court's construction of statute still covered attempts "to contact people with the request that they write their Congressman" about legislation); *Florida League of Professional Lobbyists*, 87 F.3d at 461. The variances that the NAM highlights between the FRLA and the LDA as

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[13] The FRLA was part of the Legislative Reorganization Act of 1946, Mem. Op. at 5 [App. 68], which focused on congressional operations and structure. Moreover, in 1946, there was substantially less administrative agency activity than when the LDA was enacted in 1995 or HLOGA in 2007.

amended by HLOGA are distinctions without a difference relevant to the holding in *Harriss*.

Finally, the NAM points out that *Harriss* "was decided before present First Amendment standards of review developed," and so "must be applied with caution." NAM's Br. at 33. Yet, no decision of the Supreme Court nor of any Court of Appeals has suggested that *Harriss* is no longer binding precedent on the constitutionality of lobbying disclosure statutes under the First Amendment. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (courts should not conclude that "more recent [Supreme Court] cases have, by implication, overruled an earlier precedent"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

B. Alternatively, Amended Section 1603(b)(3)'s Disclosure Requirements Pass Both the *Buckley/McConnell* and Strict Scrutiny Standards

Even if *Harriss* did not alone dictate upholding section 1603(b)(3) as amended by HLOGA § 207, that provision passes First Amendment scrutiny whether analyzed under the Supreme Court's decisions in *Buckley* and *McConnell* upholding disclosure requirements allegedly burdening political speech or under strict scrutiny.

1. Amended section 1603(b)(3) serves two compelling governmental interests.

As the District Court found, the LDA registration scheme and the disclosure requirement in amended section 1603(b)(3) serve two vital governmental interests, Mem. Op. at 28-30 [App. 91-93], both of which were relied upon in *Buckley*. First, the provision "provides the electorate with information" regarding where money comes from and where it is spent, so that the public and public officials can better evaluate the influence of lobbying on government decisions. *Buckley*, 424 U.S. at 66-67. In the LDA itself, Congress expressly found that "responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government." 2 U.S.C. § 1601(1); *see also* 153 Cong. Rec. S258 (daily ed. Jan. 9, 2007) (statement of Sen. Collins) (explaining that lobbying disclosure "will help to provide much needed transparency" and "will allow citizens to decide for themselves what is acceptable and what is not"); 153 Cong. Rec. H5743 (daily ed. May 24, 2007) (statement of Rep. Doggett) ("When deep-pocketed interests spend big money to influence public policy, the public has a right to know. Even a little light can do a lot of good.").

As the Eleventh Circuit explained, lobbying disclosure serves the "interest of voters (in appraising the integrity and performance of officeholders and candidates, in view of the pressures they face) and legislators (in 'self-protection' in the face of coordinated pressure campaigns)." *Florida League of*

Professional Lobbyists, 87 F.3d at 460. By providing important information to the public and public officials, lobbying disclosure "maintain[s] the integrity of a basic governmental process," *Harriss*, 347 U.S. at 625, and "safeguard[s] a vital national interest." *Id.* at 626. Hence, the court below correctly concluded that "the interest in providing Congress and the electorate with information regarding 'who is being hired, who is putting up the money, and how much' . . . is properly described as compelling." Mem. Op. at 29 [App. 92] (quoting *Harriss*, 347 U.S. at 625).

The second vital interest served by the disclosure requirement is to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67. Congress reasonably found that "effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government." 2 U.S.C. § 1601(3). The LDA's disclosure provisions were "designed to strengthen public confidence in government," H.R. Rep. No. 104-339, pt. 1, at 2, "by ensuring that the public is aware of the efforts that are made by paid lobbyists to influence public policy." 141 Cong. Rec. 20007 (1995) (statement of Sen. Levin); *see also* 153 Cong. Rec. S10691 (daily ed. Aug. 2, 2007) (statement of Sen. Lieberman) ("This sweeping legislation shines much needed light in corners and corridors of this Capitol, too long left in the dark. It should help restore the public's trust now, a trust that is in much need of

restoration."). The District Court correctly and "easily conclude[d] that the interest in avoiding the appearance of corruption is a compelling one." Mem. Op. at 30 [App. 93].

The NAM asserts that avoiding the appearance of corruption is a compelling interest only in the context of election campaigns. NAM's Br. at 33 (citing *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2672-73 (2007) (Roberts, C.J., concurring)). But just as the appearance of corruption may exist from campaign contributions to a candidate, so, too, can it arise from contacts by paid lobbyists with government officials. Indeed, the Supreme Court has specifically recognized that "[t]he activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20 (1995). Thus, "[b]oth the Supreme Court and [the Eighth Circuit] have upheld lobbyist-disclosure statutes based on the government's 'compelling' interest in requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption." *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005).

The NAM further maintains that Congress did not develop a sufficient record regarding the need for the disclosures mandated by amended section 1603(b)(3). NAM's Br. at 31-32. However, as this Court has explained, "no smoking gun is needed where, as here, the . . . likelihood of stealth [is] great, and the legislative purpose prophylactic." *Blount v. S.E.C.*, 61 F.3d 938, 945

(D.C. Cir. 1995). Indeed, the Supreme Court has refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *F.E.C. v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982).[14]

Moreover, the legislative history reflects that Congress had received testimony establishing that organizations sometimes seek to hide their lobbying through activities of coalitions and associations. *See* S. Hrg. 102-609, at 83 (statement of Thomas M. Susman, Chair, ABA Section of Admin. Law and Regulatory Practice) ("Corporations or other organizations occasionally hide their identities behind a coalition established or available for the purpose of preventing the public from learning of their efforts to influence congressional action. This plainly circumvents the Lobbying Act's public disclosure goals."); *see also id.* at 34 (statement of Ann McBride, Sr. V. Pres., Common Cause) ("Very often those coalition groups operate under very lovely-sounding names, without the public or sometimes even the Congress having a clear understanding of the groups that are backing them. The public has a right to know who is backing these coalition groups . . ."). Accordingly, Congress had a sufficient basis for closing this loophole in lobbying disclosure. *Cf. Montana*

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[14] The NAM not only disputes that Congress' determination of the need for more robust lobbying disclosure merits deference, but maintains the opposite, that is, that "[t]he mere fact that Congress enacted the LDA burdening First Amendment rights is a prima facie basis for striking it down," because "the First Amendment specifies that 'Congress shall make no law.'" NAM's Br. at 34. This argument is baseless. The fact that Congress passed a law surely cannot be "prima facie" evidence that the law is unconstitutional.

Right to Life Ass'n v. Eddleman, 343 F.3d 1085, 1092 (9th Cir. 2003) ("With respect to the quantum of evidence necessary to justify this interest [in avoiding the appearance of corruption], the Supreme Court has required only that the perceived threat not be 'illusory,' or 'mere conjecture.'" (quoting *Buckley*, 424 U.S. at 27, and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000)).[15]

2. Amended section 1603(b)(3) furthers the identified governmental interests.

The challenged provision furthers the government's interests in lobbying disclosure by ensuring that the LDA's reporting requirements are not easily circumvented. Congress provided in section 1603(b)(3) for the disclosure of organizations, other than clients, that fund and participate in lobbying by registrants (particularly associations and coalitions) to "preclude evasion of the

[15] The NAM's claim that there was no demonstrated need for tightening the threshold in section 1603(b)(3) is belied by its own statements. In its brief, the NAM explains that, while the prior version of section 1603(b)(3) "[i]n theory" required disclosures of entities involved in planning, supervising, or controlling the lobbying activities of an association, in practice the term in "'major part' was understood to exclude situations in which several entities planned, supervised, or controlled" the lobbying activities of an association. NAM's Br. at 6. Thus, the NAM explains, former section 1603(b)(3) "had no practical significance for membership organizations in which multiple members participated," *id.*, such as itself, because "[a]s long as several members were involved, no single member would meet the threshold [for disclosure]." *Id.* at 45; *see also* Mem. Op. at 32 [App. 95]. Thus, pre-HLOGA, associations and coalitions with "multiple members" participating in lobbying activities – which describes many, if not most, lobbying associations and coalitions – were not disclosing information under section 1603(b)(3), and Congress reasonably sought to achieve more robust disclosure from these entities.

disclosure requirements of the [LDA] through the creation of ad hoc lobbying coalitions behind which real parties in interest can hide." H.R. Rep. No. 104-339, pt. 1, at 18.[16] As the District Court explained, because the previous version of section 1603(b)(3) "did not require disclosure of even those coalition members who were substantially involved in the coalitions' lobbying activities," Mem. Op. at 32 [App. 95], Congress enacted HLOGA § 207 to reduce the disclosure threshold to address evasion of the LDA's requirements. *Id.* (citing 153 Cong. Rec. S10709 (daily ed. Aug. 2, 2007) (joint statement of Sens. Feinstein, Lieberman, and Reid)).

In making this change, Congress considered over many years various proposals for disclosure mechanisms that would best accomplish the goals of lobbying disclosure. Mem. Op. at 33 [App. 96]. Such "thoughtful and careful effort by our political branches, over such a lengthy course of time, deserves respect." *Id.* (quoting *McConnell v. F.E.C.*, 251 F. Supp. 2d 176, 434 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.)); *cf. also McConnell*, 540 U.S. at 158 ("[W]e respect Congress' decision to proceed in incremental steps in the area of campaign finance regulation.").

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[16] The NAM challenges reliance on the LDA's legislative history to support HLOGA § 207. However, HLOGA § 207 merely altered the threshold in an existing provision of the LDA regarding disclosure of affiliated organizations. Mem. Op. at 32-33 [App. 95-96]. Hence, as the court below found, "the legislative history of the LDA's 1995 enactment is both relevant to, and supportive of, Congress' determination that § 207 was necessary to close a loophole left open in the LDA, which permitted lobbying through stealth coalitions to go unchecked." *Id.* at 34 [App. 97].

The information required to be disclosed by amended section 1603(b)(3) assuredly has a substantial relationship to the governmental interest being served. That information, "the name, address, and principal place of business" of organizations that contribute more than $5,000 in a quarter to an association's or coalition's lobbying activities and actively participate in the planning, supervision, or control of those activities, 2 U.S.C. § 1603(b)(3), is precisely the "who pays, who puts up the money, and how much," that *Harriss* recognized as the purpose of lobbying disclosure. *See* Mem. Op. at 34 [App. 97]. This very information would have to be disclosed under the LDA – even pre-HLOGA – had the organization retained or employed its own lobbyist.[17]

The NAM argues that the provision at issue fails to advance the government's interests because it does not compel any "greater disclosure with respect to active participation or stealth coalitions than was already required by the LDA." NAM's Br. at 36. The NAM bases this assertion on its argument

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[17] The NAM asserts that the provision fails to advance the identified governmental interests because it creates a "patchwork" of disclosure. NAM's Br. at 11-13. But the NAM's examples do not demonstrate a random patchwork, but merely reflect that Congress selected a threshold for disclosure that would exclude organizations that play a minor role in funding or participating in an association's lobbying activities. Such decisions on where to draw statutory boundaries do not render a law problematic under the First Amendment. *See Buckley*, 424 U.S. at 83 ("[W]e cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion."); *cf. Blount*, 61 F.3d at 946 ("[A] regulation is not fatally underinclusive simply because an alternative regulation which would restrict *more* speech or the speech of *more* people, could be more effective.").

that a coalition can avoid disclosure "by not employing lobbyists of their own but, instead, relying on lobbyists employed by one or a few coalition members for the direct lobbying contacts." *Id.* at 11, 36.

This argument misconceives the problem that amended section 1603(b)(3) seeks to ameliorate. Under the LDA, registrants must disclose their clients. The concern addressed by amended section 1603(b)(3) is that organizations might avoid disclosure as clients by joining in a coalition or association to engage lobbyists – thereby making only the association or coalition the lobbyist's "client" disclosed under the LDA.[18] The challenged provision is meant to prevent such circumvention by requiring disclosure of organizations that significantly fund and actively participate in the planning, supervision, or control of the lobbying activities of the client. If, instead of the coalition or association retaining or employing a lobbyist on its own behalf, it relies on the underlying organizations themselves to employ lobbyists to lobby covered officials on a matter, as the NAM suggests, then those organizations *will* be disclosed as clients in the registrant's LDA filings, and the purpose of the disclosure requirement – to ensure disclosure of organizations lobbying government officials – will have been achieved.

The NAM further argues that the challenged provision does not advance the identified governmental interests because it is underinclusive, as it does not

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[18] The LDA provides that "[i]n the case of a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association and not its individual members." 2 U.S.C. § 1602(2).

cover individuals who fund and participate in the planning, supervision, or control of lobbying activities of associations or coalitions. *See* NAM's Br. at 7, 12. Congress' decision to exclude individuals was an accommodation of both the heightened sensitivity regarding the potential impact of disclosure on individuals as opposed to organizations and the concern that organizational entities such as businesses, labor organizations, or issue-advocacy groups have a substantial influence that they may attempt to conceal.

> An appropriate means of striking a balance between the competing interests of the public's right to know and an individual's right to petition the government without risking harm to his or her well-being or reputation is to focus on organization members of coalitions or associations lobbying Congress.

S. Hrg. 102-609, at 83 (statement of Thomas M. Susman, Chair, ABA Section of Admin. Law. and Regulatory Practice). By striking that balance, Congress tailored the disclosure requirement to the area of greatest concern – organizations that evade disclosure through coalitions and associations – while safeguarding individuals' right to petition. Indeed, the Supreme Court has stated that "[t]he governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals." *National Right to Work Comm.*, 459 U.S. at 210-11 (citations omitted).

Furthermore, as the District Court recognized, "corporations can claim no equality with individuals in the enjoyment of a right to privacy." Mem. Op. at 36 [App. 99] (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). Hence, the court explained, "[i]n the absence of any evidence that individuals contributing to lobbying coalitions or associations pose the same types of problems as organizational entities, the Court cannot conclude that Congress struck an improper balance by taking the privacy rights of such individuals into account." *Id.* (citing *Blount*, 67 F.3d at 946-47); *cf. McConnell*, 540 U.S. at 158 ("We have recognized that the differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process[.]") (internal quotation marks and citations omitted).[19]

3. Amended section 1603(b)(3) is closely related and narrowly tailored to the vital interests it serves.

By requiring disclosure of organizations that significantly fund and actively participate in the lobbying activities of an association or coalition, amended section 1603(b)(3) is narrowly tailored to the precise harm it seeks to prevent, namely, evasion of disclosure requirements by organizations that hide their lobbying activities behind the lobbying of a third-party entity – generally

[19] The Court noted in *Buckley* "that a statute is not invalid under the Constitution because it might have gone farther than it did, . . . that a legislature need not strike at all evils at the same time, . . . and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." 424 U.S. at 105 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)) (internal quotation marks and citations omitted).

an association or coalition. Moreover, by providing for disclosure of these organizations, instead of prohibiting or limiting their involvement in the lobbying activities of associations or coalitions, Congress has used the least restrictive means of protecting the government's interest. *See Buckley*, 424 U.S. at 68 ("[D]isclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."). Accordingly, the District Court correctly "conclude[d] that Defendants have met their burden of showing that § 207 is closely drawn and thus avoids unnecessary infringement of First Amendment rights." Mem. Op. at 41 [App. 104] (internal quotation marks and citation omitted).

The NAM argues that amended section 1603(b)(3) is overinclusive because it reaches "long-standing groups like the NAM," and not merely short-lived "stealth coalitions." NAM's Br. at 10. The NAM asserts that because associations and coalitions are unable to "conceal the interests they represent over extended periods [of time]," *id.*, there is no need to require amended section 1603(b)(3) disclosures from long-standing groups such as itself. Rather, the NAM submits, the law need require disclosures only from associations and coalitions that "have not been registered lobbyists for the last two or three years." *Id.* at 19.

Yet, Congress recognized that organizations could conceal their involvement in lobbying activities through any third-party entity, including

established associations, not just so-called "stealth coalitions." Indeed, HLOGA § 207 is entitled "Disclosure of lobbying activities by certain coalitions and *associations*." (emphasis added). That an association or coalition has existed for several years does not mean that the interests and organizations behind its lobbying are publicly known. There can be just as much "stealth" regarding the organizations and interests that control and influence the lobbying of long-standing associations as with recently-formed groups. Indeed, even for the NAM, which has been in existence over 100 years, the court below noted that "[w]hile the NAM's constituencies may, in fact, be understood by Members of Congress and executive branch officials, it is doubtful that the general public (whose informational interests § 207 supports) have an equally thorough understanding." Mem. Op. at 40 [App. 103].

Furthermore, the interests and organizations involved in an association's lobbying may change over time. Even if the member organizations participating in an association's lobbying at a particular time are known, that does not mean that those organizations will continue to influence or participate in the association's lobbying or that, in the future, other member organizations representing different interests will not engage in planning, supervising, or controlling the association's lobbying activities. The NAM has experienced such a shift in the influence and participation of its members in its lobbying activities. *See Domestic Manufacturers Worry About Loss of Influence in*

NAM's New Policy-Making Process, 14 Manufacturing & Technology News (Oct. 17, 2007), *available at* http://www.manufacturingnews.com/news/07/1017/art1.html. In addition, as the District Court found, "drawing a line based on the time an organization has been in existence, on the theory that long-standing organizations are less likely to be stealth" ones, is not an effective alternative, as "Congress and the public may have an arguably greater interest in disclosure of the members actively participating in and funding the lobbying activities of such long-standing groups in light of their significant political clout and wealth." Mem. Op. at 41 [App. 104].

The NAM also asserts that it "makes no secret that it represents the interests of America's manufacturers," NAM's Br. at 3; *see also* Compl. ¶ 26(c) [App. 13] (NAM's name "adequately identifies those interests" that it represents), and thus there is no need for it to disclose affiliated organizations under amended section 1603(b)(3). However, the term "manufacturers" encompasses such a broad constituency of companies (the NAM has over 11,000 members, Compl. ¶ 14 [App. 7]) with a wide variety of interests that it provides scant information as to which particular manufacturing interests control the NAM's lobbying efforts. *See, e.g.*, *NAM Board Votes in Favor of Multinationals in Debate over China's Currency*, 13 Manufacturing & Technology News (Oct. 10, 2006), *available at* 2006 WLNR 18153813 (Westlaw) (describing internal controversy between NAM's domestic and multinational members over what interests NAM represents on particular trade

issues). As the court below recognized, "Congress certainly could not draw a 'bright line' rule based on some loose conception of whether an association or coalition's name accurately represented its constituencies." Mem. Op. at 39 [App. 102]. Including "established" associations such as the NAM within the coverage of amended section 1603(b)(3) is not overinclusive but necessary to achieve Congress' purpose of preventing evasion of the LDA's disclosure requirements.[20]

Finally, the NAM suggests that Congress failed to consider adequately alternative regulations to achieve its goal. *See* NAM's Br. at 9-10, 38-40. To the contrary, as the legislative record demonstrates, "Congress did consider less restrictive alternatives, in the form of the FRLA, the LDA, and the various reform proposals considered over the years[.]" Mem. Op. at 40 [App. 103]. The existing disclosure requirement was the result of that deliberation, and the NAM fails to show that any less restrictive alternative exists that "would be even *almost* equally effective." *Id.* (quoting *Blount*, 61 F.3d at 947).

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[20] Indeed, the NAM's arguments presuppose a clear division between the activities of groups it considers *ad hoc* stealth coalitions and groups it considers long-standing associations. Yet, these groups do not inhabit separate spheres in the lobbying arena. As previously indicated on its webpage, the NAM itself is a member of over 70 coalitions, of varying opacity, including "Compete America," "OSHA Fairness Coalition," "Air Quality Coalition," and "The National Coalition to Protect Family Leave," *see*, NAM Coalition Activity, Legislative Defendants' Opposition attachment 1, previously available at http://www.nam.org/s_nam/bin.asp?CID=28&DID=201898&DOC=FILE.PDF (last visited Feb. 22, 2008) [no longer available].

4. The NAM has not established a significant burden on its members' associational rights arising from amended section 1603(b)(3).

In considering the burden on the associational rights of members of organizations, the Supreme Court has focused on the harassment and retribution that could be suffered by members publicly linked to an unpopular group. *See NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *Buckley*, 424 U.S. at 71-72. To establish the likelihood and severity of potential retribution and harassment, the Court has required a specific factual showing of the threat of harm to members. In *NAACP*, the association "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. Similarly, in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), the Court invalidated a state's campaign expenditure and contribution disclosure requirements as applied to the Socialist Workers' Party based on "substantial evidence of past and present hostility from private persons and Government officials," *id.* at 102, including record proof of "threatening telephone calls and hate mail, the burning of [the party's] literature, the destruction of . . . members' property," and of "22 [party] members . . . [who] were fired because of their party membership." *Id.* at 99.

The NAM has made no showing that disclosure poses any actual prospect of harassment or retaliation against its member organizations that even

remotely approaches the evidentiary showings in *NAACP*, *Socialist Workers*, and *Buckley*. Instead, "the NAM offers only speculation that harm may befall its members if they are disclosed as connected to the NAM's lobbying activities." Mem. Op. at 44 [App. 107] . The NAM relies on the Declaration of Jan Sarah Amundson, its Senior Vice President and General Counsel ("Amundson Decl.") [App. 49], in support of its allegations. Ms. Amundson avers that "[t]he NAM regularly lobbies on a variety of hot-button issues . . . that may lead to adverse consequences for members identified as 'actively participat[ing]' in such efforts." Amundson Decl. ¶ 10 [App. 53] (second alteration and quotation marks in original). She suggests generally that firms associated with "lobbying on issues related to on-going litigation . . . risk becoming litigation targets," and that "[t]aking policy positions that are unpopular with some groups may lead to boycotts, shareholder suits, demands for political contributions or support, and other forms of harassment." *Id.* For support, Ms. Amundson cites five newspaper articles and one lawsuit involving a labor union. *Id.*

The assertions and evidence offered in Ms. Amundson's declaration fall woefully short of demonstrating the reasonable probability of serious harassment and retribution from disclosure of a member organization's involvement with the NAM and its lobbying activities that could outweigh the compelling governmental interest furthered by the challenged provision. As the District Court explained, "the newspaper articles and lawsuit to which Ms.

Amundson points in her Declaration in no way indicate that any member of the NAM (or the NAM itself) has suffered harm or retaliation as a result of the NAM's lobbying activities." Mem. Op. at 44 [App. 107]. Similarly, the submission of Amici in support of the NAM, Brief Amici Curiae of Wisconsin Manufacturers & Commerce, *et al.*, which inappropriately endeavors to augment the record on appeal without seeking leave of this Court, contains no evidence that the NAM's member organizations are likely to suffer harassment and retaliation from disclosure of their involvement in the NAM's lobbying activities.

Indeed, the Supreme Court in *Buckley* found speculative assertions such as the NAM offers insufficient:

> [N]o appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*. Instead, appellants primarily rely on "the clearly articulated fears of individuals, well experienced in the political process." . . . At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure . . . outweighs the harm generally alleged.

424 U.S. at 71-72. Similarly, in *McConnell*, the Court found that challengers of campaign finance disclosures provisions had submitted insufficient evidence to establish a reasonable probability of retribution or harassment, 540 U.S. at 199, even though they offered far more evidence than the NAM does here. *See McConnell v. F.E.C.*, 251 F. Supp. 2d 176, 245-47 (D.D.C. 2003) (per curiam)

(reviewing evidence of alleged threat of harassment and retaliation from disclosure and finding it insufficient under *Buckley*).[21]

Not only do the NAM's assertions of potential harassment and retribution fail for lack of an evidentiary basis, but they also do not present an injury deriving specifically from disclosure of its members' associational activities. The LDA requires disclosure of an organization that lobbies on its own behalf or hires a lobbyist. The challenged provision simply requires organizations that instead choose to conduct lobbying activities through an association or coalition likewise be disclosed. The NAM complains that this requirement burdens those member organizations by revealing their involvement in lobbying on "hot-button issues." NAM's Br. at 14-15. But an organization that retains its own lobbyist or lobbies through in-house employees must disclose such information and suffers the same burden. If such a "burden" rendered amended section 1603(b)(3) unconstitutional, it would invalidate all disclosures required by the FRLA and now the LDA for more than 60 years – in

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[21] The NAM asserts that "[t]he evidence is undisputed that taking policy positions that are unpopular with some groups may lead to boycotts, shareholder suits, demands for political contributions or support, and other forms of harassment." NAM's Br. at 15. While Defendants-appellees proffered no contrary evidence, they certainly disputed that the paltry evidence the NAM offered – conclusory statements in a declaration supported by five newspaper articles and one lawsuit – supported the NAM's claim that its member organizations face a serious threat of harassment or retribution from disclosure of their involvement in planning, supervision, or control of the NAM's lobbying. *See* Mem. Op. at 42-4 [App. 105-107]; Legislative Defendants' Opposition at 31-33 [dist. ct. dkt #13].

direct conflict with *Harriss*. The NAM fails to provide evidence of retribution and harassment that is caused by the disclosure of an organization's *association with the NAM and its lobbying*, as opposed to merely an organization's lobbying on certain "controversial" topics.

Furthermore, the NAM's general allegations regarding potential "adverse consequences" to its members from disclosing that they actively participate in the NAM's lobbying activities are undermined by disclosures that it routinely and voluntarily makes on its own website. As the District Court noted, "the NAM's website . . . already discloses the membership of over 250 organizations in the NAM," yet "the NAM proffers no evidence of any past incidents suggesting that public affiliation with the NAM leads to a substantial risk of 'threats, harassment, or reprisals from either Government officials or private parties.'" Mem. Op. at 44 [App. 107] (quoting *Buckley*, 424 U.S. at 74).[22] Moreover, that the NAM itself readily disclosed such a substantial number and variety of member organizations undermines its general assertions that disclosure of organizational members that significantly fund and actively participate in planning, supervising, or controlling its lobbying activities leads to harassment and retaliation.

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[22] Indeed, approximately half of the 65 member organizations disclosed in the NAM's quarterly filing are disclosed on its website as part of its Board of Directors and Executive Committee. *See* Legislative Defendants' Opposition, attachment 2, http://namissvr.nam.org/NAMISSvr/NAMBoardOfDirectors.aspx. (last visited Feb. 28, 2008).

In sum, the NAM has failed to make a credible showing that members disclosed under amended section 1603(b)(3) face an actual prospect of retribution or harassment sufficient to outweigh the substantial governmental interest in disclosure. As the District Court "easily conclude[d] . . . , in light of the speculative nature of the NAM's allegations, 'the substantial public interest in disclosure identified by the legislative history of [§ 207 and other disclosure requirements] outweigh[s] the harm generally alleged.'" *Id.* at 45 [App. 108] (quoting *Buckley*, 424 U.S. at 72).

II. THE DISTRICT COURT CORRECTLY HELD THAT AMENDED SECTION 1603(b)(3) IS NOT UNCONSTITUTIONALLY VAGUE

The NAM claims that the terms "lobbying activities" and "active participation" in amended section 1603(b)(3) render that provision unconstitutionally vague. NAM's Br. at 42-49. A statute is unconstitutionally vague under the due process clause if it fails to "provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Buckley*, 424 U.S. at 77; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (statute unconstitutionally vague when it "'either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application . . . .'") (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). Where First Amendment rights are implicated, "the general test of vagueness applies with particular force," *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620

(1976), but even in that context, the Supreme Court has rejected vagueness challenges where the statutes are "easily understood and objectively determinable." *McConnell*, 540 U.S. at 194.

The NAM takes issue with this standard, asserting that in the First Amendment area a statute must meet a heightened test and "provide an objective and precise standard." NAM's Br. at 42. But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). Indeed, in its most recent term, the Supreme Court faced a vagueness challenge to a law that regulated speech and expressive activity. *United States v. Williams*, 128 S. Ct. 1830 (2008). In setting out the vagueness standard in that case, the Court explained:

> Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

Id. at 1845. The Court did not apply any higher standard for First Amendment cases, but simply noted that, in the First Amendment context, it has allowed plaintiffs whose own conduct is clearly proscribed nevertheless "to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *Id.*

A. "Lobbying Activities" as Defined in the LDA Is Not Vague

The NAM argues that the term "lobbying activities" is unconsitutionally vague because, as defined, it can depend in part on intent. NAM's Br. at 42-45. The LDA defines lobbying activities as:

> [L]obbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

2 U.S.C. § 1602(7). This definition of "lobbying activities" has been part of the LDA since 1995 and was not amended by HLOGA. The term is referenced not just in amended section 1603(b)(3), but also in many other parts of the LDA's regulatory scheme, including: who constitutes a "lobbyist," *id.* § 1602(10); whether a lobbyist must register for a specific client, *id.* § 1603(a)(3)(A)(i); whether an organization that employs lobbyists to lobby on its own behalf must register, *id.* § 1603(a)(3)(A)(ii); and the amount of income or expenses that must be disclosed on registrants' quarterly reports, *id.* § 1604(b)(3)-(4). Consequently, accepting the NAM's argument that "lobbying activities" is unconstitutionally vague would effectively gut the law, as the entire statutory scheme hinges on the requirement to disclose "lobbying activities."

The NAM, along with all other registrants, has been filing reports for over a decade disclosing their total expenses on (or income from, in the case of lobbying firms) "lobbying activities," as well as following the other parts of the LDA dependent on that term. The record contains no evidence that, in the 12

years since the LDA's enactment, any registrant has found the term "lobbying activities" so vague or unclear that a person must "guess at its meaning." *Roberts*, 468 U.S. at 629. Nevertheless, the NAM now complains that the term "lobbying activities" is vague because it depends, in part, on "intent" in determining its application to certain activities in support of lobbying. *See* NAM's Br. at 43-44. But the use of intent in the definition of lobbying activities – background work "that is intended, at the time it is performed, for use in [lobbying] contacts" – makes the definition more precise, not less. *Cf. Gonzales v. Carhart*, 127 S. Ct. 1610, 1628 (2007) ("The Court has made clear that scienter requirements alleviate vagueness concerns."); *Ward v. Utah*, 398 F.3d 1239, 1252 (10th Cir. 2005) (requirement of intent rendered statute not unconstitutionally vague).

Congress wanted to capture both lobbying contacts with government officials and the activities that supported those contacts, recognizing that a substantial segment of lobbying work happens prior to actual contacts with government officials. *See* H.R. Rep. No. 104-339, pt. 1, at 4 (noting that prior to LDA, "many lobbyists disclose[d] only income and expenses directly associated with [meeting with Members of Congress]."). Accordingly, Congress defined lobbying activities in the LDA to encompass background preparation, planning, and research in support of lobbying contacts with covered officials. At the same time, Congress did not want to include activities that were performed for other purposes but later used in lobbying. Preparing

materials for presentation to covered officials is lobbying activity, while "the effort that goes into preparing materials for purposes other than lobbying would not become a lobbying activity simply because the materials are subsequently used in the course of lobbying activities." *Id.* at 14. Thus, in the LDA, the definition of lobbying activities refers to the purpose for which a certain activity was undertaken, to determine whether conduct was done to support lobbying contacts (for which the statute requires disclosure) or for other purposes (which are outside the statute's scope). That definition is not so vague that "a person of ordinary intelligence" cannot understand what is covered.

The NAM asserts that "intent is too vague a concept to employ where core First Amendment rights may be deterred." NAM's Br. at 42 (citing *Buckley*, 424 U.S. at 43-44, and *Wisconsin Right to Life*, 127 S. Ct. at 2665-66 (Roberts, C.J., concurring)). But, as the District Court recognized, Mem. Op. at 48 [App. 111], the Court in *Wisconsin Right to Life* was attempting to develop a judicial test for interpreting the term "electioneering communication" in the Bipartisan Campaign Reform Act, by formulating what constitutes the "functional equivalent of express advocacy" for or against a candidate as opposed to advocacy on public issues. *Wisconsin Right to Life*, 127 S. Ct. at 2660, 2662-65. In that situation, a judicial test that turns solely on whether a speaker "intends" to influence an election as opposed merely to speak on an issue of public concern depends in large part on "evidence" that might only "reside in [the speaker's] own head," and could "leave the speaker entirely at

the mercy of his listeners." Mem. Op. at 48 [App. 111]. In contrast, the reference to intent in the LDA's definition of lobbying activities is susceptible to a more objective standard. The use of "intent" here distinguishes whether an activity was done to support lobbying contacts or for some other purpose – questions that can be answered from "objective indicators such as contemporaneous descriptions of the work in question and how the work is put to immediate use." *Id.* at 50 [App. 113].

Indeed, the Supreme Court's most recent statement on this issue directly refutes the NAM's contention that *Wisconsin Right to Life* and *Buckley* bar the use of "intent" in the First Amendment context. In *United States v. Williams*, the Court addressed a vagueness challenge to a criminal statute that the defendant claimed violated the First Amendment. Specifically, the challenged statute, 18 U.S.C. § 2252A(a)(3)(B), as amended, made punishable by law "any person who . . . knowingly . . . advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is *intended* to cause another to believe" that the material is or contains child pornography. *Williams*, 128 S. Ct. at 1836-37 (emphasis added). The Court rejected the argument that the statute is vague because it depends, in part, on intent:

> The statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe. Those are clear questions of fact. Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is "annoying" or

> "indecent.". . . To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. "But courts and juries every day pass upon knowledge, belief and intent – the state of men's minds – having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred."

Id. at 1846 (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 411(1950) (citing 2 J. Wigmore, Evidence §§ 244, 256 *et seq.* (3d ed. 1940)). Similarly here, as the District Court recognized, the statute's use of intent can be determined from the circumstances and is not dependent on a purely subjective judgment. The use of intent in the definition of lobbying activities does not render that term "unconstitutionally vague."[23]

B. "Active Participation" Is Not Unconstitutionally Vague

The NAM asserts that the term "active participation" is also unconstitutionally vague. To the contrary, ordinary people can easily understand the term's meaning. The legislative history explains that active participation denotes more than mere membership or passive receipt of information on legislative matters: "[O]rganizations that have only a passive role [in the lobbying activities of a coalition or association] – e.g., mere donors, mere recipients of information and reports, etc. – would not be considered to be

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[23] The NAM also argues that it is difficult to know the intent of its members when they participate in associational activities. NAM's Br. at 43-44. But surely the NAM coordinates and manages its own lobbying efforts and, therefore, knows whether, for example, the purpose of a NAM committee meeting was to plan the association's lobbying or whether research by a member organization was done for use in the NAM's lobbying.

'actively participating' in the lobbying activities." 153 Cong. Rec. S10709 (daily ed. Aug. 2, 2007) (joint statement of Sens. Feinstein, Lieberman, and Reid). In addition, the guidance issued by the Secretary and Clerk provides a detailed explanation of active participation, including specific examples of what conduct would and would not trigger the provision. *See supra* at 14 & n.7.

Indeed, the Supreme Court rejected a First Amendment vagueness challenge to identical terminology regarding restrictions on federal employee political activity:

> There might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in . . . fund-raising" . . . ; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

U.S. Civil Service Comm'n v. Nat'l Assn. of Letter Carriers, 413 U.S. 548, 577-79 (1973).

The NAM argues that the Supreme Court in *Letter Carriers* found that the phrase "active part" in the statute challenged there, the Hatch Act, was not vague only because the statute incorporated existing Civil Service Commission regulations to define what activities constituted taking "an active part in political management or in political campaigns." NAM's Br. at 45-47. Yet, the Court in *Letter Carriers* opined that a statute that used "plain and understandable language" forbidding "actively participating in fund-raising

activities for a partisan candidate or political party" and "actively managing the campaign of a partisan candidate for public office" would be "unquestionably valid," *Letter Carriers*, 413 U.S. at 556, without rulings or regulations to clarify the phrase "actively participating." Moreover, a review of the regulations relied on by the statute and pointed to by the Court reveals that, far from resolving any ambiguity in the term "active part," the regulations themselves repeatedly use that same phrase to describe both prohibited and permitted activities – *e.g.,* the regulations proscribe "actively participating in a fund-raising activity of a partisan candidate, political party or political club," and "[t]aking an active part in managing the political campaign of a partisan candidate," and permit employees to "[t]ake an active part, as an independent candidate, or in support of an independent candidate, in a partisan election," to "take an active part, as a candidate or in support of a candidate, in a nonpartisan election," and to "[b]e politically active in connection with a question which is not specifically identified with a political party." *Id.* at 576 n.21 (quoting 5 C.F.R. §§ 733.111(a)(9), (a)(10), and (a)(11), 733.121(b)(4) and (b)(5) [repealed]). It was in reference to those regulations that the Court rejected "quibbles about the meaning of taking an 'active part in managing' or about 'actively participating in . . . fund-raising'" – terms that "the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Id.* at 578-79.

Just as *Letter Carriers* did not find the terms "active part" or "actively participating" vague once the scope of "political management" and "political

campaign" was specified by incorporating the regulations, so here, where the scope of "lobbying activities" is defined by law, the term "actively participates" is similarly not unconstitutionally vague.

CONCLUSION

For these reasons, the Court should affirm the judgment of the District Court.

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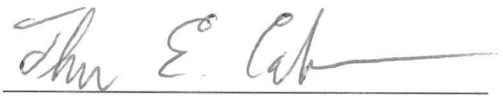

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CERTIFICATE OF SERVICE

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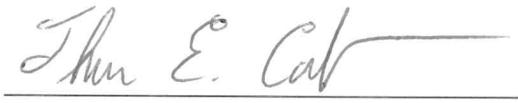

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Addendum

Lobbying Disclosure Act of 1995--Current through October 1, 2007

Note: This compilation includes language from Public Law 104–65, as well as amending language from Public Laws 105–166 and 110–81. These materials are not official evidence of the laws set forth herein. Sections 112 and 204 of title 1 of the United States Code establish the rules governing which text serves as legal evidence of the laws of the United States.

For changes, after the closing date of this publication, to provisions of law in this publication, see the United States Code Classification Tables published by the Office of the Law Revision Counsel of the House of Representatives at http://uscode.house.gov/classification/tables.shtml

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LOBBYING DISCLOSURE ACT OF 1995 [1]

[As Amended Through P.L. 110–81, Enacted September 14, 2007]

AN ACT To provide for the disclosure of lobbying activities to influence the Federal Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. [2 U.S.C. 1601 note] SHORT TITLE.

This Act may be cited as the "Lobbying Disclosure Act of 1995".

SEC. 2. [2 U.S.C. 1601] FINDINGS.

The Congress finds that—

(1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government;

(2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and

(3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.

SEC. 3. [2 U.S.C. 1602] DEFINITIONS.

As used in this Act:

(1) AGENCY.—The term "agency" has the meaning given that term in section 551(1) of title 5, United States Code.

(2) CLIENT.—The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. A person or entity whose employees act as lobbyists on its own behalf is both a client and an employer of such employees. In the case of a coalition or association that employs or retains other persons to conduct lobbying activities,

[1] Title II of Public Law 110–81 provides for amendments to the Lobby Discolusure Act of 1995. Section 215 of such Public Law provides:

SEC. 215. EFFECTIVE DATE.

Except as otherwise provided in sections 203, 204, 206, 211, 212, and 213, the amendments made by this title shall apply with respect to registrations under the Lobbying Disclosure Act of 1995 having an effective date of January 1, 2008, or later and with respect to quarterly reports under that Act covering calendar quarters beginning on or after January 1, 2008.

the client is the coalition or association and not its individual members.

(3) COVERED EXECUTIVE BRANCH OFFICIAL.—The term "covered executive branch official" means—

(A) the President;

(B) the Vice President;

(C) any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;

(D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;

(E) any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37, United States Code; and

(F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, United States Code.

(4) COVERED LEGISLATIVE BRANCH OFFICIAL.—The term "covered legislative branch official" means—

(A) a Member of Congress;

(B) an elected officer of either House of Congress;

(C) any employee of, or any other individual functioning in the capacity of an employee of—

(i) a Member of Congress;

(ii) a committee of either House of Congress;

(iii) the leadership staff of the House of Representatives or the leadership staff of the Senate;

(iv) a joint committee of Congress; and

(v) a working group or caucus organized to provide legislative services or other assistance to Members of Congress; and

(D) any other legislative branch employee serving in a position described under section 109(13) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(5) EMPLOYEE.—The term "employee" means any individual who is an officer, employee, partner, director, or proprietor of a person or entity, but does not include—

(A) independent contractors; or

(B) volunteers who receive no financial or other compensation from the person or entity for their services.

(6) FOREIGN ENTITY.—The term "foreign entity" means a foreign principal (as defined in section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b)).

(7) LOBBYING ACTIVITIES.—The term "lobbying activities" means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

(8) LOBBYING CONTACT.—

(A) DEFINITION.—The term "lobbying contact" means any oral or written communication (including an electronic

communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);

(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;

(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or

(iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

(B) EXCEPTIONS.—The term "lobbying contact" does not include a communication that is—

(i) made by a public official acting in the public official's official capacity;

(ii) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

(iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;

(iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.);

(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;

(vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;

(vii) testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force;

(viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license;

(x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar

publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;

(xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

(xii) made to an official in an agency with regard to—

(I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or

(II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis,

if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing;

(xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5, United States Code, or substantially similar provisions;

(xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding;

(xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures;

(xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with—

(I) a covered executive branch official, or

(II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision),

with respect to the formulation, modification, or adoption of private legislation for the relief of that individual;

(xvii) a disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989, under the Inspector General Act of 1978, or under another provision of law;

(xviii) made by—

(I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of the Internal Revenue Code of 1986, or

(II) a religious order that is exempt from filing a Federal income tax return under paragraph (2)(A)(iii) of such section 6033(a); and

(xix) between—

(I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act) that is registered with or established by the Securities and Exchange Commission as required by that Act or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act; and

(II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively;

relating to the regulatory responsibilities of such organization under that Act.

(9) LOBBYING FIRM.—The term "lobbying firm" means a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity. The term also includes a self-employed individual who is a lobbyist.

(10) LOBBYIST.—The term "lobbyist" means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.

(11) MEDIA ORGANIZATION.—The term "media organization" means a person or entity engaged in disseminating information to the general public through a newspaper, magazine, other publication, radio, television, cable television, or other medium of mass communication.

(12) MEMBER OF CONGRESS.—The term "Member of Congress" means a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress.

(13) ORGANIZATION.—The term "organization" means a person or entity other than an individual.

(14) PERSON OR ENTITY.—The term "person or entity" means any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or State or local government.

(15) PUBLIC OFFICIAL.—The term "public official" means any elected official, appointed official, or employee of—

(A) a Federal, State, or local unit of government in the United States other than—

(i) a college or university;

(ii) a government-sponsored enterprise (as defined in section 3(8) of the Congressional Budget and Impoundment Control Act of 1974);

(iii) a public utility that provides gas, electricity, water, or communications;

(iv) a guaranty agency (as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1085(j))), including any affiliate of such an agency; or

(v) an agency of any State functioning as a student loan secondary market pursuant to section 435(d)(1)(F) of the Higher Education Act of 1965 (20 U.S.C. 1085(d)(1)(F));

(B) a Government corporation (as defined in section 9101 of title 31, United States Code);

(C) an organization of State or local elected or appointed officials other than officials of an entity described in clause (i), (ii), (iii), (iv), or (v) of subparagraph (A);

(D) an Indian tribe (as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e));

(E) a national or State political party or any organizational unit thereof; or

(F) a national, regional, or local unit of any foreign government, or a group of governments acting together as an international organization.

(16) STATE.—The term "State" means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

SEC. 4. [2 U.S.C. 1603] REGISTRATION OF LOBBYISTS.

(a) REGISTRATION.—

(1) GENERAL RULE.—No later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, or on the first business day after such 45th day if the 45th day is not a business day, such lobbyist (or, as provided under paragraph (2), the organization employing such lobbyist), shall register with the Secretary of the Senate and the Clerk of the House of Representatives.

(2) EMPLOYER FILING.—Any organization that has 1 or more employees who are lobbyists shall file a single registration under this section on behalf of such employees for each client on whose behalf the employees act as lobbyists.

(3) EXEMPTION.—

(A) GENERAL RULE.—Notwithstanding paragraphs (1) and (2), a person or entity whose—

(i) total income for matters related to lobbying activities on behalf of a particular client (in the case of a lobbying firm) does not exceed and is not expected to exceed $2,500; or

(ii) total expenses in connection with lobbying activities (in the case of an organization whose employees engage in lobbying activities on its own behalf) do not exceed or are not expected to exceed $10,000,

(as estimated under section 5) in the quarterly period described in section 5(a) during which the registration would be made is not required to register under subsection (a) with respect to such client.

(B) ADJUSTMENT.—The dollar amounts in subparagraph (A) shall be adjusted—

(i) on January 1, 1997, to reflect changes in the Consumer Price Index (as determined by the Secretary of Labor) since the date of enactment of this Act; and

(ii) on January 1 of each fourth year occurring after January 1, 1997, to reflect changes in the Consumer Price Index (as determined by the Secretary of Labor) during the preceding 4-year period,

rounded to the nearest $500.

(b) CONTENTS OF REGISTRATION.—Each registration under this section shall contain—

(1) the name, address, business telephone number, and principal place of business of the registrant, and a general description of its business or activities;

(2) the name, address, and principal place of business of the registrant's client, and a general description of its business or activities (if different from paragraph (1));

(3) the name, address, and principal place of business of any organization, other than the client, that—

(A) contributes more than $5,000 to the registrant or the client in the quarterly period to fund the lobbying activities of the registrant; and

(B) actively participates in the planning, supervision, or control of such lobbying activities;

(4) the name, address, principal place of business, amount of any contribution of more than $5,000 to the lobbying activities of the registrant, and approximate percentage of equitable ownership in the client (if any) of any foreign entity that—

(A) holds at least 20 percent equitable ownership in the client or any organization identified under paragraph (3);

(B) directly or indirectly, in whole or in major part, plans, supervises, controls, directs, finances, or subsidizes the activities of the client or any organization identified under paragraph (3); or

(C) is an affiliate of the client or any organization identified under paragraph (3) and has a direct interest in the outcome of the lobbying activity;

(5) a statement of—

(A) the general issue areas in which the registrant expects to engage in lobbying activities on behalf of the client; and

(B) to the extent practicable, specific issues that have (as of the date of the registration) already been addressed or are likely to be addressed in lobbying activities; and

(6) the name of each employee of the registrant who has acted or whom the registrant expects to act as a lobbyist on behalf of the client and, if any such employee has served as a covered executive branch official or a covered legislative branch official in the 20 years before the date on which the employee first acted as a lobbyist on behalf of the client, the position in which such employee served.

No disclosure is required under paragraph (3)(B) if the organization that would be identified as affiliated with the client is listed on the client's publicly accessible Internet website as being a member of

or contributor to the client, unless the organization in whole or in major part plans, supervises, or controls such lobbying activities. If a registrant relies upon the preceding sentence, the registrant must disclose the specific Internet address of the web page containing the information relied upon. Nothing in paragraph (3)(B) shall be construed to require the disclosure of any information about individuals who are members of, or donors to, an entity treated as a client by this Act or an organization identified under that paragraph.

(c) GUIDELINES FOR REGISTRATION.—

(1) MULTIPLE CLIENTS.—In the case of a registrant making lobbying contacts on behalf of more than 1 client, a separate registration under this section shall be filed for each such client.

(2) MULTIPLE CONTACTS.—A registrant who makes more than 1 lobbying contact for the same client shall file a single registration covering all such lobbying contacts.

(d) TERMINATION OF REGISTRATION.—A registrant who after registration—

(1) is no longer employed or retained by a client to conduct lobbying activities, and

(2) does not anticipate any additional lobbying activities for such client,

may so notify the Secretary of the Senate and the Clerk of the House of Representatives and terminate its registration.

SEC. 5. [2 U.S.C. 1604] REPORTS BY REGISTERED LOBBYISTS.

(a) QUARTERLY REPORT.—No later than 20 days after the end of the quarterly period beginning on the first day of January, April, July, and October of each year in which a registrant is registered under section 4, or on the first business day after such 20th day if the 20th day is not a business day, each registrant shall file a report with the Secretary of the Senate and the Clerk of the House of Representatives on its lobbying activities during such quarterly period. A separate report shall be filed for each client of the registrant.

(b) CONTENTS OF REPORT.—Each quarterly report filed under subsection (a) shall contain—

(1) the name of the registrant, the name of the client, and any changes or updates to the information provided in the initial registration, including information under section 4(b)(3);

(2) for each general issue area in which the registrant engaged in lobbying activities on behalf of the client during the quarterly period—

(A) a list of the specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities, including, to the maximum extent practicable, a list of bill numbers and references to specific executive branch actions;

(B) a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client;

(C) a list of the employees of the registrant who acted as lobbyists on behalf of the client; and

(D) a description of the interest, if any, of any foreign entity identified under section 4(b)(4) in the specific issues listed under subparagraph (A);

(3) in the case of a lobbying firm, a good faith estimate of the total amount of all income from the client (including any payments to the registrant by any other person for lobbying activities on behalf of the client) during the quarterly period, other than income for matters that are unrelated to lobbying activities;

(4) in the case of a registrant engaged in lobbying activities on its own behalf, a good faith estimate of the total expenses that the registrant and its employees incurred in connection with lobbying activities during the quarterly period; and

(5) for each client, immediately after listing the client, an identification of whether the client is a State or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more State or local governments.

(c) ESTIMATES OF INCOME OR EXPENSES.—For purposes of this section, estimates of income or expenses shall be made as follows:

(1) Estimates of amounts in excess of $5,000 shall be rounded to the nearest $10,000.

(2) In the event income or expenses do not exceed $5,000, the registrant shall include a statement that income or expenses totaled less than $5,000 for the reporting period.

(d) SEMIANNUAL REPORTS ON CERTAIN CONTRIBUTIONS.—

(1) IN GENERAL.—Not later than 30 days after the end of the semiannual period beginning on the first day of January and July of each year, or on the first business day after such 30th day if the 30th day is not a business day, each person or organization who is registered or is required to register under paragraph (1) or (2) of section 4(a), and each employee who is or is required to be listed as a lobbyist under section 4(b)(6) or subsection (b)(2)(C) of this section, shall file a report with the Secretary of the Senate and the Clerk of the House of Representatives containing—

(A) the name of the person or organization;

(B) in the case of an employee, his or her employer;

(C) the names of all political committees established or controlled by the person or organization;

(D) the name of each Federal candidate or officeholder, leadership PAC, or political party committee, to whom aggregate contributions equal to or exceeding $200 were made by the person or organization, or a political committee established or controlled by the person or organization within the semiannual period, and the date and amount of each such contribution made within the semiannual period;

(E) the date, recipient, and amount of funds contributed or disbursed during the semiannual period by the person or organization or a political committee established or controlled by the person or organization—

(i) to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official;

(ii) to an entity that is named for a covered legislative branch official, or to a person or entity in recognition of such official;

(iii) to an entity established, financed, maintained, or controlled by a covered legislative branch official or covered executive branch official, or an entity designated by such official; or

(iv) to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, 1 or more covered legislative branch officials or covered executive branch officials,

except that this subparagraph shall not apply if the funds are provided to a person who is required to report the receipt of the funds under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434);

(F) the name of each Presidential library foundation, and each Presidential inaugural committee, to whom contributions equal to or exceeding $200 were made by the person or organization, or a political committee established or controlled by the person or organization, within the semiannual period, and the date and amount of each such contribution within the semiannual period; and

(G) a certification by the person or organization filing the report that the person or organization—

(i) has read and is familiar with those provisions of the Standing Rules of the Senate and the Rules of the House of Representatives relating to the provision of gifts and travel; and

(ii) has not provided, requested, or directed a gift, including travel, to a Member of Congress or an officer or employee of either House of Congress with knowledge that receipt of the gift would violate rule XXXV of the Standing Rules of the Senate or rule XXV of the Rules of the House of Representatives.

(2) DEFINITION.—In this subsection, the term "leadership PAC" has the meaning given such term in section 304(i)(8)(B) of the Federal Election Campaign Act of 1971.

(e) ELECTRONIC FILING REQUIRED.—A report required to be filed under this section shall be filed in electronic form, in addition to any other form that the Secretary of the Senate or the Clerk of the House of Representatives may require or allow. The Secretary of the Senate and the Clerk of the House of Representatives shall use the same electronic software for receipt and recording of filings under this Act.

SEC. 6. [2 U.S.C. 1605] DISCLOSURE AND ENFORCEMENT.

(a) IN GENERAL.—The Secretary of the Senate and the Clerk of the House of Representatives shall—

(1) provide guidance and assistance on the registration and reporting requirements of this Act and develop common standards, rules, and procedures for compliance with this Act;

(2) review, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registration and reports;

(3) develop filing, coding, and cross-indexing systems to carry out the purpose of this Act, including—

(A) a publicly available list of all registered lobbyists, lobbying firms, and their clients; and

(B) computerized systems designed to minimize the burden of filing and maximize public access to materials filed under this Act;

(4) make available for public inspection and copying at reasonable times the registrations and reports filed under this Act and, in the case of a report filed in electronic form under section 5(e), make such report available for public inspection over the Internet as soon as technically practicable after the report is so filed;

(5) retain registrations for a period of at least 6 years after they are terminated and reports for a period of at least 6 years after they are filed;

(6) compile and summarize, with respect to each quarterly period, the information contained in registrations and reports filed with respect to such period in a clear and complete manner;

(7) notify any lobbyist or lobbying firm in writing that may be in noncompliance with this Act;

(8) notify the United States Attorney for the District of Columbia that a lobbyist or lobbying firm may be in noncompliance with this Act, if the registrant has been notified in writing and has failed to provide an appropriate response within 60 days after notice was given under paragraph (7);

(9) maintain all registrations and reports filed under this Act, and make them available to the public over the Internet, without a fee or other access charge, in a searchable, sortable, and downloadable manner, to the extent technically practicable, that—

(A) includes the information contained in the registrations and reports;

(B) is searchable and sortable to the maximum extent practicable, including searchable and sortable by each of the categories of information described in section 4(b) or 5(b); and

(C) provides electronic links or other appropriate mechanisms to allow users to obtain relevant information in the database of the Federal Election Commission;

(10) retain the information contained in a registration or report filed under this Act for a period of 6 years after the registration or report (as the case may be) is filed; and

(11) make publicly available, on a semiannual basis, the aggregate number of registrants referred to the United States Attorney for the District of Columbia for noncompliance as required by paragraph (8).

(b) ENFORCEMENT REPORT.—

(1) REPORT.—The Attorney General shall report to the congressional committees referred to in paragraph (2), after the

end of each semiannual period beginning on January 1 and July 1, the aggregate number of enforcement actions taken by the Department of Justice under this Act during that semiannual period and, by case, any sentences imposed, except that such report shall not include the names of individuals, or personally identifiable information, that is not already a matter of public record.

(2) COMMITTEES.—The congressional committees referred to in paragraph (1) are the Committee on Homeland Security and Governmental Affairs and the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

SEC. 7. [2 U.S.C. 1606] PENALTIES.

(a) CIVIL PENALTY.—Whoever knowingly fails to—

(1) remedy a defective filing within 60 days after notice of such a defect by the Secretary of the Senate or the Clerk of the House of Representatives; or

(2) comply with any other provision of this Act;

shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $200,000, depending on the extent and gravity of the violation.

(b) CRIMINAL PENALTY.—Whoever knowingly and corruptly fails to comply with any provision of this Act shall be imprisoned for not more than 5 years or fined under title 18, United States Code, or both.

SEC. 8. [2 U.S.C. 1607] RULES OF CONSTRUCTION.

(a) CONSTITUTIONAL RIGHTS.—Nothing in this Act shall be construed to prohibit or interfere with—

(1) the right to petition the Government for the redress of grievances;

(2) the right to express a personal opinion; or

(3) the right of association,

protected by the first amendment to the Constitution.

(b) PROHIBITION OF ACTIVITIES.—Nothing in this Act shall be construed to prohibit, or to authorize any court to prohibit, lobbying activities or lobbying contacts by any person or entity, regardless of whether such person or entity is in compliance with the requirements of this Act.

(c) AUDIT AND INVESTIGATIONS.—Nothing in this Act shall be construed to grant general audit or investigative authority to the Secretary of the Senate or the Clerk of the House of Representatives.

SEC. 9. AMENDMENTS TO THE FOREIGN AGENTS REGISTRATION ACT.

[Sec. 9 provides for amendments to the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.)]

SEC. 10. AMENDMENTS TO THE BYRD AMENDMENT.

[Sec. 10 provides for amendments to section 1352 of title 31, United States Code]

SEC. 11. REPEAL OF CERTAIN LOBBYING PROVISIONS.

(a) REPEAL OF THE FEDERAL REGULATION OF LOBBYING ACT.—[Sec. 11(a) provides for the repeal of the Federal Regulation of Lobbying Act (2 U.S.C. 261 et seq.) in its entirety]

(b) REPEAL OF PROVISIONS RELATING TO HOUSING LOBBYIST ACTIVITIES.—

(1) [Sec. 11(b)(1) provides for the repeal of section 13 of the Department of Housing and Urban Development Act (42 U.S.C. 3537b)]

(2) [Sec. 11(b)(2) provides for the repeal of section 536(d) of the Housing Act of 1949 (42 U.S.C. 1490p(d))]

SEC. 12. CONFORMING AMENDMENTS TO OTHER STATUTES.

(a) AMENDMENT TO COMPETITIVENESS POLICY COUNCIL ACT.—[Sec. 12(a) provides for an amendment to section 5206(e) of the Competitiveness Policy Council Act (15 U.S.C. 4804(e))]

(b) AMENDMENTS TO TITLE 18, UNITED STATES CODE.—[Sec. 12(b) provides for amendments to section 219(a) of title 18, United States Code]

(c) AMENDMENT TO FOREIGN SERVICE ACT OF 1980.—[Sec. 12(c) provides for an amendment to section 602(c) of the Foreign Service Act of 1980 (22 U.S.C. 4002(c))]

SEC. 13. [2 U.S.C. 1608] SEVERABILITY.

If any provision of this Act, or the application thereof, is held invalid, the validity of the remainder of this Act and the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 14. [2 U.S.C. 1609] IDENTIFICATION OF CLIENTS AND COVERED OFFICIALS.

(a) ORAL LOBBYING CONTACTS.—Any person or entity that makes an oral lobbying contact with a covered legislative branch official or a covered executive branch official shall, on the request of the official at the time of the lobbying contact—

(1) state whether the person or entity is registered under this Act and identify the client on whose behalf the lobbying contact is made; and

(2) state whether such client is a foreign entity and identify any foreign entity required to be disclosed under section 4(b)(4) that has a direct interest in the outcome of the lobbying activity.

(b) WRITTEN LOBBYING CONTACTS.—Any person or entity registered under this Act that makes a written lobbying contact (including an electronic communication) with a covered legislative branch official or a covered executive branch official shall—

(1) if the client on whose behalf the lobbying contact was made is a foreign entity, identify such client, state that the client is considered a foreign entity under this Act, and state whether the person making the lobbying contact is registered on behalf of that client under section 4; and

(2) identify any other foreign entity identified pursuant to section 4(b)(4) that has a direct interest in the outcome of the lobbying activity.

(c) IDENTIFICATION AS COVERED OFFICIAL.—Upon request by a person or entity making a lobbying contact, the individual who is contacted or the office employing that individual shall indicate whether or not the individual is a covered legislative branch official or a covered executive branch official.

SEC. 15. [2 U.S.C. 1610] ESTIMATES BASED ON TAX REPORTING SYSTEM.

(a) ENTITIES COVERED BY SECTION 6033(b) OF THE INTERNAL REVENUE CODE OF 1986.—A person, other than a lobbying firm, that is required to report and does report lobbying expenditures pursuant to section 6033(b)(8) of the Internal Revenue Code of 1986 may—

(1) make a good faith estimate (by category of dollar value) of applicable amounts that would be required to be disclosed under such section for the appropriate quarterly period to meet the requirements of sections 4(a)(3) and 5(b)(4); and

(2) for all other purposes consider as lobbying contacts and lobbying activities only—

(A) lobbying contacts with covered legislative branch officials (as defined in section 3(4)) and lobbying activities in support of such contacts; and

(B) lobbying of Federal executive branch officials to the extent that such activities are influencing legislation as defined in section 4911(d) of the Internal Revenue Code of 1986.

(b) ENTITIES COVERED BY SECTION 162(e) OF THE INTERNAL REVENUE CODE OF 1986.—A person, other than a lobbying firm, who is required to account and does account for lobbying expenditures pursuant to section 162(e) of the Internal Revenue Code of 1986 may—

(1) make a good faith estimate (by category of dollar value) of applicable amounts that would not be deductible pursuant to such section for the appropriate quarterly period to meet the requirements of sections 4(a)(3) and 5(b)(4); and

(2) for all other purposes consider as lobbying contacts and lobbying activities only—

(A) lobbying contacts with covered legislative branch officials (as defined in section 3(4)) and lobbying activities in support of such contacts; and

(B) lobbying of Federal executive branch officials to the extent that amounts paid or costs incurred in connection with such activities are not deductible pursuant to section 162(e) of the Internal Revenue Code of 1986.

(c) DISCLOSURE OF ESTIMATE.—Any registrant that elects to make estimates required by this Act under the procedures authorized by subsection (a) or (b) for reporting or threshold purposes shall—

(1) inform the Secretary of the Senate and the Clerk of the House of Representatives that the registrant has elected to make its estimates under such procedures; and

(2) make all such estimates, in a given calendar year, under such procedures.

(d) STUDY.—Not later than March 31, 1997, the Comptroller General of the United States shall review reporting by registrants under subsections (a) and (b) and report to the Congress—

(1) the differences between the definition of "lobbying activities" in section 3(7) and the definitions of "lobbying expenditures", "influencing legislation", and related terms in

sections 162(e) and 4911 of the Internal Revenue Code of 1986, as each are implemented by regulations;

(2) the impact that any such differences may have on filing and reporting under this Act pursuant to this subsection; and

(3) any changes to this Act or to the appropriate sections of the Internal Revenue Code of 1986 that the Comptroller General may recommend to harmonize the definitions.

SEC. 16. REPEAL OF THE RAMSPECK ACT.

(a) REPEAL.—Subsection (c) of section 3304 of title 5, United States Code, is repealed.

(b) REDESIGNATION.—Subsection (d) of section 3304 of title 5, United States Code, is redesignated as subsection (c).

(c) EFFECTIVE DATE.—The repeal and amendment made by this section shall take effect 2 years after the date of the enactment of this Act.

SEC. 17. EXCEPTED SERVICE AND OTHER EXPERIENCE CONSIDERATIONS FOR COMPETITIVE SERVICE APPOINTMENTS.

(a) IN GENERAL.—Section 3304 of title 5, United States Code (as amended by section 2 of this Act) is further amended by adding at the end thereof the following new subsection:

"(d) The Office of Personnel Management shall promulgate regulations on the manner and extent that experience of an individual in a position other than the competitive service, such as the excepted service (as defined under section 2103) in the legislative or judicial branch, or in any private or nonprofit enterprise, may be considered in making appointments to a position in the competitive service (as defined under section 2102). In promulgating such regulations OPM shall not grant any preference based on the fact of service in the legislative or judicial branch. The regulations shall be consistent with the principles of equitable competition and merit based appointments.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect 2 years after the date of the enactment of this Act, except the Office of Personnel Management shall—

(1) conduct a study on excepted service considerations for competitive service appointments relating to such amendment; and

(2) take all necessary actions for the regulations described under such amendment to take effect as final regulations on the effective date of this section.

SEC. 18. [2 U.S.C. 1611] EXEMPT ORGANIZATIONS.

An organization described in section 501(c)(4) of the Internal Revenue Code of 1986 which engages in lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant, or loan.

SEC. 19. AMENDMENT TO THE FOREIGN AGENTS REGISTRATION ACT (P.L. 75-583).

[Sec. 19 provides for an amendment to strike and insert section 11 of the Foreign Agents Registration Act of 1938]

SEC. 20. DISCLOSURE OF THE VALUE OF ASSETS UNDER THE ETHICS IN GOVERNMENT ACT OF 1978.

[Sec. 20 provides for amendments to section 102 of the Ethics in Government Act of 1978]

SEC. 21. BAN ON TRADE REPRESENTATIVE REPRESENTING OR ADVISING FOREIGN ENTITIES.

(a) REPRESENTING AFTER SERVICE.—[Sec. 21(a) provides for amendments to section 207(f)(2) of title 18, United States Code]

(b) LIMITATION ON APPOINTMENT AS UNITED STATES TRADE REPRESENTATIVE AND DEPUTY UNITED STATES TRADE REPRESENTATIVE.—[Sec. 21(b) provides for an amendment to section 141(b) of the Trade Act of 1974 (19 U.S.C. 2171(b))]

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to an individual appointed as United States Trade Representative or as a Deputy United States Trade Representative on or after the date of enactment of this Act.

SEC. 22. FINANCIAL DISCLOSURE OF INTEREST IN QUALIFIED BLIND TRUST.

(a) IN GENERAL.—[Sec. 22(a) and (b) provides for amendments to section 102 of the Ethics in Government Act of 1978]

(c) EFFECTIVE DATE.—The amendment made by this section shall apply with respect to reports filed under title I of the Ethics in Government Act of 1978 for calendar year 1996 and thereafter.

SEC. 23. [2 U.S.C. 1612] SENSE OF THE SENATE THAT LOBBYING EXPENSES SHOULD REMAIN NONDEDUCTIBLE.

(a) FINDINGS.—The Senate finds that ordinary Americans generally are not allowed to deduct the costs of communicating with their elected representatives.

(b) SENSE OF THE SENATE.—It is the sense of the Senate that lobbying expenses should not be tax deductible.

SEC. 24. [2 U.S.C. 1601 note] EFFECTIVE DATES.

(a) Except as otherwise provided in this section, this Act and the amendments made by this Act shall take effect on January 1, 1996.

(b) The repeals and amendments made under sections 9, 10, 11, and 12 shall take effect as provided under subsection (a), except that such repeals and amendments—

(1) shall not affect any proceeding or suit commenced before the effective date under subsection (a), and in all such proceedings or suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted; and

(2) shall not affect the requirements of Federal agencies to compile, publish, and retain information filed or received before the effective date of such repeals and amendments.

SEC. 25. [2 U.S.C. 1613] PROHIBITION ON PROVISION OF GIFTS OR TRAVEL BY REGISTERED LOBBYISTS TO MEMBERS OF CONGRESS AND TO CONGRESSIONAL EMPLOYEES.

(a) PROHIBITION.—Any person described in subsection (b) may not make a gift or provide travel to a covered legislative branch official if the person has knowledge that the gift or travel may not be accepted by that covered legislative branch official under the

Rules of the House of Representatives or the Standing Rules of the Senate (as the case may be).

(b) PERSONS SUBJECT TO PROHIBITION.—The persons subject to the prohibition under subsection (a) are any lobbyist that is registered or is required to register under section 4(a)(1), any organization that employs 1 or more lobbyists and is registered or is required to register under section 4(a)(2), and any employee listed or required to be listed as a lobbyist by a registrant under section 4(b)(6) or 5(b)(2)(C).

SEC. 26. [2 U.S.C. 1614] ANNUAL AUDITS AND REPORTS BY COMPTROLLER GENERAL.

(a) AUDIT.—On an annual basis, the Comptroller General shall audit the extent of compliance or noncompliance with the requirements of this Act by lobbyists, lobbying firms, and registrants through a random sampling of publicly available lobbying registrations and reports filed under this Act during each calendar year.

(b) REPORTS TO CONGRESS.—

(1) ANNUAL REPORTS.—Not later than April 1 of each year, the Comptroller General shall submit to the Congress a report on the review required by subsection (a) for the preceding calendar year. The report shall include the Comptroller General's assessment of the matters required to be emphasized by that subsection and any recommendations of the Comptroller General to—

(A) improve the compliance by lobbyists, lobbying firms, and registrants with the requirements of this Act; and

(B) provide the Department of Justice with the resources and authorities needed for the effective enforcement of this Act.

(2) ASSESSMENT OF COMPLIANCE.—The annual report under paragraph (1) shall include an assessment of compliance by registrants with the requirements of section 4(b)(3).

(c) ACCESS TO INFORMATION.—The Comptroller General may, in carrying out this section, request information from and access to any relevant documents from any person registered under paragraph (1) or (2) of section 4(a) and each employee who is listed as a lobbyist under section 4(b)(6) or section 5(b)(2)(C) if the material requested relates to the purposes of this section. The Comptroller General may request such person to submit in writing such information as the Comptroller General may prescribe. The Comptroller General may notify the Congress in writing if a person from whom information has been requested under this subsection refuses to comply with the request within 45 days after the request is made.