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

THE HISPANIC LEADERSHIP FUND, INC.
P.O. Box 23162
Alexandria, VA 22304,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463,

Defendant.

Civil Case No. 1:12CV893-TSE/TRJ

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Hispanic Leadership Fund, Inc. ("HLF") moves for a preliminary injunction against Defendants to enjoin them from enforcing (a) 11 C.F.R. § 100.17 ("clearly identified" candidate definition), (b) 2 U.S.C. § 431(18) ("clearly identified" candidate definition), (c) 11 C.F.R § 100.29 ("electioneering communications" definition), (d) 2 U.S.C. § 434(f) ("electioneering communications" definition) as applied to HLF and its intended activities, as set out in the Verified Complaint. This motion is made on the grounds specified in this motion, Plaintiff's brief in support thereof, the Verified Complaint, the Exhibits attached to the Verified Complaint, and such other and further evidence as may be presented to the Court at the time of the hearing.

Further, Plaintiff moves this Court for an expedited preliminary injunction hearing pursuant to Fed. R. Civ. P. 65(a), and a nominal bond under Fed. R. Civ. P. 65(c). Plaintiff respectfully requests oral argument at the hearing because of the complexities and the important constitutional rights involved in this case.

Dated: August 10, 2012

Respectfully submitted,

By: _____

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**Motion for pro hac vice admission pending*

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PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Hispanic Leadership Fund, Inc. ("HLF") requests that this Court issue a preliminary injunction enjoining the Defendant from applying the electioneering communications disclosure and disclaimer requirements of the Federal Election Campaign Act of 1971, as amended ("FECA"), to HLF's proposed communications. HLF's proposed advertisements do not "refer[] to a clearly identified candidate for Federal office," and in the absence of such a reference, an advertisement cannot, by definition, be an "electioneering communication" subject to Federal Election Commission ("FEC") regulation.

This case is not ultimately about what might be the best or preferred scope of coverage for federal reporting and disclosure requirements, but rather, what the federal law currently does cover, and what it may properly be construed to cover under applicable First Amendment precedent. HLF does not, in this matter, challenge the constitutionality of the electioneering communications provisions. Rather, HLF seeks clarity on what constitutes a reference to a "clearly identified candidate," which is one of the four statutory elements of an "electioneering communication" under the law and a prerequisite to invoking its corresponding disclosure and reporting requirements.

In *Buckley v. Valeo* the United States Supreme Court emphasized that a reference to a "clearly identified" candidate must be explicit and unambiguous. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (holding that "[t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608(e)(2) requires that *an explicit and unambiguous reference* to the candidate appear as part of the communication") (emphasis added).

An organization called American Future Fund ("AFF") sought an advisory opinion from the FEC on whether certain proposed advertisements containing various terms and phrases constitute references to a clearly identified candidate for Federal office, including: "the government;" "the administration;" "the White House;" and unidentified audio clips of Barack Obama and the White House Press Secretary speaking. HLF wishes to air materially indistinguishable advertisements. HLF believes that none of its proposed communications "refers to a clearly identified candidate for Federal office," as that phrase is used in the statute at 2 U.S.C. § 434(f)(3)(A)(i)(I), as it has been interpreted by the Supreme Court, and as the FEC has previously represented the standard in litigation.

When AFF sought to confirm its understanding of the law, the FEC was unable to reach an affirmative conclusion by the required four votes with respect to the references and audio clips noted above. As a result, all similarly situated organizations, including HLF, now face the prospect of potential civil and criminal penalties if they proceed, like HLF with its proposed communications, without first seeking a pre-enforcement preliminary injunction.

STATEMENT OF FACTS

The Hispanic Leadership Fund, Inc., is a non-profit organization that operates pursuant to Section 501(c)(4) of the Internal Revenue Code of 1986, as amended. HLF was incorporated in Virginia in 2008.

The Federal Election Commission is the independent federal regulatory agency charged with civil enforcement of the Federal Election Campaign Act of 1971, as amended, and is located in Washington, D.C.

HLF was founded to advance free enterprise, limited government, and individual freedom. HLF has, for a number of years, engaged in making public communications on a wide variety of federal and state policy matters. HLF has previously made an "electioneering communication," as that term is used in FECA.

On March 30, 2012, the United States District Court for the District of Columbia issued an order invalidating the FEC's regulation that generally governed the scope of disclosure required of organizations that fund "electioneering communications" from their general treasuries. *Van Hollen v. FEC*, No. 11-0766 (D.D.C. Mar. 30, 2012). The effect of the court's decision – which is currently under appeal – was to significantly expand both the scope of required disclosure and the administrative burden of complying with the reporting requirements of FECA's "electioneering communication" provisions. The district court decision forces organizations making "electioneering communications" funded by their general treasuries to report to the FEC the names and addresses of all "donors who donated" $1,000 or more to the organization from January 1 of the prior year through the date of the electioneering communication. The additional reporting that is now required increases the burden of compliance by requiring more detailed recordkeeping and reporting by these organizations.

Would-be speakers have taken notice of the greatly increased consequences of airing an "electioneering communication." Since the March 30, 2012, district court order went into effect, only a single entity of has made an electioneering communication despite the ongoing Presidential and Congressional primary season.[1] *See* Federal Election Commission

[1] Pursuant to Rule 62 of the Federal Rules of Civil Procedure, the district court's March 30, 2012 order was automatically stayed for 14 days. Two reports were filed after this period. The reports filed on May 22 and June 30 appear to be misfilings due to the lack of any dollar values and the lack of any identified candidate. On August 6, 2012, an organization called Mayors Against Illegal Guns Action Fund filed an electioneering communications report disclosing $133,000

Electioneering Communications Reports, http:// www.fec.gov/finance/disclosure/ec_table.shtml (last visited August 9, 2012) (listing recently filed electioneering communications reports); Federal Election Commission 2012 Electioneering Communications Periods, http://www.fec.gov/ info/charts_ec_dates_2012.shtml (last visited August 9, 2012) (listing electioneering communications date ranges for 2012). Prior to this district court ruling, electioneering communications reports were filed approximately every one to three days for the ninety-day period ending March 31, 2012.

On April 18, 2012, American Future Fund submitted an advisory opinion request ("AOR"), attached as Exhibit 2 to HLF's Complaint, to the FEC pursuant to 2 U.S.C. § 437f. This request asked whether a series of eight proposed communications contained one or more references to a clearly identified candidate for Federal office, as that phrase is used in the definition of "electioneering communication."

The advisory opinion process allows a person to receive a written response from the FEC "concerning the application of this Act [FECA] . . . or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person." 2 U.S.C. § 437f(a)(1). Furthermore, "any person who relies upon any provision or finding of an advisory opinion . . . and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act . . . ." 2 U.S.C. § 437f(c)(2).

Pursuant to 11 C.F.R. § 112.1, the FEC accepted AFF's AOR for review, designated the request as AOR 2012-19, and posted it on the FEC's website for public comment on April 25,

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spent on electioneering communications, and over $3.35 million in contributions. This organization was in large part funded personally by Michael Bloomberg, the incumbent Mayor of New York City. Some 96% of the contributions disclosed in this report were unrelated to the spending on electioneering communications.

2012. On May 31, 2012, the FEC's General Counsel issued two proposed draft responses to the AOR, Draft A and Draft B, attached as Exhibit 3 to HLF's Complaint and Exhibit 4 to HLF's Complaint, respectively (hereinafter "Draft A" and "Draft B"). Draft A concluded "that none of AFF's proposed advertisements would constitute an electioneering communication." Draft A at 1. Draft B concluded "that seven of AFF's eight proposed advertisements would constitute electioneering communications. One of AFF's proposed advertisements does not refer to a clearly identified candidate for Federal office and would therefore not be an electioneering communication." Draft B at 1.

On June 7, 2012, at an open meeting of the FEC, the Commissioners failed to approve a slightly revised version of Draft A by a vote of 2-4.[2] The Commissioners then failed to approve Draft B by a vote of 3-3.[3] By a vote of 4-2, the Commissioners then agreed that two proposed advertisements (AFF's Advertisements 7 and 8, containing references to "Obamacare" and "Romneycare") were electioneering communications. (This finding is not being challenged in this case because Plaintiff's proposed advertisements do not implicate this finding.) By a vote of 6-0, the Commissioners also unanimously agreed that one proposed communication (AFF's Advertisement 4, containing two references to "the government," and also references to "HHS" and "Secretary Sebelius") was not an electioneering communication. (This finding is not being challenged in this case because Plaintiff thinks it is correct.) By the same 6-0 vote, the Commissioners agreed that they could not reach a conclusion with respect to AFF's Advertisements 1, 2, 3, 5, and 6 by the required four votes. The FEC's Certification of these votes is attached as Exhibit 5 to HLF's Complaint (hereinafter "FEC Certification"). A

[2] Commissioners Hunter and McGahn voted for the motion, and Commissioners Bauerly, Petersen, Walther, and Weintraub voted against the motion.
[3] Commissioners Bauerly, Walther, and Weintraub voted for the motion, and Commissioners Hunter, McGahn, and Petersen voted against the motion.

transcript of the Commissioners' discussion and consideration of AFF's AOR is attached as Exhibit 6 to HLF's Complaint. The FEC provided a response to the requestor on June 13, 2012. Commissioners Bauerly and Weintraub issued a concurring statement on June 14, 2012. Commissioner McGahn issued a separate statement on June 29, 2012. The FEC's response and additional Commissioner Statements are attached as Exhibit 7 to HLF's Complaint.[4]

HLF planned to rely upon the Advisory Opinion rendered to AFF, pursuant to 2 U.S.C. § 437f(c)(1)(B), and air advertisements that are materially indistinguishable from those submitted by AFF in their AOR. These advertisements would call on the public to contact "the administration," "the government," or "the White House" to express their views on important public policy issues. They would also feature short audio clips of President Obama and other government officials speaking. HLF planned to air its advertisements in Iowa and other states. HLF's proposed advertisements are attached as Exhibit 1 to HLF's Complaint.

The FEC's failure to provide an affirmative four-vote, binding advisory opinion in response to the bulk of AFF's AOR is the legal equivalent of the FEC taking no action, which leaves Plaintiff HLF, and all similarly situated organizations, exposed to possible civil enforcement actions and/or criminal penalties pursuant to 2 U.S.C. § 437g if it publicly disseminates any of its proposed communications, which are materially indistinguishable from those on which the FEC was unable to agree. *See Carey v. FEC*, 791 F. Supp. 2d 121, 127 (D.D.C. 2011) (noting "the six-member Commission failed to issue a binding four-vote advisory

[4] AOR 2012-19 is the second electioneering communications-related advisory opinion request submitted since March 30, 2012, in which the FEC failed to reach a conclusion. In AOR 2012-20, the FEC was unable to issue an opinion regarding the application of the electioneering communication provisions to plumbing advertisements that featured the plumbing company's owner, who is also a candidate for Congress. The company's owner had been regularly featured in his company's advertisements for nearly a decade. *See* FEC Advisory Opinion Request 2012-20 (Mullin), *available at* http://saos.nictusa.com/saos/searchao?AONUMBER=2012-20 (last visited July 26, 2012).

opinion . . . . As a result, the Commission left [requestors] liable for possible enforcement actions against them" should requestors proceed with their proposed activity). The FEC's inability to issue a binding advisory opinion deprives HLF of its ability to rely on that opinion pursuant to 2 U.S.C. § 437f(c)(1)(B), (2).

The advisory opinion process in this matter is complete and deprives Plaintiff of a legal right – the right to engage in constitutionally protected speech and association with the prior knowledge that its communications will or will not require various disclaimers and public disclosures. *See Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) ("parties are commonly not required to violate an agency's legal position and risk an enforcement proceeding before they may seek judicial review").

The Hispanic Leadership Fund filed this case and the motion for a preliminary injunction in the U.S. District Court for the Southern District of Iowa on July 30, 2012 where it intended to air its advertisements. On August 8, the court there heard oral argument on both the Plaintiff's Motion for a Preliminary Injunction, and the FEC's Motion to Transfer Venue. On August 9, 2012, the court dismissed the case for improper venue under 28 U.S.C. § 1391(e)(1)(b). *Hispanic Leadership Fund, Inc. v. FEC*, No. 12-00339, slip. op. at 4 (S.D. Iowa August 9, 2012) (ECF 26). The United States District Court for the Southern District of Iowa did not address the substance of the Motion for Preliminary Injunction.

Hispanic Leadership Fund now files seeking relief from this court with venue under 28 U.S.C. § 1391(e)(1)(a). Although it is unknown whether the Federal Election Commission will maintain the same substantive position before this court, for the Court's convenience we have attached hereto both the Federal Election Commission's Resistance to Plaintiff's Motion for a Preliminary Injunction (Attachment A) and Hispanic Leadership Fund's Response to

Defendant's Resistance to Plaintiff's Motion for Preliminary Injunction (Attachment B) filed in the United State District Court for the Southern District of Iowa.

STANDARD OF REVIEW

As held by the Fourth Circuit, a preliminary injunction is an "extraordinary remedy" to be granted "only sparingly." *In re Microsoft Litig.*, 333 F.3d 517, 524 (4th Cir. 2003). Under the standards laid out by the Supreme Court in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), the four factors that must be satisfied to grant are preliminary injunction are the Plaintiff's likelihood of success on the merits, that the Plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in the plaintiff's favor, and that an injunction is in the public interest. Under the standards of the Fourth Circuit, plaintiff must "clearly show" that it is likely to succeed on the merits. *Dewhurst v. Century Aluminum Co.*, 648 F.3d 287 (4th Cir. 2011).

Plaintiff satisfies all of the elements required for a preliminary injunction, as outlined in the Complaint, the Motion for Preliminary Injunction, and this Brief.

ARGUMENT

The legal question presented in this matter is simple: do Plaintiff's proposed advertisements contain language that "refers to a clearly identified candidate for Federal office"? The phrase "refers to a clearly identified candidate for Federal office" is defined in the FEC's regulations. The Federal Election Campaign Act of 1971, as amended, defines the phrase "clearly identified," as do the FEC's regulations. The United States Supreme Court construed this standard in *Buckley v. Valeo*, 424 U.S. at 43, noting that the definition of "clearly identified" "requires that *an explicit and unambiguous reference* to the candidate appear as part of the communication" (emphasis added). Despite the very clear language of the statute, the

regulations, and the Supreme Court in *Buckley* v. *Valeo*, three FEC Commissioners refused to faithfully apply that standard, thereby depriving the FEC of the four votes needed to provide a full response to American Future Fund and others similarly situated like HLF.

The inability of four members of the Federal Election Commission to agree on whether these proposed advertisements "refer[] to a clearly identified candidate for Federal office" convincingly demonstrates that the proposed advertisements do not contain the "explicit and unambiguous" references required under *Buckley v. Valeo*. By definition, the 3-3 split vote demonstrates that the references are, in fact, ambiguous.

When the FEC adopted its first "electioneering communications" regulations in 2002, the agency's *Explanation and Justification* stated that the "refers to a clearly identified candidate" standard "would not be based on the intent or purpose of the person making the communication." Explanation and Justification of Final Rule on Electioneering Communications, 67 Fed. Reg. 65,190, 65,192 (Oct. 23, 2002) (describing rule to be codified at 11 C.F.R. § 100.29(b)(2)) ("Explanation and Justification"). This language is consistent with the FEC's litigation position in *McConnell* v. *FEC*, in which the agency assured the courts, "BCRA's definition of electioneering communication is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners, *Buckley*, 424 U.S. at 43 (quoting *Thomas*, 323 U.S. at 535)." Brief of Government Defendants at 156, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582) ("FEC Brief"); *see also Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. ___, No. 10-1121, slip op. at 13-14 n.3 (June 21, 2012) (quoting *Teachers v. Hudson* 475 U.S. 292, 303 n.11 (1986); *NAACP v. Button*, 371 U.S. 415, 438 (1963)) ("'Precision of regulation must be the touchstone' in the First Amendment context"). However, as the text of Draft B and the transcript

of the FEC's public consideration of AFF's AOR makes clear, the three Commissioners who supported Draft B improperly invoked subjective considerations and criteria and refused to apply the legally required objective, unambiguous, bright-line test that the FEC previously assured the courts was the hallmark of the electioneering communication standard. In a concurring statement, two Commissioners who supported Draft B plainly acknowledge their application of a subjective standard: "We see nothing in American Future Fund's proposed ads to suggest that they were *intended* to be anything other than what they appear to be: references to the candidates and the policies associated with them" (emphasis added). See Exhibit 7 at 7-8 (Concurring Statement on Advisory Opinion 2012-19 (American Future Fund) of Commissioners Bauerly and Weintraub).

Three other Commissioners, however, recognized that they are bound by the U.S. Supreme Court's construction of the relevant statutory language in *Buckley* v. *Valeo*, the FEC's own regulations, and the assurances previously provided to the courts by the FEC. These three Commissioners applied an objective, bright-line standard and correctly determined that inherently imprecise or ambiguous terms do not "refer[] to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I). However, the full FEC's failure to adhere to the plain language of the statute, the FEC's own regulations, binding Supreme Court precedent, and the agency's own prior representations to the courts leaves plaintiff without any legal assurances that it will not be subject to civil enforcement proceedings before the FEC if it airs its proposed advertisements.

As demonstrated below, HLF meets all of the required elements to obtain a preliminary injunction in this matter.

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

A. Statutory Background

i. The Electioneering Communication Provision Was Designed To Create An Objective, Bright Line Standard For Regulating Speech

The "electioneering communications" concept was conceived as an expansion of the so-called "magic words" standard of "express advocacy" set forth in *Buckley v. Valeo*, 424 U.S. at 43-44, that would allow Congress to broaden its scope of regulation to include "so-called issue ads [that] eschewed the use of magic words" but which were being "used to advocate the election or defeat of clearly identified federal candidates." *McConnell v. FEC*, 540 U.S. 93, 126 (2003).

As the United States Supreme Court explained in *McConnell*:

> The first section of Title II, § 201, comprehensively amends [Federal Election Campaign Act] § 304, which requires political committees to file detailed periodic financial reports with the FEC. The amendment coins a new term, "electioneering communication," to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*. As discussed further below, that construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or defeat of particular candidates. By contrast, the term "electioneering communication" is not so limited, but is defined to encompass any "broadcast, cable, or satellite communication" that
>
> > "(I) ***refers to a clearly identified candidate for Federal office***;
> > "(II) is made within--
> > > "(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> > > "(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> >
> > "(III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate." 2 USC § 434(f)(3)(A)(i) (Supp. 2003).
>
> New FECA § 304(f)(3)(C) further provides that a communication is "'targeted to the relevant electorate'" if it "can be received by 50,000 or more persons" in the district or State the candidate seeks to represent. 2 USC § 434(f)(3)(C).

Id. at 189-90 (emphasis added).

The plaintiffs in *McConnell* challenged the "electioneering communication" provision, arguing that the Court in *Buckley* "drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." *Id.* at 190. They argued that *Buckley* permitted regulation only of communications that contained express advocacy. The majority in *McConnell* rejected these arguments, and explained that the *Buckley* Court's adoption of the express advocacy standard was only a narrowing construction that saved otherwise "impermissibly vague" statutory language. *Id.* at 190-91. The Court explained:

> Thus, a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague or overbroad would be required to toe the same express advocacy line.

Id. at 191-92. The *McConnell* Court concluded that the new "electioneering communications" standard satisfied the *Buckley* Court's concerns:

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

Id. at 194 (emphasis added); *see also* FEC Brief at 129 ("Congress designed BCRA's definition of 'electioneering communication[s]' to meet the Supreme Court's concerns about vagueness of certain language in FECA's regulation of independent expenditures. It draws a clear line in the right place . . . .").

After initially upholding the electioneering communications provisions against a facial challenge in *McConnell*, the Supreme Court subsequently issued a series of decisions that

dismantled BCRA's electioneering communications funding restrictions. *See Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (*WRTL I*); *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007) (*WRTL II*); *Citizens United v. FEC*, 558 U.S. 50 (2010). BCRA's disclosure provisions that apply to electioneering communications have survived, however. Thus, while the "electioneering communications" concept previously served (primarily) as a ban on speech, it exists today as a trigger for disclaimer and disclosure requirements. Accordingly, would-be speakers, in order to satisfy various legal requirements, must still be cognizant of whether their constitutionally protected speech is an "electioneering communication." At this time, HLF does not challenge the constitutionality of the electioneering communications provision, or of the disclaimer and disclosure requirements that apply to communications that actually satisfy the established definition of "electioneering communication." This action is limited to seeking a declaratory judgment 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, and a preliminary injunction that prevents the FEC from applying the statute against HLF in a contrary manner.

In 2002, when Congress used a previously-defined term of art ("refers to a clearly identified candidate") as part of its definition of electioneering communication, it knowingly adopted that term of art's history and meaning and incorporated it into the new statute. *See, e.g., Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944) (noting "the general rule that adoption of the wording of a statute . . . carries with it the previous judicial interpretations of the wording"); *Kepner v. United States*, 195 U.S. 100, 124 (1904) ("It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning,

sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."). As the FEC noted in its *Explanation and Justification*, the phrase "refers to a clearly identified candidate" "is already defined in the Commission's rules at 11 CFR 100.17," "[t]he final rule tracks the language of the current rule in 11 CFR 100.17," and "[t]his approach appears to be consistent with legislative intent." Explanation and Justification at 65,192. The FEC also noted "the well-established body of law construing this term," that is, "clearly identified," in rejecting the arguments of one commenter who suggested the regulatory definition was "vague and too broad." *Id.*

ii. Source of "Clearly Identified Candidate" Standard and Past Treatment

This litigation concerns one prong of the definition of electioneering communication: "refers to a clearly identified candidate for Federal office." As noted above, this phrase is not new to BCRA; it dates back to FECA's adoption in the early 1970s and was construed and explained by the Supreme Court in *Buckley* in 1976.

In *Buckley*, the Court was confronted with statutory language in the Federal Election Campaign Act of 1971, as amended in 1974, referring to expenditures made "relative to a clearly identified candidate." *Buckley*, 424 U.S. at 39 (quoting section 608(e)(1)). The term "clearly identified" was (and remains) statutorily defined to mean "(i) the candidate's name appears; (ii) a photograph or drawing of the candidate appears; or (iii) the identity of the candidate is apparent by unambiguous reference." *Id.* at 193-94 (quoting section 608(e)(2)); *see also* 2 U.S.C. § 431(18). The Court explained that "the definition of 'clearly identified' in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication." *Buckley*, 424 U.S. at 44. To the extent that the third statutory definition above ("the identity of the candidate is apparent by unambiguous reference") is subject to a potentially

broad reading, the Court very clearly imposed a limiting construction to ensure the constitutionality of the standard. *See id.* (requiring "*an explicit* and unambiguous reference to the candidate") (emphasis added). In a footnote, the Court further explained:

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

Buckley, 424 U.S. at 43 n.51.

In light of the Court's striking clarity on the issue, this standard has been subject to very little subsequent judicial scrutiny. The "clearly identified candidate" standard arose occasionally in pre-BCRA cases that focused on whether certain communications constituted "express advocacy," thereby making them subject to FEC regulation.[5] For example, in *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428, 433 (D.D.C. 1989), the district court reiterated that the "clearly identified candidate" standard requires that "an explicit and unambiguous reference to the candidate must be mentioned in the communication in order for express advocacy to be present."

The FEC has previously acknowledged that *Buckley*'s instructions provide the relevant construction for the phrase "refers to a clearly identified candidate for Federal office" that is used in BCRA's electioneering communication definition. *See* FEC Brief at 154 n.110 ("The Court found that this language was unambiguous when construing a nearly identical clause in *Buckley*, 424 U.S. at 43-44 n.51 (construing then § 608(e)(2), *id.* at 193-94, since recodified as 2 U.S.C. 431(18)).").

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[5] The Supreme Court construed certain of FECA's requirements "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44.

iii. Federal Election Commission Implementing Regulations

Current FEC regulations on "electioneering communications" establish that the phrase

> *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) (emphasis added). This is the exact same definition that appears at 11 C.F.R. § 100.17 as the FEC's regulatory definition of "clearly identified."[6]

iv. BCRA's Legislative History Demonstrates That Lead Sponsors Intended The Electioneering Communication Provision To Serve As A Clear, Objective, Bright-Line Standard

On the U.S. Senate floor, Senator Feingold, one of the main sponsors of the Bipartisan Campaign Reform Act (known colloquially as the McCain-Feingold Act), made absolutely clear that the "clearly identified candidate" standard used in the electioneering communication provision was the same standard that had long existed:

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

148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold); *see also* Statement of Commissioner McGahn on Advisory Opinion 2012-19 (American Future Fund), Exhibit 7 to

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[6] 11 C.F.R. § 100.17 dates to 1995, when the FEC consolidated its separate definitions of "clearly identified" and "clearly identified candidate" and "provide[d] some additional examples of when candidates are considered to be 'clearly identified.'" Final Rule on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,293-35,294 (July 6, 1995).

HLF's Complaint, at 7-12 ("A review of the legislative history of the electioneering communication statute demonstrates that Congress intended 'clearly identified candidate for federal office' to remain unchanged, and continue to mean what it meant prior to the passage of McCain-Feingold.").

Senator Snowe, one of the sponsors of the electioneering communications provision (known as the Snowe-Jeffords provision), said of the provision:

> Already I have established how our provision is not even remotely vague. As the Brennan Center scholars' letter says that was signed by 70 scholars, "Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court's vagueness concerns. *Any sponsor will know, with absolute certainty, whether the ad depicts or names a candidate* and how many days before an election it is being broadcast. *There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard.*
>
> [***]
>
> They know their message is clear. And they know that using the name of Federal candidates in their ads near the election is an effective way of influencing the election. That's why Snowe-Jeffords keys in on the naming of candidates as one of the triggers of our disclosure regulations.

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

Thus, in the minds of those who proposed and supported passage of the electioneering communications provision, the provision utilized "a clear standard," "defined with great clarity," and "[a]ny sponsor will know, with absolute certainty, whether the ad depicts or names a candidate . . . ." *Id*; *see also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-15 ("supporters in Congress emphasized that the electioneering communication provisions were narrow, objective, and clear"). HLF now faces circumstances that the sponsors of this legislation virtually guaranteed could never arise.

B. Application Of "Refers To A Clearly Identified Candidate For Federal Office" Standard To Plaintiff's Proposed Advertisements

When the FEC defended BCRA's electioneering communications provisions shortly after the law's passage, the agency told the three-judge panel of the D.C. District Court that "the four criteria by which BCRA defines electioneering communications are perfectly clear, and suffer from none of the vagueness that concerned the [Supreme] Court in *Buckley*." FEC Brief at 131-32. Furthermore, the FEC, echoing Senator Snowe's statement quoted above, assured the court:

> These criteria are absolutely clear, individually and collectively, and no one wishing to avoid violations of BCRA need guess at where these four defining characteristics have drawn the line. Any individuals or organizations intending to broadcast electioneering communications, or wishing, on the other hand, to engage in genuine issue advocacy, can easily determine in advance whether their advertisements meet BCRA's definition of electioneering communications, and thus encounter no realm of legal uncertainty from which they must steer clear. "Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Yet "perfect clarity" and "precise guidance" are exactly what BCRA provides.

FEC Brief at 155. The FEC's response to AFF's advisory opinion request, however, demonstrates that three Commissioners now interpret the phrase "refers to a clearly identified candidate for Federal office" in a highly subjective, context-dependent manner that deprives the standard of its saving virtues: "perfect clarity" and "precise guidance."

In public comments made during the FEC's consideration of AFF's advisory opinion request, Commissioner Weintraub indicated that Draft B's deviation from the required objective, bright-line test analysis was justified because the only consequence of declaring the proposed advertisements to be "electioneering communications" is disclosure. Transcript of Open Meeting of the Federal Election Commission, Consideration of Draft Advisory Opinion 2012-19 (American Future Fund), Exhibit 6 to HLF's Complaint at 6-15 to 6-18 (June 7, 2012) (statement of Comm'r Weintraub) ("FEC Transcript") ("first of all, let's remember we're talking about

disclosure . . . . The Court not only upheld these requirements as constitutional, they thought they were important . . . . You can't avoid disclosure by using a pronoun."); *see also* Concurring Statement on Advisory Opinion Request 2012-19 (American Future Fund) of Commissioners Bauerly and Weintraub, Exhibit 7 to HLF's Complaint at 7-9 ("we would have thought that all commissioners would be inclined to proceed with caution when presented with a new request to narrow our EC reporting and disclaimer requirements"). Administrative agencies, however, are not free to disregard clear statutory standards and direct, binding Supreme Court precedent because they believe that the ends (here, maximizing disclosure) justify the means (here, unlawfully broadening the scope of the electioneering communications provision by replacing an objective, bright-line standard with a subjective, totality of the circumstances standard). *See* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint at 7-40 ("While some of my colleagues have focused much of their attention on the disclosure aspects at issue in this Advisory Opinion request, this rhetoric has nothing to do with applying the electioneering communication provisions."); *see also Knox*, No. 10-1121, slip op. at 22 (holding that where the law has "substantially impinged upon the First Amendment rights" of certain parties, general rules about First Amendment rights should prevail absent "justification for any further impingement").

In fact, when the Supreme Court heard oral argument in *McConnell* v. *FEC*, Justice Souter asked the Solicitor General, "[D]oesn't the primary definition today, in effect, give a corporation or a union that wants to run an issue ad *a safe harbor simply by virtue of not mentioning the name*? Say, let's hear it for nuclear power and don't let anybody else tell you otherwise. That's safe, isn't it?" The Solicitor General responded, "That's exactly right. That is safe . . . ." Transcript of Oral Argument at 164, *McConnell*, 540 U.S. 93 (No. 02-1674)

(emphasis added). In other words, the Government has previously maintained that one may rather easily avoid application of the "electioneering communications" provisions "simply by virtue of not mentioning the name." *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint at 7-16 to 7-17 (reviewing FEC's assertions before U.S. Supreme Court).

In *Christian Civic League of Maine, Inc. v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006), counsel for the FEC appears to have conceded that a reference to "your Senator" is not a reference to a clearly identified candidate for Federal office. *See* Transcript of Motion Hearing at 27, *Christian Civic League*, 433 F. Supp. 2d 81 (No. 06-00614) ("I don't believe the Commission has taken a definitive position on 'Your Senators.' . . . I think -- I don't mean to split hairs, but if you said, 'Your Senator,' there's more ambiguity than the plural because we have more than one Senator[].").

In voting to support Advisory Opinion Response Draft B, three Commissioners voted for a response that: (i) is guided by a "totality of the circumstances" approach that otherwise contains no readily discernible analytic standard; (ii) includes no reference to the Supreme Court's footnote 51 in *Buckley* or the Court's requirement that "the definition of 'clearly identified' . . . requires than an explicit and unambiguous reference to the candidate appear as part of the communication"; and (iii) contains no acknowledgment that the standard to be applied is an objective test that was previously described by the FEC as "a classic bright-line test" that offers "perfect clarity" and "precise guidance." This approach is plainly in error.

i. "The Government" Is Not A Reference To A Clearly Identified Candidate For Federal Office

It is impossible to seriously maintain that the term "the government" is an explicit and unambiguous reference to President Obama, or even a more general reference to the President of the United States. A dictionary definition of "the government" includes: "the executive branch

of the U. S. federal government"; "a small group of persons holding simultaneously the principal political executive offices of a nation or other political unit and being responsible for the direction and supervision of public affairs: . . . administration"; "the complex of political institutions, laws, and customs through which the function of governing is carried out"; and "the body of persons that constitutions the governing authority of a political unit or organization." *Merriam-Webster's Collegiate Dictionary* 541 (11th ed. 2011). Of course, the federal government consists of the three separate branches, of which this court may take judicial notice. The federal government currently has more than three million civilian employees. *See* U.S. Census Bureau, U.S. Department of Commerce, Federal Government Civilian Employment by Function: March 2010, http://www2.census.gov/govs/apes/10fedfun.pdf (last visited July 26, 2012).

Appropriately, the FEC concluded unanimously that two references to "the government" in proposed Advertisement 4 did not constitute references to any clearly identified candidate for Federal office. *See* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint at 7-24 ("All six Commissioners . . . agreed that 'the government' is not a reference to a candidate."). However, the FEC was not able to reach a conclusion with respect to references to "the government" in AFF's proposed Advertisements 2, 3, and 6. The three Commissioners who supported Draft B voted to treat "the government" as a reference to a clearly identified candidate in three proposed advertisements (AFF's Advertisements 2, 3, and 6), but *not* in a fourth proposed advertisement (AFF's Advertisement 4). This disparate treatment of the exact same term is glaringly inconsistent, inexplicable, and wholly at odds with the notion that the electioneering communications standard provides an objective, bright-line standard that affords speakers "perfect clarity" and "precise guidance."

During floor debate on the Bipartisan Campaign Reform Act, Senator Snowe very clearly stated that an advertisement that referred to "our own government" would not be subject to the electioneering communication provisions. Senator Snowe provided the following example of an "issue ad that wouldn't be covered at all by Snowe-Jeffords in any way, shape or form":

> (Woman): "We can't pay these bills, John."
>
> (Man): "Prices are as low as when my dad started farming."
>
> (Woman): "It's bad, alright."
>
> (Man): "Farmers are suffering because foreign markets have been closed to us and ***our own government*** won't even help."
>
> (Woman): "I hear the Thompsons are going to have to quit farming after four generations."
>
> (Man): "I can't even bear to think about it."
>
> (Announcer): Tell Congress we need a sound, strong trade policy. Call 202-225-3121.

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

Referring to this same advertisement, Senator Snowe explained, "there are graphics on the screen that show the phone number, that direct viewers to tell Congress that we need to pass initiatives like 'IMF Funding' and 'Sanctions Reform', and they give the number for the Capitol switchboard. *Again, this is a pure issue ad that we wouldn't touch.*" *Id.* (emphasis added).

Nevertheless, three Commissioners have now taken the position that "the government" both is, and is not, a reference to a clearly identified candidate for Federal office. Draft B does not explain why the several references to "the government" in AFF's proposed communications are subject to different treatment, other than to assert, with respect to Advertisement 3 that "[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.'" Draft B, Exhibit 4 to HLF's Complaint, at 4-8.

It is readily apparent that this explanation does not reflect the application of an objective, bright-line standard that disregards "the intent or purpose of the person making the communication," *Explanation and Justification*, 67 Fed. Reg. at 65,192, and "entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners," FEC Brief at 156. *See* Statement of Commissioner McGahn at 7-27 ("McCain-Feingold and the Commission's regulations require more than such inferential reference, tied to the subjective impression of viewers and listeners"). Objective, bright-line standards are not satisfied by "I know it when I see it" analyses, and under the required objective, bright-line test, which requires an explicit and unambiguous reference, "the government" simply cannot be a reference to a clearly identified candidate in one advertisement but not in another.

ii. "The Administration" Is Not A Reference To A Clearly Identified Candidate For Federal Office

Three Commissioners concluded that "[t]he terms 'the Administration,' 'this Administration,' and 'the White House' are commonly understood as references to 'the President.'" Draft B, Exhibit 4 to HLF's Complaint, at 4-5. According to these three Commissioners, "[t]he references to 'the Administration' and 'this Administration' likewise unambiguously reference President Obama. Those terms are merely short-hand for the *Obama* Administration: 'this Administration' began with the inauguration of President Obama and it will conclude with his exit from office." *Id.* at 4-5 to 4-6.

In her comments during the FEC's consideration of AFF's advisory opinion request, Commissioner Weintraub offered the following analysis of the term "the administration": "When

people talk about the Administration, they know who they're talking about, and the listeners all know who they're talking about." FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-19. The FEC itself previously explained that the electioneering communication standard was not "based on the intent or purpose of the person making the communication," *Explanation and Justification*, 67 Fed. Reg. at 65,192, and the FEC argued in court that the standard does not "plac[e] speakers 'wholly at the mercy of the varied understanding' of their listeners," FEC Brief at 156. Accordingly, this focus on the alleged intent of the speaker and the presumed understanding of the listener involve improper considerations.

In a 1995 decision, a federal district court rejected a very similar "codeword" theory advanced by the FEC. *See FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995). In that matter, the FEC "submitted a twenty-four page analysis of the advertisements prepared by an expert in Political Science and federal campaign ads." Of this expert analysis, the court wrote:

> The court finds the expert's analysis unpersuasive for several reasons. First, the fact that an expert was needed to enlighten the court on the message conveyed by the communications strongly suggests that they did not directly exhort the public to vote. Second, the concepts used by the FEC's expert contradict his claim that a clear message was conveyed. For example, the term "codeword" cannot, by its very definition, be said to express a direct message. Lastly, nowhere in the expert's analysis does he state the *legal* standard or test on which he basis his opinion that the ads constituted "express advocacy."

Id. at 956 n.14.

While the context is somewhat different, both the "clearly identified candidate" and 1995-era "express advocacy" definitions require clear, explicit and unambiguous language, and in both that case and the present matter, the FEC advanced a "codeword" theory that is completely untethered from the law. Here, three FEC Commissioners plainly resorted to a

"codeword" theory in their analysis of the term "the administration." *See* Draft B, Exhibit 4 to HLF's Complaint, at 4-5 (using phrases "commonly understood as references" and "merely short-hand"). The "codeword" theories advanced in Draft B should be rejected by this court as well.

"The Administration" refers to the Executive Branch, "a governmental agency or board," or "a group constituting the political executive in a presidential government." *Merriam-Webster's, supra*, at 16. On the White House's own website, "the Administration" is described as consisting of "[t]housands of people work[ing]" in a variety of departments. The White House, http://www.whitehouse.gov/administration (last visited July 26, 2012). At the time American Future Fund made their advisory opinion request, the White House website described the Administration as "consist[ing] of thousands of individuals in a variety of departments." The website has since been redesigned, but both descriptions make clear that "administration" does not "explicitly and unambiguously" refer to President Obama. *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-24 ("After all, one cannot place 'the administration' or 'the White House' on the ballot – the laws of all fifty states require that a candidate be named, and not merely referenced by inference. Instead, both 'the administration' and 'the White House' refer to elements of the executive branch generally.").

iii. "The White House" Is Not A Reference To A Clearly Identified Candidate For Federal Office

The Commissioners who supported Draft B claimed that "*the only logical reading*" of a reference to "the White House" is "as a reference to the President, rather than as a personification of his residence." Draft B, Exhibit 4 to HLF's Complaint, at 4-10. As proof that this is "the only logical reading," Draft B includes the following explanatory footnote: "One of the preeminent authorities on English usage invokes the example of 'the White House' as a

reference to the Presidency in its definition of 'metonymy,' which is '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.' R.W. Burchfield, *The New Fowler's Modern English Usage* 492 (3d ed., 2000)." *Id.* at 4-5 n.1. In addition, Commissioner Weintraub added that "there are certain addresses that really do suffice."[7] FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-19. An "analysis" that "everyone knows" what a reference to a "certain address" means, or that "the only logical reading" of the term "the White House" is that it is a codeword for "the President," is not consistent with an objective, bright-line standard. *See Christian Action Network*, 894 F. Supp. at 956-57 (rejecting FEC's interpretation of "codewords" in an advertisement as constituting express advocacy).

"The White House," in addition to being the structure located at 1600 Pennsylvania Avenue, also means "the executive department of the U. S. government." *Merriam-Webster's*, *supra*, at 1428. In addition, there are numerous government officials who work at "the White House," including a number of government officials with specific statutory authorities provided in numerous different statutes, including the application of the Freedom of Information Act, such as the Director of the Office of National Drug Control Policy, the Director of the Office of Management and Budget, the Director of the Office of Science, Technology and Space Policy, and the United States Trade Representative. *See* Webster L. Hubbell, FOIA Memo on White House Records (Nov. 3, 1992), *available at* http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page4.htm. In that same memorandum, the Department of Justice explained:

[7] *See also* Concurring Statement on Advisory Opinion 2012-19 (American Future Fund) of Commissioners Bauerly and Weintraub, Exhibit 7 to HLF's Complaint, at 7-8 ("And 'the White House' – like '10 Downing Street' or 'Buckingham Palace' – is a place inextricably linked to the official who lives and works there. Anyone else currently working in the White House works for President Obama, and acts solely on his behalf.").

> By its terms, the FOIA applies to "the Executive Office of the President," 5 U.S.C. § 552(f), but this term does not include either "the President's immediate personal staff" or any part of the Executive Office of the President "whose sole function is to advise and assist the President." *Meyer v. Bush*, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)); *see also, e.g., Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). This means, among other things, that the parts of the Executive Office of the President that are known as the "White House Office" are not subject to the FOIA; certain other parts of the Executive Office of the President are.

Id.

The U.S. Department of Justice recognizes that statutes treat different parts of the White House differently for the purposes of applications of other statutes, and this alone makes clear that the White House is not an unambiguous reference to President Obama. The "White House" is an inherently ambiguous term that could refer to the historic building at 1600 Pennsylvania Avenue, the President, the President's staff, agencies within the White House, or certain government officials. The term does not "explicitly and unambiguously" refer to President Obama. Even the FEC has previously acknowledged this. As Commissioner McGahn notes:

> [W]hile investigating [Matters Under Review] 4407 and 4544, the Commission issued a number of subpoenas. One went to the Executive Office of the President and certain named individuals to seek "White House materials." A separate subpoena was addressed specifically and personally to the President by name. Thus, in other contexts, the Commission has already determined that the White House generally is not the same as the President individually.

Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-25 (footnotes omitted).

iv. Unidentified Audio Clips Of A Federal Officeholder Do Not Refer To A Clearly Identified Candidate For Federal Office

Draft B's explanation for why the inclusion of an unidentified audio clip of President Obama speaking "refers to a clearly identified candidate for Federal office" is that "President Obama's voice is widely recognized." Draft B, Exhibit 4 to HLF's Complaint, at 4-7. Commissioner Weintraub also stated that "the voice of the President is . . . clearly recognizable to the citizens of this country . . . ." FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-20. Whether something is "widely recognized" or "clearly recognizable" is not the applicable legal standard, and, in fact, the FEC has previously stated that such considerations are irrelevant. *See* FEC Brief at 156 ("the definition of electioneering communications is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners").

Draft B does not even attempt to explain how an unidentified audio clip satisfies the standard set forth at 2 U.S.C. § 431(18), 11 C.F.R. § 100.29(b)(2), 11 C.F.R. § 100.17, or the construction rendered in *Buckley v. Valeo*. One Commissioner who supported Draft B indicated that she was motivated to conclude that unidentified audio "refers to a clearly identified candidate," at least in part, because she found the request offensive:

> The notion that you could actually use somebody's own voice, their own voice, and claim that you're allowed to criticize them using their own voice, and you don't have to identify who you are, you want to hide behind some shield, some ambiguous name like American Future Fund, and not identify who you are when you're criticizing the White House, when you're criticizing the President using his own voice, that certainly is not demonstrating civic courage.

FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-20 (statement of Comm'r Weintraub); *see also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-42 n.98

(discussing Commissioner Weintraub's statement). A Commissioner's views on how a party *should* conduct itself, or what the law *should* be, is no substitute for what the law actually is.

The applicable law setting forth the various types of references that qualify as a reference to a clearly identified candidate for Federal office does not include audio recordings of a candidate's voice. The FEC's own regulation, which is based on the Supreme Court's footnote 51 in *Buckley v. Valeo*, includes names, nicknames, photographs, drawings, other "unambiguous references" such as "the President," "your Congressman," or "the incumbent," or an "unambiguous reference" to "the status of a candidate," such as "the Democratic presidential nominee." 11 C.F.R. § 100.17. All of these examples are either visual representations or means of actually naming the candidate. *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-13 ("Under the plain text of the regulation, a reference to a clearly identified candidate can be either visual or by name."). Audio recordings are not included, nor are they similar to any of the examples provided.

The applicable bright-line standard cannot turn on whether listeners do or do not recognize the voice speaking. As was noted during the FEC's consideration of this advisory opinion request, while some or many may recognize the voice of the President, very few would recognize the unidentified voice of a Member of Congress. Any standard that turns entirely on the listener's reaction yields inconsistent results that are simply not consistent with an objective, bright-line standard. *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-33 ("That audio of someone's voice was not included in the Act or the regulation makes sense when one realizes that a uniform rule needs to apply to all candidates, not just the more well-known ones. It makes little sense for a voice that is unrecognizable to the vast majority of listeners to be considered 'clearly identified' for statutory purposes. To claim that a

voice can be sufficiently recognizable merely begs the pertinent questions: at what point is a voice sufficiently recognizable and on what principle do we draw the line?").

An unidentified audio recording, whether the speaker is recognized by the listener or not, cannot be a reference to a clearly identified candidate for federal office because the applicable statutes, regulations, and precedent do not include audio clips within the definition of a clearly identified candidate.

v. Unidentified Audio Clips Of An Unelected Federal Official Do Not Refer To A Clearly Identified Candidate For Federal Office

Proposed Advertisement 3 in the AOR included an unidentified audio clip of the White House Press Secretary speaking. Draft B concludes that Proposed Advertisement 3 contains references to a clearly identified candidate, but does not specifically address whether the use of unidentified audio of the White House Press Secretary is a reference to a clearly identified candidate. Draft A, in its original form, was responsive to the question posed in the AOR, and concluded, "The inclusion of an audio clip of the White House Press Secretary's voice in Advertisement 3 also is not a reference to a clearly identified candidate because the White House Press Secretary is an employee of the federal government and is not himself a candidate." Draft A, Exhibit 3 to HLF's Complaint, at 3-8. However, the motion to approve Draft A included an amendment deleting the foregoing explanation from Draft A. *See* FEC Certification, Exhibit 5 to HLF's Complaint, at 5-1. Accordingly, neither Draft A nor Draft B actually addressed this issue.

As noted above, the applicable law setting forth the various types of references that qualify as a reference to a clearly identified candidate for Federal office does not include the use of a person's voice, but only includes either visual representations or means of actually naming a candidate. *See* 11 C.F.R. § 100.17. It is difficult to even conceive of an argument that would

seriously maintain that the use of unidentified audio of an individual who is not even a federal candidate constitutes "an unambiguous reference" that makes "the identity of the candidate . . . otherwise apparent." *Id.* Even the faulty and subjective "voice recognition" analysis of Draft B with respect to the use of unidentified audio of the President's voice does not support the view that the use of unidentified audio of the White House Press Secretary's voice is an explicit and unambiguous "reference" to the President.

II. THREAT OF IRREPARABLE HARM

As other courts in this Circuit have held:

> [T]he Fourth Circuit has generally found irreparable injury where a plaintiff has demonstrated a likelihood of success on a First Amendment claim. See *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir.2003) ("[T]he Supreme Court has explained that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976))).

Tepeyac v. Montgomery County, 779 F.Supp 2d 456, 471 (D. Md. 2011). HLF faces a real and immediate threat of lengthy government investigations, civil penalties and potential criminal liability if fails to act in full compliance with applicable legal standards. Additionally, HLF is presented with a series of options, all of which carry the threat of irreparable harm.

First, if HLF proceeds with airing its proposed advertisements, it must decide whether to treat the advertisements as electioneering communications and file reports with the FEC. Three Commissioners have instructed AFF that its proposed Advertisements 1, 2, 3, 5, and 6 *are not* electioneering communications, and three Commissioners have instructed AFF that these advertisements *are* electioneering communications. If HLF opts to air its materially indistinguishable advertisements under the theory that they *are not* electioneering communications, HLF will almost certainly be the subject of a complaint filed with the FEC. On

the other hand, if HLF airs its proposed advertisements under the theory that they *are* electioneering communications, and complies with BCRA's disclosure requirements for electioneering communications, it will be required to disclose the identity of all persons who have given more than $1,000 to HLF since January 1, 2011. If this disclosure is made, it cannot be undone or retracted, even if this court subsequently determines that the advertisements in question *are not* "electioneering communications." In this scenario, HLF will have unnecessarily invaded the privacy of its supporters, subjected them to potential harassment,[8] and

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[8] If disclosures are not required to be made in the first place, it is of no significance that the "harassment" may not rise to the level of requiring a constitutionally-mandated exemption, as in *NAACP v. Alabama*, 357 U.S. 449 (1958). *Any* harassment that results from disclosures that were not legally required, and which were made only because the FEC was unable to render guidance to Plaintiff, is unacceptable. *See Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010) ("as-applied challenges would be available if a group could show a reasonable probability that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials *or* private parties.") (internal quotation marks omitted) (emphasis added); *Brown v. Socialist Workers '74 Campaign Comm.* , 459 U.S. 87 (1982); FEC Advisory Opinion 2009-1 (Socialist Workers Party), *available at* http://saos.nictusa.com/saos/searchao?AONUMBER=2009-01 (extending FECA reporting exemption for Socialist Workers Party). At this time, though, HLF is not requesting any such exemption.

Donor harassment has recently become a favored political tool of some. For example:

- On April 20, 2012, President Obama's reelection campaign posted on its website details about seven of Mitt Romney's financial supporters. The supporters were dubbed "a group of wealthy individuals with less-than-reputable records." Senator McConnell referred to this as "a list of eight private citizens [the campaign] regards as enemies – an actual old-school enemies list . . . ." Senator Mitch McConnell, Growing Threats to Our First Amendment Rights (June 15, 2012), *available at* http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=10f84ce5-aba9-42e8-9119-fb88d2edb2e2.

- In a June 12, 2012, letter, the Congressional Progressive Caucus, using official U.S. House of Representatives letterhead, wrote to the National Federation of Independent Business and demanded that the organization, "Please report all donors to NFIB over the past three years. For each year please provide the donor name and amounts." Letter from Congressional Progressive Caucus to National Federation of Independent Business (June 12, 2012), *available at* http://grijalva.house.gov/uploads/CPC%20Co-

Chair%20Letter%20to%20NFIB%20June%2012.pdf. The source of the Congressional Progressive Caucus's interest in the NFIB's financial support is a lawsuit brought by the NFIB challenging portions of the Patient Protection and Affordable Care Act.

- On June 14, 2012, Citizens for Responsibility and Ethics in Washington (CREW) issued a press release and correspondence in which the organization attacks a donor to the U.S. Chamber of Commerce and American Action Network, both of whom produce and distribute advertisements that are reported to the FEC. CREW included the following accusations of corruption in its press release: [CREW President Melanie] "Sloan continued, "I wonder how much influence Aetna has on exactly which lawmakers AAN and the Chamber target? Just because Aetna isn't telling the public what it's up to, doesn't mean the company is hiding its political activities from everyone. I'm sure Aetna is expecting lawmakers to express their gratitude with legislative favors. Just like these grateful lawmakers, Americans should know what Aetna is really doing with their insurance premiums." Press Release, Citizens for Responsibility and Ethics in Washington, Aetna Hides $7 Million in Political Spending; CREW Calls for Greater Disclosure (June 14, 2012), *available at* http://www.citizensforethics.org/press/entry/aetna-political-spending-american-action-network-chamber-of-commerce.

- In early April 2012, the leftist Center for Media and Democracy "launched a protest campaign in tandem with Color of Change opposing what it said were [American Legislative Exchange Council]'s efforts to deny climate change, undermine public schools and encourage laws that would require voters to present various forms of identification before voting." Color of Change is led by Van Jones, who previously served as President Obama's "Special Advisor for Green Jobs, Enterprise and Innovation." In response to the boycott threats, "Coca-Cola Co. and Kraft Foods Inc. bowed to consumer pressure this week and cut ties with the American Legislative Exchange Council." Tiffany Hsu, *Coca-Cola, Kraft Leave Conservative ALEC After Boycott Launched, L.A. Times*, Apr. 6, 2012, *available at* http://articles.latimes.com/2012/ apr/06/business/la-fi-mo-coca-cola-kraft-alec-20120406. PepsiCo also yielded to these secondary boycott tactics.

- Numerous troubling instances of political harassment facilitated by government-compelled disclosure are detailed by Justice Thomas in his separate opinion in *Citizens United v. FEC*. He succinctly summarizes the threats faced by would-be speakers as follows:

> "Some opponents of [California's] Proposition 8 compiled this [individual supporter] information and created Web sites with maps showing the locations of home or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result. . . . The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to pre-empt citizens' exercise of their First Amendment rights. . . . Disclaimer and disclosure

undermined HLF's own First Amendment rights to free speech and association. HLF will certainly comply with all clearly applicable disclosure requirements, but it cannot be asked to volunteer disclosure that may or may not be required.

Alternatively, HLF could determine that the consequences of proceeding are simply too unclear, potentially harmful and irreversible, and not air any of its proposed advertisements. At this point, the FEC's inability to render guidance will have chilled HLF's protected speech. Self-censorship "[i]s a harm that can be realized even without actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006)

> requirements enable private citizens and elected officials to implement political strategies specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United*, 130 S.Ct. at 980-82 (Thomas, J., concurring and dissenting).

Senate Minority Leader Mitch McConnell of Kentucky gave a speech on June 15, 2012, about what he called "an effort by the government itself to expose its critics to harassment and intimidation, either by government authorities or through third-party allies." McConnell, Growing Threat. He noted that Charles and David Koch, "along with Koch employees, have had their lives threatened, received hundreds of obscenity-laced hate messages, and been harassed by left-wing groups." *Id.*

Each of these examples may very well be mere nuisances that must be tolerated as part of free political debate. *See generally Doe* v. *Reed*, 130 S.Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."). *But see* McConnell, Growing Threat ("the harassment and intimidation by private citizens of those who choose to participate in the political process – is deplorable"). What Plaintiff seeks is the ability to determine whether or not it will engage in activities that require the filing of disclosure reports, which in turn may subject its supporters to the types of treatment described above. Plaintiff cannot make an informed decision, however, without guidance from the FEC, which it requested and did not receive.

("[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.")

The deprivation of a plaintiff's First Amendment rights constitutes *per se* irreparable injury. *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978); *see also Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

HLF wishes to engage the public on the issues of the day. HLF anticipates that public interest in these major public policy issues will be at their zenith in the time periods before the election. The opportunity to engage the public on major issues of policy when the public is most engaged will be gone if this court does not act soon. Because HLF is likely to succeed on the merits of its First Amendment claim, irreparable harm is presumed.

III. BALANCE OF HARMS

The Fourth Circuit has held that when First Amendment rights are involved, the plaintiff's constitutional rights "easily outweighs whatever burden the injunction may impose. *Legend Night Club*, 637 F.3d at 302. The balancing required by this Court favors Plaintiff's constitutional right to freedom of expression over the government interest in maintaining an unconstitutional position. *Newsom*, 354 F.3d at 261.

Finally, as the Supreme Court has made clear, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 469, 474. HLF prevails on this factor.

IV. PUBLIC INTEREST

"[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *United States v. Raines*, 362 U.S. 17, 27 (1960). This Circuit has held that protecting the First Amendment's right of political expression is in the public's interest. *Newsom*, 354 F.3d at 261. Furthermore, the Circuit has held that "Surely, upholding constitutional rights serves the public interest." *Newsom*, 354 F.3d at 261.

The Supreme Court "has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981). HLF wishes to speak on important issues of the day at the time when the citizenry is most tied in to what the federal government is doing.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ; *see also Knox*, No. 10-1121, slip op. at 22 ("The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals."). Thus "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Plaintiff wishes to participate in the process of self-government by urging the public to support the policies that it believes should be adopted. HLF prevails on this factor as well.

PLAINTIFF SATISFIES THE REQUIREMENTS OF STANDING

To demonstrate standing, three elements must be established: an injury in fact, a causal connection between the injury and the defendant's conduct, and a likelihood that the injury will

be redressed by a decision favorable to the plaintiff. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is satisfied when plaintiffs make a showing of an "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560. (internal quotation marks and citations omitted).

HLF has demonstrated an injury in fact capable of relief by this court. There is a causal connection between the FEC's failure to apply the law and issue an advisory opinion, and the harm now faced by HLF. This court can cure this injury through the issuance of the injunction sought by HLF.

In First Amendment cases, pre-enforcement challenges are subject to more flexible standing requirements. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965) (detailing expanded standing principles for pre-enforcement First Amendment challenges); *American Booksellers Ass'n*, 484 U.S. at 393 (self-censorship is a harm that can be alleged without actual prosecution); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution").

In this context, prospective speakers bringing pre-enforcement challenges must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," and make a showing that there exists a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). HLF meets all of the standing requirements to maintain this action.

REQUEST FOR NOMINAL BOND UNDER RULE 65(c)

Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction shall issue without the giving of security by the application in an amount determined by the court. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999) (holding that while the issuance of a bond is required, that if the circumstance warrant it, or the harm to the defendant is remote, the judge could set the bond at $0); *Maryland Dept. of Human Resources v. U.S. Department of Agriculture,* 976 F.2d 1462, 1483 (4th Cir. 1992). Under the circumstances, Plaintiff asks that this Court issue a nominal bond requirement in the event the requested preliminary injunction is granted.

CONCLUSION

For the foregoing reasons, this Court should declare that, as a matter of law, references to "the government," "the administration," "the White House," and the use of unidentified audio of a person's voice do not "refer to a clearly identified candidate for Federal office," grant HLF's motion for a preliminary injunction, and enjoin defendants from enforcing:

1. 11 C.F.R. § 100.17 as applied to HLF's proposed communications;
2. 11 C.F.R. § 100.29 as applied to HLF's proposed communications; and
3. 2 U.S.C. §§ 431(18) and 434(f) as applied to HLF's proposed communications.

HLF also asks that that this court grant any other relief that may be appropriate, including attorney's fees and costs under applicable provisions of law.

Dated: August 10, 2012

Respectfully submitted,

By: _____

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Motion for pro hac vice admission pending

Counsel for The Hispanic Leadership Fund, Inc.

Attachment A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THE HISPANIC LEADERSHIP FUND, INC.,	Civ. No. 4:12-339-JAJ-TJS
Plaintiff,	
v.	
FEDERAL ELECTION COMMISSION,	RESISTANCE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
Defendant.	

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

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August 7, 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.

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," "the Administration," and an audio clip of the President's voice. Under well-settled principles of administrative law, this decision is entitled to great 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 this Court has noted, "'the public has an interest in knowing who is speaking about a candidate shortly before an election,' an interest which would be impaired — not served — by the broad relief" of enjoining campaign finance statutes. *Iowa Right to Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1049 (S.D. Iowa 2010) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 915 (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. *McConnell*, 540 U.S. 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

[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), 434(f)(3)(C).

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).

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 v. FEC*, 130 S. Ct. 876, 913 (2010), 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 requirements for all electioneering communications, even those that are not the functional equivalent of express advocacy. 130 S. Ct. at 914-15. The Court held that "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 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 constitutes an electioneering communication. (Compl. Exh. 3.) Draft B would have concluded that seven of AFF's eight proposed ads constitute 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 the instant complaint and moved for a preliminary injunction. 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 "materially indistinguishable" from AFF's).) HLF alleges that it plans to broadcast these ads "in Iowa 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.* ¶ 20; Pl.'s Br. in Supp't of Mot. for Prelim. Inj. at 9, 39 (Dkt. No. 3-1) ("Pl.'s Inj. Br.").) 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 plaintiff seeking a preliminary injunction bears a heavy burden. It must show that four factors weigh in its favor: (1) the probability that movant will succeed on the merits; (2) the

[2] The Commission defends in this lawsuit the position of the "controlling group" of three Commissioners who declined to provided AFF with the response it sought to its request. *Cf. FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (explaining that when suit challenges action on which Commission deadlocked, subject of judicial review is position of controlling group of Commissioners).

threat of irreparable injury if the injunction is denied; (3) the balance between that injury and the injury that granting the injunction would inflict on the defendant; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F. 2d 109, 113 (8th Cir. 1981) (en banc); *see 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); *Dataphase*, 640 F.2d at 113 & n.5; *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 because "[b]y seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis in original). Because HLF seeks an injunction to upset the status quo, it faces an even higher hurdle. An 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 a remedy that is extraordinary even in the normal course." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012).

The Eighth Circuit has held that requests to enjoin a statute are subject to a more "rigorous standard" because "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a *higher degree of deference and should not be enjoined lightly*." *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 731-32 (8th Cir. 2008) (emphasis added) (internal quotation marks and citation omitted); *Iowa Right To Life*, 750 F. Supp. 2d at 1029 (quoting *Planned Parenthood*). 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, "preliminary injunctions that thwart the [government's] presumptively reasonable democratic processes [should be] pronounced only after an appropriately deferential analysis." *Planned Parenthood*, 530 F.3d at 733; *Iowa Right To Life*, 750 F. Supp. 2d at 1029 (quoting *Planned Parenthood*).

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

Plaintiff's claim for a preliminary injunction fails under first *Dataphase* factor, as plaintiff is unable to meet its heavy burden of showing that it is likely to prevail on the merits. Plaintiff fails to meet the Eighth Circuit's "more rigorous standard," which applies to HLF's challenge to the application of FECA's electioneering communication statute at issue here. *Planned Parenthood*, 530 F.3d at 731-32.

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

An "administrative agency enjoys broad discretion in carrying out the mandates of its governing statutes." *Mausolf v. Babbitt*, 125 F.3d 661, 667 (8th Cir. 1997) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984)). Where Congress has not "directly spoken to the precise question at issue," the Court must defer to "a reasonable interpretation made by the administrator of an agency." *Chevron*, 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.'" *Beeler v. Astrue*, 651 F.3d 954, 959 (8th Cir. 2011) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)), *cert. denied*, 132 S. Ct. 2679 (2012). There is no requirement that an agency's interpretation comport with the one a court would have adopted; a "permissible" construction means only "a construction that is 'rational and consistent with the

statute.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987)).

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 4, 15-16.) It argues instead that those provisions should be interpreted not to apply to each of plaintiff's proposed advertisements (*id.* at 15-16) — 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. The Commission declined to find that the advertisements are not electioneering communications, and because that determination was a reasonable interpretation of FECA, it must be upheld by under the Supreme Court's decision in *Chevron*. *See Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476-77 (deferring to interpretation of controlling group of Commissioners when the Commission is deadlocked).

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 15-16.) 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.*, *Michaelis v. CBS, Inc.*, 119 F.3d 697, 700 (8th Cir. 1997) ("In determining whether a particular statement is defamatory, a court must review the statement in the context in which it was presented . . . .").

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." *Id.* § 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 referenced President Obama. Contrary to HLF's assertion (Pl.'s Inj. Br. at 24), 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 reference 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

[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 24-25.) 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.*) But nothing in Senator Snowe's statement suggests that she believed "the government" can *never* refer to a federal candidate in another communication.

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 29-30 ("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 23, 27, 29.) 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.

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 references 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 "thousands of people" who work for the administration. (Pl.'s Inj. Br. at 27.) 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 29.) 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. It is the President, and not others who work in the White House or Administration, who sets energy policy and has the power to change it.[4]

[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 26-27). 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 were tantamount to "magic words," like "vote against," "defeat," and "reject," or otherwise functioned as synonyms for other terms.

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 31). 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 "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 30-31.) 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

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[5] Despite HLF's erroneous contention (Pl.'s Inj. Br. at 24), 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.").)

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" in a context that makes clear that it is an 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 Heath 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.)

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" combined with images of the White House, makes clear that the advertisement is unambiguously referencing the White House's primary occupant, President Obama. (*Id.*)

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[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.").)

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" in a context that makes clear it unambiguously refers 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 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

[7] HLF's Advertisement 5 only differs from AFF's Advertisement 6 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).

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 11), 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 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.*

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[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.").)

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 17), 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" 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*,

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[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 the 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 the Establishment Clause, symbols and visual associations, such as a crèche on public property, can convey prohibited religious messages and government endorsements of religion).

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]

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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.

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[11] Contrary to plaintiff's suggestion (Pl.'s Inj. Br. at 12, 21), 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), 431(9)(A)(i) (definitions of "contribution" and "expenditure" include the 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 the communication encourages action to elect or defeat a 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 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)), 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 a "wholly objective standard" based on whether a "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?").

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 probable success on the merits of their 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 cannot meet this burden. The application of law HLF challenges does not prevent it from speaking but instead implicates only a requirement to disclose information to the public. And HLF has shown no irreparable injury from such disclosure.

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 36-37.) But plaintiff admits that the Commission has done nothing to limit its speech. (*See* Pl.'s Resp. & Opp. to Def.'s Mot. to Continue Hearing on Pl.'s Mot. for Prelim. Inj. at 2 (Dkt. No. 15) ("*HLF does not allege that it is precluded from airing the proposed advertisements.*") (emphasis added); Pl.'s Inj. Br. at 15 (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, the only relevant harm HLF could possibly allege here would be one arising from FECA's disclosure requirements for electioneering communications. (*See* Pl.'s Inj. Br. at 1 (seeking injunction to prevent Commission from applying "disclosure and disclaimer requirements . . . to HLF's proposed communications").) But HLF fails to identify *any* irreparable harm that would result from complying with those disclosure provisions while this case is pending.

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").

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[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 36 n.9 (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.

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 34-36 n.9.) 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.[13] *See* Fed. R. Evid. 201 advisory committee's note (explaining difference between adjudicative and legislative facts); 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. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) ("Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction.").

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[13] The Commission has a well-established procedure for exempting from disclosure groups with a history of donor harassment — an exemption that HLF says "it is not requesting." (Pl.'s Inj. Br. at 34-36 n.9.) *See, e.g.*, FEC Advisory Op. 2009-01 (Socialist Workers Party), 2009 WL 961212.

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 v. FEC*, 575 F.3d 342, 352 (4th Cir. 2009) (upholding denial of pre-election preliminary injunction regarding a regulation and policy that implicated disclosure requirements), *vacated on other grounds*, 130 S. Ct. 2371 (2010); *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 37) — 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 make the required disclosures. *Iowa Right to Life*, 750 F. Supp. 2d at 1048-49 (finding that balance of harms favored government because injunction would impair government's "valid interest in facilitating transparency in . . . elections").

As this Court has noted, "'the public has an interest in knowing who is speaking about a candidate shortly before an election,' an interest which would be impaired — not served — by the broad relief" of enjoining campaign finance statutes. *Iowa Right to Life*, 750 F. Supp. 2d at 1049 (quoting *Citizens United*, 130 S. Ct. at 915). 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, 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); *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.[14]

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

[14] Finally, the Commission opposes plaintiff's request that its motion for a preliminary injunction be consolidated with the final determination of the merits of this action pursuant to Fed. R. Civ. P 65(a)(2). (Pl.'s Mot. for Prelim. & Permanent Inj. at 2 (Dkt. No. 2).) Because a party is "not required to prove his case in full at a preliminary-injunction hearing . . . it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395 (citations omitted). This case presents a number of potential factual disputes about which the Commission cannot compile a full record in the six business days between the filing of plaintiff's complaint and the hearing on plaintiff's motion for a preliminary injunction.

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August 7, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, the foregoing Resistance to Plaintiff's Motion for Preliminary Injunction was filed electronically with the Clerk of Court through the Court's ECF system, which will send notification of this filing to the following recipients:

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Attachment B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

The Hispanic Leadership Fund, Inc., Plaintiff,	Civil Case No. 4:12-cv-00339-JAJ-TJS
v.	RESPONSE TO DEFENDANT'S RESISTANCE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCITON
Federal Election Commission, Defendant.	

PLAINTIFF'S RESPONSE TO DEFENDANT'S RESISTANCE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. The FEC's Arbitrary Selection of a "Controlling Group" Is Contrary To Law

The Federal Election Commission's Resistance To Plaintiff's Motion For Preliminary Injunction (FEC's Resistance") defends the positions taken by three of six FEC Commissioners in Advisory Opinion 2012-19 as "controlling," and suggests that the views expressed in Draft B preserve the "status quo." The FEC's alleged litigation position is contrary to law, as the agency's authorizing statute specifically declares that "All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission." 2 U.S.C. § 437c(c). *See also* 11 C.F.R. § 112.4(a) ("Within 60 calendar days after receiving an advisory opinion request that qualifies under 11 CFR 112.1, the Commission shall issue to the requesting person a written advisory opinion or shall issue a written response stating that the Commission was unable to approve an

advisory opinion by the required affirmative vote of 4 members."). In the context of an Advisory Opinion Request in which the Commission divides 3-3 on a question of law, there is, by definition, no "controlling group" because the Commission has not made any substantive decision. The FEC also erroneously claims that it may designate one side of a 3-3 deadlock as "entitled to great deference." Again, because no substantive decision was made, this position is contrary to law.

At footnote 2 of its "Resistance To Plaintiff's Motion For Preliminary Injunction," the FEC writes:

> The Commission defends in this lawsuit the position of the "controlling group" of three Commissioners who declined to provided [sic] AFF with the response it sought to its request. *Cf. FEC* v. *Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 14765 (D.C. Cir. 1992) (explaining that when suit challenges action on which Commission deadlocked, subject of judicial review is position of controlling group of Commissioners.).

FEC Resistance To Plaintiff's Motion For Preliminary Injunction ("FEC Resistance") at 2.

We fail to see how the FEC may *legitimately* designate a "controlling group" of Commissioners in this matter, as the Commissioners split 3-3 on those questions when they were presented in Advisory Opinion 2012-19. The precedent cited by the FEC in "*cf*" fashion does not support the assertion that a "controlling group" exists. The theory advanced by the FEC derives from *Democratic Congressional Campaign Committee* v. *FEC*, 831 F.2d 1131 (D.C. Cir. 1987). As the D.C. Circuit explained in a subsequent matter:

> In *Democratic Congressional Campaign Committee v. Federal Election Commission*, 831 F.2d 1131 (D.C. Cir. 1987) (*DCCC*), we held that when the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § 437g(a)(8). 831 F.2d at 1133. We further held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss

> must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did. *Id.* at 1134-35.

FEC v. *National Republican Senatorial Committee*, 966 F.2d 1471 (D.C. Cir. 1992). *See also Stark* v. *FEC*, 683 F.Supp. 836, 841 (D.D.C. 1988) ("this Court reads DCCC to require that the same deference be accorded the reasoning of 'dissenting' Commissioners who prevent Commission action by voting to deadlock as is given the reasoning of the Commission when it acts affirmatively as a body to dismiss a complaint."). Arguably, this decision may be read as creating an exception to the statutory requirement that the FEC's position must be represented by a four-vote majority in order "to make judicial review a meaningful exercise." Whether read that way or not, the rule only makes sense in its particular context.

Democratic Congressional Campaign Committee involved a 3-3 deadlock vote on a motion to adopt the General Counsel's recommendation to proceed with an investigation into alleged wrongdoing. The result of the 3-3 vote was dismissal of the matter, as the Commission lacked the statutorily-required four affirmative votes to proceed. The court in *Democratic Congressional Campaign Committee* required the three Commissioners who voted against the General Counsel's recommendation – i.e., the three Commissioners who actually voted to dismiss – to explain their reasoning. This group of three Commissioners was deemed "controlling" in that particular situation because their votes clearly caused the ultimate result – dismissal of the enforcement matter – and it was their reasoning that, accordingly, served as the basis for judicial review. *See also* Former FEC Chairman Brad Smith, "What does it mean when the Federal Election Commission "Deadlocks," Center For Competitive Politics (April 14, 2009) ("the FEC needs 4 votes to find a violation. If the FEC votes 3-3 not to find a violation, that means the FEC has determined that the conduct does not violate the law. For purposes of

judicial review, the controlling opinion is that of the Commissioners who voted not to find a violation, and it is that reasoning that is subject to review") *available at* http://www.campaignfreedom.org/2009/04/14/what-does-it-mean-when-the-federal-election-commission-deadlocks/.

The FEC seeks to import this theory to the current context, but the theory is entirely inapplicable. A 3-3 vote in the enforcement context is entirely different than a 3-3 vote in the advisory opinion context. For enforcement purposes, four votes are required to find a violation of the law. Thus, the absence of four votes to find a violation in an enforcement case *is* a substantive legal determination that no violation occurred. In the advisory opinion context, four votes are required to issue an opinion, but in the absence of four votes, no opinion issues and no substantive legal determination is made.

In the instant matter, the Office of General Counsel did not recommend any particular course of action – it merely circulated two opposing drafts that were prepared by the Commissioners themselves. At issue was an Advisory Opinion Request that sought responses to several questions of law. The ultimate resolution of the Advisory Opinion Request was to provide no answer to the Requestor on the questions that are now before this Court, leaving those who engage in materially indistinguishable conduct "liable for a possible enforcement action." *See Carey* v. *FEC*, Memorandum Opinion on Motion For Preliminary Injunction, No. 11-259 (D.D.C. June 14, 2011), slip op. at 6. No Commissioner voted to "dismiss" or not proceed with an enforcement matter; the divided vote has no legal significance. There are no "dissenters" among the Commissioners and neither group of three Commissioners was any more or less responsible for the final outcome. Draft B does not explain why "no action" was taken here any better than Draft A, and vice versa. In other words, Draft B cannot reasonably or legitimately be

regarded as representing the legal position of the FEC, unless the FEC's Commissioners have changed their views since June.

The FEC then attempts to claim that the views of three FEC Commissioners in a "no decision" Advisory Opinion are entitled to deference under *Chevron*. *See* FEC Resistance at 10. According to the FEC, "[t]he Commission declined to find that the advertisements are not electioneering communications, and because that determination was a reasonable interpretation of FECA, it must be upheld by under [sic] the Supreme Court's decision in Chevron. See Nat'l Republican Senatorial Comm., 966 F.2d at 1476-77 (deferring to interpretation of controlling group of Commissioners when the Commission is deadlocked)." First, the FEC's position misrepresents the legal significance of an advisory opinion response that does not garner the statutorily required four votes. Without four votes, no substantive decision is made and the advisory opinion response is simply a "no response" with no legal implications whatsoever. *See* 11 C.F.R. § 112.4(a). Thus, the Commission absolutely did not "decline[] to find that the advertisements are not electioneering communications." As the FEC's Commissioners explained in their written response, "The Commission could not approve a response by the required four affirmative votes about the remaining proposed advertisements." *See* Advisory Opinion 2012-19 (AFF) at 1. In rendering Advisory Opinion 2012-19, on the questions now presented to this court, the FEC made no "interpretation of the statute," reasonable or otherwise. *Chevron* is not implicated here. The FEC's counsel therefore cannot claim, under any applicable law, that a "no decision" on an advisory opinion request is a substantive decision on the merits that is entitled to *Chevron* deference.

The FEC's Resistance then proceeds, with an obvious eye to *Chevron*, to explain why the views held by the three Commissioners who supported Draft B are "reasonable." The obvious implication is that there is something deficient about the views of the three Commissioners who

supported Draft A. Plaintiff disagrees and objects to the FEC's arbitrary designation of Draft B as "controlling" over, and in any way preferable to, Draft A.[1] Both drafts, along with the views of all six Commissioners, are entitled to precisely the same respect and deference in this litigation.

While the FEC is certainly entitled to present whatever position it wishes in litigation, assuming it acts consistent with its authorizing statute, we simply wish to note that the FEC's cited precedent does not support its decision to deem the views of three Commissioners "controlling." Nor do the positions articulated in Draft B preserve the legal status quo, as the FEC claims – there is no status quo in this case. In any event, Draft B does not purport to preserve the status quo as it cites no judicial precedent or relevant legislative history, and fails to acknowledge the FEC's own prior representations made in court.

In conclusion, the FEC's claims of representing a "controlling group" of Commissioners does not survive scrutiny. The views of three Commissioners in an evenly divided advisory opinion are no more controlling than the views of the other three Commissioners, and the views of one group are most certainly not entitled to deference under *Chevron*. Accordingly, the designation of the views of three Commissioners as "controlling" over the views of three other Commissioners is arbitrary. If Plaintiff is subsequently in a position to seek attorneys fees in this matter, Plaintiff will almost certainly ask the court to consider the FEC's unsupported adoption of a novel "controlling group" theory as further evidence of its refusal to apply the law correctly.

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[1] Plaintiff also objects to the inclusion at page 24 of the FEC's Resistance of language from Justice Scalia's concurring opinion in *Doe* v. *Reed* that was previously used by one Commissioner to mock the requestor during the Commission's public consideration of Advisory Opinion Reqest 2012-19. *See* FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-20 (statement of Comm'r Weintraub) ("The notion that you could actually use somebody's own voice, their own voice, and claim that you're allowed to criticize them using their own voice, and you don't have to identify who you are, you want to hide behind some shield, some ambiguous name like American Future Fund, and not identify who you are when you're criticizing the White House, when you're criticizing the President using his own voice, that certainly is not demonstrating civic courage.").

II. FEC Incorrectly Characterizes This Matter As One That Concerns "Mere Disclosure"

The FEC incorrectly contends that Plaintiff "seeks only to avoid disclosing its donors." FEC Resistance at 2, and that "[t]he application of law HLF challenges does not prevent it from speaking but instead implicates only a requirement to disclose information to the public." As previously explained, what Plaintiff seeks is an *actual answer* to the questions presented to the FEC in Advisory Opinion 2012-19. Whether the end result is "only a requirement to disclose information to the public" or something else, the government is not relieved of its obligation to clearly state the rules, restrictions, and contours of law and regulations that burden speech. Plaintiff acknowledges that "disclosure" is especially fashionable in some quarters now, and that the Supreme Court has upheld disclosure as a general matter. That does not mean that disclosure has ceased to be any burden at all on First Amendments rights, or that the government may now loosely define when disclosure is required.

The FEC argues that "[t]he 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.'" The FEC speaks here of "harm" that the Supreme Court has said would qualify an organization from an outright exemption from otherwise applicable disclosure requirements. This is, of course, not the only "harm" that may arise from disclosure – it is simply the threshold for constitutionally-cognizable harm. Plaintiff does not seek a constitutionally-mandated exemption from the FEC's disclosure requirements, nor does Plaintiff contend that the harassment, nuisances, intrusions and inconveniences referenced in its Preliminary Injunction Brief rise to the level described by the Supreme Court as requiring some remedy. *See* Plaintiff's Preliminary Injunction Brief at footnote 9. The examples provided in Plaintiff's Preliminary Injunction Brief are all examples of "harm," albeit admittedly

not all constitute "harms" with which the Supreme Court is constitutionally concerned. Plaintiff's point was, and remains, that Plaintiff is entitled to know what the law is when its First Amendment rights, and the First Amendment rights of its supporters, are at issue so that Plaintiff may accurately weigh the potential costs ("harms") of speaking against its benefits.

Plaintiff has repeatedly stated that it does not challenge the constitutionality of the disclosure requirements that attach to electioneering communications. Plaintiff simply asks if the proposed advertisements are electioneering communications so that it may know the consequences of its speech before it speaks. As explained previously, electioneering communications must carry both spoken and written disclaimers *and* must be reported to the FEC on prescribed forms within a certain period of time. The FEC's position is that Plaintiff is free to distribute its advertisements at any time – but in order to do so without risking an enforcement action, Plaintiff must include the aforementioned disclaimers and file reports with the FEC. Yet, the same FEC is unable to tell Plaintiff if these disclaimers and reports are actually required.[2] The government may not compel speech without adequate reason. *See, e.g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."). Thus, the FEC's position is that while this litigation is pending, Plaintiff is free to speak and should voluntarily

[2] The practical, real world consequences are significant, at least to Plaintiff. For example, if the proposed advertisements *are not* electioneering communications, then approximately four seconds of each thirty-second advertisement may be filled with Plaintiff's own speech rather than by government-mandated disclaimers. On the other hand, if the proposed advertisements *are* electioneering communications, these various disclaimers must be inserted at the end of the advertisement, which may need to be shortened as a result. Thus, Plaintiff cannot actually complete the final production of any proposed advertisement unless some legal authority, be it the FEC or this Court, is able to decide if certain speech qualifies as an electioneering communication or not.

burden its First Amendment rights because doing so "implicates only a requirement to disclosure information to the public." While there may be debate about the precise meaning of the First Amendment in certain circumstances, there can be no debate that the First Amendment does not permit what the FEC insists is reasonable here.

III. Conclusion

For the reasons set forth herein and in Plaintiff's prior submissions, the Court should grant Plaintiff's motion for preliminary injunction.

Dated: August 7, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, copies of the foregoing Response Defendant's Resistance To Plaintiff's Motion For Preliminary Injunction were served by electronic mail on the following parties:

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And

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