UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

THE HISPANIC LEADERSHIP FUND, INC.,	Civ. No. 1:12-893-TSE-TRJ
Plaintiff,	
v.	
FEDERAL ELECTION COMMISSION,	ADDITIONAL BRIEFING
Defendant.	

ADDITIONAL BRIEF OF HISPANIC LEADERSHIP FUND IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

On August 31, 2012, this Court ordered additional briefing from the parties. Plaintiff Hispanic Leadership Fund responds to the Court's order below.[1]

In its Brief in Support of Motion for Preliminary Injunction, HLF explained that this as-applied challenge is necessary to provide "clarity on what constitutes a reference to a 'clearly identified candidate,' which is one of the four statutory elements of an 'electioneering communication' under the law and a prerequisite to invoking its corresponding disclosure and reporting requirements." HLF.'s Brief at 2 (ECF 4, 2). In recognition of previous facial challenges compelling narrowing judicial constructions of "clearly identified candidate,"[2] HLF noted that it "does not, in this matter, challenge the constitutionality of the electioneering communications provisions." *Id*. This note was intended to disclaim only a full facial challenge

[1] For the convenience of the Court, HLF has attached Proposed Order as Attachment A hereto that narrowly grants HLF's request without deciding any questions of law beyond those specifically posed by the Complaint.

[2] As HLF notes below, the phrase clearly identified candidate is contained throughout the FECA, and this Court's interpretation of the term of art will have a significant impact on the future application of these provisions of law as well.

to BCRA's electioneering communication provision.[3] HLF does not argue that the electioneering communication provision is unconstitutional when properly applied. Rather, HLF argues that the FEC's interpretation of the component statutory definition at issue here, as applied to HLF's proposed advertisements, unconstitutionally expands the scope of what the Supreme Court has previously held is the proper constitutional interpretation of the phrase "clearly identified candidate."

I. HISPANIC LEADERSHIP FUND HAS ARTICLE III STANDING TO BRING THIS AS-APPLIED CHALLENGE

HLF has Article III standing to bring this as-applied challenge because it satisfies the *Lujan* factors: (1) plaintiff has suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of — the injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted)

Although the Supreme Court resolved a facial challenge to BCRA's electioneering communications provisions in *McConnell v. FEC*, 540 U.S. 93 (2003), the Court subsequently held that these provisions remain subject to as-applied challenges. *See FEC v. Wisconsin Right To Life*, (*WRTL II*) 551 U.S. 449, 456-57 (2007). Accordingly, HLF is not precluded from

[3] HLF's disclaimer of any facial challenge is clear in Paragraph 1 of HLF's Complaint: "This is a pre-enforcement, as-applied challenge to a [FECA] definitional statute at 2 U.S.C. §§ 431(18) and 434(f) and the [FEC's] parallel implementing regulations at 11 C.F.R. §§ 100.17 and 100.29…"

challenging the constitutionality of the FEC's statutory interpretation and application of the term "clearly identified candidate" to its proposed advertisements.

In the special realm of First Amendment speech, the Supreme Court made clear that relaxed standing requirements apply to pre-enforcement challenges. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (explaining the expansion of standing principles as-applied for First Amendment challenges); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (holding that self-censorship is a sufficient allegation of harm); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution"). The allegations set forth by HLF in its Complaint and its Brief satisfy each of the required elements of standing.

A. HLF'S INJURY IN FACT IS ESTABLISHED BY THE CREDIBLE THREAT OF PROSECUTION

HLF satisfies the injury in fact requirement for standing by showing "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61 (internal citations omitted). HLF is not required to subject itself to prosecution in order to present a justiciable case or controversy. Rather, pre-enforcement challengers must allege their "intention to engage in a course of conduct affected with a constitutional interest" and must satisfy the court that there is a "credible threat of prosecution" under the challenged law. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In establishing standing in a First Amendment pre-enforcement challenge, HLF is also entitled to the presumption of a credible threat of prosecution where the challenged law as-applied clearly "restricts a party from engaging in expressive activity." *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 388 (4th Cir. 2001).

HLF intends to distribute the proposed communications as constitutionally-protected "issue advocacy" communications that do not trigger the reporting, disclaimer, and disclosure requirements of the "electioneering communications" provisions because the communications do not "refer to a clearly identified candidate for Federal office." Compl. at ¶¶ 1, 7. However, under the view of three FEC Commissioners, as represented by the FEC's counsel as the Commission's position,[4] HLF's proposed communications would qualify as electioneering communications, and HLF's failure to include allegedly required disclaimers and file certain disclosure reports would violate federal campaign finance laws.

HLF faces several specific threats. First, the Commission may commence an investigation by majority vote pursuant to 2 U.S.C. § 437g.[5] Second, a private right of action exists pursuant to Section 437g for individuals dissatisfied with the FEC's inaction.[6] Finally, we have no indication that the Department of Justice would refrain from prosecuting HLF for failing to report and disclose in the manner required by statute for electioneering communications.

In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709 (4th Cir. 1999), the plaintiff refrained from distributing communications and sought declaratory pre-enforcement relief from the District Court after receiving advice from the State Elections Commission that was unclear. *Id*. at 709-11. The Fourth Circuit rejected defendant's arguments that no case or

[4] As noted in the initial Brief of HLF and in the Statement of Commissioner McGahn on Advisory Opinion 2012-19, the position being advocated here by the FEC is contrary to the position it has previously advanced before numerous courts. Under the Supreme Court's decision in *FCC* v. *Fox Television Stations, Inc*., 132 S.Ct. 2307, 2317 (2012), this raises serious due process issues.

[5] *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (recognizing a cognizable injury despite the Commission's split vote on whether to issue an Advisory Opinion: "Nothing . . . prevents the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners. The rule constitutes the purported legal norm that binds the class regulated by statute.").

[6] *See id. citing FEC v. National Right to Work Committee*, 459 U.S. 197 (1982).

controversy existed, explaining: "In this case, NCRL has discontinued distributing its voter guide and NCRLPAC has stopped soliciting without providing a disclaimer because of a credible threat of prosecution. Consequently, a case or controversy inheres in each provision." *Id.* at 711. Similarly, in *Virginia Society for Human Life,* the Circuit Court held that a case or controversy existed even where the FEC adopted a policy of nonenforcement of a particular regulation at issue. In these circumstances, the court determined that a credible threat of prosecution still existed. *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 387-90 (4th Cir. 2001).[7]

Further, there is no impediment to HLF's standing due to the fact that a particular interpretation of a statute would precede the initiation of any future prosecution. *See American Booksellers,* 484 U.S. at 392 ("If [the state's] interpretation of the statute is correct, [the speaker] will have to take significant and costly compliance measures or risk criminal prosecution."). The uncertainty of the interpretation that will be applied to HLF's proposed communications is clear from the FEC's failure to render a determination on the advisory opinion request ("AOR") submitted by American Future Fund ("AFF"). Compl. at 31-40. HLF attested that its proposed advertisements are materially indistinguishable from those proposed by AFF in AOR 2012-19. HLF's Brief at 7.

[7] *See also South Carolina Citizens for Life, Inc. v. Krawcheck*, 301 Fed. Appx. 218, 220 (4th Cir. 2008) (unpublished opinion). In that case this Circuit reversed and remanded to the District Court for failure to recognize the existence of a case or controversy. *Id*. at 220 (4th Cir. 2008) (internal citation omitted). The Circuit Court extended its analysis of ripeness as to also establish standing pursuant to *North Carolina Right to Life* and *Virginia Society for Human Life*. *See id.* at 220, 222 n. 6 ("The justiciability doctrines designed to assess whether an actual case or controversy exists" include "ripeness, along with standing . . . as doctrines that cluster about Article III"). Here, as in *Krawcheck,* a case or controversy exists in the first amendment pre-enforcement context based on the analyses set forth in *North Carolina Right to Life* and *Virginia Society for Human Life*.

The Commission's failure to provide an affirmative four-vote, binding advisory opinion in response to the bulk of AFF's AOR leaves HLF, as a similarly situated organization, exposed to particularized civil enforcement actions and/or criminal penalties pursuant to 2 U.S.C. § 437g for its proposed conduct.[8] *See Carey v. FEC*, 791 F. Supp. 2d 121, 127 (D.D.C. 2011) (noting "the six-member Commission failed to issue a binding four-vote advisory opinion . . . . As a result, the Commission left [requestors] liable for possible enforcement actions against them" should requestors proceed with their proposed activity).

Because First Amendment speech is chilled prior to enforcement, HLF need only show the credible threat of prosecution that is apparent in its proposed communications that are materially indistinguishable from those that were the subject of AFF's AOR. *See* 2 U.S.C. § 437f(c)(1)(B); *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986). Moreover, the FEC has failed to rebut the presumption of a credible threat of prosecution established by HLF in its alleged course of conduct.

B. THIS COURT'S FAVORABLE DETERMINATION PROTECTS HLF FROM FURTHER INJURY, EVINCING A CAUSAL CONNECTION BETWEEN INJURY AND CONDUCT.

The credible threat of prosecution HLF faces is "fairly . . . trace[able] to the" conduct HLF intends to take, and is not "the result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61 (internal citations omitted). Further, it is at least "likely, as opposed to merely speculative," that the credible threat of prosecution, as it applies to HLF, will be "redressed by a favorable decision" of this Court. *Id.* This Court's determination, as a matter of constitutional interpretation, that HLF's proposed communications do not "refer to

[8] Pursuant to 2 U.S.C. § 437f(c)(1)(B), "Any advisory opinion rendered by the Commission . . . may be relied upon by— (B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered."

a clearly identified candidate for Federal office," will free HLF from possible civil and criminal prosecution under the electioneering communications provisions of the FECA and its implementing provisions.

In the absence of the Court's intervention and issuance of a determination, HLF must censor itself from engaging in constitutionally protected issue advocacy. *See Minnesota Citizens Concerned for Live v. Swanson*, no. 10-3126, slip op. at 14-15 (8th Cir., September 5, 2012) ("Unlike compliance with the mandatory tax laws, the laws at issue here give Minnesota associations a choice—either comply with cumbersome ongoing regulatory burdens or sacrifice protected core First Amendment activity. This is a particularly difficult choice for smaller businesses and associations for whom political speech is not a major purpose nor a frequent activity. Such a disincentive for political speech demands our attention.") (reversing denial of a preliminary injunction). Accordingly, there is a clear causal connection between HLF's proposed conduct and the credible threat of prosecution for undertaking such conduct.

HLF's injury in fact is the credible threat of prosecution for engaging in the proposed conduct, and HLF is entitled to the presumption that such a threat exists. This Court's favorable determination would, as a matter of law, redress HLF's injury by removing that threat of prosecution. Thus, HLF's standing to bring this as applied pre-enforcement constitutional challenge under Article III is well established and supported by the allegations contained in HLF's pleadings.

II. PLAINTIFF'S REQUEST FOR A DECLARATORY JUDGMENT IS PROPER AND SHOULD BE GRANTED

Granting Plaintiff a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, would be a proper exercise of the court's power. 28 U.S.C. § 2201(a) provides, "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon

the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

This Court has discretionary power to grant a declaratory judgment if the case presents an actual controversy, is within the court's jurisdiction, and exercising jurisdiction is not an abuse of discretion.[9] The Fourth Circuit opined that "this discretion should be liberally exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1937)

A court's power to decide actual controversies in the Declaratory Judgment Act is consonant with the power to hear cases and controversies under Article III of the Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). As such, the controversy must be "one that is appropriate for judicial determination," which means it is "definite and concrete, touching the legal relations of parties having adverse legal interests" and not merely "of a hypothetical or abstract character." *Id.* at 240-41; *see also Alvarez v. Smith*, 558 U.S. 87, 130 S. Ct. 576, 581 (2009). "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins.*, 300 U.S. at 241.

An actual controversy exists in this case. After Defendant FEC failed to reach a decision in Advisory Opinion 2012-19 (American Future Fund) on the applicability of 2 U.S.C. §§ 431(18) and 434(f)(3)(A)(i)(I) to advertisements that are materially indistinguishable from HLF's proposed advertisements, HLF's constitutionally protected free speech was and is chilled by the threat of possible legal action against it. *See Citizens United v. FEC*, 130 S. Ct. 876, 889

[9] *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-88 (1995); *Volvo Constr. Equip. North America v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir. 2004).

(2010); *American Booksellers*, 484 U.S. at 393. This controversy is definite and concrete and not hypothetical or abstract – it concerns the applicability of specific provisions of law to specific proposed advertisements. If HLF airs its advertisements with the understanding that they are *not* electioneering communications, it could be subjected to lengthy and costly government investigations, civil penalties, and potential criminal liability. With a declaratory judgment on which to rely, HLF could proceed with airing its advertisements without the threat of investigation and prosecution that is, at present, causing HLF to self-censor its speech.

For the Declaratory Judgment Act to apply, a case must also be within a court's jurisdiction and a court's exercise of jurisdiction over a case must not be an abuse of discretion. This court clearly has jurisdiction over this case under 28 U.S.C. § 1331 because this case arises under the First Amendment of the Constitution of the United States and federal statutory law (the Federal Election Campaign Act of 1971, as amended). Further, this court is the proper venue for hearing this case under 28 U.S.C. § 1391(e) because Defendant is an entity of the United States Government and Plaintiff resides in this district.

When deciding whether to grant a declaratory judgment in the context of administrative decision-making, a court must consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (portions of the court's opinion not affecting its declaratory judgment analysis have been overturned by statute, *see Califano v. Sanders*, 430 U.S. 99, 105 (1977)). "Fitness for judicial decision means, most often, that the issue is legal rather than factual. Sufficient hardship is usually found if the regulation . . . chills protected First Amendment activity." *Minnesota Concerned Citizens for Life*, 113 F.3d at 132.

Here, the administrative decision-making process is complete and the issues for determination are solely legal issues. Defendant FEC fully considered materially indistinguishable advertisements in Advisory Opinion 2012-19 and failed to reach a decision regarding the applicability of the federal campaign finance laws to most of those advertisements. HLF may rely on the FEC's failure to reach a determination on materially indistinguishable advertisements in Advisory Opinion 2012-19; no circumstances have changed to indicate that the FEC would vote differently on a materially indistinguishable advisory opinion request. *See* 2 U.S.C. § 437f(c)(1)(B). Accordingly, no further action by Defendant FEC is pending or available. No facts are in dispute in this case. The legal issues in this case, the application of the law to Plaintiff's First Amendment rights, are fit for judicial decision. If court consideration is withheld, HLF is harmed through risking investigation and prosecution by airing its advertisements as issue advocacy rather than electioneering communications, or by self-censoring and being irreparably harmed through deprivation of its First Amendment rights. *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978).

In the Fourth Circuit, a declaratory judgment action "is appropriate 'when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) (quoting *Quarles*, 92 F.2d at 325). A declaratory judgment action is inappropriate when used "to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted." *Quarles*, 92 F.2d at 325.

The nature of HLF's legal rights and responsibilities is currently unclear, and a declaratory judgment would clarify and settle them and remove all uncertainty. Under Fourth Circuit standards, exercising the court's discretionary power to issue a declaratory judgment in this case would be an entirely appropriate exercise of this Court's discretion. Invocation of the Declaratory Judgment Act in the context of challenges to federal campaign finance law is routine.[10] Further, it is not uncommon for district courts to grant declaratory judgments in matters involving issues of campaign finance law.[11] For these reasons, this court is empowered to grant Plaintiff the declaratory judgment it requests.

III. BCRA'S SPECIAL RULES REGARDING THREE-JUDGE PANEL REVIEW ARE OPTIONAL AND PLAINTIFF DID NOT DEEM THAT OPTION TO BE THE MOST EXPEDITIOUS MEANS FOR RESOLUTION

Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") provides "special rules for actions brought on constitutional grounds" and specifies that "[w]ith respect to any action initially filed on or before December 31, 2006," "[i]f any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act," "[t]he action shall be filed in the United States District Court for the District of Columbia and

[10] *See, e.g.*, Verified Compl. for Decl. & Inj. Relief at 19, *Carey v. FEC*, 791 F. Supp. 2d 121 (D. D.C. 2011) (No. 11-259) (requesting declaratory judgment and preliminary and permanent injunctions; court granted preliminary injunction); Verified Compl. for Decl. & Inj. Relief at 19, *Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736 (E.D. Va. 2011) (No. 08-483), *aff'd sub nom Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) (requesting declaratory judgment and preliminary and permanent injunctions; court dismissed all of plaintiff's claims); Compl. for Decl. & Inj. Relief at 12, *Davis v. FEC*, 501 F. Supp. 2d. 22 (D. D.C. 2007) (No. 06-1185), *rev'd Davis v. FEC*, 554 U.S. 724 (2008) (requesting declaratory judgment and preliminary and permanent injunctions; court dismissed all of plaintiff's claims).

[11] *See, e.g.*, *Virginia Soc'y. for Human Life*, 263 F.3d at 390-94 (upholding district court's declaratory judgment regarding unconstitutionality of "express advocacy" definition but limiting application of the accompanying injunction to plaintiff alone); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130 (8th Cir. 1997) (affirming district court's declaratory judgment holding requirements for exemption to independent expenditures prohibition unconstitutional).

shall be heard by a 3-judge court . . . ." BCRA § 403(a), (d), Pub. L. No. 107-155, 116 Stat. 81, 113-14 (2002).

However, "[w]ith respect to any action initially filed after December 31, 2006, the provisions of subsection (a) *shall not apply* to any action described in such section *unless the person filing such action elects such provisions to apply to the action*." BCRA § 403(d)(2) (emphasis added). Since January 1, 2007, BCRA's special review rules have not been mandatory, but are still available at the plaintiff's election. Early cases challenging BCRA were reviewed by a three-judge panel in the District Court for the District of Columbia pursuant to BCRA's mandatory judicial review provision.[12] In cases filed since January 1, 2007, however, three-judge panel review is no longer mandated by the statute, and some cases have been considered by three-judge panels, while others have been considered by a single judge.[13]

A three-judge panel of the District Court for the District of Columbia was available in this case at, and only at, Plaintiff's election. Plaintiff believes this matter involves a narrow, discrete issue that can be most expeditiously resolved by a single judge sitting in the Eastern District of Virginia. In addition, given the nature of the narrow and discrete issue involved, Plaintiff did not believe this matter to be one that would benefit greatly from the prospect of an "appeal directly to the Supreme Court of the United States." BCRA § 403(a)(3). Accordingly, Plaintiff exercised its option under BCRA § 403(d) to have its case reviewed under normal procedures in this court.

---

[12] *See, e.g.*, *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 460 (2007); *Davis*, 554 U.S. at 732 (filed June 28, 2006); *McConnell v. FEC*, 540 U.S. 93, 132 (2003) (filed Mar. 27, 2002).

[13] *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010) (filed Dec. 13, 2007; three-judge panel); *Real Truth About Abortion*, 681 F.3d at 546-48 (filed July 30, 2008 in E.D. Va.; single judge); *Koerber v. FEC*, 583 F. Supp. 2d 740, 743-44 (D. N.C. 2008) (filed Oct. 3, 2008; single judge); *McCutcheon v. FEC*, No. 12-1034 (D. D.C. filed June 22, 2012; three-judge panel); *James v. FEC*, No. 12-1451 (D. D.C. filed Aug. 31, 2012; three-judge panel).

IV. IN PLAINTIFF'S PROPOSED ADVERTISEMENTS, THE PHRASES AT ISSUE DO NOT REFER TO A CLEARLY IDENTIFIED CANDIDATE FOR FEDERAL OFFICE

The statutory language directly at issue in this matter, "refers to a clearly identified candidate" and "clearly identified," originates in the FECA's provisions regulating contributions and expenditures. Specifically, FECA's original provisions prohibited a person from spending more than $1,000 in a calendar year "relative to a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The statute defined "clearly identified" to mean:

> (A) the name of the candidate involved appears;
> (B) a photograph or drawing of the candidate appears; or
> (C) the identity of the candidate is apparent by unambiguous reference.

2 U.S.C. § 431(18).[14]

In *Buckley v. Valeo*, the Supreme Court addressed the constitutionality of FECA and provided critical constitutional constructions of key terms that have guided campaign finance law for decades. With respect to the independent expenditure provision described above, the Court emphasized that the statutory language must be precise so that potential speakers may be aware of their potential liabilities. Otherwise, a potential speaker is left:

> [W]holly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Buckley, 424 U.S. at 43 (*quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945).

[14] The term "clearly identified candidate" is used in numerous sections of the FECA and its implementing regulations, and this court's construction of the provision here will impact these other portions of the FECA and its implementing regulations as well. *See, e.g.*, 2 U.S.C. 431(17)(A) (definition of independent expenditure); 2 U.S.C. 431(20) (definition of federal election activity); 2 U.S.C. 441i(b)(2)(B)(i-ii) (exceptions for state, district and local political committees); 11 C.F.R. 100.22(b) (definition of expressly advocating); 11 C.F.R. 100.25 (definition of generic campaign activity); 11 C.F.R. 100.134 (internal communications by corporations, labor organizations, and membership organizations); 11 C.F.R. 109.21 (definition of coordinated communication).

The Court further explained,

> The constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) [regarding limits on making an expenditure "relative to a clearly identified candidate"] as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication.

Buckley, 424 U.S. at 43. In footnote 51 of *Buckley*, the Court provided further explanation as to what is meant by an "explicit and unambiguous reference to the candidate":

> Section 608(e)(2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (e.g., FDR), the candidate's nickname (e.g., Ike), his office (e.g., the President or the Governor of Iowa), or his status as a candidate (e.g., the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

Id. at 44 n.51.

This clear formulation, requiring that individuals actually be identified has been applied without subsequent judicial construction or re-interpretation, including by the FEC.[15] In FEC Matter Under Review 1830 (NRCC), the FEC's Office of General Counsel wrote:

> The [advertisement] contains no visual image or verbal identification of anyone purporting to be a Democratic Congressman. Nor does this ad make apparent any candidates' identity by unambiguous reference, because the ad simply makes no reference at all to a candidate by name, photograph, or office. The ad does use the word "House" in referring to Democratic control thereof. ***However, this is a reference to the institution, as opposed to a reference to the office or office holder***. The primary focus of this ad is the Democrats' tax program, as distinguished from [another] ad which focuses on the support of the program by the viewer's "Congressman."

[15] *See, e.g.*, *North Carolina Right to Life v. Leake*, 525 F.3d 274, 298-99 (4th Cir. 2008) ("Indeed, BCRA § 203 only regulates communications that refer to *specific individuals* ('clearly identified candidates'")) (emphasis added); *Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) ("we find that Unity08 is not subject to regulation as a political committee unless and until it selects a 'clearly identified' candidate"); *FEC v. Nat'l Org. for Women*, 713 F. Supp. 428, 433 (D. D.C. 1989) (requiring that to clearly identify a candidate, "[a]n explicit and unambiguous reference to the candidate must be mentioned in the communication").

First General Counsel's Report in MUR 1830, at 8 (1985) (emphasis added). The Commission voted 6-0 to find no reason to believe there had been a violation, accepting the recommendation of the General Counsel. HLF's proposed ads are no different in that they also reference institutions (the White House, the government and the administration) as opposed to "the office or officeholder."[16] The weight of both judicial and agency interpretation makes plain that a candidate is "clearly identified" only by an explicit and unambiguous reference to a specific office or individual.[17] No such references are present in HLF's proposed ads.

B. "EXPLICIT" EXCLUDES CONTEXT-BASED INTERPRETATIONS AND REFERENCES WHICH ARE MERELY IMPLIED OR APPARENT

Under *Buckley*, the Supreme Court's construction of the aforementioned "expenditure" provisions limited "express advocacy" to "*explicit* words of advocacy," and "clearly identified candidate" to an "*explicit* and unambiguous reference to the candidate." *Buckley*, 424 U.S. at 43 (emphasis added). With respect to the scope of "express advocacy," the Fourth Circuit determined that "code words" were insufficient to trigger the "express advocacy" provision, which covers only *explicit* words of advocacy for or against a candidate's election. *FEC v. Christian Action Network*, 110 F.3d 1049, 1062-64 (4th Cir. 1997) ("*CAN*").

The television advertisement in *CAN* included the following language:

---

[16] *See also* Advisory Opinion 2004-33 (Ripon) ("The Commission determines that, unlike the examples listed in section 100.29(b)(2) (i.e. 'the President,' 'your Congressman,' 'the Republican candidate for Senate in the State of Georgia,' or 'the incumbent'), 'Republicans in Congress' does not constitute an unambiguous reference to any specific Federal candidate.); Advisory Opinion 1985-14 (DCCC) (determining that advertisements using the taglines "your Republican Congressman" or "the Republicans in Congress" are not subject to the Act's limitations on expenditures for political advertisements under a standard that required such advertisements to depict "a clearly identified candidate" in order to come within the Act's limitations).

[17] *See* Statement of Commissioner McGahn on Advisory Opinion 2012-19 at 11-12 for a compilation of representations the FEC made to the judiciary previously in defending the electioneering communications statute against constitutional challenges.

> Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

Id. at 1058.

The FEC contended, among other things, that the language of the advertisement above expressly advocated the defeat of President Clinton because it used "codewords" such as "vision" and "quota" and the "issues raised . . . are relevant only if candidate Clinton became president." *FEC v. Christian Action Network*, 894 F. Supp. 946. 956 (W.D. Va. 1995), *aff'd CAN*, 110 F.3d at 1062-64. The court rejected the FEC's argument, repeatedly noting the advertisement's lack of "any explicit words or language advocating Governor Clinton's defeat." *CAN*, 110 F.3d at 1056. The Court ruled that the use of "codewords" "cannot, by its very definition, be said to express a direct message." *Christian Action Network*, 894 F. Supp. at 956.

Of the FEC's position in *CAN*, the Fourth Circuit wrote:

> Stripped of its circumlocution, the FEC's argument was (and is) that the determination of whether a given communication constitutes "express advocacy" depends upon all of the circumstances, internal and external to the communication, that could reasonably be considered to bear upon the recipient's interpretation of the message. The right to engage in political speech would turn on an interpretation of the "imagery" employed by the speaker . . . . This is little more than an argument that the FEC will know "express advocacy" when it sees it.

CAN, 110 F.3d at 1056-57. The FEC urges the exact same kind of standard here in an effort to do away with *Buckley*'s requirement that a candidate reference must be "explicit and unambiguous." The analysis set forth in Draft B, and defended by FEC counsel here, appeals to the full "context" of the proposed advertisements and contends that implied, apparent, or ambiguous references are actually explicit and unambiguous references to an unidentified, but nevertheless clearly identified, candidate. In addition, the FEC advances the exact same kind of argument that the Fourth Circuit criticized and rejected in *CAN*:

> The FEC's enforcement action against the Christian Action Network in this case brings into relief the extent to which, under the FEC's interpretation of "express advocacy," political speech would become hostage to the vicissitudes of the Commission, because, although a viewer could interpret the Network's video as election advocacy of the defeat of Governor Clinton, another viewer could just as readily interpret the video as issue advocacy on the question of homosexual rights. . . . [T]he FEC's interpretation of these advertisements is exactly that contemplated by the Court when it warned of the constitutional pitfalls in subjecting a speaker's message *to the unpredictability of audience interpretation*.

Id. at 1057 (emphasis added).[18]

C. THE ELECTIONEERING COMMUNICATION STANDARD

In 2002, partly in response to the limited scope of the "express advocacy" standard, Congress enacted BCRA, which included the electioneering communication provision at issue here. That provision covers any broadcast, cable, or satellite communication that:

> (I) *refers to a clearly identified candidate for Federal office*;
> (II) is made within--
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i) (emphasis added).

Thus, while unquestionably intended to expand the scope of Congress's regulation beyond "express advocacy," the second element of an "electioneering communication" is

[18] The FEC distinguishes its position in *CAN* and this case. In *CAN*, the FEC contends, it relied on codeword analysis where an expert analyzed alleged "codewords" such as "vision" and "quota" that the expert claimed "had particular meanings at the time of that election that would resonate with viewers by associating certain policies and issues with the candidates." In this case, however, the FEC contends that HLF is using "synonyms for other terms," and is therefore subject to FEC regulation. Def.'s Opp. To Pl.'s Mot. for Prelim. Inj. at 17 n.4 (ECF 14, 20). The difference between "codewords" and "synonyms" notwithstanding, the FEC appears to fully acknowledge in the aforementioned footnote that HLF's proposed advertisements do not contain "explicit and unambiguous references to a candidate" but instead contain "synonyms." (At least one FEC Commissioner disagrees with this assessment, making the rather obvious point that with respect to "the government" and "President Obama," "the two are not synonymous." Statement of Commissioner McGahn on Advisory Opinion 2012-19 at 14.)

described with an established term of art drawn from the well-known world of "express advocacy." In choosing this language, Congress adopted and incorporated the phrase's history and meaning into the new provision.[19] Accordingly, the presence or absence of a reference to a clearly identified candidate within the "electioneering communications" context is to be determined by the same rigorous standard required by footnote 51 of *Buckley* v. *Valeo*, and upheld and applied by courts ever since.

The incorporation of this rigorous standard is not simply the unintended result of a judicial rule of construction. Rather, it is readily apparent from BCRA's legislative history that Congress consciously adopted this term *and* its prior judicial construction. During the Senate floor debates, Senator Feingold, one of the main sponsors of BCRA (known colloquially as the McCain-Feingold Act), made absolutely clear that the "clearly identified candidate" standard used in the electioneering communication provision was the same standard that had long existed:

> In the bill, the phrase "refers to" precedes the phrase "clearly identified" candidate. That latter phrase is precisely defined in the Federal Campaign Election Act to mean a communication that includes the name of a federal candidate for office, a photograph or drawing of the candidate, or some other words or images that identify the candidate by "unambiguous reference." A communication that "refers to a clearly identified candidate" is one that mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing, or otherwise makes an "unambiguous reference" to the candidate's identity.

148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

[19] *See Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944) (noting "the general rule that adoption of the wording of a statute . . . carries with it the previous judicial interpretations of the wording").

Senator Snowe, one of the original sponsors of the electioneering communications (Snowe-Jeffords) provision, was well aware of the legal theory supporting the constitutionality of that provision[20] when she stated:

> Already I have established how our provision is not even remotely vague. . . . *Any sponsor will know, with absolute certainty, whether the ad depicts or names a candidate . . . . There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard* . . . .Snowe-Jeffords keys in on *the naming of candidates* as one of the triggers of our disclosure regulations.

148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (emphasis added).

The FEC first adopted regulations implementing BCRA's electioneering communication provision in 2002. The Explanation and Justification for those regulations makes clear that disputes like the one before this Court were never supposed to arise. The FEC explained:

> "[C]learly identified" means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia." The final rule tracks the language of the current rule in 11 CFR 100.17.

Final Rule on Electioneering Communications, 67 Fed. Reg. 65190, 65192 (Oct. 23, 2002). By tying the phrase "clearly identified" as used in the electioneering communications statute to the definition of that phrase already present at 11 C.F.R. § 100.17, the FEC made clear that the definition of the phrase had not changed and was to have the same meaning in both the electioneering communication and express advocacy/independent expenditure context. Second, the FEC emphasized that the definition of "clearly identified" "would not be based on the intent or purpose of the person making the communication." 67 Fed. Reg. at 65192. Thus, there was no

[20] *See* 147 Cong. Rec. S2456 (daily ed. Mar. 19, 2001) (statement of Senator Snowe) ("We must recognize that, as a legal matter, Congress is not foreclosed from adopting a definition of 'electioneering' or 'express advocacy' that goes beyond the 'magic words' test . . . as long as vagueness and overbreadth concerns are met . . . .") (quoting a 2000 Brennan Center report).

question at the time that the FEC's regulation reflected the required objective, bright-line test that was supposed to be easily applied in practice by any would-be speaker.

The constitutionality of the electioneering communications provision was challenged on its face in *McConnell v. FEC* and the plaintiffs argued that *Buckley v. Valeo* had established a constitutional rule limiting government regulation of electoral speech to express advocacy. The Supreme Court rejected this argument and explained that *Buckley*'s introduction of the express advocacy concept was a matter of statutory construction undertaken to save the constitutionality of the statute. *McConnell v. FEC*, 540 U.S. 93, 190-191 (2003). In defending the new law, the FEC explained that the electioneering communication criteria did not suffer from the same vagueness concerns that were at issue in *Buckley*. Brief of Government Defendants at 131-32, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582) ("FEC Brief"). The FEC wrote, "These criteria are absolutely clear, individually and collectively, and no one wishing to avoid violations of BCRA need guess at where these four defining characteristics have drawn the line . . . . '[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.' Yet 'perfect clarity' and 'precise guidance' are exactly what BCRA provides." FEC Brief at 155 (internal citation omitted). Similarly, the Solicitor General contended that the absence of a candidate's name in an advertisement provided the speaker a "safe harbor." During oral argument in *McConnell*, Justice Souter asked the Solicitor General, "[D]oesn't the primary definition today, in effect, give a corporation or a union that wants to run an issue ad *a safe harbor simply by virtue of not mentioning the name*? Say, let's hear it for nuclear power and don't let anybody else tell you otherwise. That's safe, isn't it?" The Solicitor General responded, "That's exactly right. That is safe . . . ." Tr. of Oral Argument at 164, *McConnell*, 540 U.S. 93 (No. 02-1674) (emphasis added). In other words, and directly contrary

to what the FEC argues now, the Government has previously maintained that one may rather easily avoid application of the "electioneering communications" provisions "simply by virtue of not mentioning the name."

The Supreme Court upheld the electioneering communication statute against the *McConnell* plaintiffs' *facial* challenge precisely because it was not unconstitutionally vague:

> [W]e observe that new FECA § 304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley*. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both *easily understood and objectively determinable*.

McConnell, 540 U.S. at 194.

The Supreme Court, however, has since held that the electioneering communication provisions of BCRA remain vulnerable to constitutional as-applied challenges. *See, e.g.*, *Wisconsin Right to Life, Inc.*, 551 U.S. at 456-57.[21]

As originally conceived, drafted, and implemented by regulation, the validity of BCRA's electioneering communication has always been understood to rest on its precision and clarity. In defending the provision against assertions of unconstitutionality, the Government assured the courts that there was no danger of unconstitutional vagueness because the electioneering communication standard is a perfectly clear, bright-line standard that offers precise guidance. In the absence of this precision and clarity, the electioneering communication provision loses its central (and perhaps only) virtue and is re-opened to vagueness challenges. Here, however, when asked to apply a provision that allegedly offers "perfect clarity" and "precise guidance," the FEC divided 3-3.

[21] Both times since the Supreme Court's decision in *WRTL II* regarding as-applied challenges that the electioneering communication law has been before the Court, the challengers have substantially prevailed. *See WRTL II*, 551 U.S. at 456-57; *Citizens United*, 130 S. Ct. at 914.

Three Commissioners supported Draft B, which reflects a view of the law that is wholly detached from the requirements of footnote 51 of *Buckley*, BCRA's legislative history, prior enforcement actions, and the prior representations the Government made to the courts. These three Commissioners' views are now represented here by the FEC's counsel, who continues to advance a view of the law that is wrong as a matter of statutory interpretation, and which in turn raises the very First Amendment vagueness concerns that are supposed to be altogether absent.

This unsupported view of the law alters both the long-established understanding of "clearly identified" and the intended scope and operation of the "electioneering communication" statute and does so with absolutely no prior notice to would-be speakers. Administrative agencies cannot simply change the law without prior notice to the public through the notice and comment rulemaking process.[22] "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC* v. *Fox Television Stations, Inc*., 132 S.Ct. 2307, 2317 (2012). The Supreme Court continued:

> This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. It requires the invalidation of laws that are impermissibly vague. . . . Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

Id. (internal citations omitted).

Prior to the FEC's consideration of Advisory Opinion 2012-19, the FEC never gave any notice whatsoever that references consisting of something other than the candidate's name, nickname, photograph or drawing, or a *genuinely* unambiguous reference such as "the President"

[22] The FEC's own statute specifies that "[a]ny rule of law which is not stated in this Act or in chapter 95 or chapter 96 of the Internal Revenue Code . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in [2 U.S.C. § 438(d)] [describing formal rulemaking procedures]." 2 U.S.C. § 437f(b).

or "the incumbent," could still be treated as referencing a "clearly identified candidate," thereby triggering FEC regulation of the advertisements at issue. This failure to provide fair notice that three of six current Commissioners could at any time find that inherently ambiguous terminology, when used in a certain "context" or by some disfavored organization, is actually a reference to a "clearly identified" candidate renders that position impermissibly vague on Due Process grounds. (All but one current Commissioner is serving an expired term, meaning that new Commissioners could be appointed and confirmed at any time, including a fourth vote for the views objected to herein). The FEC is free "to modify its current . . . policy" and expand the scope of its electioneering communication regulations to include references to clearly identified candidates that are not especially clear, but it must adhere to established law while it revises its regulations through the normal rulemaking process. *Fox Television Stations*, 132 S.Ct. at 2320. A modified regulation would then be subject to normal review under the Administrative Procedures Act.

D. THE ELECTIONEERING COMMUNICATION STANDARD AS APPLIED TO PLAINTIFF'S PROPOSED ADVERTISEMENTS

1. ADVERTISEMENT 1

Advertisement 1 contains references to "this Administration," "the Administration," and "the White House" (by both image/visual and words) and is an issue advertisement that asks viewers to contact government officials at "the White House" to change current energy policy. However, Draft B concluded,

> In the context of Advertisement 1, each of the voice-over references to "this Administration," "the Administration," "the White House," and the instruction to "Call the White House," as well as the visual depiction of the White House, are references to a clearly identified candidate for federal office, President Barack Obama. The terms "the Administration," "this Administration," and "the White House" are commonly understood as references to "the President." . . . The references to "the Administration"

> and "this Administration" likewise unambiguously reference President Obama. Those terms are merely short-hand for the *Obama* Administration . . . ."

Draft B at 4. The FEC's assessment of Advertisement 1 makes perfectly clear that the terms at issue do not explicitly and unambiguously refer to a clearly identified candidate when it acknowledges that the terms are merely "commonly understood as references to 'the President'" and "merely short-hand." The *Oxford Dictionary* defines "explicit" as "stated clearly and in detail, leaving no room for confusion or doubt." Oxford Dictionaries Online, Explicit, http://oxforddictionaries.com/definition/american_english/explicit?region=us&q=explicit (last visited Sept. 6, 2012). These terms ("White House" and "Administration") simply do not satisfy the requirement that the reference be "explicit." Rather, the advertisements refer simply to the institutions at issue. *See* First General Counsel's Report in MUR 1830, at 8 (1985).

Contrary to the FEC's contentions, the terms at issue are not "unambiguous." The word "unambiguous" means clear, precise, and not open to more than one interpretation. The FEC even uses the term in its regulation defining "express advocacy," and the relevant portion reads: "The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning." 11 C.F.R. § 100.22(b)(1).

In the context of Advertisement 1, the terms at issue are easily and reasonably interpreted as references to the Executive Branch of the United States Government, or perhaps to the politically-appointed, decision-making personnel within the Executive Branch, or to the institution rather than any individual. There are dozens or hundreds, if not more, persons within the Executive Branch that have control over, or the ability to impact, U.S. energy policy.[23]

[23] In 2006, the FEC conceded that an advertisement that refers to "Your Senator" is not a reference to a clearly identified federal candidate because the term could potentially refer to either of two individuals. *See* Tr. of Mot. Hearing at 27, *Christian Civic League of Maine, Inc. v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006). If language that could be understood as referring to

The controlling standard does *not* ask what the best interpretation of a communication is, or whether someone might believe a candidate has been referenced; the constitutionally-required question is whether the terms used are "explicit and unambiguous" such that they may *only* be reasonably interpreted as referring to a Federal candidate. As explained in detail above, Congress knowingly incorporated the "explicit and unambiguous" standard into the electioneering communications statute when it used the phrase "refers to a clearly identified candidate for Federal office" to describe an element of an electioneering communication. The Government represented to the courts that the electioneering communications standards offered "perfect clarity" and "precise guidance," and the Solicitor General indicated that the standard provided "a safe harbor simply by virtue of not mentioning the [candidate's] name." The Supreme Court upheld the constitutionality of the electioneering communication statute because the "definition of 'electioneering communication' raises none of the vagueness concerns that drove our analysis in *Buckley*" and the "components are both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194. However, the standard applied in Draft B, which permits "inferential reference, tied to the subjective impression of viewers and listeners,"[24] presents a far different case.

If the "vagueness concerns" present in *Buckley*, with respect to the term "clearly identified candidate," were cured by construing that term to require an "explicit and unambiguous" reference to that clearly identified candidate, then it is clear that that same limiting construction is a vital aspect of the electioneering communication standard's constitutionality. The electioneering communications provision was not drafted as a broad,

---

either of two people is not "explicit and unambiguous," HLF fails to see how terms that refer to thousands of individuals could ever be thought to be "explicit and unambiguous."

[24] Statement of Commissioner McGahn on Advisory Opinion 2012-19 at 18.

catch-all mechanism designed to result in the maximum possible amount of disclosure of "political" advertising – despite the fact that the Commissioners who supported Draft B treat it that way. Rather, it was drafted to capture a very narrow class of communications that "explicitly and unambiguously" refer to a candidate during short periods of time before elections for the sake of satisfying constitutional demands. The introduction of vagueness into the statutory definition by ignoring the "explicit and unambiguous" reference requirement – as is evident throughout Draft B – is therefore contrary to the Supreme Court's ruling and represents an unconstitutional application of the statute to HLF's proposed advertisement. To interpret this statute as the FEC suggests here is to adopt an unconstitutionally vague standard.

2. ADVERTISEMENT 2

Advertisement 2 includes references to "the government," and calls on viewers to "Tell the government it's time for an American energy plan . . . that actually works for America." The term "the government" is even less precise than the terms "Administration" and "White House." Whereas the latter terms encompass the Executive Branch, or the political appointees within the Executive Branch, "the government" consists of each person working within the three branches. A term that literally refers to several million individuals cannot possibly be an "explicit and unambiguous" reference to President Obama, in this or any context.

The FEC's position with respect to the term "the government" is altogether unclear. Plaintiff initially believed that Draft B determined the reference to "the government" in Advertisement 2 was a reference to a clearly identified candidate, although the FEC's counsel contends that it was not. Def. FEC's Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 17 n.5. Draft B concluded that an advertisement that refers to "the government" and tells viewers to "Call Secretary Sebelius" does *not* contain a reference to a clearly identified candidate.

However, Draft B also concluded that Advertisement 3, which closes with instructions to "call[] the White House to tell 'the government' about the need for a different energy policy," *does* refer to a clearly identified candidate. Draft B *seems* to take the position that "the government" may refer to a clearly identified candidate in some contexts but not others, or when used in combination with certain words. The FEC's confused position illustrates that the term "the government" cannot possibly satisfy the "explicit and unambiguous" requirement because it is very obviously neither, and therefore, this position cannot stand under the First Amendment.

Advertisement 2 also includes unidentified audio of President Obama's voice. Whether this is an "unambiguous" reference to President Obama depends entirely on the listener's or viewer's subjective perception (whether he actually recognizes the voice of the person speaking). As the FEC itself represented to the courts, "the definition of electioneering communications is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners." FEC Brief at 156. Accordingly, unidentified audio cannot, by definition, be "unambiguous."[25]

3. ADVERTISEMENT 3

Advertisement 3 includes references to "the government," "the White House," and unidentified audio of the White House Press Secretary's voice. Advertisement 3 contains the same voice-over call to action as Advertisement 2, but the following also appears in text on-screen: "Call the White House at (202) 456-1414." Draft B posits that:

[25] Audio recordings also appear to fall outside of Congress's understanding of "clearly identified" references, which are limited to "words or images." Senator Feingold explained that a candidate is "clearly identified" where "a communication . . . includes the name of a federal candidate for office, a photograph or drawing of the candidate, or some other words or images that identify the candidate by 'unambiguous reference.'" 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

> If viewers were to follow this command by calling the White House to tell "the government" about the need for a different energy policy, they would necessarily be seeking to convey that message to the President, the "government" official who resides and maintains his office at the White House and the only person at the White House with executive authority to change the "American energy plan."

However, absolutely no one is under the impression that a member of the general public who "calls the White House" to convey a message will actually speak with the President. Rather, that person will speak with someone who answers the outside lines and who may take a message and pass that message along to someone else whose job it is to aggregate messages from the public. The command to "call the White House" is quite accurate: one who does so will speak to and leave a message with someone – not the President – who works there. The caller's *subjective intention or hope* that someone will "convey that message to the President" is utterly irrelevant to the issue of whether there is an explicit and unambiguous reference to a clearly identified candidate in the proposed advertisement.

For the reasons set forth above, the electioneering communications statute cannot be constitutionally applied to Advertisement 3. To do otherwise would present vagueness problems rendering the statute as applied unconstitutional.

4. ADVERTISEMENT 4

Advertisement 4 (referred to as Advertisement 5 in Draft B) includes a reference to "the Administration," imagery and footage of the White, and concludes by telling viewers to "Call Secretary Sebelius, tell her its wrong for her and the Administration to trample the most basic American right." According to Draft B, by identifying "the Administration" as separate from Secretary Sebelius, and by "clarif[ying] any potential ambiguity regarding the reference to 'the Administration' by providing video 'footage and images' of the White House," Advertisement 4 "unambiguously references the President." Draft B at 8. Draft B therefore concedes that there is

"potential ambiguity" in the term "the Administration," which would seem to conclusively establish that that term is not "explicit and unambiguous." Nevertheless, according to Draft B, this "potential ambiguity" is somehow cured by a picture of the White House.

For the reasons set forth above, the electioneering communications statute cannot be applied as the FEC argues to Advertisement 4 without being unconstitutionally vague

5. ADVERTISEMENT 5

Advertisement 5 (referred to as Advertisement 6 in Draft B) includes references to the "White House" in the context of discussing the two-year anniversary of the Patient Protection and Affordable Care Act (referred to in Advertisement 5 as "national, government run healthcare"). Draft B contends that one of the news articles cited in the advertisement includes the language "'*President Obama* has no plans to mark the two-year anniversary of the Affordable Care Act's passage,' making explicit that the term 'White House' is being used . . . in that advertisement as a reference to President Obama." Draft B at 9. Advertisement 5, however, does not include the words "President Obama" – those words were omitted from the language quoted in Advertisement 5. As a result, Draft B concludes that the reference to the "White House" is made "explicit" by language that does not actually appear in the advertisement because it was omitted.

There can be no question that this analysis focuses on the subjective intent of the speaker rather than on the language actually used in the proposed advertisement. The position taken in Draft B makes absolutely clear that Draft B's purpose was not to faithfully apply the law, but rather, to stretch and twist the law in whatever way was necessary to ensure regulation of the proposed communications. This approach stands in stark contrast to the FEC's position in its brief to the Supreme Court in *McConnell v. FEC*: "BCRA's primary definition of electioneering

communications presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria." Brief for the Federal Election Commission, et al. at 109, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674) (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 574 (D. D.C. 2003) (Kollar-Kotelly, J.).

For the reasons set forth above, the electioneering communications statute cannot be constitutionally applied to Advertisement 5.

V. CONCLUSION

For the foregoing reasons, HLF respectfully requests that the Court find in its favor and issue a permanent injunction in accordance with its Motion for Preliminary Injunction.

Dated: September 6, 2012

Respectfully submitted,

By: /S/

Shawn Sheehy (VA Bar 82630)
ssheehy@hvjlaw.com
Jason Torchinsky (VA 47481), *pro hac vice*
jtorchinsky@hvjlaw.com
HOLTZMAN VOGEL JOSEFIAK PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: 540-341-8808
Fax: 540-341-8809

Counsel for The Hispanic Leadership Fund, Inc.