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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 2:12-00127-SWS
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	**OPPOSITION**
Defendant.	)	
	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The challenged regulation and policies trigger public disclosure that prevents corruption and informs the electorate about the source of funds used to influence federal elections. They do not ban or suppress speech. *See Real Truth About Abortion, Inc. f/k/a Real Truth About Obama, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*RTAA*") (rejecting constitutional attack on 11 C.F.R. § 100.22(b) and approach used by FEC to determine political committee status).

The Fourth Circuit's decision relies heavily on the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). In that case, the Court struck down a ban on corporate *spending* for independent campaign speech. But it reaffirmed the constitutionality of the *disclosure* requirements implicated by the regulation and policies at issue here. Such laws "'provid[e] the electorate with information' and 'insure that the voters are fully informed' about the person or group who is speaking" about a candidate, but they "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Id.* at 914-15 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McConnell v. FEC*, 540 U.S. 93, 201 (2003)); *see Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) ("Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.").

Just as the election season is approaching its peak, plaintiff asks this Court to alter the status quo by imposing a nationwide injunction and halting enforcement of a regulation and policies that facilitate the campaign-related disclosures embraced by eight Justices in *Citizens United*. Free Speech satisfies none of the requirements for a preliminary injunction. It has utterly failed to make the requisite "strong showing" that it will likely succeed on the merits and that the balance of harms tips in its favor. While the public has an important informational interest in knowing the identity of those who advocate for or against federal candidates, Free Speech seeks merely to avoid the cost and inconvenience of disclosing that information, burdens that do not amount to irreparable harm. Free Speech is free to finance and air each of its proposed advertisements, and to solicit and accept unlimited contributions to pay for them. But the settled case law is clear: it has no constitutional right to avoid the disclosure requirements of

the Federal Election Campaign Act when engaging in campaign activity. Plaintiff's request for a preliminary injunction should be denied.

BACKGROUND

I. THE FEDERAL ELECTION COMMISSION

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-57 ("FECA" or "Act"). Congress empowered the Commission to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce against violations of the Act. 2 U.S.C. § 437g.

II. STATUTORY AND REGULATORY BACKGROUND

A. Express Advocacy and Electioneering Communications

Before *Citizens United*, the Act prohibited corporations and labor unions from making "expenditures." 2 U.S.C. §§ 431(9)(A)(i), 441b(a). To preserve the original statutory definition of an independent "expenditure" from "invalidation on vagueness grounds," the Supreme Court in *Buckley* construed the term "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. In response, Congress amended FECA to incorporate the Court's construction by defining an "independent expenditure" as a communication "expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party. *See* FECA Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 2 U.S.C. § 431(17)).

Exercising the authority to "to make . . . such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8), in 1995 the Commission promulgated a regulation defining the statutory term "expressly advocating," 11 C.F.R. § 100.22. The regulation established a two-part definition. Part (a) of the regulation includes communications that use phrases — such as "vote for" or "reject" — "which in context can have no other

reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. § 100.22(a). This is sometimes referred to as "magic words" express advocacy. *See McConnell*, 540 U.S. at 126 (citing *Buckley*, 424 U.S. at 44 n.52). Part (b) defines express advocacy as a communication that has an unambiguous "electoral portion" as to which "[r]easonable minds could not differ [that] it encourages actions to elect or defeat one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b).[1] A person or entity — other than a political committee — that finances independent expenditures aggregating more than $250 must file with the Commission a disclosure report that identifies, *inter alia*, the date and amount of each expenditure and anyone who contributed over $200 to further it. *See* 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(e).

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), which introduced new financing and disclosure requirements for "electioneering communications." Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002). The statute prohibited corporations and unions from making any "direct or indirect payment . . . for any applicable electioneering communication," which is defined in the context of a presidential election as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is

[1] The full regulatory definition in 11 C.F.R. § 100.22(b) identifies as express advocacy a communication that:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidiate(s) or encourages some other kind of action.

made within 60 days before the general election or 30 days before a primary election or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i).[2] BCRA also mandated disclosure for electioneering communications, including a requirement that every person who makes electioneering communications aggregating in excess of $10,000 during a calendar year must file within 24 hours a statement that identifies the maker, amount, and recipient of each disbursement over $200, as well as information about donors who contributed to the person making the disbursement. 2 U.S.C. § 434(f)(1)-(2).

The Supreme Court upheld the constitutionality of the financing restriction for electioneering communications "to the extent that the issue ads . . . are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08 (quotation at 206). Later, in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), the Chief Justice's controlling opinion defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. 449, 469-70 (2007). In 2007, the Commission codified this standard in a regulation. 11 C.F.R. § 114.15. In *Citizens United*, the Court held unconstitutional FECA's ban on corporate financing of independent expenditures, as well as BCRA's restriction on electioneering communication financing by corporations. 130 S. Ct. at 913.[3] But eight Justices upheld BCRA's *disclosure* requirements for electioneering communications, even for communications that are *not* the functional equivalent of express advocacy. 130 S. Ct. at 914-15. The Court recognized that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'" *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64).

The Court thus declined to review such disclosure requirements through the lens of strict scrutiny and instead "subjected these requirements to 'exacting scrutiny,' which requires 'a

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[2] In the context of campaigns for the United States Senate and House of Representatives, the communication must also be broadcast within the geographic area of the given campaign to constitute an electioneering communication. *See* 2 U.S.C. § 434(f)(3)(A)(i)(III).

[3] The Commission has thus announced that it will no longer enforce these restrictions. Press Release, FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC*, http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml (Feb. 5, 2010).

substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (quoting *Buckley*, 424 U.S. at 64, 66). The Court also explained that disclosure is "less restrictive" than a limit on spending, and that the public has an interest in knowing who is responsible for pre-election communications that speak about candidates, "[e]ven if the ads only pertain to a commercial transaction." *Id.* at 915-16.

Because *Citizens United* struck down the ban on corporate independent expenditures in 2 U.S.C. § 441b as unconstitutional, the Commission's regulatory definition of express advocacy in 11 C.F.R. § 100.22, which had helped to implement that ban, no longer operates to restrict such corporate (or labor union) speech. *See infra* pp. 27-29. But, consistent with the Court's decision, the Commission's regulation continues to trigger disclosure obligations in connection with such speech.

B. Political Committee Status

The statutory definition of "political committee" — commonly known as a "PAC" — includes "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). In *Buckley*, however, the Supreme Court narrowed the statutory definition, because defining PAC status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the definition "need only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate*." *Id.* (emphasis added). Under the statute as thus construed, an organization that is not controlled by a candidate must register as a PAC only if (1) the entity crosses the $1,000 threshold of contributions or expenditures and (2) its "major purpose" is the nomination or election of federal candidates.

1. Organizational and Reporting Requirements; Contribution Limits

Political committees must comply with certain organizational and reporting requirements. They must register with the Commission and file periodic reports for disclosure to the public of

their total operating expenses and cash on hand, as well as their receipts and disbursements, with limited exceptions for most transactions below a $200 threshold. *See* 2 U.S.C. §§ 433, 434. Each PAC must have a treasurer who maintains its records and a separately designated bank account. 2 U.S.C. § 432(a)-(d), (h). Political committees also must disclose in their regularly scheduled reports additional information about their independent expenditures, including the date, amount, and candidates supported or opposed for each independent expenditure over $200. 2 U.S.C. § 434(b)(4)(H)(iii), (6)(B)(iii). In addition, PACs must identify themselves through "disclaimers" on all of their public political advertising, on their websites, and in mass emails. 11 C.F.R. § 110.11(a)(1).

As enacted, FECA permitted PACs to accept contributions only up to $5,000 from individuals. *See* 2 U.S.C. §§ 441a(a)(1)(C), 441b(a). In *SpeechNow.org v. FEC*, however, the D.C. Circuit invalidated the $5,000 limit on individual contributions to political committees that receive contributions only from individuals and whose campaign-related activity consists only of independent expenditures — so-called "super PACs" or "independent-expenditure-only political committees." 599 F.3d 686, 692-97 (D.C. Cir.) (en banc), *cert. denied*, 131 S. Ct. 553 (2010). *SpeechNow*, however, expressly upheld the Act's reporting and organizational requirements for political committees — including as applied to super PACs. *Id.* at 696-98.

In so holding, the court observed that the reporting required of political committees does not "impose much of an additional burden" compared with the reporting requirements for persons making independent expenditures. *Id.* at 697. It further reasoned that "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures."[4] *Id.* at 698; *see also, e.g.*, *Vt. Right to Life Comm. Inc. v. Sorrell*, --- F. Supp. 2d -

[4] The Commission has since concluded, in several recent advisory opinions, that independent-expenditure only political committees may solicit and accept unlimited contributions from individuals, corporations, labor organizations, and other political committees. *See, e.g.*, FEC Advisory Op. 2011-11 (Colbert), 2011 WL 2662412, at *3-*4 (June 30, 2011) ("Colbert AO"); FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269, at *1-*2 (July 22, 2010) ("Commonsense Ten AO"); FEC Advisory Op. 2010-09 (Club for Growth), 2010

--, 2012 WL 2370445, at *17 (D. Vt. June 21, 2012) ("*VRLC*") (Vermont's organizational, registration, and disclosure requirements for PACs bear "a substantial relation to Vermont's sufficiently important interest in permitting Vermonters to learn of the sources of significant influence in their state's elections"), *appeal docketed*, No. 12-2904 (2d Cir. July 23, 2012); *Iowa Right to Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1038-40 (S.D. Iowa 2010) (Iowa registration and disclosure requirements are substantially related to important government interest of "letting the public know who is speaking about a candidate shortly before an election") (internal quotation marks and citation omitted).

2. Major Purpose Test

In 2004, the Commission issued a notice of proposed rulemaking, asking whether the agency should promulgate a regulatory definition of "political committee." *See Political Committee Status*, 69 Fed. Reg. 11,736, 11,743-49 (Mar. 11, 2004). In 2007, after receiving public comments and holding extensive hearings, the Commission published a notice stating that the Commission had decided not to promulgate a new definition of "political committee" but instead to continue its longstanding practice of determining each organization's major purpose through a case-by-case analysis of an organization's conduct. *Supplemental Explanation and Justification for the Regulations on Political Committee Status*, 72 Fed. Reg. 5,595, 5,596-97, 5,601 (Feb. 7, 2007).[5] The notice explained that while the major purpose test can be satisfied "through sufficiently extensive spending on Federal campaign activity," *id.* at 5601 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*")), a fact-intensive analysis of each organization's conduct, including public statements, fundraising appeals, and spending on other activity, can be instructive in evaluating the organization's campaign activities compared to

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WL 3184267, at *2 (July 22, 2010) ("Club for Growth AO"). Consistent with *SpeechNow*, the Commission further concluded that such committees still must register with the Commission and comply with all applicable reporting rules. *See* Colbert AO, 2011 WL 2662412, at *3; Commonsense Ten AO, 2010 WL 3184269, at *1-*2; Club for Growth AO, 2010 WL 3184267, at *2.

[5] The complete administrative record of this rulemaking, including public comments, is available at http://sers.nictusa.com/fosers/viewreg.htm?regno=2003-07.

its activities unrelated to campaigns. *Id.* (citations omitted). The notice discussed a number of administrative and civil matters in which the Commission or a court had analyzed a group's major purpose; these descriptions cumulatively "provide considerable guidance to all organizations" regarding the criteria that are used to apply the "major purpose" test. *See id.* at 5,595, 5,605-5,606. In addition, the notice explained that the Commission refers to its regulatory definition of "express advocacy" to help determine whether an organization has satisfied the statutory criteria for political committee status by making $1,000 in expenditures in a calendar year. *See id.* at 5,604.

The Commission's case-by-case approach was challenged under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and upheld in *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007)). More recently, the Fourth Circuit upheld the constitutionality of the Commission's case-by-case approach to applying the major purpose test. *RTAA*, 681 F.3d at 556. As the Fourth Circuit recognized, "Although *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose. And thus the Commission was free to administer FECA political committee regulations either through categorical rules or through individualized adjudications." *Id.* at 556 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

C. Solicitation of Contributions

FECA defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see* 11 C.F.R. § 100.52(a). In 1979, Congress amended the Act, *inter alia*, to extend the disclaimer and disclosure requirements codified at section 441d(a) — which had previously applied only to express advocacy communications — to *solicitations* for contributions. FECA Amendments of 1979, Pub. L. No. 96-187, § 111, 93 Stat. 1339, 1365-66 (1980); *see FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 293 (2d Cir. 1995) ("*SEF*") (rejecting district court's construction of § 441d(a) as applying only to express advocacy communications in light of Congress's "specific[] exten[sion]" of that provision in 1979 FECA Amendments to include solicitations for contributions).

As amended, the Act requires "any person" who "solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising" to include a specified disclaimer in the solicitation. 2 U.S.C. § 441d(a); *see* 11 C.F.R. § 110.11(a)(3). If the solicitation was not paid for or authorized by a candidate, it must include a disclaimer clearly stating "who paid for the communication and . . . that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3). Requests for funds that "clearly indicate[] that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office" are considered solicitations for contributions under the Act. *SEF*, 65 F.3d at 295 (analyzing communications for purposes of section 441d(a)); *see* Pl.'s Mem. in Support of Mot. for Preliminary Injunctive Relief at 35-36 ("Pl. Mem.") (invoking *SEF* standard for solicitations); Amend. Compl. ¶ 90 (same).

III. PLAINTIFF'S ADVISORY OPINION REQUEST

Plaintiff Free Speech is an unincorporated nonprofit association located in Wyoming that was formed on February 21, 2012. (Amend. Compl. ¶¶ 10, 13.) It seeks to finance and distribute certain communications anonymously, without registering as a political committee or complying with the disclaimer and disclosure obligations required for certain types of campaign-related communications. (*Id.* ¶¶ 24-25, 47-50.) Free Speech alleges that it does not coordinate any of its activities with candidates, political party committees, or other political committees. (*Id.* ¶ 10.) It wishes to finance certain advertisements in various media outlets, and its Memorandum discusses two of them. (Pl. Mem. at 24-26.)

Plaintiff's "Environmental Policy" radio advertisement reads:

> President Obama opposes the Government Litigation Savings Act. This is a tragedy for Wyoming ranchers and a boon to Obama's environmentalist cronies. Obama cannot be counted on to represent Wyoming values and voices as President. *This November*, call your neighbors. Call your friends. Talk about ranching.

(Amend. Compl. ¶ 15.) Plaintiff plans to broadcast this advertisement approximately 60 times through November 3, 2012. (*Id.*) Its "Gun Control" Television advertisement reads:

> Guns save lives. That's why all Americans should seriously doubt the qualifications of Obama, an ardent supporter of gun control. This fall, get enraged, get engaged, and get educated. And support Wyoming state candidates who will protect your gun rights.

(*Id.* ¶ 16.) Free Speech alleges that it would like to spend $16,900 to publish a similar version of this ad in USA Today on or about November 1, 2012. (*Id.* ¶ 18.)

Free Speech also wishes to solicit donations of funds to finance additional, unidentified advertisements. (*Id.* ¶ 13.) Its "War Chest" Donation Request reads:

> Friends of freedom celebrated when the Supreme Court decided *Citizens United*. Now, more than ever, we can make the most effective use of your donations this coming fall. Donations given to Free Speech are funds spent on beating back the Obama agenda. Beating back Obama in the newspapers, on the airwaves, and against his $1 billion war chest.

(Amend. Compl. Exh. A.) And its "Make Them Listen" Donation Request reads:

> In 2010, the Tea Party movement ushered in an historic number of liberty-friendly legislators. But President Obama and his pals in Congress didn't get the message. Stop the bailouts. No socialized healthcare. End oppressive taxes. But we won't be silenced. Let's win big this fall. Donate to Free Speech today.

(*Id.*)

On February 29, 2012, Free Speech submitted a letter to the Commission requesting an advisory opinion, including on the proposed activities outlined above.[6] (Amend. Compl. Exh. A (FEC, AO Request 2012-11, Letter from Benjamin T. Barr & Stephen R. Klein, Wyoming Liberty Group, to Anthony Herman, Feb. 29, 2012 ("AO Request")).) Free Speech asked whether (a) any of its proposed advertisements or donation requests would be deemed express

[6] The AO Request became complete on March 9, 2012, after counsel clarified certain aspects of Free Speech's AO Request in supplemental correspondence with the Commission. (*See* E-mail from Benjamin Barr, Counsel for Free Speech, to FEC Staff (Mar. 9, 2012, 1:36 PM), included in AO Request (Amend. Compl. Exh. A).)

advocacy; (b) any of its proposed donation requests would be deemed "solicitations"; and (c) its proposed activities would require it to register with the Commission as a political committee. (*Id.*)

On April 12, 2012, the Commission held an open session during which it considered two draft responses to Free Speech's AO Request.[7] Draft A concluded that none of Free Speech's 11 proposed advertisements would expressly advocate the election or defeat of a clearly identified Federal candidate; none of its proposed donation requests would be a solicitation of contributions; and Free Speech's proposed activities would not require it to register and report with the Commission as a political committee. (Amend. Compl. Exh. B (FEC, Draft AO 2012-11 – Draft A, Agenda Doc. 12-24)) ("Draft A").) Draft B concluded that seven of Free Speech's 11 proposed advertisements — including the "Environmental Policy" radio ad and the "Gun Control" television ad discussed in plaintiff's Memorandum — would expressly advocate the election or defeat of a clearly identified Federal candidate. (Amend. Compl. Exh. C (FEC, Draft AO 2012-11 – Draft B, Agenda Doc. 12-24, at 1, 6-7, 11-13)) ("Draft B").) Draft B further concluded that two of the four proposed donation requests — the "War Chest" and "Make Them Listen" donation requests discussed in plaintiff's Memorandum — would be solicitations of contributions (*id.* at 1, 17-18, 20-21) and that Free Speech's proposed activities would require it to register and report with the Commission as a political committee (*id.* at 1, 22-26).

At a second open meeting on April 26, 2012, the Commission considered a third draft response to Free Speech's AO Request. Draft C resembled Draft A and reached nearly the same

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[7] Plaintiff's description of the advisory opinion process — "requestors are not allowed to speak unless spoken to" (Pl. Mem. at 39) — is misleading. Requestors "speak" by submitting a "complete written request" concerning the application of FECA or Commission rules or regulations "with respect to a specific transaction or activity.'" 2 U.S.C. § 437f(a)(1). Requestors and members of the public are also permitted to submit written comments on draft opinions. *See Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures*, 74 Fed. Reg. 32,160, 32,160 (July 7, 2009). While requestors are permitted to attend the Commission's open meetings to answer Commissioners' questions, such meetings are not intended to be formal oral hearings, which the Commission determined were "not needed and would prove unworkable within the short statutory deadlines for issuing advisory opinions." *Id.* at 32,161.

conclusions as Draft A had reached, except that unlike Draft A, Draft C concluded that two of Free Speech's proposed advertisements — neither of which is discussed in plaintiff's Memorandum, *see infra* n.9 — would expressly advocate the election or defeat of a clearly identified Federal candidate.[8] (Amend. Compl. Exh. D (FEC, Draft AO 2012-11 – Draft C, Agenda Doc. 12-24-B ("Draft C").)

On April 26, 2012, having considered the three drafts, three Commissioners supported issuance of Draft B, and three Commissioners supported issuance of Draft C. Thereafter, on May 8, 2012, the Commission approved a response to Free Speech's AO Request concluding that two of Free Speech's 11 proposed advertisements would expressly advocate the election or defeat of a clearly identified Federal candidate,[9] and two of the four proposed donation requests would not be solicitations under the Act.[10] (Amend. Compl. Exh. G at 1 (FEC, AO 2012-11, May 8, 2012) ("Free Speech AO").) The response explained that the Commission was unable to approve a response by the required four affirmative votes about Free Speech's remaining nine propose advertisements, its two other proposed donation requests, and the question of whether Free Speech must register as a political committee. *Id.*; *see* 2 U.S.C. §§ 437c(c), 437d(a)(7) (requiring affirmative vote of four members of Commission for Commission to render advisory opinion).

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[8] Although the introduction to Draft C states that only one of the proposed advertisements was express advocacy, the Draft later clarifies that its conclusion regarding the single "Financial Reform" *script* applies to two "'Financial Reform' advertisements, which Free Speech propose[d] to air on the radio and run in newspapers." (*Compare* Draft C at 1, *with id.* at 27.)

[9] Plaintiff's Memorandum omits any discussion of these "Financial Reform" advertisements, which the Commission *unanimously* concluded were express advocacy under 11 C.F.R. § 100.22(a). (Free Speech AO at 4-5.)

[10] Despite plaintiff's characterization of the advisory opinion process (*see* Pl. Mem. at 23), the Commission approved this response within the timeframe proscribed by the Act. *See* 2 U.S.C. § 437f(a)(1) (requiring the Commission to respond to an advisory opinion request within 60 days of the date the request is complete).

ARGUMENT

I. A PRELIMINARY INJUNCTION IS AN EXTRAORDINARY REMEDY THAT REQUIRES PLAINTIFF TO MEET A HEAVY BURDEN

To obtain a preliminary injunction, a plaintiff bears a heavy burden. It is an "extraordinary" remedy. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). A plaintiff "must show that four factors weigh in [its] favor: (1) [it] is substantially likely to succeed on the merits; (2) [it] will suffer irreparable injury if the injunction is denied; (3) [its] threatened injury outweighs the injury the [Commission] will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Id*. (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)); *see Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

Because Free Speech seeks an injunction to upset the status quo, it faces an even higher hurdle. A injunction that alters the status quo is a "disfavored type of injunction" and "must be more closely scrutinized to assure that the exigencies of the case support granting of a remedy that is extraordinary even in the normal course." *Awad*, 670 F.3d at 1125; *see Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement of congressional act despite First Amendment claim and noting that, "[b]y seeking an injunction, applicants request that I issue an order *altering* the legal status quo.") (emphasis in original); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). Such an injunction is particularly inappropriate in the pre-election context, where "considerations specific to election cases" weigh even further against the issuance of injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (vacating lower court's injunction against enforcement of election statute and noting potential for pre-election injunctions to cause confusion among voting public).

Free Speech claims that it "may" be entitled to injunctive relief merely by establishing "that the latter three elements [of irreparable injury, balance of harms, and no harm to the public interest] alone tip in [its] favor." (Pl. Mem. at 3 (citing *Davis v. Mineta*, 302 F.3d 1104, 1111

(10th Cir. 2002)).) Free Speech is wrong. That argument not only is contrary to the Tenth Circuit's recent decision in *Awad* and the Supreme Court's 2008 decision in *Winter*, but also misrepresents the *actual* test articulated in the case it cites for the proposition, *Davis*, decided years earlier. In this Circuit, "[a] district court may not grant a preliminary injunction unless the moving party makes a *strong showing* both with regard to the likelihood of success on the merits *and* with regard to the balance of harms." *Awad*, 670 F.3d at 1125 (emphasis added) (collecting cases).[11]

II. PLAINTIFF FAILS TO MAKE THE REQUIRED SHOWING THAT IT IS LIKELY TO PREVAIL ON THE MERITS

A. Applicable Legal Standards for Plaintiff's Constitutional Claims

1. Intermediate Scrutiny Applies Here

In determining the level of constitutional scrutiny applicable to campaign finance regulations, the Supreme Court has long distinguished between disclosure provisions, which are subject to intermediate (sometimes referred to as "exacting") scrutiny, and expenditure limits, which are subject to strict scrutiny. *See, e.g.*, *Buckley*, 424 U.S. at 64.

Although "disclosure requirements may burden the ability to speak . . . they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citations omitted). Disclosure provisions thus require only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (quoting *Buckley*, 424 U.S. at 64, 66); *see also RTAA*, 681 F.3d at 549 (analyzing section "100.22(b) and [Commission's] policy for determining the major purpose of an organization under the exacting scrutiny standard" because "even after

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[11] *Davis* nowhere suggests that a party may be relieved from having to make *any* showing regarding the merits. Instead, the court described a "modified" test, whereby a movant could address the question of its likely success on the merits by "showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." 302 F.3d at 1111 (internal quotation marks and citation omitted). But even this test has been undermined by *Winter*, which requires the plaintiff to "make a clear showing that it will likely succeed on the merits at trial." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009) (citing *Winter*, 129 S. Ct. at 374).

Citizens United, it remains the law that provisions imposing disclosure obligations are reviewed under the intermediate scrutiny level of 'exacting scrutiny'") (citing *Reed*, 130 S. Ct. at 2818; *SpeechNow*, 599 F.3d at 696; *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55-57 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012)); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1003-05 (9th Cir. 2010) (same), *cert. denied*, 131 S. Ct. 1477 (2011).

After *Citizens United*, section 100.22's definition of express advocacy implicates only disclosure requirements: Section 100.22 provides guidance on the definition of "independent expenditures," which must include certain disclaimers and whose financing must be reported to the Commission for public disclosure; it also can be relevant to whether a group has made more than $1,000 in expenditures, spending that can trigger political-committee status. *See* 2 U.S.C. §§ 431(17)(A), 431(4)(A). For entities like Free Speech that do not make contributions to federal candidates, political-committee status also gives rise only to disclosure and organizational requirements; such groups remain free to make unlimited expenditures and receive unlimited contributions from eligible contributors. *See supra* p. 6 & n.4.[12]

Plaintiff nevertheless argues (Pl. Mem. at 27) for strict scrutiny here based on its unsupported contention that "the Supreme Court and Tenth Circuit have consistently recognized the severe burdens of registration and reporting." To the contrary, *Citizens United* confirmed that "[d]isclaimer and disclosure requirements" are subject to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." 130 S. Ct. at 914 (citations omitted); *accord New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (distinguishing state regulations imposing political committee registration and disclosure requirements "from regulations that limit the amount of speech a group may undertake" and concluding that under *Buckley*, the former category "must pass 'exacting scrutiny'"); *see also, e.g.*, *RTAA*, 681 F.3d at 558

[12] According to its bylaws, Free Speech cannot make contributions. (Amend. Compl. Exh. A, Article IV, § 7.) In any event, contribution limits, like disclosure requirements, are subject to intermediate scrutiny. *McConnell*, 540 U.S. at 134-41; *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010).

(analyzing section 100.22(b) and Commission's method of determining political committee status under exacting scrutiny standard); *SpeechNow*, 599 F.3d at 698; *McKee*, 649 F.3d at 55-57; *Brumsickle*, 624 F.3d at 1003-05; *Smithson*, 750 F. Supp. 2d at 1036-37. Strict scrutiny plainly has no application here.

2. Plaintiff's Burden for Its Facial Challenges

Plaintiff's facial challenges include claims of both overbreadth and vagueness.[13] The Tenth Circuit has held that a plaintiff bringing a facial challenge "must establish that the law, in *every* application, 'creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.'" *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1155 (10th Cir. 2007) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992)).[14]

Thus, Free Speech carries the "heavy burden of proving" that the challenged regulations' "'application to protected speech is substantial, 'not only in an absolute sense, but also relative to

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[13] Although Free Speech styles its claims as both as-applied and facial challenges, it does little to support its purported as-applied claims, offering minimal explanation of how the challenged provisions are unconstitutional as they pertain to the specific communications plaintiff wishes to distribute. *See VRLC*, 2012 WL 2370445, at *8 (noting VRLC's general failure to craft its as-applied vagueness claim); *Iowa Right to Life Comm., Inc. v. Tooker*, 795 F. Supp. 2d 852, 862 n.16 (S.D. Iowa 2011) (noting IRTL's failure to distinguish between its facial and as-applied arguments). Like the plaintiff in *VRLC*, Free Speech "seems to argue that the provisions here must be vague as applied to it because they are vague in all applications." *VRLC*, 2012 WL 2370445, at *8. Such an argument "flips on its head the general 'preference for as-applied review even where First Amendment rights are implicated," *id.* (quoting *United States v. Farhane*, 634 F.3d 127, 138 n.9 (2d Cir. 2011)), and could provide a basis for the court "to reject [plaintiff's] claims summarily if [it] were so inclined," *id.* (citing and quoting parenthetically *McKee*, 669 F.3d at 43).

[14] The Supreme Court has used various formulations in determining facial overbreadth. *Compare, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiff must "establish that no set of circumstances exists under which the Act would be valid"), *with, e.g., New York v. Ferber*, 458 U.S. 747, 769-771 (1982) (plaintiff can succeed if it establishes that a 'substantial number' of the challenged law's applications are unconstitutional) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)).

Free Speech also argues that the regulation and policies it challenges are unconstitutionally vague on their face. To prevail on this theory — and it cannot — Free Speech must show that they fail to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and permit "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

B. Section 100.22(b) Is Constitutional

Section 100.22 defines "expressly advocating" and thus provides guidance on whether a communication is an independent "expenditure" under the Act. For a communication to constitute "express advocacy" under 11 C.F.R. § 100.22(b), it must contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning," as to which "[r]easonable minds could not differ [that] it encourages actions to elect or defeat one or more clearly identified candidate(s)."

As discussed *supra* pp. 2-5, the regulation originally functioned in part to implement the ban on corporate and union independent expenditures in 2 U.S.C. § 441b, which the Supreme Court struck down in *Citizens United*. Because such prohibitions no longer exist, the regulation no longer implements spending limits but instead implicates only disclosure requirements. *See supra* pp. 2-5; *RTAA*, 681 F.3d at 548. Thus, contrary to plaintiff's hyperbolic assertion, section 100.22(b) does not "muzzle" any First Amendment activity (Pl. Mem. at 11). It simply triggers disclosure requirements for communications that unambiguously call for the election or defeat of a federal candidate and helps determine whether an organization must register and report as a political committee.[15] Moreover, far from defining "almost any speech" as express advocacy (Pl. Mem. at 10), the regulation is narrow, objective, and consistent with Supreme Court precedent.

[15] Because section 100.22(b) no longer serves to implement a ban on corporate spending, plaintiff's repeated characterization of the regulation as a tool for suppressing political speech is no more than empty rhetoric, and plaintiff's reliance on cases addressing speech restrictions is misplaced. (*See, e.g.*, Pl. Mem. at 18 (invoking Tenth Circuit's invalidation of state law "speech

1. Section 100.22(b) Is Not Unconstitutionally Vague

a. The regulation is consistent with WRTL*'s definition of the functional equivalent of express advocacy*

As the Fourth Circuit recently concluded, section 100.22(b)'s definition of "express advocacy" is not vague and comports with the articulation of the "functional equivalent of express advocacy" that the Supreme Court recognized in *WRTL* and applied in *Citizens United*. *RTAA*, 681 F.3d at 552-55. Fundamentally, section 100.22(b) — like the Supreme Court's *WRTL* test — provides that any communication that can reasonably be interpreted as non-candidate advocacy is excluded from the regulation. *Compare* 11 C.F.R. § 100.22(b) ("[r]easonable minds could not differ"), *with WRTL*, 551 U.S. at 469-70 ("susceptible of no [other] reasonable interpretation"). And both definitions are objective, precluding consideration of the speaker's "subjective intent." *Compare WRTL*, 551 U.S. at 472, *with Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995); *see Citizens United*, 130 S. Ct. at 895, 889-90 (describing *WRTL's* "functional equivalent of express advocacy" test as "objective").[16]

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bans aimed at corporations"); *id.* at 12 (citing *Speiser v. Randall*, 357 U.S. 513 (1958), which invalidated a "discriminatory denial of a tax exemption for engaging in [certain] speech" because it "is a limitation on free speech").) In addition, plaintiff's reliance on *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), rests on a misunderstanding of the holding in that case. According to Free Speech, the regulations at issue in *Fox* — which, unlike section 100.22(b), defined speech that could result in an imposition of a fine — "proved fatal *because* the regulations touched upon 'sensitive areas of basic First Amendment freedoms.'" (Pl. Mem. at 16 (quoting *Fox*, 132 S. Ct. at 2318 (internal quotation marks and citation omitted)) (emphasis added).) Not so. "[B]ecause the Court "resolve[d] [*Fox*] on fair notice grounds under the Due Process Clause *it* [*did*] *not address the First Amendment implications* of the [FCC's] indecency policy." *Fox*, 132 S. Ct. at 2320 (emphasis added).

[16] The regulation's "reasonable person" test is like other objective constitutional tests. *See, e.g.*, *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity depends upon a "wholly objective standard" based on whether a "reasonable person" would have known of clearly established rights) (citation omitted); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("[C]onsent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?") (citation omitted).

In the controlling opinion in *WRTL*, Chief Justice Roberts specifically rejected Justice Scalia's argument in a separate opinion that the *WRTL* test was "impermissibly vague." *WRTL*, 551 U.S. at 474 n.7. And the fact that the Court applied the *WRTL* test in *Citizens United* puts to rest any credible claim that the standard is constitutionally infirm. *See Citizens United*, 130 S. Ct. at 889-90 (applying "the standard stated in *McConnell* and further elaborated in *WRTL*" to conclude that film criticizing presidential candidate Hillary Clinton "qualifie[d] as the functional equivalent of express advocacy"). Relying on the striking similarity between the standard in section 100.22(b) and the Chief Justice's articulation of the test in *WRTL*, the Fourth Circuit flatly rejected a constitutional challenge to section 100.22(b). The court held that "§ 100.22(b) is constitutional . . . and consistent with the test developed in *Wisconsin Right to Life* and is not unduly vague" or overbroad. *RTAA*, 681 F.3d at 551-52, 555.

The Fourth Circuit explained:

> The language of § 100.22(b) is consistent with the test for the "functional equivalent of express advocacy" that was adopted in *Wisconsin Right to Life*, a test that the controlling opinion specifically stated *was not "impermissibly vague.*" Moreover, just as the "functional equivalent" test is objective, so too is the similar test contained in § 100.22(b).
>
> Both standards are also restrictive, in that they limit the application of the disclosure requirements solely to those communications that, in the estimation of any reasonable person, would constitute advocacy. Although it is true that the language of § 100.22(b) does not exactly mirror the functional equivalent definition in *WRTL* . . . the differences between the two tests are not meaningful. Indeed, the test in § 100.22(b) is likely narrower than the one articulated in *Wisconsin Right to Life*, since it requires a communication to have an "electoral portion" that is "unmistakable" and "unambiguous."

RTAA, 681 F.3d at 552 (internal citations omitted; emphasis added).

The controlling opinion in *WRTL* and the Fourth Circuit's analysis in *RTAA* refute plaintiff's unsupported characterizations of section 100.22(b) as a "muddled mess" of "fuzzy factors" that are "remarkably vague" and "subjective." (*See* Pl. Mem. at 1, 12, 13.)

It is telling that plaintiff elects not to discuss *RTAA* but instead to dismiss it by (1) labeling it "an aberration"; (2) making the unremarkable point that Fourth Circuit precedent

is not binding on this court; (3) claiming baldly that *RTAA* "stands in conflict" with "the Tenth Circuit's clear adherence to speech-protective principles," while failing to explain or even cite a single, specific holding or statement by the Tenth Circuit that conflicts with *RTAA*; (4) claiming, again without support, that "the facts and legal theories presented to this court are different than those presented in *RTAA*"; and (5) making the irrelevant and uncontroversial point that "there is no reason to doubt the continued viability of *Citizens United*." (*Id.* at 6.) All of these points lack merit.

First, *RTAA* is hardly "an aberration." The Fourth Circuit's decision follows directly from the Supreme Court's holdings and reasoning in *McConnell*, *WRTL*, and *Citizens United*, and the Fourth Circuit explicitly relies on the analyses and holdings in those decisions. *See RTAA*, 681 F.3d at 548-55. *RTAA* is also entirely consistent with other lower courts' understanding of those decisions. *See supra* pp. 15-16; *infra* pp. 26-27, 37-38 & n.31.

Second, *RTAA* does not conflict with either of the Tenth Circuit decisions plaintiff cites or any others of which the Commission is aware. Neither *Coffman* nor *Herrera* addressed the constitutionality of section 100.22(b). *Coffman*, decided before *Citizens United*, involved challenges to state campaign finance laws prohibiting corporations from directly financing expenditures. *See* 498 F.3d at 1139-41. And *Herrera*, decided in 2010, *supports* the Commission's analysis, not plaintiff's unsubstantiated arguments. *Herrera* recognized that (a) state disclosure regulations like those challenged here are subject to intermediate scrutiny, 611 F.3d at 676 (citing *Buckley*, 424 U.S. at 64; *Reed*, 130 S. Ct. at 2818); and (b) speech that "is the functional equivalent of express advocacy for the election or defeat of a specific candidate is unambiguously related to the campaign of a candidate and thus properly subject to regulation regardless of its origin," *compare id.* (citing *WRTL*, 551 U.S. at 476), *with* Pl. Mem. at 19 (quoting *Herrera* and claiming without support that after *Citizens United*, the Supreme Court "has abandoned" that standard).

Third, while of course *RTAA* was a "different" case, just as here it involved a facial challenge to section 100.22(b), and the Fourth Circuit addressed several of the same points raised here when it rejected RTAA's arguments for strict scrutiny, overbreadth, and vagueness. For

example, the Fourth Circuit rejected the analogy that the plaintiff there attempted to draw between the "two-part, 11-factor balancing test" in 11 C.F.R. § 114.15 and section 100.22(b), finding them "substantially distinguishable." *Compare RTAA*, 681 F.3d at 553-54 ("The Supreme Court's criticism of § 114.15 can hardly cast doubt on § 100.22(b)."), *with* Pl. Mem. at 3, 9, 37-38 (analogizing Supreme Court's criticism of § 114.15).

The Fourth Circuit also rejected the argument, raised here, that certain individual words or phrases contained in section 100.22(b) are vague. (Pl. Mem. at 12-13.) The Fourth Circuit explained that "[r]egardless . . . of whether words might be insufficiently clear when standing alone, we cannot conclude that they render the [regulation] vague when considered in their context." *RTAA*, 681 F.3d at 554. Recognizing the similarity between section 100.22(b) and "the relevant language from [*WRTL's*] 'functional equivalent' test," the Fourth Circuit concluded that "[i]f, as the Supreme Court has held, the test in [*WRTL*] is not vague, then neither is § 100.22(b)." *Id.*

The Fourth Circuit likewise disagreed with the assertion that a communication's "proximity to the election" is an impermissible consideration in determining whether it is express advocacy or the functional equivalent thereof. *Compare RTAA*, 681 F.3d at 554, *with* Pl. Mem. at 17.[17] It explained that the Supreme Court has "simply held that the timing of speech cannot be used as a proxy for a speaker's intent." *RTAA*, 681 F.3d at 554 (citing *WRTL*, 551 U.S. at 472). But both section 100.22(b) and *WRTL's* "functional equivalent" test eschew considerations of subjective intent, *id.*, and "while considering timing with respect to electioneering communications[, which have a time-sensitive statutory definition], would prove redundant, a limited reference to whether, for example an ad airs in an election year, would actually help limit the number of communications that are considered independent expenditures." *Id.*

[17] Plaintiff cites *Citizens United* and asserts that "the Supreme Court has already determined that timing of communications, or their proximity to an election, is irrelevant for purposes of express advocacy analysis" (Pl. Mem. at 17 (citing *Citizens United*, 130 S. Ct. at 895)), but neither the cited portion nor any other part of that opinion supports plaintiff's assertion.

In sum, the Fourth Circuit's decision, though not controlling, is instructive here. The analysis and conclusions in *RTAA* directly refute many of plaintiff's arguments challenging the constitutionality of section 100.22(b), and plaintiff does not — and cannot — seriously attempt to distinguish that decision.

b. Disagreements in the application of section 100.22(b) do not demonstrate that the regulation is unconstitutionally vague

Although the Commissioners were not unanimous in their application of section 100.22(b) to some of plaintiff's proposed communications, this fact "proves little because," as the Fourth Circuit recognized, "cases that fall close to the line will inevitably arise when applying § 100.22(b)." *RTAA*, 681 F.3d at 554. "This kind of difficulty is simply inherent in any kind of standards-based test." *Id.* at 554 (citations omitted); *see United States v. Williams*, 553 U.S. 285, 306 (2008) ("Close cases can be imagined under virtually any statute. The problem that poses is [not] addressed . . . by the doctrine of vagueness."); *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (holding that Federal Corrupt Practices Act was not facially vague because "[w]herever the law draws a line there will be cases very near each other on opposite sides").

Moreover, plaintiff's attempted mockery of the analyses and conclusions of the Commissioners with whom it disagrees is misleading. For example, Draft B, which found plaintiff's "Environmental Policy" radio ad to be express advocacy, does not rely on "a loose mélange of factors." (Pl. Mem. at 24.) Nor does Draft B conclude that the ad is express advocacy because it fails to "sufficiently explain" the merits of the Government Litigation Savings Act or because it "mention[s] the wrong month." (*Id.*) Likewise, Draft B's conclusion has nothing to do with whether the Commissioners "care for [plaintiff's] criticism of the president." (*Id.* at 18.) Plaintiff, of course, is free to mention any month it likes, to explain the merits of a particular piece of legislation (or not), and to criticize the President. Section 100.22(b) does not prohibit *any* speech. But the "Environmental Policy" ad triggers the Act's disclosure requirements because the radio ad clearly attacks the President and links that criticism to the month of the upcoming election when it says, "Obama cannot be counted on to represent Wyoming values and voices as President. *This November*, call your neighbors." The ad does not

even hint at what the Government Litigation Savings Act concerns,[18] nor does it identify any means by which one could find out; it is thus different from what the controlling opinion in *WRTL* identified as "a genuine issue ad." *See WRTL*, 551 U.S. at 469-70 & n.6 (explaining that a "genuine issue ad" "conveys information and educates" and distinguishing such ads from those that "condemn [a candidate's] record on a particular issue") (citation omitted). Draft B thus concludes that the "Environmental Policy" radio ad, "when taken as a whole" "'goes beyond issue discussion to express electoral advocacy,' asserting that President Obama 'cannot be counted on to represent Wyoming values and voices *as President*' and concluding with a call to action '*this November.*'" (Draft B at 7 (quoting *MCFL*, 479 U.S. at 249).)

Equally erroneous is plaintiff's characterization of Draft B as concluding that "'Support Wyoming State Candidates' equals 'Vote Against Obama.'" (Pl. Mem. at 26.) It says no such thing. In finding that plaintiff's "Gun Control" television ad is express advocacy, Draft B identifies *two* exhortations, one concerning President Obama and another concerning Wyoming state candidates. (Draft B at 12-13.) Regarding President Obama, Draft B concludes that "[t]he advertisement exhorts 'all Americans' to 'seriously doubt' President Obama's 'qualifications' based on his 'ardent support[]' of gun control" and "the advertisement's 'electoral portion' then immediately exhorts viewers to 'get enraged, get engaged, and get educated,' and to do so 'this fall'" in the year of a presidential election. (*Id.* at 12.) Draft B acknowledges the ad's "*additional* exhortation to 'support Wyoming state candidates who will protect your gun rights,'" (*id.* (emphasis added)), but concludes that such language does not preclude a finding of express advocacy *as to the separate portion of the ad concerning a clearly identified presidential candidate*. (*Id.* at 12-13.)

The analysis in Draft B, which was issued before the Fourth Circuit decided *RTAA*, affirming the district court's opinion, is consistent with the district court's application of section 100.22(b) to the ads at issue in that case. (*See id.* at 11, 12, 16 (citing *Real Truth About Obama,*

[18] The Government Litigation Savings Act is an unenacted bill that proposed amendments to the Equal Access to Justice Act. *See generally* H.R. 1996, 112th Cong. (2011).

Inc. v. FEC, 796 F. Supp. 2d 736, 749-50 (E.D. Va. 2011) ("*RTAO*"), *aff'd*, *RTAA*, 681 F.3d 544 (4th Cir. 2012).) Specifically, the district court agreed with the Commission's conclusion that Real Truth's "Survivors" ad was express advocacy and lawfully regulated under section 100.22(b). That ad "focuse[d] entirely on then-Senator Obama's position on abortion, . . . call[ed] Senator Obama's votes on state abortion legislation 'horrendous,' . . . claim[ed] he 'tried to cover-up' those votes and lied about them," and "call[ed] Senator Obama 'callous.'"[19] *RTAO*, 796 F. Supp. 2d at 750; *see also Citizens United*, 130 S. Ct. at 890 (concluding that film providing "extended criticism of Senator Clinton's character and her fitness for the office of the Presidency" was "equivalent to express advocacy"); *WRTL*, 551 U.S. at 470 (identifying certain "indicia of express advocacy" such as whether a communication "mention[s] an election, candidacy, political party, or challenger" or "take[s] a position on a candidate's character, qualifications, or fitness for office"). Like Free Speech's proposed ads, the "Survivors" ad invoked a policy issue as a basis for opposing a presidential candidate. Free Speech's ads go even *further*, concluding their criticism of President Obama with exhortations to take action "in November" or "this fall," in a presidential election year. In sum, plaintiff fails to explain how Draft B's *actual* analysis and conclusions, as opposed to plaintiff's result-driven effort at caricature, demonstrate that section 100.22(b) is vague.

2. Section 100.22(b) Is Not Overbroad

Supreme Court decisions culminating in *Citizens United* have held that disclosure requirements may reach even *beyond* express advocacy or its functional equivalent. After clarifying that *Buckley's* "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation, rather than a constitutional command," *McConnell* upheld BCRA's disclosure requirements for electioneering communications. 540 U.S. at 191-92, 194-99. The Court reiterated the "important state interests" served by disclosure requirements — interests that include "providing the electorate with information" and "deterring

[19] Like the disagreement among Commissioners over some of Free Speech's communications, the disagreement between the Commission and the district court over Real Truth's "Change" ad does not mean that section 100.22(b) is vague. *RTAA*, 681 F.3d at 554.

actual corruption and avoiding any appearance thereof." *Id.* at 196 (citing *Buckley*). The Court noted that the only constitutional challenges it had ever sustained to such disclosure provisions involved situations in which disclosure led to "threats, harassment, and reprisals" against individuals engaged in First Amendment activity. *See id.* at 197-98. The Court held that in the absence of evidence showing a "reasonable probability" of such incidents occurring, *id.* at 198-99, a constitutional challenge to disclosure of electioneering communications is "foreclose[d]." *Id.* at 197.

In *Citizens United*, the Court upheld BCRA's disclosure requirements as applied to a movie that was the functional equivalent of express advocacy; the Court found that the film "would be understood by most viewers as an extended criticism of Senator [Hillary] Clinton's character and her fitness for the office of the Presidency." 130 S. Ct. at 889-90. But the Court also upheld BCRA's disclosure requirements for all electioneering communications — even as applied *to three advertisements for the movie*, which the Commission had conceded were *not* the functional equivalent of express advocacy. *Id.* at 914-16. Eight Justices agreed that disclosure is "less restrictive" of speech than a limit on spending, *id.* at 915, and is a constitutionally permissible method of furthering the public's important interest in knowing who is responsible for pre-election communications that speak about candidates, *see id.* at 915-16. Such mandatory disclosure is constitutional even if the communications contain no direct candidate advocacy but "only pertain to a commercial transaction." *Id.* (citing *Buckley*, 424 U.S. at 75-76; *McConnell*, 540 U.S. at 321).

As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916. In particular, when asked to confine the "disclosure requirements . . . to speech that is the functional equivalent of express advocacy," the Court flatly "reject[ed] this contention." *Id.* at 915. Instead, the Court held that the Constitution

permits Congress to regulate even communications that contain *no* words of electoral advocacy. *Id.* at 914-16.[20]

As the Fourth Circuit recently held, if mandatory disclosure requirements are permissible in each of these contexts, including "when applied to ads that merely *mention* a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible." *RTAA*, 681 F.3d at 552. Courts in at least four other circuits have reached similar conclusions. *See McKee*, 649 F.3d at 54-55 (1st Cir.) ("[I]t [is] reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); *Brumsickle*, 624 F.3d at 1016 (9th Cir.) ("Given the Court's analysis in *Citizens United* and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *VRLC*, 2012 WL 2370445, at *7 (D. Vt.) ("The *Citizens United* court made clear that the power to require disclosure extends beyond the power to limit speech" and it "went further toward solidifying this principle, explicitly endorsing a system of relatively unrestricted political speech paired with 'effective disclosure'") (quoting *Citizens United*, 130 S. Ct. at 915-

[20] That holding is of a piece with the Supreme Court's long history of applying intermediate scrutiny and upholding disclosure requirements for issue advocacy. Decades before *Citizens United*, the Supreme Court had upheld the constitutionality of lobbying disclosure laws that "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." *United States v. Harriss*, 347 U.S. 612, 625 (1954). Later in *First National Bank of Boston v. Bellotti*, the Court, while striking down *spending* restrictions on ballot measures, noted that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. 765, 792 n.32 (1978). And just two years ago the Court held that a state's interest in preserving the integrity of the electoral process is sufficient to justify a requirement that individuals who sign petitions to place referenda on state ballots disclose their names and addresses. *Reed*, 130 S. Ct. at 2819-22. In light of these decisions and *Citizens United's* endorsement of "[a] campaign finance system that pairs corporate independent expenditures *with effective disclosure*," 130 S. Ct. at 916 (emphasis added), plaintiff's qualified concession (Pl. Mem. at 30) — that "the Supreme Court affirmed disclosure in the *Citizens United* case, but that ruling only concerned electioneering communications" — is insufficient and inaccurate.

16); *Yamada v. Weaver*, No. 10-00497, 2012 WL 983559, at *17 (D. Haw. Mar. 21, 2012) (quoting *Brumsickle*, 624 F.3d at 1016); *Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) ("Recently, in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent.") (citing *Citizens United*, 130 S. Ct. at 915).

Thus, requiring disclosure of communications that meet section 100.22(b)'s definition of "expressly advocating" is plainly constitutional.

3. Plaintiff's Remaining Objections to Section 100.22(b) Lack Merit

a. The lower court decisions upon which plaintiff relies have been rendered inapposite in the wake of more recent Supreme Court decisions

Although plaintiff notes that more than ten years ago a few lower courts in other circuits found section 100.22(b) to be invalid (Pl. Mem. at 8, 43, 45), those decisions are of no consequence now. *First*, the decisions all predated the Supreme Court's recognition, in *McConnell*, *WRTL*, and *Citizens United*, that the regulation of "the functional equivalent" of express advocacy is permissible.[21] *Citizens United*, 130 S. Ct. at 890; *WRTL*, 551 U.S. at 470; *McConnell*, 540 U.S. at 193, 206. *Second*, those earlier cases were predicated on the regulation's function as a speech *ban* — a function it no longer serves — so they had no occasion to consider the constitutionality of section 100.22(b) as it serves today to implement disclosure requirements. *Cf. Reed*, 130 S. Ct. at 2837 (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."). *Third*, the decisions in those cases preceded the Supreme Court's holding in *Citizens United* that disclosure

[21] As Justice Thomas observed in his dissent in *McConnell*, the majority opinion in that case "overturned" all of the courts of appeals decisions that had interpreted *Buckley* as limiting government regulation to a wooden magic-words formula. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting) (collecting cases). Justice Thomas went on to note that the only express advocacy decision that *McConnell* did not cast into doubt was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the case from which the Commission derived the test codified at section 100.22(b). *See* 60 Fed. Reg. at 35,292-95 ("[S]ection 100.22(b) . . . incorporate[s] . . . the *Furgatch* interpretation . . . .").

requirements are constitutional not only for communications that are the functional equivalent of express advocacy, but even for communications that "only pertain to a commercial transaction, [because] the public has an interest in knowing who is speaking about a candidate shortly before an election." 130 S. Ct. at 915-16.

In recognition of these recent legal developments, the Fourth Circuit in *RTAA* overruled its own earlier conclusion in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*"), "that § 100.22(b) was unconstitutional because it 'shift[ed] the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation.'" *RTAA*, 681 F.3d at 550 n.2 (quoting *VSHL*, 263 F.3d at 392). The Fourth Circuit explained that its earlier "conclusion can no longer stand, in light of *McConnell* and [*WRTL*]." *Id.*

Similarly, the First Circuit recently held "in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *McKee*, 649 F.3d at 54-55. In a "case [that] does not involve a limit on independent expenditures, the relevance of these [earlier] cases is limited at best." *Id.* at 54. "[M]ore fundamentally, the Supreme Court has explicitly rejected an attempt to 'import [the] distinction' between issue and express advocacy into the consideration of *disclosure requirements*." *Id.* (emphasis added) (quoting *Citizens United*, 130 S. Ct. at 915). Although the First Circuit did not explicitly address the continued validity of its earlier decision in *Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996) ("*MRLC*"), upon which plaintiff relies (Pl. Mem. at 8, 43), *McKee* makes clear that the premise underlying *MRLC* affirmed no longer holds. The district court decision affirmed on appeal had noted that it was addressing a "prohibition" on corporate spending for express advocacy, and in that context the court cited the Supreme Court's primary "concern[] not to permit intrusion upon 'issue' advocacy." *Maine Right to Life Comm. v. FEC*, 914 F. Supp. 8, 10, 12 (D. Maine 1996). In light of *McKee* and *Citizens United*, the relevance of *MRLC* — which was premised on a concern about "permit[ting] a speaker or writer

to know from the outset exactly what is permitted *and what is prohibited*," 914 F. Supp. at 12 (emphasis added) — "is limited at best." *McKee*, 649 F.3d at 54.[22]

b*. *Plaintiff misunderstands the Commission's enforcement process

Plaintiff's entire "heckler's veto" argument (Pl. Mem. at 21) rests on a fundamental misunderstanding of the Commission's enforcement process. Contrary to plaintiff's mistaken claim (*id.* at 20), FECA explicitly *precludes* a general private right of action to enforce violations of its provisions. *See* 2 U.S.C. § 437d(e) ("Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the *exclusive civil remedy for the enforcement of the provisions of this Act*.") (emphasis added). Any person who believes that FECA has been violated may file *with the Commission* an administrative complaint regarding that violation. 2 U.S.C. § 437g(a)(1). The Commission then considers the complaint to determine whether it provides "reason to believe" that FECA has been violated. *Id.* § 437g(a)(2). If at least four Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *See id*. When the Commission dismisses a complaint, the complainant may file suit in the United States District Court for the District of Columbia *against the Commission* seeking a declaration that the Commission's dismissal was "contrary to law." *Id.* § 437g(a)(8).[23] If the district court declares that the dismissal was contrary to law, the court can

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[22] Also of limited relevance, in addition to being of no precedential value, is *Right to Life of Dutchess Co. Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) ("*RLDC*"). (*See* Pl. Mem. at 8, 43.) That decision predates *McConnell*, *WRTL*, and *Citizens United*, and its conclusion that *Buckley* imposed a constitutional "bright-line requirement of 'express' or 'explicit' words of advocacy of election or defeat of a candidate," *RLDC*, 6 F. Supp. 2d at 253-54, was undermined by *McConnell*, which held that *Buckley's* "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation, rather than a constitutional command." *McConnell*, 540 U.S. at 191-92, 194-99. *See supra* p. 24.

[23] Establishing that such a dismissal was "contrary to law" is not "easy," as plaintiff assumes. (Pl. Mem. at 20.) The Commission's dismissal of an administrative complaint cannot be disturbed unless it is based on "an impermissible interpretation of [FECA]" or is "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981) ("*DSCC*"). To affirm

"direct the Commission to conform with such declaration within 30 days." *Id.* § 437g(a)(8)(C). Only if the Commission then fails to conform to the court's declaration may the complainant bring a civil action to remedy the alleged violation. *Id.*

Plaintiff's description of the Commission enforcement process as a system "where opponents and those who do not understand the speech in controversy may suppress it" is just wrong. (Pl. Mem. at 21.) Setting aside plaintiff's rhetoric of speech "suppress[ion]," FECA's explicit preclusion of the private right of action Free Speech imagines was designed to prevent the very evil plaintiff complains about: No formal investigation can take place until at least four Commissioners agree that there is "reason to believe" a violation has occurred. 2 U.S.C. § 437g(a)(2). Plaintiff's extended allegations (*see* Pl. Mem. at 21-22) regarding a complaint against another group, its speculation about "a likely investigation into [the other group's] affairs," and its unsupported characterization of what "is enough to get speakers in trouble" all demonstrate plaintiff's fundamental misunderstanding of the Commission's enforcement process and fail to identify any flaws in section 100.22(b) or the Commission's *actual* application of it.

c. There is no "sordid" history of enforcement of section 100.22(b)

Plaintiff argues that the Commission has a "sordid" history of enforcing section 100.22(b), but fails to offer specific facts or legitimate arguments in support of this claim. Plaintiff cites various matters under review ("MURs") in which the Commission supposedly "found express advocacy under Section 100.22(b)" or which otherwise "detail[] the reach of Section 100.22(b)." (Pl. Mem. at 14-15, 18 n.9.) But six of those MURs were closed without a Commission finding that there was even *reason to believe* any violation premised on express advocacy had occurred, *i.e.*, before any formal investigation could have begun.[24]

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the agency's action, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39.

[24] *See In the Matter of Economic Freedom Fund, et al.*, MUR 5842, Certification (Apr. 16, 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044240853.pdf; *In the Matter of Patriot Majority, et al.*, MUR 6073, Certification (Apr. 3, 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044234187.pdf; In the Matter of American Future Fund,

Plaintiff's characterizations of out-of-context snippets of statements from unspecified documents in unspecified MURs fail to identify any specific flaws in any particular MURs. (*See, e.g.*, Pl. Mem. at 14 (claiming Commission or its staff "found express advocacy under Section 100.22(b) when an advertisement or communication 'lacked legislative focus' or did not sufficiently urge a candidate to take a specific action").)[25] Such out-of-context excerpts do not demonstrate any deficiency in section 100.22(b) or the Commission's *actual* interpretation and application of the regulation.[26]

MUR 5988, Amended Certification (Mar. 17, 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044232280.pdf; *In the Matter of Americans for Job Security, Inc., et al.*, MURs 5694 & 5910, Certification (Feb. 27, 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044232232.pdf; *In the Matter of Gun Owners of Amer., Inc., et al.*, MURs 5874 & 5875, Certification (Oct. 10, 2007), *available at* http://eqs.nictusa.com/eqsdocsMUR/000067A7.pdf. MUR 5024R and MUR 5634 (which plaintiff mistakenly cited as MUR 5631) were both resolved through the Commission's conciliation process. *See* 2 U.S.C. § 437g(a)(4) (outlining Commission conciliation process); *In the Matter of Council for Responsible Gov't, et al.*, MUR 5024R, Conciliation Agreement (Nov. 17, 2005), *available at* http://eqs.nictusa.com/eqsdocs MUR/00004C5F.pdf; *In the Matter of Sierra Club, Inc.*, MUR 5634, Conciliation Agreement (Nov. 15, 2006), *available at* http://eqs.nictusa.com/eqsdocsMUR/00005815.pdf.

[25] Even when plaintiff actually identifies specific documents, its argument fares no better. None of the MURs cited in footnote 9 of plaintiff's Memorandum (Pl. Mem. at 18 n.9) "detail[] the reach of Section 100.22(b)." And predecisional statements by "the Commission's lawyers" (Pl. Mem. at 14) or an individual Commissioner (*id.* at 18 n.9) that have not been adopted by a majority of the Commission do not constitute an official Commission interpretation. *See, e.g.*, *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002) (explaining that judicial review is not based on predecisional process); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998) ("*Chevron* deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to each individual agency employee . . . ."); *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1327 (D.C. Cir. 1984) (observing that NRC majority is not "required to accept the advice of some members of their legal and technical staff"), *aff'd in relevant part sub. nom., San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C Cir. 1986) (en banc).

[26] Moreover, it is simply not true that the regulation "[o]n its face . . . may regulate issue advocacy if an 'external event' proves significant to the Commission" or "if the speech is close to an election or if the communication discusses issues deemed too 'electoral' during an electoral season" (Pl. Mem. at 17); nor is the regulation a "speech test tied to public perception or the

More fundamentally, plaintiff's implicit legal arguments are undermined by *Citizens United* and *WRTL*. For example, plaintiff criticizes consideration of whether a communication "address[es] the character, qualifications or fitness of a candidate for office" without explaining why such a consideration is constitutionally flawed. (Pl. Mem. at 14-15.) The Supreme Court itself explicitly identified such factors as "indicial of express advocacy," *WRTL*, 551 U.S. at 470, and in *Citizens United* concluded that a movie was the functional equivalent of express advocacy because it "would be understood by most viewers as an extended criticism of Senator [Hillary] Clinton's character and her fitness for the office of the Presidency," 130 S. Ct. at 889-90.

In sum, plaintiff fails to demonstrate any constitutional flaw in section 100.22(b), including in the Commission's interpretation and application of the regulation. The regulation is neither vague nor overbroad, and it is consistent with the "functional equivalent" test that the Supreme Court articulated in *WRTL* and applied in *Citizens United*.

C. The Commission's Method of Determining Political Committee Status and the Registration and Disclosure Requirements for PACs Are Constitutional

As explained *supra* p. 5, a "political committee" includes any organization that receives more than $1,000 in contributions or more makes more than $1,000 in expenditures, 2 U.S.C. § 431(4)(A), and is "under the control of a candidate" or has as its "major purpose" "the nomination or election of a candidate," *Buckley*, 424 U.S. at 79; *see also McConnell*, 540 U.S. at 170 n.64. Under this construction of "political committee," FECA's organizational and disclosure requirements for political committees "directly serve substantial government interests." *Buckley*, 424 U.S. at 68. Such requirements further the "public . . . interest in knowing who is speaking about a candidate and who is funding that speech"; they also "deter[] and help[] expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations and individuals." *SpeechNow*, 599 F.3d at 698; *see Brumsickle*, 624 F.3d at 1013.

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government's perception about the intent, import or effect of speech" (*id.* at 26). These are just two examples of plaintiff's many inaccurate statements concerning the Commission's application of section 100.22(b).

1. The Commission's Method for Determining a Group's Major Purpose Is Constitutional

The Commission's case-by-case approach to determining political committee status has been upheld by the courts. *RTAA*, 681 F.3d at 556; *Shays*, 511 F. Supp. 2d at 29-31.[27] Indeed, Free Speech concedes that that it is "undoubtedly true that in conducting the major purpose analysis, fact-intensive inquiries are often appropriate" (Pl. Mem. at 33, 35).

For decades, the Commission has determined on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of candidates. *See* 72 Fed. Reg. at 5,596. The Commission's Political Committee Status Supplemental Explanation and Justification ("PAC-Status Supplemental E&J") describes the Commission's policy for making such determinations. *See generally* 72 Fed. Reg. 5,595 *passim*. The Commission considers the major purpose test only after first determining that an organization has met the statutory criteria for political committee status, either by making more than $1,000 in expenditures or receiving more than $1,000 in contributions. *See id.* at 5,603-04; 2 U.S.C. § 431(4)(A). To apply the major purpose test, the Commission has consulted sources such as the group's public statements, fundraising appeals, government filings (*e.g.*, IRS notices), charters, and bylaws. *See id.* at 5,601, 5,605 (describing sources). Because no two groups are exactly alike, the Commission's analysis has frequently turned on a group's specific activities, such as spending on a particular election or issue-advocacy campaign. *See id.* at 5,601-02, 5,605.

The Commission decided in 2007 not to promulgate a *per se* rule classifying section 527 organizations like Free Speech as political committees. *See* 26 U.S.C. § 527. Instead of creating categorical regulations that might have led to overbroad or underinclusive PAC determinations, *see* 72 Fed. Reg. at 5,598-5,601 (analyzing differences between political organizations under tax law and PACs under FECA), the Commission, in an exercise of discretion, decided to continue its practice of implementing the major purpose test on a case-by-case basis. *See id.* at

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[27] Although *Buckley* created the major purpose test, it "did not mandate a particular methodology for determining an organization's major purpose." *RTAA*, 681 F.3d at 556.

5,595-5,602. The Commission's PAC-Status Supplemental E&J "discusse[d] several recently resolved administrative matters that provide[d] considerable guidance to all organizations regarding . . . political committee status." *Id.* at 5,595; *see id.* at 5,601-5,606 (discussing matters).

The MURs plaintiff cites (Pl. Mem. at 33-34) are consistent with this approach, which courts have endorsed.[28] The Commission's specific decision to make PAC-status determinations on a case-by-case basis was challenged and upheld in *Shays*, 511 F. Supp. 2d at 29-31. And the Fourth Circuit in *RTAA* concluded that the Commission's approach to determining an organization's major purpose is "sensible, . . . consistent with Supreme Court precedent," and, most importantly, "constitutional." *RTAA*, 681 F.3d at 558. Plaintiff does not even address *RTAA*'s analysis on this issue.

As the Fourth Circuit recognized, the "determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others." *RTAA*, 681 F.3d at 556. And "[t]he necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *Id.* at 557 (collecting cases). Indeed, courts not only have endorsed the Commission's examination of these factors, they have relied on the *very same factors* to make their own major purpose determinations. *Koerber v. FEC*, 583 F. Supp. 2d 740, 748 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission's approach to determining PAC status, and noting

[28] Notably, half of plaintiff's examples of the Commission's supposed "vague and overbroad approach to determining the major purpose of an organization" are matters in which the Commission failed to find that a group met the major purpose test. *See* MUR 5988, Amended Certification (Mar. 17, 2009); MURs 5694 & 5910, Certification (Feb. 27, 2009); *see supra* p. 30 n.24. In plaintiff's other examples (*see* Pl. Mem. at 34), MUR 5753 and MUR 5754, "the Commission conducted a thorough investigation of all aspects of the organization's statements and activities to determine first if the organization exceeded the $1,000 statutory and regulatory threshold for expenditures or contributions . . . and then whether the organization's major purpose was Federal campaign activity." 72 Fed. Reg. at 5,603-04.

that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose"); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."); *id.* at 864, 866 (description of organizations' meetings attended by national leaders; references to organization's "Political Strategy Campaign Plan and Budget").[29]

The Commission's approach, moreover, is consistent with the law in this Circuit. The state campaign finance law at issue in *Coffman*, unlike the law here, defined a group as a political committee without *any* consideration of its major purpose; instead, "any group that spen[t] more than $200 a year to support or oppose the nomination or election of one or more candidates" was deemed a political committee. 498 F.3d at 1153. In describing the major purpose requirement, the Tenth Circuit cited the Supreme Court's endorsement of "two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent [express advocacy] spending with overall spending." *Id.* at 1152. The Commission applies the major purpose test by examining an "organization's central organizational purpose"; its approach is thus entirely consistent with the Tenth Circuit's understanding of the major purpose test. *See id.*; *Herrera*, 611 F.3d at 677-78 (citing *Coffman's* "two methods" for analyzing an organization's "major purpose" and determining organization's purpose by "comprehensive examination of its activities").

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[29] *GOPAC* does not, as plaintiff suggests (Pl. Mem. at 34), undermine the Commission's general application of the major purpose test. The court itself undertook a highly fact-intensive inquiry to determine GOPAC's major purpose, *see* 917 F. Supp. at 853-58, but ultimately concluded that the organization did not have as its major purpose the election of federal candidates, *id.* at 862-66.

Finally, plaintiff relies on *Citizens United's* rejection of "'case-by-case determinations to verify whether political speech is *banned*'" to argue that case-by-case analyses are impermissible in determining political committee status. (Pl. Mem. at 32 (quoting *Citizens United*, 130 S. Ct. at 892) (emphasis added).) But this argument ignores the Court's express refusal to import its holding regarding prohibitions on independent expenditures into its analysis of disclosure requirements. *Citizens United*, 130 S. Ct. at 876.

2. The Consequences of Political Committee Status Are Constitutional Organizational and Disclosure Obligations

The primary obligation of PACs that make no candidate contributions is *disclosure*, which is not much more burdensome than the reporting requirements the Supreme Court upheld in *Citizens United*. Indeed, relying upon *Citizens United*, the D.C. Circuit upheld the organizational and reporting requirements for independent expenditure-only "super PACs," noting that the additional reporting requirements "are *minimal*" and the organizational requirements do not "impose much of an additional burden" compared to independent-expenditure reporting. *See SpeechNow*, 599 F.3d at 697-98 (emphasis added); *see also RTAA*, 681 F.3d 558 (describing PAC status as entailing "'minimal' reporting and organizational obligations") (citing *SpeechNow*, 599 F.3d at 697-98). In light of *Citizens United*'s upholding of disclosure requirements for entities whose major purpose is *not* campaign activity, plaintiff's generalized arguments about the burdens of PAC status is unsustainable.[30]

[30] Plaintiff has not produced any evidence or even alleged specific facts demonstrating that complying with the PAC registration and reporting requirements would be unduly burdensome for plaintiff, *i.e.*, that the PAC requirement *as applied* to Free Speech is unconstitutional. *See Tooker*, 795 F. Supp. 2d at 862 n.16 (noting plaintiff's failure to distinguish its as-applied challenge from its facial challenge, including its failure to explain how the challenged disclosure requirements "'impinge[] upon its associational freedoms'") (citing *Brumsickle*, 624 F.3d at 1021-22). It is unclear, therefore, why plaintiff invokes (Pl. Mem. at 29) *Buckley's* discussion of *NAACP v. Alabama*, 357 U.S. 449 (1958), in which the Court distinguished the facts in *Buckley* from the NAACP's "uncontroverted showing" of the harms it had suffered from past disclosures of its members, which included "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Buckley*, 424 U.S. at 69 (discussing

While it is true that *Citizens United* and *MCFL* described speaking through a corporate PAC as a burdensome alternative *to speaking directly with corporate treasury funds*, that context was "significantly different from the one facing [Free Speech]." *RTAA*, 681 F.3d at 549; *see Tooker*, 795 F. Supp. 2d at 863 (distinguishing the "statutes that prohibited corporations and unions from using their general treasury funds to make certain independent expenditures" at issue in *Citizens United* and *MCFL* from a case challenging "provisions [that] do not ban any independent expenditures"). As the Fourth Circuit explained in response to an argument similar to plaintiff's:

> The regulation invalidated in *Citizens United* required corporations to set up a separate PAC with segregated funds before making any direct political speech. These corporate PACs were subject to several limitations on allowable contributions, including a prohibition on the acceptance of funds from the corporation itself. The Court accordingly held that the option to create a separate corporate PAC did not alleviate the burden imposed by § 441b *on the corporation's own speech*. In contrast, the PAC disclosure requirements at issue here neither prevent Real Truth from speaking nor "impose [a] ceiling on campaign-related activities."

RTAA, 681 F.3d at 549 (internal citations omitted); *see MCFL*, 479 U.S. at 253 ("Because it is incorporated, . . . MCFL must establish a 'separate segregated fund' if it wishes to engage in any independent spending whatsoever.").

In light of this distinction, "[m]any decisions since *Citizens United* have analyzed various definitions of a 'political committee,' which include the burdens associated with such classification, and considered them to be 'disclosure requirements.'" *Yamada*, 2012 WL 983559, at *20 (collecting cases and noting, "[t]his makes sense — the purpose of requiring registration as a noncandidate committee is transparency and to enable disclosure"). Among those decisions is the Tenth Circuit's opinion in *Herrera*, in which the court observed that regulations classifying

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NAACP, 357 U.S. at 462). *NAACP* lends no support to Free Speech's generalized arguments for avoiding disclosure here.

groups as political committees "require disclosure, thus distinguishing them from regulations that limit the amount of speech a group may undertake." 611 F.3d at 675-76.[31]

D. The Commission's Solicitation Standard Is Constitutional

FECA authorizes the Commission to regulate "contributions" but does not specify the circumstances under which proceeds from a solicitation will be considered contributions. Free Speech and the Commission agree that the Second Circuit's test for defining "solicitation" is the proper standard for determining whether a request for funds seeks a "contribution" under FECA. *See FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995) ("*SEF*"); Pl. Mem. at 35-36 (invoking *SEF* standard for solicitations); Free Speech AO at 9 (referencing standard from *SEF*).

In *SEF*, the Second Circuit held that "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of § 441d(a) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." 65 F.3d at 295. The court analyzed a solicitation that was mailed to nearly 31,000 members of the general public between July 23 and 27, 1984, and stated that "'your special election-year contribution today will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies *must* be stopped.'" *Id.* at 288-89, 295. The Second Circuit concluded that this solicitation left "no doubt that that the funds contributed would be used to advocate President Reagan's defeat at the polls, [and] not simply to criticize his policies during the election year," and it was thus properly subject to FECA's disclosure and disclaimer requirements for solicitations for contributions. *Id.* at 295.

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[31] *See also, e.g.*, *McKee*, 649 F.3d at 54 n.29 ("Maine's requirement that non-major-purpose PACs register with the Commission is . . . first and foremost a disclosure provision."); *Brumsickle*, 624 F.3d at 1012 (concluding that "the definition of 'political committee' does not violate the First Amendment"; analyzing "the disclosure requirements attached to political committee status"); *Madigan*, 735 F. Supp. 2d at 1000 (comparing "registration requirements, including related reporting, recordkeeping, and disclosure requirements" with "election-law disclosure requirements" upheld in *Citizens United*).

Draft B reasonably applies the *SEF* standard for "solicitations" in concluding that two of plaintiff's proposed donation requests are solicitations for contributions. First, Draft B concludes that the "War Chest" Donation Request is a solicitation under the *SEF* standard because its statements that "'[d]onations given to Free Speech are funds spent on beating back the Obama agenda' and 'against his $1 billion war chest,' and that Free Speech can use donations most effectively 'this coming fall'" collectively "make plain that funds received in response to the request will be used to advocate the electoral defeat of President Obama 'this coming fall.'" (Draft B at 18 (quoting "War Chest" Donation Request).)

Second, Draft B concludes that the "Make Them Listen" Donation Request is a solicitation because its statement "'Let's win big this fall. Donate to Free Speech today,' and criticiz[ism] [of] 'President Obama and his pals in Congress' who didn't get the message' after the 2010 electoral victories of 'the Tea Party movement' . . . make plain that funds received in response to the request will be used to advocate the defeat of President Obama and to 'win big this fall.'" (*Id.* at 20 (quoting "Make Them Listen" Donation Request).)

Plaintiff fails to identify any flaw in Draft B's analysis or conclusions regarding plaintiff's donation requests; its limited discussion of these requests is based on erroneous descriptions of Draft B's conclusions. (*See* Pl. Mem. at 36.) Contrary to plaintiff's assertion, Draft B did *not* conclude that use of the terms "war chest," "win big this fall," or "references to this 'coming fall," *in the abstract*, are "clearly campaign references," nor did it conclude that mere inclusion of a campaign reference triggers regulation. (*Id*.)

Moreover, plaintiff does not even attempt to demonstrate how the Commission's solicitation standard hinders its "ability to raise funds to support" its advocacy, and the cases it cites concerning the right to fundraise are therefore inapposite. (Pl. Mem. at 37.) Plaintiff is free to spend unlimited funds on its solicitations and to solicit unlimited funds for its express advocacy. *See supra* pp. 6 & n.4, 9. The disclaimers required for solicitations for contributions are substantially related to the government's interest in disclosure. As *Citizens United* explained, in the context of electioneering communications that need *not* be targeted to the election or defeat of a federal candidate, "[a]t the very least, the disclaimers avoid confusion by making

clear that the [communications] are not funded by a candidate or political party." 130 S. Ct. at 915. The Second Circuit in *SEF* similarly recognized that the disclosure requirements for solicitations "serve[] important First Amendment values. Potential contributors are entitled to know that they are supporting independent critics of a candidate and not a group that may be in league with that candidate's opponent." 65 F.3d at 296. Disclosure is "'a reasonable and minimally restrictive method' of ensuring open electoral competition that does not unduly trench upon [individuals'] First Amendment rights." *Id.* (quoting *Buckley*, 424 U.S. at 82).[32]

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[32] Free Speech misconstrues the note in Draft B stating that the decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), has not undermined the Commission's application of the *SEF* standard. (*See* Pl. Mem. at 35-36.) Unlike *SEF*, *EMILY's List* involved a challenge to Commission regulations governing how certain "mixed" federal and nonfederal activity (such as a voter registration drive) could be financed, and whether funds solicited in certain ways would be considered federal, rather than nonfederal, contributions. The regulation addressing solicitations, 11 C.F.R. § 100.57, had been promulgated as part of the Commission's effort to "significantly curb[] the raising and spending of non-Federal funds in connection with Federal elections," 72 Fed. Reg. 5,595, 5,602 (Feb. 7. 2007). Section 100.57 treated as "hard-money 'contributions'" "*all funds* given in response to solicitations indicating that '*any portion*' *of the funds* received will be used to support or oppose the election of a federal candidate" — even if the solicitations also stated that some portion of the money would be used for *non-federal* elections. *EMILY's List*, 581 F.3d at 21 (emphases added). The D.C. Circuit held that the "statutory defect in the rule is that, depending on the particular solicitation at issue, it requires covered non-profits to treat as hard money certain donations that are not actually made 'for the purpose of influencing' federal elections." *Id.*

No Commissioner has indicated that section 100.57 "still lives on" or has been "resurrect[ed]." (Pl. Mem. at 36, 37.) To the contrary, the Commission has announced that until it adopts a final rule regarding the removal of section 100.57, that provision "will not be enforced." Press Release, FEC Statement on the D.C. Circuit Court of Appeals Decision in *EMILY's List v. FEC*, http://www.fec.gov/press/press2010/20100112EmilyList.shtml (Jan. 12, 2010). Draft B merely notes that the basis for the regulation's invalidation in *EMILY's List* was the way the regulation treated too many funds as federal instead of nonfederal, not that it too expansively treated donations as given for the purpose of supporting or opposing candidates. Thus, *EMILY's List* did not undermine *SEF's* general premise "that a solicitation that indicates that donated funds will be used to support or oppose the election of a clearly identified federal candidate results in 'contributions.'" (Draft B at 17-18 n.6.) Indeed, that premise was not discussed in *EMILY's List*, and plaintiff fails to offer any legal basis for challenging it here.

In sum, Free Speech fails to demonstrate any constitutional flaw in the Commission's approach to determining whether a communication is a solicitation for contributions.

E. Plaintiff Fails to Identify Any "Prior Restraint" On Speech

Plaintiff utterly fails to demonstrate how any of the challenged provisions, none of which imposes any restrictions on plaintiff's speech, functions as a "prior restraint" on such speech. (Pl. Mem. at 37.) *Free Speech is free to run its ads.*

Although *Citizens United* described requirements that *actually* prohibit speech as "the equivalent of prior restraint," 130 S. Ct. at 896, nothing in that decision suggests that FECA's *disclosure requirements* function that way. Again, plaintiff ignores the Court's refusal to "import" its analysis regarding restrictions on independent expenditures into the separate context of disclosure requirements. *Citizens United*, 130 S. Ct. at 915; *see supra* pp. 28, 36. Because neither section 100.22(b) nor the Commission's policy regarding political committee status imposes a restraint on speech — let alone a *prior* restraint — plaintiff's entire discussion of the law of "prior restraint" is misplaced. (*See* Pl. Mem. at 37-39.)

III. PLAINTIFF FAILS TO DEMONSTRATE IRREPARABLE HARM

As demonstrated above, the provisions challenged here do not limit plaintiff's speech. The only *actual* harms alleged here are the administrative burdens associated with registration and disclosure. (Amend. Compl. ¶ 6 (alleging that challenged provisions "prohibit Free Speech from engaging in protected issue advocacy without complying with burdensome registration, reporting and disclaimer requirements").) Because plaintiff has not suffered any "loss of First Amendment freedoms," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the presumption of irreparable harm from a law that "deprives" speech rights is inapplicable. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001). And plaintiff has failed to identify any irreparable harm that would result from compliance with the Act's disclosure, reporting, and registration requirements. (*See, e.g.*, Amend. Compl. ¶¶ 6, 43 (complaining of burden of "having to expend time and money complying with FEC registration, reporting and disclaimer requirements").)

Proof of irreparable harm would require evidence of burdensome reprisals against its members, *see Citizens United*, 130 S. Ct. at 914, but as discussed *supra* p. 36 n.30, Free Speech has alleged no such harm. Serious harm of this kind has been demonstrated only in cases involving organizations, such as the NAACP and the Socialist Workers Party, whose members faced actual, documented danger at the relevant time. *See Buckley*, 424 U.S. at 69 (noting that NAACP members faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility") (citation omitted); *McConnell*, 540 U.S. at 198-99 (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S 87 (1982), in which Court found "'reasonable probability'" of "'threats, harassment, and reprisals'"); *see also Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 75-76 (D.D.C. 2008) (trade association suffers no irreparable harm in disclosing membership list under lobbying disclosure provisions).

The administrative and financial burdens associated with the Act's disclosure, reporting, and registration requirements do not begin to rise to the level of *irreparable* harm. And since "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted), Free Speech's failure on this element alone warrants denial of the requested preliminary injunction.

IV. THE BALANCE OF HARMS FAVORS THE COMMISSION AND AN INJUNCTION WOULD BE ADVERSE TO THE PUBLIC INTEREST

In contrast to the administrative burdens plaintiff seeks to avoid, enjoining the Commission from enforcing its regulation and policies would substantially harm the Commission and the public. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A "presumption of constitutionality . . . attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

The imminent harm to the public if the Commission is enjoined from requiring Free Speech — and every other organization, *see infra* pp. 44-46 — to comply with these

organizational and disclosure requirements in the months leading up to a presidential election far outweighs Free Speech's interest in avoiding the relatively modest administrative burdens resulting from such compliance. *See Citizens United*, 130 S. Ct. at 914-15 (disclosure and disclaimer requirements are justified by governmental interest in "providing information to the electorate" and "'insur[ing] that the voters are fully informed' about the person or group who is speaking" about a candidate).

Indeed, for the same reasons that Free Speech is especially interested in distributing its ads now, in the run-up to a presidential election, the public has "a heightened interest in knowing who [is] trying to sway [its] views on the [candidates] and how much they were willing to spend to achieve that goal." *Brumsickle*, 624 F.3d at 1019.

The disclosure requirements implicated by plaintiff's challenge are among the key means of informing the electorate about who is speaking about a candidate. As the district court in *RTAO* explained when it refused to enjoin enforcement of the same requirements, entry of a preliminary injunction during this period immediately before a general election would impede the Commission's performance of its governmental functions and deprive the public of important information. *Real Truth About Obama v. FEC*, No. 3:08-CV-483, 2008 WL 4416282, at *16 (E.D. Va. Sept. 24, 2008), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010). Such an injunction also could cause confusion among political actors, and undermine the public's confidence in the federal campaign finance system. *Id.*; *see Purcell*, 549 U.S. at 4-5 ("Court orders affecting elections . . . can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase."); *Smithson*, 750 F. Supp. 2d at 1049 (declining to impose preliminary injunction that would "radically change Iowa's campaign finance rules mid-stream during an election").

Free Speech fails to make any showing, much less a strong one, that the balance of harms tips in its favor. *See Awad*, 670 F.3d at 1125. For this reason as well, its motion should be denied.

V. A NATIONWIDE INJUNCTION WOULD BE ESPECIALLY IMPROPER HERE

Free Speech asks this Court to commit reversible error by issuing a nationwide injunction that covers other parties in every jurisdiction in the country. Not only is such a sweeping injunction plainly unwarranted by the circumstances here, it would violate several fundamental legal principles concerning the proper scope of injunctive relief, judicial comity, *stare decisis*, and the government's right to engage in intercircuit nonacquiescence.

As plaintiff acknowledges, in an earlier case concerning the constitutionality of section 100.22(b), the Fourth Circuit "conclude[d] that the district court abused its discretion by issuing a nationwide injunction . . . that prevents the FEC from enforcing the regulation against any party anywhere in the United States." *VSHL*, 263 F.3d at 393, *overruled on other grounds*, *RTAA*, 681 F.3d 544. The Fourth Circuit's analysis is directly applicable here.

First, as in *VSHL*, an injunction that prevents the Commission from enforcing its regulation and policies against any party anywhere in the country "is broader than necessary to afford full relief to [Free Speech]." *VSHL*, 263 F.3d at 393. A nationwide injunction, therefore, would violate the Supreme Court's admonition that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Even if Free Speech were entitled to an injunction — and it is not — "[a]n injunction covering [Free Speech] alone adequately protects it from the feared [enforcement]," while "[p]reventing the FEC from enforcing [the challenged provisions] against other parties in other circuits does not provide any additional relief to [Free Speech." *VSHL*, 263 F.3d at 393.

Second, a nationwide injunction would violate principles of judicial comity and *stare decisis*, purporting to supersede, for example, the Fourth Circuit's recent decision upholding the constitutionality of the provisions challenged here and precluding other circuits from deciding the constitutionality of the challenged provisions for themselves.[33] *See VSHL*, 263 F.3d at 393-

[33] Although plaintiff asserts that section 100.22(b) "remains unconstitutional in the First Circuit and other federal district courts" (Pl. Mem. at 46), it is far from clear that the two

94. But a single federal district court has no jurisdiction to bind other courts in other circuits, let alone to overrule a decision by the Fourth Circuit. "In the absence of a controlling decision by the Supreme Court, the respective courts of appeals express the law of the circuit." *Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986); *see, e.g.*, *Jordan v. Sosa*, 654 F.3d 1012, 1034 (10th Cir. 2011) (stating that "[w]e have rejected the notion that 'we [a]re bound by opinions handed down in other circuits,'" and explaining that "considerations of prudence and comity" weigh against issuing an injunction affecting "*non-party* [prison] officials *outside* this Circuit . . . in the very manner that our case law discourages") (quoting *Hill v. Kan. Gas Serv. Co.*, 323 F.3d 858, 869 (10th Cir. 2003); citing *VSHL*, 263 F.3d at 393); *United States v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994) (explaining that another circuit's decision is not binding on courts outside its territory because "[o]pinions 'bind' only within a vertical hierarchy").

Third, the requested relief would foreclose the policy of intercircuit nonacquiescence by the government that the Supreme Court relies on to develop important questions of law. *VSHL*, 263 F.3d at 393 (citing *United States v. Mendoza*, 464 U.S. 154, 160 (1984)). As the Supreme Court has explained, "[g]overnment litigation frequently involves questions of substantial public importance" and preventing the government from relitigating such issues "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Mendoza*, 464 U.S. at 160. Granting the relief requested here not only would "thwart the development of important questions of law," it would pervert the federal judicial hierarchy by empowering a single district court to decide constitutional questions in the first instance for every federal circuit and to effectively overrule the Fourth Circuit. *See United States v. AMC Entm't, Inc.*, 549 F.3d 760, 771 (9th Cir. 2008) ("In instances where the circuits do not agree on the interpretation of a statute or regulation, those disagreements should be

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decisions plaintiff cites remain valid. As discussed *supra* pp. 27-29, those decisions predated, and are inconsistent with, *McConnell*, *WRTL*, and *Citizens United*.

resolved by the Supreme Court."). Plaintiff's opinion that "questions of Section 100.22(b) are as developed as they need to be" (Pl. Mem. at 46) is irrelevant and directly at odds with *Mendoza*.[34]

Plaintiff fails to distinguish *VSHL* and none of its other authority supports the relief it seeks here. The Fourth Circuit never indicated that an injunction limited to VSHL was appropriate *because* it "planned to broadcast its communications only in Virginia, possibly in the District of Columbia." (Pl. Mem. at 46.) Instead, the court explained that while nationwide relief may be appropriate in a case where the plaintiffs hail from across the country, such was not the case in *VSHL*. 263 F.3d at 393. Nor is it the case here. (Amend. Compl. ¶ 1 (Free Speech is "a Wyoming organization comprised of three Wyoming residents").)

Plaintiff's attempt to minimize the distinction drawn in *Hedges v. Obama* fails for the same reason. *See Hedges v. Obama*, No. 12 Civ. 331, 2012 WL 2044565, at *3 (S.D.N.Y. June 6, 2012) (explaining that unlike in *VSHL*, "the plaintiffs in this case hail from across the nation"). And the Supreme Court's holding in *Reno v. ACLU* — which affirmed an order enjoining laws that *prohibited* certain online speech *without addressing the propriety of the nationwide scope of the injunction* — has no bearing on the propriety of an injunction here, which would halt disclosure of important election-related information. *See* 521 U.S. 844, 885 (1997).

[34] Moreover, plaintiff's concern about "a flood of duplicative litigation" is premised on its incomplete reading of *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). (Pl. Mem. at 43 n.14.) In that case, the court explained that the propriety of "broad injunction[s]" to avoid "duplicative litigation" in the D.C. Circuit is a unique aspect of lawsuits brought in that circuit challenging federal agency rules. *Nat'l Mining Ass'n*, 145 F.3d at 1409. Plaintiff fails to note the court's key clarification regarding the special role of the D.C. Circuit: Courts outside the D.C. Circuit "*need not fear a flood of relitigation* since venue restrictions would exclude many would-be plaintiffs from access to the invalidating court." *Id.* at 1409-10 (emphasis added).

CONCLUSION

Plaintiff has failed to carry its heavy burden to satisfy the criteria for an extraordinary preliminary injunction that would alter the status quo in the months leading up to a presidential election and limit disclosure of campaign finance information to the public. Accordingly, the Court should deny plaintiff's motion.

Respectfully submitted,

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Dated: August 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012, the foregoing Federal Election Commission's Opposition to Plaintiff's Motion for Preliminary Injunction was filed electronically with the Clerk of Court through the Court's ECF system, and served by electronic filing on the following recipients:

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