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

THE HISPANIC LEADERSHIP FUND, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 1:12-893-TSE-TRJ MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELMINARY INJUNCTION

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

Anthony Herman
General Counsel

David Kolker
Associate General Counsel

Lisa J. Stevenson
Special Counsel to the General Counsel

Adav Noti
Acting Assistant General Counsel

Audra Hale-Maddox
Kevin P. Hancock
Attorneys

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

August 15, 2012

TABLE OF CONTENTS

Page

The Hispanic Leadership Fund, Inc. ("HLF") asks this Court for extraordinary preliminary injunctive relief that would alter the status quo and bar enforcement of a key provision of the Federal Election Campaign Act ("FECA") that ensures that the voting public has access to information about who is financing campaign-related advertisements during the run-up to a presidential election. The Court should deny this relief because plaintiff meets none of the requirements for a preliminary injunction.

HLF is unlikely to succeed on the merits. At issue in this case is whether five advertisements HLF claims it wishes to air are within the scope of FECA's provision governing "electioneering communications," because they "refer[] to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I). If the provision applies, then HLF may have to disclose certain information relating to the financing of those ads and include in their text a disclaimer stating that HLF is responsible for their content.

Nearly seven weeks before HLF filed its motion, a controlling group of Commissioners of the Federal Election Commission found that five proposed advertisements identical to those that HLF now wishes to air would be "electioneering communications" because, among other things, they unambiguously refer to President Barack Obama by using phrases like "the White House" and "the Administration" and an audio clip of the President's voice. Under well-settled principles of administrative law, this decision is entitled to deference. Plaintiff makes the meritless claim that an advertisement featuring an audio clip of President Obama speaking does not unambiguously refer to President Obama. Plaintiff also takes the extreme position that phrases like "the White House" and "the Administration" can *never* be considered unambiguous references to the President simply because, like virtually all words, they have different meanings in differing contexts. Nothing in the governing statutes or regulations requires such a strange

result, which would undermine the campaign finance disclosure regime that the Supreme Court has recognized is important to ensuring that the public can assess various claims made in federal election campaigns.

Additionally, HLF cannot show that it will suffer irreparable harm in the absence of a preliminary injunction. As HLF is forced to concede, it seeks only to avoid disclosing its donors — the legal regime it challenges *does not prevent it from speaking*, *i.e.*, from running the advertisements at issue. And HLF has not even attempted to show that it would suffer the kind of serious threats or reprisals necessary to demonstrate irreparable injury from such disclosure. In contrast, a preliminary injunction barring disclosure of information about the funding of electioneering communications would significantly harm the public because it would erode the public's confidence in the federal campaign finance system and deprive voters of knowledge about who is speaking about candidates shortly before an election. As the Supreme Court has noted, "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010). Enjoining a campaign finance statute providing for disclosure just months before an election would harm that interest by "depriv[ing] the public of important information." *Real Truth About Obama, Inc. v. FEC*, Civ. No. 3:08-483, 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).

LEGAL AND FACTUAL BACKGROUND

I. STATUTES AND REGULATIONS

A. Electioneering Communications

The text of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), as amended, prohibits corporations and labor unions from making any "expenditure" in connection with a campaign for federal office. 2 U.S.C. § 441b(a). Included within this statutory

prohibition are "independent expenditures," which FECA defines as communications "expressly advocating the election or defeat of a clearly identified candidate" and not made in coordination with a candidate or political party. 2 U.S.C. § 431(17). FECA also requires that any entity financing an independent expenditure file with the Commission for public disclosure certain information regarding the entity's disbursements in support of the expenditure, and contributions the entity received "for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2).

This statutory regime, which Congress enacted in the 1970s, was being widely circumvented by the end of the 1990s. Independent groups had begun to spend millions of dollars on so-called "sham issue ads" — ads that avoided "expressly advocating" for or against candidates but nonetheless included candidate advocacy under the guise of educating the public about legislative issues. *See McConnell v. FEC*, 540 U.S. 93, 126-128 (2003). After conducting an exhaustive investigation, Congress determined that entities were funding sham issue ads to influence federal elections "while concealing their identities from the public" by avoiding FECA's disclosure requirements. *Id.* at 196-97 (discussing Congressional report of investigation); *see also id.* at 131-32.

Congress addressed this problem by enacting the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). BCRA expanded FECA's corporate financing prohibition to encompass any "electioneering communication," 2 U.S.C. §§ 434(f), 441b(b)(2), which BCRA defines as a "broadcast, cable, or satellite communication" that (a) "refers to a clearly identified candidate for Federal office," and (b) is aired within sixty days before the general election or thirty days before a primary election or convention. 2 U.S.C.

§ 434(f)(3)(A)(i).[1] BCRA also contains disclosure provisions requiring each entity spending more than $10,000 in a calendar year on electioneering communications to file with the Commission a statement that identifies the maker, amount, and recipient of each of the entity's disbursements over $200, as well as information about donors who contributed to the entity making the communications. 2 U.S.C. § 434(f)(1)-(2). Additionally, BCRA requires an electioneering communication that is not authorized by a candidate to contain a disclaimer stating the name and the address, phone number, or website of the entity that paid for the advertisement, and stating that the communication is not authorized by any candidate. 2 U.S.C. § 441d(a)(3), (d)(2); 11 C.F.R. § 110.11.

The Supreme Court initially upheld the constitutionality of BCRA's prohibition on corporate financing of electioneering communications "to the extent that the [communications] . . . are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08 (quotation at 206). The Court later 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." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (Roberts, C.J., controlling op.). In *Citizens United*, 130 S. Ct. at 913, the Court subsequently struck down the corporate financing prohibition in its entirety, including both BCRA's restrictions on corporate electioneering communications and FECA's ban on corporate independent expenditures.

But in *Citizens United*, eight Justices upheld BCRA's disclosure and disclaimer requirements for all electioneering communications, even those that are not the functional

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

equivalent of express advocacy. 130 S. Ct. at 913-15. The Court held 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 v. Valeo*, 424 U.S. 1, 64 (1976)). The Court thus declined to review such requirements through the lens of strict scrutiny and instead "subjected these requirements to 'exacting scrutiny,' which requires 'a substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (quoting *Buckley*, 424 U.S. at 64, 66). Applying that standard, the Court held that the government can constitutionally require disclaimers and financial disclosure relating to all electioneering communications to further the government's important interest in ensuring that the public can know "who is speaking about a candidate shortly before an election," even if the ads contain no candidate advocacy. *See id.* at 915-16.

B. "Clearly Identified"

As noted above, a broadcast communication is not regulated as an "electioneering communication" unless it "refers to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I). FECA defines the term "clearly identified" to mean "that

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) *the identity of the candidate is apparent by unambiguous reference*."

2 U.S.C. § 431(18) (emphasis added). The Commission's regulations similarly explain the term:

> *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

11 C.F.R. § 100.29(b)(2); *see also* 11 C.F.R. § 100.17.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. 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.

On April 18, 2012, an organization named American Future Fund ("AFF") — not HLF — requested an advisory opinion from the Commission. (Compl. Exh. 2.) AFF's request stated that it planned to produce and distribute a series of television advertisements within 30 days of the upcoming presidential primaries and within 60 days of the November 2012 general election. (*See id.* at 1-3.) AFF asked the Commission to opine that none of its planned ads would "refer to a clearly identified candidate for federal office"; under such an opinion, the ads would not constitute electioneering communications and would thereby trigger no disclosure requirements. (*See id*. at 5-11.)

The Commission considered two alternative draft responses to AFF's request. Draft A would have concluded that none of AFF's proposed ads constituted an electioneering communication. (Compl. Exh. 3.) Draft B would have concluded that seven of AFF's eight proposed ads constituted electioneering communications; one did not refer to a clearly identified candidate for federal office. (Compl. Exh. 4.)

The Commission deliberated over these drafts during an open meeting on June 7, 2012 (*see generally* Compl. Exhs. 5, 6), but neither draft received the affirmative votes of four Commissioners, as is required for the Commission to issue an advisory opinion. 2 U.S.C.

§§ 437c(c), 437d(a)(7). Ultimately, four Commissioners agreed that two of AFF's proposed ads — ads that discussed the Patient Protection and Affordable Care Act and included multiple references to "Obamacare" and "Romneycare" — referred to clearly identified candidates. (Compl. Exh. 7 at 3-4 (FEC Advisory Op. 2012-19).) The Commission also unanimously agreed that one proposed communication — an ad that contained references to "the government," "HHS," and "Secretary Sebelius" — did *not* refer to a clearly identified candidate. (*Id.* at 2-3.) The Commission was unable to issue an advisory opinion regarding AFF's five other proposed ads.[2] (*Id*. at 4.)

Plaintiff HLF is a non-profit Virginia corporation holding tax-exempt status as a "social welfare" organization under 26 U.S.C. § 501(c)(4). (*See* Compl. ¶ 24.) On July 30, 2012, almost seven weeks after the Commission issued its final response to AFF's request for an advisory opinion, HLF filed a complaint and moved for a preliminary injunction in the United States District Court for the Southern District of Iowa. *Hispanic Leadership Fund, Inc. v. FEC*, Civ. No. 4:12-339 (S.D. Iowa) (Docket No. 1). On August 9, 2012, that court granted the Commission's motion to dismiss the case without prejudice for improper venue pursuant to 28 U.S.C. § 1406(a). *Hispanic Leadership Fund, Inc. v. FEC*, Civ. No. 4:12-339, slip. op. at 1-5 (S.D. Iowa Aug. 9, 2012) (Docket No. 26).

On August 10, 2012, plaintiff refiled its suit in this Court. HLF alleges that it plans to run the same five advertisements as to which AFF did not receive a conclusive determination from the Commission. (Compl. Exh. 1 (scripts); Compl. ¶ 48 (noting that HLF's ads are

[2] The Commission defends in this lawsuit the position of the "controlling group" of three Commissioners who declined to provide AFF with the response it sought to its request. *Cf. FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1475-76 (D.C. Cir. 1992) (in case where the "central issue" concerned "the appropriate construction of" an FEC regulation, explaining that when suit challenges action on which Commission deadlocked, subject of judicial review is position of controlling group of Commissioners).

"materially indistinguishable" from AFF's).) HLF alleges that it plans to broadcast these ads "in Virginia and other states" (*id.* ¶ 46) on unspecified dates. HLF argues that its ads do not refer to a clearly identified candidate, and therefore that the Commission erred as a matter of law by not granting AFF's advisory opinion request. (*Id.* ¶¶ 15-20; Pl.'s Br. in Supp't of Mot. for Prelim. Inj. ("Pl.'s Inj. Br.") at 9-11 (Docket No. 4).) HLF avers that it does not wish to disclose the information required of entities that finance electioneering communications and that HLF will *choose* not to run its ads unless it is assured that no such disclosure will be required. (*See* Compl. ¶¶ 17, 40, 48.)

ARGUMENT

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

A preliminary injunction is "an extraordinary remedy afforded prior to trial at the discretion of the district court." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345 (4th Cir. 2009), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. 2010). To qualify, a plaintiff "must demonstrate by 'a clear showing' . . . '[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Id.* at 345-46 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

"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," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Capital Tool & Mfg. Co., Inc. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988), but plaintiff here seeks to upend the status quo by preventing the Commission from enforcing an important provision of FECA in the final months of the presidential election cycle.

Cf. 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 because "[b]y seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis in original). An injunction that alters the status quo is "'disfavored'" and "'require[s] that the movant satisfy an even heavier burden of showing that the four factors listed above weigh *heavily* and *compellingly* in movant's favor before such an injunction may be issued.'" *Tiffany v. Forbes Custom Boats, Inc.*, 959 F.2d 232 (table), No. 91-3001 (4th Cir. Apr. 6, 1992) (emphases added) (quoting *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991)). 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).

Thus, plaintiff can prevail on its motion only by meeting its heavy burden to make a clear showing in its favor on all four of the preliminary injunction factors, *see Real Truth About Obama*, 575 F.3d at 346 — a showing sufficient to justify bringing to a halt the enforcement of a longstanding federal election statute just as the election season approaches its peak.

II. PLAINTIFF CANNOT MEET ITS HEAVY BURDEN OF DEMONSTRATING THAT IT IS LIKELY TO SUCCEED ON THE MERITS

Plaintiff's claim for a preliminary injunction fails under the first factor, as plaintiff is unable to demonstrate that it is likely to succeed on the merits.

A. The Commission's Statutory Interpretation Is Entitled to Deference

"When a court reviews an agency's construction of the statute that it administers, it employs the deferential standard of review articulated in *Chevron, U.S.A., Inc. v. Natural Res.*

Def. Council, Inc., 467 U.S. 837 [] (1984)." *EEOC v. Seafarers Intern. Union*, 394 F.3d 197, 200 (4th Cir. 2005). Under *Chevron*, where Congress has not "directly spoken to the precise question at issue," a court must defer to "a reasonable interpretation made by the administrator of an agency." 467 U.S. at 842, 844. The agency's "view governs if it is a reasonable interpretation of the statute — not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); *see Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 505 (4th Cir. 2011); *Md. Dep't of Human Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1475 (4th Cir. 1992) ("The court is not empowered to substitute its judgment for that of the agency." (internal quotation marks omitted)).

Plaintiff expressly states that it does not challenge the constitutionality of the electioneering communications statute or the validity of the Commission's regulations. (Pl.'s Inj. Br. at 2, 14.) It argues instead that those provisions should be interpreted not to apply to each of plaintiff's proposed advertisements (*id.* at 14) — an issue of statutory interpretation that falls squarely within the Commission's broad discretion because the statutory text does not "directly sp[eak] to" it. *See Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476-77 (deferring to interpretation of controlling group of Commissioners when Commission deadlocks); *In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000) (same, citing *Nat'l Republican Senatorial Comm.*).

B. It Is Reasonable to Examine How an Advertisement Uses Words or Phrases in Context When Determining Whether It Contains an Unambiguous Reference to a Clearly Identified Candidate

As explained *supra* pp. 2-5, for a communication to be an "electioneering communication" it must "refer[] to a clearly identified candidate for Federal office" through an "unambiguous reference." 2 U.S.C. §§ 431(18), 434(f)(A)(i)(II). HLF takes the extreme

position that words such as "the Administration" or "the White House" can *never* be considered unambiguous references to a clearly identified candidate. Specifically, plaintiff claims that "advertisements containing the terms 'the government,' 'the Administration,' and 'the White House,' or unidentified audio passages of federal officials or their spokesmen speaking, do not 'refer[] to a clearly identified candidate for Federal office,' as that phrase is used in FECA." (Pl.'s Inj. Br. at 14 (alteration in original).) HLF's position is untenable.

This broad assertion ignores the unremarkable and universally understood proposition that the precise meaning of virtually any word or phrase in the English language cannot be determined without examining its context — that is, "'[t]he part or parts of a discourse preceding or following a 'text' or passage or a word, or so intimately associated with it as to throw light upon its meaning.'" *Rowland v. Cal. Men's Colony Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993) (quoting Webster's New International Dictionary 576 (2d ed. 1942)). Thus, courts commonly examine context to interpret the meaning of statutory text, *see, e.g., Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text."); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). And courts commonly look to context to interpret the meaning of text to which a statute might apply. *See, e.g., Browning v. Washington Post Co.*, 92 F.3d 1177 (table), No. 95-2895 (4th Cir. Aug. 6, 1996) ("[A]n alleged defamatory statement must be determined from the document or material as a whole, from beginning to end, and words cannot be singled out as libelous, but rather, the material must be libelous within the context of the entire writing." (alteration in original and internal quotation marks omitted)).

Like most words and phrases, the meaning of the terms "the Government," "the Administration," and "the White House" depend on context. While a communication stating that "the White House was painted yesterday," makes clear that "the White House" refers to a building at 1600 Pennsylvania Avenue in Washington, a communication stating that "the White House vetoed legislation passed by Congress yesterday" uses "the White House" to unambiguously refer to the President of the United States, the only person with authority to veto an act of Congress. The same would be true of statements claiming that "the Administration" vetoed legislation.

Nothing in FECA or its implementing regulations prevents the Commission from using common sense and looking to the entire context of a communication to determine whether it unambiguously references a federal candidate. Plaintiff points to nothing in the statutory or regulatory language to the contrary. The test for an electioneering communication in FECA asks whether a "communication . . . refers to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I). One way a candidate is "clearly identified" is when his or her identity is "apparent by unambiguous reference." 2 U.S.C. § 431(18). Nothing in these definitions indicates that Congress shared HLF's tunnel-vision and atextual focus on just one or two words at a time divorced from their context.

As explained below, the Commissioners supporting Draft B reasonably determined that five advertisements used the phrases "the Administration" and "the White House," images of the White House, and audio of President Obama's voice in ways that unambiguously referred to President Obama. Contrary to HLF's assertion (Pl.'s Inj. Br. at 22), none of these analyses hinged on the advertisements' use of the word "government." In fact, the Commission unanimously agreed that another advertisement with the words, "the Government," did *not*

unambiguously refer to President Obama or any other federal candidate, as it only instructed viewers to call Secretary of Health and Human Services Kathleen Sebelius.[3] (Compl. Exh. 7 at 2-3 (FEC Advisory Op. 2012-19).) But if an advertisement instead were to state, "the Government vetoed the bill Congress passed," it would unambiguously refer to President Obama since he is the only person in the government with such veto power. What HLF condemns as "disparate treatment" (Pl.'s Inj. Br. at 24), is simply the common-sense and quite ordinary principle that what a word means depends on the context in which it is used.

Indeed, even HLF recognizes — as it must — that context matters, as it concedes that the "White House" can sometimes refer to a federal candidate. (Pl.'s Inj. Br. at 28 ("The 'White House' . . . could refer to . . . the President.").) Nevertheless, plaintiff claims that because phrases like the "White House" can have different meanings in different contexts — like virtually all words and phrases — they are "inherently ambiguous" and thus can never be considered references to federal candidates. (*See id.*) HLF cites multiple dictionary definitions for "Government," "Administration," and "White House" for the unremarkable proposition that these terms each have various meanings. (*Id.* at 21-22, 26, 27.) But the fact that "White House" might refer to the building at 1600 Pennsylvania Avenue in one communication does not create permanent ambiguity in all contexts that forecloses a conclusion that, for example, "the White House nominated an experienced criminal lawyer to join the Supreme Court" is an unambiguous reference to the President.

---

[3] Draft B's contextual analysis is consistent with Senator Snowe's statement during floor debate on BCRA about an advertisement that she did not consider to be an electioneering communication. (*See* Pl.'s Inj. Br. at 23.) That advertisement's use of "government" did not unambiguously refer to a particular federal candidate. It stated, "Farmers are suffering because foreign markets have been closed to us and *our own government* won't even help," and then instructed, "Tell Congress we need a sound, strong trade policy." (*Id.*) Nothing in Senator Snowe's statement suggests that she believed "the government" can *never* refer to a federal candidate in another communication.

In this sense, HLF's analysis is perversely extra-contextual and backwards: It would require the Commission to make itself aware of *alternative contexts* outside the four corners of the particular communication at issue; and if any of those alternatives used an operative word or phrase in a way that did not unambiguously refer to a candidate, this would preclude a "clearly identified candidate" conclusion for the actual ad being construed. Thus, for example, even a reference to "the President" might not meet plaintiff's standard. To be sure, "the President" in a communication stating, "Call the President of the United States," unambiguously refers to a candidate for federal office (assuming he is running for reelection). Under HLF's approach, however, even "the President" would be "inherently ambiguous" and thus could *never* qualify as a reference to a federal candidate because — read in a different context — "the President" could refer to the president of countless businesses or non-profit entities, including, for that matter, the president of HLF, Mario Lopez. (*See* Verification of Pl.'s Compl. ¶ 1.) By allowing potentially unlimited hypothetical formulations and contexts to trump the meaning of a word or phrase as it is *actually* used in a communication under review, this peculiar approach would critically undermine the statute and the important governmental interest in informing the electorate. Plaintiff provides no support for such an unusual and unprincipled method of interpretation.

In sum, the Commissioners who supported Draft B acted reasonably when they rejected plaintiff's interpretation of the electioneering communication definition and instead examined the context of how a phrase is actually used to determine whether a communication refers to a clearly identified candidate for federal office. HLF's approach — which focuses on discrete references entirely divorced from the context of the advertisement — should be rejected.

C. Draft B Reasonably Concluded that Five Advertisements Unambiguously Refer to a Clearly Identified Candidate

The Commissioners supporting Draft B reasonably determined that the five advertisements at issue here are electioneering communications. (*See* Compl. Exh. 4.) Read in context, the way the advertisements used "White House," "Administration," images of the White House, and an audio clip of President Obama made apparent that they unambiguously refer to President Obama, a candidate for federal office.

1. Advertisement 1

Advertisement 1 uses the words "Administration," "White House," and images of the White House. The context in which they are used makes clear that they are unambiguous references to President Obama. The advertisement generally criticizes American energy policy and features an announcer who states that "[s]ince this Administration began, gas prices are up 104%." (Compl. Exh. 1 at 1, Exh. 2 at 12.) The video shows an image of the White House while the announcer states, "The White House *says:* We must end our dependence on foreign oil." (*Id.*) The announcer continues by stating that "the Administration *stopped* American energy exploration" and "*banned* most American oil and gas production," and that "the White House wants *foreign* countries to drill — so we can buy from *them*," while the video shows a "'Denied' Stamp with an image of the White House." (*Id.*) Finally, text appears on the screen instructing to "Call the White House at (202) 456-1414," while the announcer states, "Tell the White House it's time for an American energy plan . . . that actually works for *America*." (*Id.*)

The advertisement personifies "White House" by stating that it "says" something; by stating that the White House "wants" foreign countries to do something; and by instructing that people should "Call" the White House and "Tell" it their opinions on the nation's energy plan. (*See* Compl. Exh. 1 at 1, Exh. 2 at 12.) The advertisement similarly personifies

"Administration," by stating that it "*stopped*" American energy exploration and "*banned*" American oil and gas production, while video of a "Denied" stamp and the White House plays, indicating that someone at the White House has taken action to deny American oil and gas production. (*See id.*)

The President, of course, lives and works at the White House, and as such, "White House" is commonly understood as a reference to the President. (*See, e.g.*, Compl. Exh. 4 at 5 & n.1 (explaining that using "White House" to refer to the President is a textbook example of "a figure of speech which consists in substituting for the name of a thing the name of an attribute of it or of something closely related").) Similarly, the "Administration" is shorthand for the "Obama Administration," which "began" when the President took office. (*See id.* at 5 & n.2 (citing numerous periodicals using "White House" and "Administration" as a synonym for President Obama).) The actions the advertisement attributes to the personified "White House" and "Administration" — determining American energy policy — are within the executive responsibilities of the President. Accordingly, Draft B reasonably concluded that Advertisement 1 unambiguously refers to the identity of a federal candidate. (*Id.* at 4-6.)

HLF points out — quite correctly — that "Administration" in other contexts means the Executive Branch, "a governmental agency or board," and the "[t]housands of people" who work for the administration. (Pl.'s Inj. Br. at 26 (alteration in original).) Plaintiff also points out, again correctly, that "White House" can mean the physical structure located at 1600 Pennsylvania Avenue, and that other people besides the President work there. (*Id.* at 27.) But that is all beside the point. *In the context of this advertisement*, those words unambiguously refer to President Obama. As Draft B explains, "the building located at 1600 Pennsylvania Avenue, of course, cannot speak, nor can it 'want[] *foreign* countries to drill.'" (Compl. Exh. 4 at 5.)

Similarly, no reasonable person would take the advertisement's instruction to "Tell the White House" it is time for a better energy plan as an instruction to tell this to the physical building or people besides the President. Of the people who work in the White House, it is the President who ultimately sets energy policy and has the power to change it.[4]

2. Advertisement 2

Advertisement 2 features an audio clip with President Obama's voice, which Draft B reasonably concludes is an unambiguous reference to President Obama. (*See* Compl. Exh. 4 at 6-7.) The advertisement is nearly identical to Advertisement 1, except it omits the references to the "Administration" and "White House," as well as the images of the White House. (Compl. Exh. 1 at 2, Exh. 2 at 13.) Instead of a narrator, the advertisement uses an audio recording of President Obama stating, "We must end our dependence on foreign oil."[5] (*Id.*)

The audio recording of President Obama's voice is an unambiguous reference to his identity because the clip is, in fact, President Obama. Thus, the audio clip makes "the identity of the candidate . . . apparent by unambiguous reference." 2 U.S.C. § 431(18)(C).

HLF objects that the clip is audio, not text or an image. (Pl.'s Inj. Br. at 29-30.) But the statute does not require that a communication "refer[] to" a clearly identified federal candidate in any particular form, *see id.* 434(f)(3)(A)(i)(I); it only requires that a "reference" be

---

[4] Draft B's conclusion that "Administration" and "White House" can be unambiguous references to a clearly identified candidate does not rely on the kind of "codewords" at issue in *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd*, 92 F.3d 1178 (4th Cir. 1996), as HLF claims (Pl.'s Inj. Br. at 25-27). In that case, an expert opined that "codewords" like "vision" and "quota" had particular meanings at the time of that election that would resonate with viewers by associating certain policies and issues with the candidates. *See* http://www.insidepolitics.org/ps111/issueads.html. The FEC did not argue that such words functioned as synonyms for other terms.

[5] Despite HLF's erroneous contention (Pl.'s Inj. Br. at 22), Draft B's analysis of Advertisement 2 does not depend upon the advertisement's references to the "government." (*See* Compl. Exh. 4 at 7 ("[T]he inclusion of an audio clip of President Obama's voice discussing his energy policy is a reference to a clearly identified candidate for Federal office.").)

"unambiguous," *id.* § 431(18)(C). The non-exhaustive list of examples of unambiguous references in 11 C.F.R. § 100.29(b)(2) does not purport to have anticipated every way in which a communication might "[r]efer[] to a clearly identified candidate" and thus does not exempt identifications made by audio reference from the scope of electioneering communications.

President Obama's voice is widely recognized, which HLF does not dispute. (Pl.'s Inj. Br. at 29-31.) But even if it were not, whether an audio clip of a candidate is clearly identifying does not depend on whether the candidate's voice is well-known among the public. What makes an identifying reference unambiguous is not how widely known it is but whether it is clear and accurate, and thus *recognizable* to someone already familiar with the reference. For example, a photograph or drawing that accurately portrays the face of a fringe candidate unknown to the vast majority of the electorate is still unambiguous, even if not widely known. What matters about the use of a name, photo, drawing, or audio recording of a candidate is whether it is clearly identifying to those who know the candidate's name, appearance, or voice. Draft B was thus entirely reasonable in concluding that an audio clip of the President clearly identifies him.

3. Advertisement 3

Advertisement 3 uses the phrase "White House" as a contextually unambiguous reference to President Obama. Advertisement 3 is similar to Advertisement 2, except the audio clip of President Obama has been replaced by the White House press secretary's voice stating, "We must end our dependence on foreign oil." (Compl. Exh. 1 at 3; Exh. 2 at 14.) Like Advertisement 2, Advertisement 3 concludes with audio instructing to "[t]ell the government it's time for an American energy plan . . . that actually works for *America*." (*Id.*) But like Advertisement 1, Advertisement 3 also includes on-screen text instructing the viewer to "[c]all the White House at (202) 456-1414." (*Id.*)

Draft B reasonably concludes that "[c]all the White House," is an unambiguous reference to President Obama given that this instruction is accompanied by an audio command to air displeasure about America's energy plan. (Compl. Exh. 4 at 7.) As Draft B explains, "[i]f viewers were to follow this command by calling the White House to tell 'the government' about the need for a different energy policy, they would necessarily be seeking to convey that message to the President, the 'government' official who resides and maintains his office at the White House and the only person at the White House with executive authority to change the 'American energy plan.'"[6] (*Id.* at 8.)

4. Advertisement 4

Advertisement 4 (Compl. Exh. 1 at 4), which was the fifth advertisement Draft B considered (Compl. Exh. 2 at 16), uses the phrase "the Administration" and White House footage and images in a context that makes clear they unambiguously refer to President Obama. This advertisement criticizes the Administration's alleged policies on religious liberty and abortion. (*See* Compl. Exh. 1 at 4.) An announcer states that "the Administration is taking a stand on a critical question of religious liberty[] . . . [*a*]*gainst* the U.S. Catholic Bishops . . . and people of faith across the country," as images of the Health and Human Services building appear. (*Id.*) The advertisement concludes with video of "White House footage and images," while audio instructs the viewer to "[c]all Secretary Sebelius, tell her it's wrong for her *and the Administration* to trample the most basic American right." (*Id.* (emphasis added).)

[6] Like its analysis of Advertisement 2, Draft B's analysis of Advertisement 3 does not depend upon the advertisement's references to the "government," as HLF claims. (*See* Compl. Exh. 4 at 7-8 ("[T]he textual instruction to '[c]all the White House,' particularly when accompanied by an audio command to '[t]ell the government it's time for an American energy plan . . . that actually works for *America*' is an unambiguous reference to a clearly identified candidate for federal office.").)

Draft B reasonably concludes that the reference to "the Administration" in combination with video footage and images of the White House unambiguously refers to President Obama. (Compl. Exh. 4 at 8.) The advertisement states that the viewer should criticize "the Administration," separate and apart from Secretary Sebelius. (*See id.*) "The Administration" is commonly a reference the President, and in this advertisement, the use of "Administration" is explicitly combined with images of the White House — a joint reference that unambiguously identifies the primary Administration occupant of the White House, President Obama. (*Id.*)

5. Advertisement 5

Advertisement 5 (Compl. Exh. 1 at 5), which was the sixth AFF advertisement Draft B considered (Compl. Exh. 2 at 17), uses the "White House" as a contextually unambiguous reference to President Obama.[7] Advertisement 5 criticizes the Patient Protection and Affordable Care Act by analogizing it to a two-year-old toddler. (*See* Compl. Exh. 1 at 5.) While an announcer states, "And now that government run healthcare is turning two, its own parents don't even want to celebrate," text appears on screen appears, which reads: "'White House will not mark two-year anniversary' of health care law (Washington Free Beacon, 3/19/12)." (*Id.*) Later on in the advertisement, that same text appears again, while the audio voice-over states, "So . . [s]ince its family won't wish its health care law a happy birthday . . . ." (*Id.*)

Like advertisements 1, 3, and 4, this advertisement personifies the "White House," with two textual references stating that the "'White House will not mark two-year anniversary' of health care law." (*See* Compl. Exh. 1 at 5, Exh. 4 at 9-10.) This personification and the context of the rest of the advertisement makes it apparent that the advertisement is stating that President

[7] HLF's Advertisement 5 differs from AFF's Advertisement 6 only in that the text of Advertisement 5 identifies "HispanicLeadershipFund.org" at its conclusion (Compl. Exh. 1 at 5), while Advertisement 6 identifies "AmericanFutureFund.com" (Compl. Exh. 2 at 17).

Obama will not mark that anniversary, not the building at 1600 Pennsylvania Avenue, which of course, could not mark an anniversary. (*See* Exh. 4 at 10.) This conclusion is further reinforced by the audio's simultaneous claim that the Affordable Care Act's "own parents" and "family" do not want to mark the anniversary. (*Id.*) Finally, as Draft B points out, "the very article AFF cites in Advertisement [5] led with the sentence, '*President Obama* has no plans to mark the two-year anniversary of the Affordable Care Act's passage.'"[8] (*Id.*)

In sum, Draft B reasonably concluded that each of the five advertisements at issue here clearly identify President Obama, a candidate for federal office.

D. Disagreements About the Meaning of References Like "White House" or "the Administration" in Particular Communications Do Not Make Their Use Inherently Ambiguous

Although the Commissioners were not unanimous in their conclusions about the meaning of references like "the White House" or "the Administration" in some of the proposed communications, such disagreement does not, as plaintiff suggests (Pl.'s Inj. Br. at 10), demonstrate that such references are ambiguous for purposes of the "clearly identified" standard. Plaintiff's suggestion is akin to arguing that the definition of "clearly identified" is necessarily vague as applied to these kinds of references, but as the Fourth Circuit explained in a closely analogous situation involving the definition of "express advocacy," 11 C.F.R. § 100.22(b), "cases that fall close to the line will inevitably arise when applying" that kind of definition. *Real Truth About Abortion v. FEC*, 681 F.3d 544, 554 (4th Cir. 2012) ("*RTAA*"). Indeed, in that case the Commission had disagreed with the district court about whether one ad in contention

[8] Like Advertisement 2 and 3, Draft B's analysis of Advertisement 5 (AFF's advertisement 6) also does not depend upon the advertisement's references to the "government." (*See* Compl. Exh. 4 at 10 (concluding that "[t]he use of 'White House' in Advertisement 6 thus unambiguously references a clearly identified candidate for Federal office.").)

constituted "express advocacy," yet the Fourth Circuit rejected the idea that such disagreement evidenced a constitutional weakness in the regulation at issue. *Id*.

While the parties here agree that the "clearly identified" standard is a bright-line test, as courts have long recognized, bright-line tests often present hard cases. "This kind of difficulty is simply inherent in any kind of standards-based test." *RTAA*, 681 F.3d at 554; *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 211 (1982) (holding FEC's construction of statute not unconstitutionally vague even if it might "leave room for uncertainty at the periphery"); *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 invalid because "[w]herever the law draws a line there will be cases very near each other on opposite sides"). "[R]egulations 'are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal [cases] fall within their language.'" *Great Am. Houseboat Co. v. United States*, 780 F.2d 741, 747 (9th Cir. 1986) (quoting *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963)). Even in reviewing statutes regulating political activity, the Supreme Court has stated that "there are limitations in the English language with respect to being both specific and manageably brief, and . . . although the prohibitions may not satisfy those intent on finding fault at any cost, [it is enough that] they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973).

Although the parties also agree that the definition of "clearly identified" requires an "unambiguous reference" to a candidate, the Supreme Court did not, as plaintiff suggests

(Pl.'s Inj. Br. at 15-16), impose a "limiting construction" on that definition in *Buckley*. Rather, when the Court explained the definition's meaning, it gave examples of unambiguous references and stated non-exhaustively that they "would *include*" references such as a candidate's initials or nickname. *Buckley*, 424 U.S. at 43 n.51 (emphasis added). Nothing in the Court's opinion suggests that "unambiguous reference" is to be equated with wooden literalism; there are numerous ways to make an "unambiguous reference to [someone's] identity," that "would include" but not be limited to a "drawing," "nickname," or "status as a candidate." *Id.* As the Ninth Circuit has warned:

> Although we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. We must read section 434(c) so as to prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act.

FEC v. Furgatch, 807 F.2d 857, 862 (9th Cir. 1987).[9] In a variety of contexts involving regulation of speech, courts have recognized that — understood in context — creative or symbolic expressions can convey the same message as literal appellations or descriptions.[10]

Thus, "clearly identified" should not be construed so narrowly that all references to the incumbent President using phrases such as "the White House" or "the Administration"

---

[9] Like this case, *Furgatch* involved reporting obligations associated with one type of independent campaign advocacy. Under 2 U.S.C. § 434(c), a person who spends more than $250 to make an expenditure that expressly advocates for or against the election of a clearly identified candidate must report certain information to the Commission for disclosure to the public.

[10] *See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (in a libel case, Court recognized true meaning of "blackmail" when used as "rhetorical hyperbole"); *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (Court viewed insults to "scabs" — calling them "traitors" — in their "loose, figurative sense" and not as literal accusations of treason); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (under Establishment Clause, symbols and visual associations, such as crèche on public property, can convey prohibited religious messages and government endorsements of religion).

would be deemed too ambiguous to require disclosure. Such a crabbed reading is especially at odds with the Supreme Court's recent reaffirmation in *Citizens United* of the important informational interests served by the disclosure plaintiff seeks to avoid — including disclosure for all ads that meet the definition of electioneering communication, "[e]ven if the ads only pertain to a commercial transaction." 130 S. Ct. at 915; *see also Doe v. Reed*, 130 S. Ct. 2811, 2819-22 (2010) (upholding disclosure of names and addresses of signatories on petitions to place referenda on ballot); *id.* at 2837 (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").[11]

* * *

[11] Contrary to plaintiff's suggestion (Pl.'s Inj. Br. at 10-11, 19), the Commissioners who supported Draft B of the advisory opinion did not rely upon an impermissible "subjective" standard when they discussed the intent of certain ads in their concurring statement. (Compl. Exh. 7.) A number of FECA's statutory and regulatory definitions include terms that could be misconstrued as requiring an analysis of subjective intent, but the Commission interprets them as objective standards. *See, e.g.*, 2 U.S.C. § 431(8)(A)(i), (9)(A)(i) (definitions of "contribution" and "expenditure" include phrase "*for the purpose of* influencing any election for Federal office") (emphasis added); 11 C.F.R. § 100.22(b) (construing "expressly advocating" portion of definition of "independent expenditure" in 2 U.S.C. § 431(17) to include requirement that "[r]easonable minds could not differ" as to whether communication encourages action to elect or defeat candidate); 60 Fed. Reg. 35,291, 35,295 (July 6, 1995) (when applying § 100.22(b), "the subjective intent of the speaker is not a relevant consideration"). While the Supreme Court in *Buckley* cautioned against putting a speaker at the mercy of the subjective "varied understanding of his hearers," 424 U.S. at 43 (internal quotation marks omitted), understanding a speaker's intent under FECA involves an objective test that does not differ based upon the sensitivity or special knowledge or ignorance of particular listeners. In many areas of the law, courts routinely apply "reasonable person" tests and consider them objective tests precisely because they do not depend upon the subjective understanding or feelings of any one person, including the specific people involved in the lawsuit at issue. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity for certain government officials depends upon "wholly objective standard" based on whether "reasonable person" would have known of clearly established statutory or constitutional rights) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent 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?").

In short, HLF cannot meet its heavy burden of showing that the conclusions in Draft B were unreasonable. Thus, HLF has not made the required showing that it is likely to succeed on the merits and, on that basis, its motion should be denied.

III. PLAINTIFF FAILS TO DEMONSTRATE THAT COMPLYING WITH FECA'S DISCLOSURE PROVISIONS DURING THE PENDENCY OF THIS CASE WILL CAUSE IRREPARABLE HARM

In addition to showing likely success on the merits of its case, plaintiff must also demonstrate a likelihood — not merely a possibility — that it will suffer irreparable harm in the absence of injunctive relief. *Winter*, 555 U.S. at 22. "[T]he injury must be . . . actual and not theoretical . . . [and] of such imminence that there is a clear and present need for equitable relief . . . ." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Plaintiff suggests that it need not independently meet this standard if it can demonstrate a likelihood of success on the merits. (Pl.'s Inj. Br. at 32.) However, the Fourth Circuit recently rejected this precise argument and held — in a case, like this one, involving allegations of First Amendment harm arising from the potential application of FECA — that a plaintiff's burden of showing irreparable harm cannot be lowered "upon a strong showing on the probability of success" on the merits of the case. *Real Truth About Obama*, 575 F.3d at 346-47 (citing *Winter*, 555 U.S. at 20-22). Each of the four requirements for a preliminary injunction articulated by the Supreme Court in *Winter* "must be satisfied as articulated." *Id.* at 347. Thus, even if plaintiff could demonstrate a likelihood of success on the merits, which it cannot, its motion should nevertheless be denied because plaintiff cannot demonstrate that it will likely suffer irreparable injury from the disclosure requirements at issue here.

In the course of discussing irreparable harm, HLF refers several times to alleged deprivations of its First Amendment rights. (*See* Pl.'s Inj. Br. at 32-33, 35-36.) But plaintiff concedes, as it must, that the provisions it challenges do not limit its speech. (*See* Pl.'s Inj. Br. at

12 (noting that definition of electioneering communication no longer implements "ban on speech" but only "exists today as a trigger for disclaimer and disclosure requirements").) Indeed, *Citizens United* reaffirmed that disclosure requirements "do not prevent anyone from speaking." 130 S. Ct. at 914. There is accordingly no legal basis for HLF's suggestion that the electioneering communication disclosure provisions are preventing it from televising its ads or from engaging in any other electioneering activity. And, indeed, HLF does not even allege that it will in fact run the ads if an injunction is granted.[12] Thus, HLF cannot claim irreparable harm on the basis of its incorrect suggestion that its speech is being limited. *See Real Truth About Obama*, 2008 WL 4416282, at *15-*16 (finding *Elrod v. Burns* inapplicable and no threat of irreparable harm where "Plaintiff is free to disseminate their message and make any expenditures they wish" and subject only to "constitutionally permitted restrictions"); *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (mere allegation of First Amendment burden does not support finding of irreparable harm under *Elrod*).

The only relevant harm HLF could possibly allege here would be one arising from FECA's disclosure and disclaimer requirements for electioneering communications. (*See* Pl.'s Inj. Br. at 2 (seeking injunction to prevent Commission from applying "disclosure and disclaimer requirements").) But HLF fails to identify *any* irreparable harm that would result from complying with those provisions while this case is pending.

---

[12] HLF states only that it "cannot make an informed decision [regarding whether to run its ads] without guidance from the FEC, *which it requested and did not receive*." (Pl.'s Inj. Br. at 33 n.8 (emphasis added).) That representation is also false: HLF never requested any guidance from the Commission. Instead, HLF filed this lawsuit piggybacking on AFF's request. The Commission does not at this stage challenge the veracity of HLF's assertion that it intends to air (by the most amazing coincidence) the exact same advertisements that AFF developed, but, even on its face, that assertion should give the Court pause as to whether HLF is truly the party whose "harm" is at issue here.

As to FECA's disclaimer requirements, plaintiff identifies no prospective harm whatsoever that would result from having to identify itself as the source of its advertising.[13] And as to the disclosure requirements, the Supreme Court has recognized that harm can arise from disclosure only when there is a "reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 130 S. Ct. at 916. 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"); *McConnell*, 540 U.S. at 198-99 (noting that *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), found "reasonable probability" of "threats, harassment, and reprisals").

HLF, relying not even on evidence about itself but on press accounts about others, asserts generally that there have been recent events in which political donors were harassed. (*See* Pl.'s Inj. Br. at 33-35 n.8.) HLF implies that the Court should infer from those reported events that HLF's donors might experience the same treatment. But to demonstrate a probability of harassment and reprisals *to itself or its donors*, HLF must provide evidence of "adjudicative facts" and cannot rely on hearsay or "legislative facts" about others.[14] *See* Fed. R. Evid. 201 advisory committee's note (explaining difference between adjudicative and legislative facts);

---

[13] To the extent HLF may argue, as it did before the Southern District of Iowa, that the disclaimer provisions are unconstitutionally burdensome because they occupy too much time within plaintiff's proposed 30-second ads, that argument is foreclosed by *Citizens United*. *See* 130 S. Ct. at 914 (upholding disclaimer requirements as applied to "two 10-second ads").

[14] The Commission has a well-established procedure for exempting from disclosure groups with a history of donor harassment — an exemption that HLF "is not requesting." (Pl.'s Inj. Br. at 33 n.8.) *See, e.g.*, FEC Advisory Op. 2009-01 (Socialist Workers Party), 2009 WL 961212.

Fed. R. Evid. 801 (hearsay). HLF's argument is precisely the type of unsupported and speculative claim that *Citizens United* rejected: The Court held that mere allegations of potential harassment are insufficient; a group seeking to avoid otherwise valid disclosure requirements must provide "*evidence that its members* may face . . . threats or reprisals." *See Citizens United*, 130 S. Ct. at 916 (emphasis added). HLF presents not a single admissible *fact* that would tie its donors to any potential reprisals, and its unsupported suggestions based on inadmissible hearsay of disclosure-related harassment to others must therefore fail.

Because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974), HLF's failure to establish this element alone warrants denial of the requested preliminary injunction. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 360 (4th Cir. 1991) ("To succeed, the [plaintiff] *must* show that it will sustain irreparable harm without a preliminary injunction." (emphasis added)).

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

The balance of harms and the public interest also weigh heavily in favor of preserving the status quo and denying plaintiff's request for extraordinary injunctive relief.

In evaluating any request to enjoin the enforcement of a federal statute, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the government] in balancing hardships." *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers); *cf. United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (holding that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute" by enjoining its enforcement). That presumption is at its apex here, because the Supreme Court has already determined in *Citizens United* that the

electioneering communications disclosure provisions are constitutional. *See Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) (three-judge court) ("To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court . . . , the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.").

As discussed above, the electioneering communications provisions are a critical part of FECA's public disclosure regime; enjoining their enforcement would therefore substantially injure the public interest. *See Real Truth About Obama*, 575 F.3d at 352 (upholding denial of pre-election preliminary injunction regarding a regulation and policy that implicated disclosure requirements); *see generally Citizens United*, 130 S. Ct. at 914-15 (discussing public interest in disclosure). Indeed, for the same reasons that HLF is especially interested in distributing its ads now — during the run-up to a presidential election, when "interest in . . . major public policy issues will be at their [sic] zenith" (Pl.'s Inj. Br. at 36) — the public also has "a heightened interest in knowing who [is] trying to sway [its] views . . . and how much they were willing to spend to achieve that goal." *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010). An injunction would open the door to sham issue advertising akin to that which led Congress to pass BCRA in the first place, and the price of such undisclosed, untraceable advertising is ultimately paid by the public. That price far outweighs any burden arising from HLF's *voluntary* decision to withhold its advertising rather than take responsibility for its communications and make the required disclosures. *See Real Truth About Obama*, 2008 WL 4416282, at *16 (noting that "enjoining application of the challenged provisions could confuse political actors . . . and deprive the public of important information") (internal quotation marks

omitted); *see also Iowa Right to Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1048-49 (S.D. Iowa 2010) (finding that balance of harms favored government because injunction would impair government's "valid interest in facilitating transparency in . . . elections").

As the Supreme Court has noted, "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 130 S. Ct. at 915. This interest would be impaired, not served, by enjoining the FECA provisions at issue in this case. Such an injunction also could cause confusion among political actors and undermine the public's confidence in the federal campaign finance system. "Should this Court enter the injunction, the next two months of election law and enforcement would likely become a 'wild west' of electioneering communication[s] . . . ." *Real Truth About Obama*, 2008 WL 4416282, at *16; *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."); *Iowa Right to Life*, 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"). Such irreparable harm to the public interest counsels heavily against granting plaintiff's desired relief.

CONCLUSION

The preliminary injunction HLF seeks would, just prior to an election, bar the enforcement of an important campaign finance statute that ensures the voting public has access to information about who is speaking about federal candidates. Plaintiff has made no showing that would justify this injury to the public interest. The statute does not prevent HLF from speaking and it has shown no irreparable harm that would result from disclosure. And HLF is not likely to succeed on the merits given its extreme claims and the deference owed to the Commission's interpretation of FECA. The Court should deny plaintiff's motion for a preliminary injunction.

Respectfully submitted,

Anthony Herman
General Counsel

David Kolker*
Associate General Counsel

Lisa J. Stevenson
Special Counsel to the General Counsel

Adav Noti*
Acting Assistant General Counsel

/s/ Audra Hale-Maddox
Audra Hale-Maddox (Va. Bar No. 46929)
ahale-maddox@fec.gov
Kevin P. Hancock*
Attorneys

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

August 15, 2012

* *Motion for admission pro hac vice pending*

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2012, I electronically filed the foregoing Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Shawn Toomey Sheehy
ssheehy@hvjlaw.com
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186

/s/ Audra Hale-Maddox

Audra Hale-Maddox (Va. Bar No. 46929)
COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260
ahale-maddox@fec.gov