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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH Plaintiff, v. FEDERAL ELECTION COMMISSION Defendant.	Civil Case No. 12-CV-127-S

MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

1. Introduction

Plaintiff Free Speech moves for a preliminary injunction for reasons set forth below and in its accompanying Memorandum in Support of Motion for Preliminary Injunctive Relief filed contemporaneously with this motion. Fed. R. Civ. P. 65(a). Plaintiff notes that it will be filing a motion to amend its Verified Complaint and is presently following Local Rules and working with the Defendant Federal Election Commission ("FEC") to achieve just this. A motion to amend along with a First Amended Verified Complaint is expected to be filed soon. In accord with Local Rule 7.1(a), counsel conferred on July 10, 2012 about this non-dispositive motion by telephone and the FEC opposes it.

In order to secure a preliminary injunction, the following elements must be established: (1) there is a substantial likelihood of success on the merits, (2) irreparable injury will result without an injunction, (3) the threatened injury to the moving party would outweigh any damage to the opposing party, and (4) issuing the injunction would not be adverse to the public interest. *Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1234 (10th Cir. 2011); *see also International Snowmobile Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1286 (D. Wyo. 2004). Plaintiff submits that because a preliminary injunction presents no monetary risk to the FEC, any bond should be waived or set at $1. Fed. R. Civ. P. 65(c).

In the Tenth Circuit, where movants establish that the latter three elements alone tip in their favor, injunctive relief may also be warranted. *See Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). Post-*Mineta*, the U.S. Supreme Court issued *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). There, the Supreme Court rejected the Ninth Circuit's relaxed approach to preliminary injunctions based on a "possibility" of irreparable harm. *Id.* at 22. The Court instructed that movants seeking preliminary injunctive relief must demonstrate that irreparable injury is likely in the absence of an injunction. *Id.* Even where a likelihood of success on the merits it established, the mere speculative possibility of irreparable injury will not suffice as a basis for injunctive relief. In the First Amendment context, *Winter* does nothing to alter the fact that once movants establish a likelihood of success, injury to First Amendment interests follows as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

2. Free Speech has Demonstrated a Substantial Likelihood of Success on the Merits

As described thoroughly in its Memorandum in Support of Motion for Preliminary Injunctive Relief, Free Speech will succeed on the merits of this challenge. The FEC maintains more than "568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions" that effectively operate to inhibit and chill speech nationwide. *Citizens United v. FEC*, 130 S.Ct. 876, 895 (2010). Guessing incorrectly about the scope, meaning, or applications of the challenged provisions leads to extensive investigations by the FEC and hefty civil penalties. Even in the wake of its many losses on constitutional grounds, the FEC has not afforded clarity, comprehensibility, or precision to the challenged regulations, policies, and practices, rendering them void both on their face and as applied to Free Speech. *See id.* at 893.

3. Irreparable Injury will Occur if First Amendment Freedoms are not Protected

Once a substantial likelihood of success on the merits has been established, the loss of First Amendment freedoms, even minimally, constitutes irreparable harm as a matter of law. *See Elrod*, 427 U.S. at 373–74; *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001). In order to stop the chill of the challenged provisions against Free Speech, and speakers nationwide not before this court, nationwide injunctive relief is appropriate to remedy the injury in question.

4. The Balance of Harms Tips in Free Speech's Favor

A threatened injury to plaintiff's constitutionally protected speech will usually outweigh the harm, if any, the defendants may incur from being unable to enforce what appears to be an unconstitutional statute. *See American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Here, Plaintiff's political speech—speech deemed an "essential mechanism of democracy"—is muted by the octopus-like grasp of the challenged provisions. *Citizens United*, 130 S. Ct. at 898. Any "reliance harm" suffered by Defendant with respect to its regulatory system can be cured by this Court acknowledging Advisory Opinion Draft C from the Free

Speech advisory opinion process as being the correct statement of law for interim guidance until the FEC has time to promulgate new regulations and policies consistent with the First Amendment. *See* Free Speech Verified Complaint, EXHIBIT D.

5. Issuing the Injunction Works in Favor of the Public Interest

Vindicating First Amendment liberties is "clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 823 F.Supp.2d 36, 52 (D.D.C. 2011) ("the public interest . . . will be served by ensuring that plaintiffs' First Amendment rights are not infringed before the constitutionality of the regulation has been definitively determined") (quoting *Stewart v. District of Columbia Armory Bd.*, 789 F.Supp. 402, 406 (D.D.C. 1992)). Because of this, protecting these rights favors the public interest and ensures that speech uttered "during a campaign for political office" invokes the "fullest and most urgent application" of the First Amendment. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

***6.* Conclusion**

For the reasons contained herein and in the accompanying Memorandum in Support of Motion for Preliminary Injunctive Relief, Free Speech prays that this Court grant this motion and preliminarily enjoin the FEC from enforcing the challenged provisions and policies facially and as applied until a final hearing on the merits may be had. Plaintiff requests a prompt oral argument in support of this motion because of the complex legal issues involved and complicated points of constitutional law and to effectuate the Federal Rules of Civil Procedure, favoring a "just, speedy, and inexpensive determination." Fed. R. Civ. P. 1.

Dated July 13, 2012

Respectfully submitted,

/s/ Stephen Klein

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MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

This case is a constitutional challenge to regulations, policies, and practices that, as promulgated, interpreted, and enforced by the Federal Election Commission ("FEC"), irreparably damage Plaintiff Free Speech's, and third parties', First Amendment rights of association and speech. Although the regulatory structure arising out of the Federal Election Campaign Act ("FECA") is complicated, the core of this challenge is not. Free Speech would like to speak publicly about political issues it cares about. Though it sought an advisory opinion from the FEC, the Commission could not agree what the FECA means and how it would be applied, leaving Free Speech subject to penalties and investigations if it speaks "incorrectly." The challenged regulatory structure amounts to a contradictory and shifting set of standards that no one understands. This situation leaves Free Speech at the mercy of *noblesse oblige*—being forced to (1) shape and shift its message to a (never defined) form deemed "safe" by the FEC, (2) mute itself, or (3) make a wild guess about how to comply with regulations and policies even the Commission itself does not understand.

The challenged system has enabled the FEC to act as a national censor of political speech. The Supreme Court recognized this very problem with the Commission's operations in the past. *See Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010). The challenged regulatory structure encourages the Commission to surmise what hypothetical members of the public might believe speech to mean and subjects speakers to far-reaching investigations, burdensome compliance requirements, and civil and criminal penalties based on government's determination of subjective intent. Today, we refer to this set of laws as "campaign finance." These provisions also permit other individuals to censor, or at least impede, ideological opponents' speech by invoking a veritable heckler's veto in the midst of an electoral season by launching burdensome investigations backed by the force of the FEC. Without the firm protection of the First Amendment, political speech would wither in a maelstrom of complaints filed during the

heat of the electoral season.[1] The only proven remedy against these evils is the maintenance of clarity and objectivity in laws abutting the First Amendment.

ARGUMENT

Free Speech would like to speak. *See* U.S. CONST. amend. I. It would like to speak without facing the hurdles of complicated trial proceedings and generating a 100,000 page record as the plaintiffs in *McConnell v. FEC* did. 251 F.Supp.2d 176, 209 (D.D.C. 2003) (*per curiam*). It would like to speak without wading through more than "568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions" issued by the Commission. *Citizens United v. FEC,* 130 S.Ct. 876, 895 (2010). It would like to speak without "retain[ing] a campaign finance attorney, conduct[ing] demographic marketing research, or seek[ing] declaratory rulings before discussing the most salient political issues of our day." *Id.* at 889. But all this has been made impossible by the FEC because it remains vigilant in its maintenance and enforcement of unconstitutional regulations, policies, and practices. To speak, Free Speech must illustrate why a preliminary injunction is appropriate here. The relevant facts supporting this motion are set forth in Plaintiff's Verified Complaint, this memorandum, and its forthcoming First Amended Verified Complaint.

In order to secure a preliminary injunction under FED. R. CIV. P. 65(a), the following elements must be established: (1) there is a substantial likelihood of success on the merits, (2) irreparable injury will result without an injunction, (3) the threatened injury to the moving party would outweigh any damage to the opposing party, and (4) issuing the injunction would not be adverse to the public interest. *Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1234 (10th Cir.

[1] Two days after Free Speech filed its Verified Complaint, Robert Bauer, General Counsel to Obama for America and Democratic National Committee, filed a complaint with the FEC against Crossroads GPS under the legal provisions described here. The complaint alleged that Crossroads GPS failed to register and report as a political committee. In its complaint, Mr. Bauer asks that the Commission take "immediate, expedited actions to remedy Crossroads GPS's failure...." Complaints like these act to stifle political expression across the U.S. *See* Letter from Robert F. Bauer, General Counsel to Obama for America and the Democratic National Committee, to Anthony Herman, General Counsel of the FEC, June 19, 2012, *available at* http://www.documentcloud.org/documents/370370-obama-lawyers-letter-to-crossroads.html.

2011). In the Tenth Circuit, where movants establish that the latter three elements alone tip in their favor, injunctive relief may also be warranted. *See Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002) (describing the Tenth Circuit's modified approach).[2]

In the wake of many losses suffered by the Commission on constitutional grounds, the foundational rules defining election law and the rigor of protection for First Amendment rights have cemented in favor of expression. *See, e.g.*, *FEC v. Wisconsin Right to Life* ("*WRTL*"), 551 U.S. 449, 469 (2007) (speech standards must eschew the "open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court") (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)); *Citizens United*, 130 S.Ct. at 896 ("If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11–factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech"). This brief begins with first principles to elucidate how the incorporation of these principles ensures that political speech—"an essential mechanism of democracy"—will be adequately protected. *Citizens United*, 130 S. Ct. at 898.

I. Extraordinary Speech Deserves Extraordinary Protection

Speech uttered "during a campaign for political office" invokes the "fullest and most urgent application" of the First Amendment. *Eu v. San Francisco County Democratic Central Cmte.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). The FEC's regulatory structure is nothing short of a labyrinth of contradictory and

[2] Post-*Mineta*, the U.S. Supreme Court issued *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). There, the Court rejected the Ninth Circuit's relaxed approach to preliminary injunctions based on a "possibility" of irreparable harm. *Id.* at 22. The Court instructed that movants seeking preliminary injunctive relief must demonstrate that irreparable injury is likely in the absence of an injunction. *Id.* Even where a likelihood of success on the merits it established, the mere speculative possibility of irreparable injury will not suffice as a basis for injunctive relief. In the First Amendment context, *Winter* does nothing to alter the fact that once movants establish a likelihood of success, injury to First Amendment interests follows as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

ever-changing regulations. The only question remaining is how the Supreme Court's past speech-protective principles ensure an appropriate remedy here. Just as the *substance* of having rights protected is important, so too is the *procedure* by which adequate remedies are afforded. *See Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., separate opinion) ("The history of American freedom is, in no small measure, the history of procedure").

One lesson originating out of the FEC's loss in *Wisconsin Right to Life* is that the First Amendment enjoys primacy over regulatory authority, especially where that authority is uncertain or the speech in question is difficult to interpret. 551 U.S. at 469 (rules must give the "benefit of any doubt to protecting rather than stifling speech"). After the FEC lost *WRTL*, it went on to lose *Citizens United* by inventing a two-prong, eleven factor speech code. The Court then elucidated: "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 130 S.Ct. at 889. Thus, a guiding principle emerges from *Citizens United* – complicated regulatory structures that inhibit First Amendment rights must fail if average speakers are to have their rights protected. Such protection helps prevent speech suppression where subjective laws "confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997).

Speed is of the essence when adjudicating political speech controversies. As stated by the *Citizens United* Court, it is "well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence." 130 S.Ct. at 895. Cumbersome litigation of First Amendment principles during the heat of an electoral cycle means that by the time the "lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on. . . ." *Id.* Meaningful remedies are also important. Rather than sanction protracted litigation, the Court has explained that once a "case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases." *Id.* at 893 (quoting Richard Fallon, *As-Applied and Facial Challenges and Third-Party*

Standing, 113 Harv. L.Rev. 1321, 1339 (2000)). Where a provision is unconstitutional on its face, it is the proper course to strike it without months of litigation. *Citizens United*, 130 S.Ct. at 896; *see also WRTL*, 551 U.S. at 482–83 (Alito J., concurring); *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940). Swift adjudication coupled with broad remedies effectuates meaningful relief. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) ("a decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively").

II. Enough Is Enough: Free Speech Will Succeed on the Merits

Political speech is at the zenith of protection under the Constitution. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Because of this, where challenged regulations implicate political speech, strict scrutiny is warranted. *WRTL*, 551 U.S. at 464. This requires proving that the challenged regulations, policies, and practices further a compelling governmental interest and are narrowly tailored to achieve it. *Id.* Where a regulatory structure acts as a content-based restriction on speech or is the functional equivalent of a prior restraint, strict scrutiny is also warranted. *See, e.g.*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75 (2002); *Citizens United*, 130 S. Ct. at 895. For the reasons presented below, because the challenged system is so far astray from constitutional limits, Free Speech has a substantial likelihood of succeeding on the merits.

A common, but flawed, argument asserts the present FEC regime places no serious burden against First Amendment interests because the system effectuates a system of "mere disclosure" that is not subject to strict scrutiny. Looking beyond this simplistic veneer, we find a gargantuan regulatory structure to secure "mere disclosure," using fuzzy factors to trigger regulation, and imposing difficult political committee registration and reporting obligations on grassroots groups. *McConnell v. FEC*, 540 U.S. 93, 332 (2003) (Kennedy, J., dissenting) ("These regulations . . . create major disincentives for speech, with the effect falling most heavily on smaller entities that often have the most difficulty bearing the costs of compliance") (overruled, in part, by *Citizens United*, 130 S.Ct. at 913). Individuals who act outside the scope of the law may be subject to investigations, imprisoned, or face hefty civil penalties. *See* 2 U.S.C. § 437g(d). This is not "mere disclosure."

Consistent with traditional constitutional principles, this court is empowered to "look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Bantam Books v. Sullivan*, 372 U.S. 58, 67 (1963). Super-sized and vague regulatory structures often inhibit or censor speech as effectively as a ban, prompting the need for relief. Even where a regulatory system invokes "classification [of speech] rather than direct suppression," strict judicial review and meaningful remedies are required. *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968). Despite the best marketing efforts of the FEC, its system of "mere disclosure" is a comprehensive system of speech censorship, intimidation, and vagary that warrants serious and prompt remedial relief.

a. Defining the Merits: The First Amendment Outweighs Regulatory Interests

The Commission enjoyed a rare moment of victory in the Fourth Circuit's recent decision in the *Real Truth About Abortion v. FEC* ("*RTAA*") suit. 681 F.3d 544 (4th Cir. 2012). While the Fourth Circuit issued this opinion as an aberration to settled First Amendment and election law principles nationwide, nothing in its holding controls the issues before this court. First, district courts must follow the precedent of the circuit they are located in. *United States v. Spedalieri*, 910 F.2d 707, 709 (10th Cir. 1990). Here, the Tenth Circuit's clear adherence to speech-protective principles is evident and stands in conflict with the Fourth Circuit. *See, e.g.*, *Colorado Right to Life Cmte. v. Coffman* ("*CRTL*"), 498 F.3d 1137 (10th Cir. 2007); *New Mexico Youth Organized v. Herrera* ("*NMYO*"), 611 F.3d 669 (10th Cir. 2010). Second, the facts and legal theories presented to this court are different than those presented in *RTAA*, and control this case. Finally, there is no reason to doubt the continued viability of *Citizens United* given the Court's summary reversal of *American Tradition Partnership v. Bullock*, No. 11-1179, 2012 WL 2368660 (U.S. June 25, 2012) ("no serious doubt" that the holding of *Citizens United* continues to apply with full rigor). Nor is there any reason to believe that the Supreme Court has vacated traditional protections against vagueness, overbreadth, or other unconstitutional infirmities that are implicated here. *See Federal Communications Comm'n v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2320 (2012). Because of this, expedited litigation and nationwide relief are requested as the only meaningful remedy to secure the rights threatened by the FEC.

i. The Building Blocks of Election Law Still Demand Rigorous First Amendment Protections

In *Buckley v. Valeo,* the Supreme Court set the foundational guidelines for the permissible reach of the FECA. There, the FECA placed limits and regulations on expenditures, communications "relative to a clearly identified candidate." *Buckley*, 424 U.S. 1, 7 (1976). The Court construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.[3] It also limited the application of the FECA to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79 (the "major purpose" test).

Buckley's limits imposed on the FECA were born out of constitutional concerns. As written, the FECA's definition of "expenditure" was invalid due to vagueness because it failed to "clearly mark the boundary between permissible and impermissible speech." *Id.* at 41. This definition of "expenditure" proved constitutionally infirm as the "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. Employing too broad a standard swept in protected issue advocacy discussion and imposed severe burdens on a class of speech that government possessed no legitimate interest in regulating. Thus, from *Buckley* moving forward, the protection of the broad class of speech known as issue advocacy has been of paramount constitutional importance.

The Supreme Court further clarified these points in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986). In *Buckley*, the Court reasoned that in order to cure constitutional maladies, the term expenditure reached "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. The *MCFL* Court explained this construction by noting that "*Buckley* adopted the 'express advocacy'

[3] Congress amended the FECA to define "independent expenditure" as "an expenditure by a person advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 431 (1976); Federal Election Campaign Act Amendments of 1976, Report to Accompany H.R. 12406 (Report No. 94-917), 94th Congress 2d Session at 82 (Minority Views).

requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." 479 U.S. at 249.[4]

In the wake of *Buckley*, several federal courts have found Section 100.22(b) and related regulations either beyond the reach of the FECA or constitutionally invalid. *See, e.g., Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *Maine Right to Life Cmte. v. FEC* ("*MRLC*"), 914 F. Supp. 8, 13 (D. Maine 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997) (Section 100.22(b) deemed "contrary to the statute as the United States Supreme Court and First Circuit have interpreted it and thus beyond the power of the FEC"); *cf. FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) (limiting the reach of "express advocacy" in accord with *Buckley* and *MCFL*). Notably, the D.C. Circuit and District Court have been consistent in holding that where the FEC promulgates or applies regulations contrary to the intent of Congress or which "raise[] serious First Amendment difficulties," no deference is afforded. *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 860–61 (D.D.C. 1996).

An animating principle that continues since *Buckley*'s ruling is the need for the judiciary to effectively police and maintain a bright line standard between regulated speech and relatively unregulated issue advocacy speech. While this may sacrifice flexibility and breadth in "capturing" potentially regulable speech, it does so to protect important First Amendment interests. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution"); *but see* Express Advocacy, 60 Fed. Reg. 35292, 35295 (Jul. 6, 1995) (claiming the FEC has the power to employ a case-by-case approach to determine express advocacy). This is, after all, the narrative of nearly all campaign

[4] One year after the Supreme Court issued *MCFL*, the Ninth Circuit issued its aberrant opinion in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). There, the Ninth Circuit adopted a mildly more expansive interpretation of express advocacy that still required a "clear plea for action" along with clarity about what was being advocated. *Id.* at 864. While slightly more expansive than *Buckley*, the Ninth Circuit has since confirmed that *Furgatch* "presumed express advocacy must contain explicit *words* of advocacy" that constituted a clear plea for action. *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003).

finance challenges since *Buckley*. It is impossible, as a matter of constitutional law, to impose blurry, shifting, and evolving speech standards, especially during the heat of the election season. While the FEC might "hammer out" the precise reach of its ambiguous regulatory system, much would be lost in allowing the vice of vagueness to chill speech throughout that process. This tension between government's desire to impose "rigorous regulation" and the protection of the First Amendment continues to this day. Free Speech simply seeks to end it.

ii. Lessons Learned by FEC Failures: Protect Free Speech

Buckley set the minimal constitutional safeguards that apply to laws, policies, and practices that suppress political speech, either by design or inadvertence. *Citizens United*, 130 S. Ct. at 898. Post-*Buckley*, the FEC, and other bureaucracies nationwide, have kept busy experimenting with expansive regulations that impose burdens on political speech. Through its many attempts to silence issue advocacy speech and grassroots speakers, the FEC has proven itself a rogue agency, isolated from the wisdom of the federal judiciary, and intent on censoring speakers with impulsive glee. *Id.* at 896 ("Because the FEC's business is to censor, there inheres the danger that [it] may well be less responsive than a court . . . to the constitutionally protected interests in free expression") (internal quotations and citations omitted). Because the FEC views each loss it incurs in isolation and fails to incorporate remedies into its future operations, the additional safeguards described earlier must be given effect.

While *Buckley* set the minimal protective standards for First Amendment political speech, recent rulings from the Supreme Court show that additional protections must apply for First Amendment freedoms to be realized. This is in large part because the FEC has persistently evaded judicially mandated standards and has otherwise sacrificed the protection of the First Amendment in order to increase its own regulatory power. *See, e.g., WRTL*, 551 U.S. at 471 (chastising the FEC for its argument that the "less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy"); *Citizens United*, 130 S. Ct. at 895 (continuing chastisement of the FEC for adopting a "two-part, 11-factor balancing test" that amounted to the functional equivalent of a prior restraint).

Because of the First Amendment's special status and the FEC's continued assault on it, the following principles must be realized: (1) any rule affecting political speech must give the benefit of the doubt to the speaker, not the censor; (2) complicated and blurry regulatory systems act as the functional equivalent of a prior restraint and come before this Court bearing a heavy presumption of invalidity; (3) First Amendment jurisprudence properly recognizes the import of *jus tertii*, third party, standing and facial invalidation to secure the speech rights of others not before the court; and (4) adjudication of constitutional issues surrounding political speech must be swift, lest remedies become meaningless through delayed litigation.

iii. Even at the Preliminary Injunction Stage, the Burden of Establishing the Constitutionality of the Challenged System Rests with the Government

In deciding whether to grant a preliminary injunction, a district court must decide whether the movants have established that they are likely to prevail on the merits. *Ashcroft v. American Civil Liberties Union*, 524 U.S. 656, 666 (2004). But when analyzing the constitutionality of regulations affecting speech, the "Government bears the burden of proof on the ultimate question" and movants must be "deemed likely to prevail unless the Government has shown that the [movants'] proposed less restrictive alternatives are less effective than [the regulations in controversy]." *Id.* Similarly, burdens at the preliminary injunction stage track the burdens at trial, where government must prove the constitutionality of the challenged provisions. *Gonzales v. O Centro Espirita Ben. Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Though traditional burdens usually apply against movants for injunctive relief, here the burden rests squarely on the shoulders of the FEC to prove why its challenged regulations, policies, and practices should survive review.

b. Section 100.22(b) Is Invalid on its Face and As Applied

The main thrust of this challenge is against 11 C.F.R. § 100.22(b). This section acts as a veritable Rorschach test for a Commission eager to regulate speech. Under the unrestrained reach of 100.22(b), almost any speech can be labeled "express advocacy," subjecting the speaker to a wide range of burdens. Permitting such open-ended standards to be applied indiscriminately only welcomes frequent government interference with political speech—speech frequently

critical of the government itself. "This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled or sterilized." *FEC v. Central Long Island Tax Reform Immediately Cmte.*, 616 F.2d 45, 54–55 (2d Cir. 1980) (Kaufman, J., concurring). Much as in *Citizens United*, the FEC has maintained a complicated and unwieldy regulatory structure that, on its face and as applied to Free Speech, completely muzzles a wide array of protected First Amendment activity as effectively as any speech ban.

Unlike some other areas of the law, determining express advocacy is a "pure question of law." *Christian Coalition*, 52 F. Supp. 2d at 62. "The only predicate factual determinations are identification of the speaker and the communication's contents. Once those have been made, a communication can be held to contain express advocacy only if no reasonable person could understand the speech in question—and in particular the verbs in question—to, in effect, contain an explicit directive to take electoral action in support of the election or defeat of a clearly identified candidate." *Id.* *See also* FED. R. CIV. P. 12(b)(6), 50(a), 56(c).

i. Section 100.22(b)'s Facial Invalidity

Section 100.22(b) claims to define "express advocacy" as any communication:

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

The Commission also issued an Explanation and Justification ("E&J") for Final Rules on Express Advocacy. 60 Fed. Reg. 35292 (July 6, 1995). The E&J claims to grant the Commission further authority to sniff out supposed express advocacy by explaining that

"communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no reasonable meaning other than to encourage actions to elect or defeat the candidate in question." *Id.* at 35295. The E&J purports to allow the Commission to conduct contextual considerations on a "case by case" basis." *Id.* Unfortunately, no one understands what this muddled mess means.

1. Section 100.22(b): Hopelessly Vague

In the first instance, 100.22(b) is facially vague because it fails to give "fair notice of conduct that is forbidden or required." *Fox Television Stations*, 132 S.Ct. at 2317. The vagueness doctrine, especially in the context of the First Amendment, addresses two important constitutional concerns. First, parties potentially regulated must "know what is required of them so they may act accordingly." *Id.* Second, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id; see also Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Absent clear standards, uniform interpretation, and consistency, such vagueness "operates to inhibit the exercise of (those) freedoms." *Id.* at 109 (citing *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961)). Under the FEC's bizarre regulatory regime, individuals guessing incorrectly about whether speech is express advocacy can be trapped in lengthy FEC investigations or face civil penalties. *See* 2 U.S.C. § 437g(d). It matters not whether the FEC suppresses speech through a direct ban or a prolix and complicated regulatory structure. *See, e.g., Citizens United*, 130 S. Ct. at 895; *Bantam Books*, 372 U.S. at 66 (obscenity licensing must include "sensitive tools" to protect First Amendment interests); *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (even where a ban is not present, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn").

On its face, Section 100.22(b) is remarkably vague because of the ill-defined factors it employs, complexity it has bred and the continued "evolution" in meaning it undergoes. To make a finding of express advocacy (and subject speakers to burdensome regulations, investigations, and penalties), it directs the Commission to examine a communication "as a

whole" and with "limited reference" to "external events." One such "external event" is described as the "proximity to the election," but other unnamed "external events" exist that could transform free speech into burdened speech. No one quite knows which external events are significant, or not, what constitutes "proximity to the election", or just how "limited" the "limited reference" should be. But rest assured, the FEC will get it right.[5]

The regulation goes on to direct the Commission to determine if the "electoral portion" of speech is "unmistakable, unambiguous, and suggestive of only one meaning." Sadly, would-be speakers are never told just what might amount to an "electoral portion" of speech. Perhaps a photograph of the Congress is substantially electoral; perhaps not. Perhaps mentioning the fall[6], a random autumn month, or an upcoming election illustrates a finding of an "electoral portion"; perhaps not. Perhaps uttering "November"[7] establishes an "electoral portion," but "September" does not. No one in the United States—not even the Commission itself—understands how this hodgepodge of fuzzy factors operates or applies to prospective speech. The safest bet for would-be speakers is to just keep their opinions to themselves.

Plaintiff asks this court to take judicial notice of the FEC's sordid history of speech regulation and enforcement in this area. Because Section 100.22(b) *on its face* gives the Commission fuzzy factors with which to regulate speech, all sorts of ensuing oddities in the regulatory process occur—oddities that stifle speech. Examining but two Matters Under Review

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[5] But it does so in secret, away from the prying eyes of the public, and from those who might be interested in understanding how to comply with these regulations. Even worse, from January 2007 to November 2009, it withheld crucial documentation from these proceedings that would have given fair notice to those who might be regulated. *See* MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn n. 174 (FEC 2011).

[6] Three Commissioners felt that referencing the term "fall" did not constitute an "electoral portion." *See* Ver. Compl. EXHIBIT B at 33–34. But another three Commissioners felt that invoking the term "fall" constituted an "electoral portion." *See* Ver. Compl. EXHIBIT C at 15 ("The advertisement's clarification of when viewers should 'support' Congresswoman Lummis—*this fall*—further underscores the manner in which viewers are encouraged to support Congresswoman Lummis, *i.e.*, by voting for her in the election 'this fall'").

[7] Three Commissioners felt the utterance of "November" constituted an "electoral portion." *See* Ver. Compl. EXHIBIT C at 7. Three Commissioners did not believe "November" constituted an "electoral portion." *See* Ver. Compl. EXHIBIT B at 25.

("MURs") helps illustrate how the facial fuzziness of 100.22(b) gives rise to myriad unconstitutional investigations and enforcement actions at the FEC. And as the Supreme Court has explained routinely, the simple deterrent effect of these practices encroaching on First Amendment freedoms is enough to strike them as constitutionally offensive. *Lamont v. Postmaster General*, 381 U.S. 301, 306–07 (1965).

In MUR 5988 (American Future Fund), the Commission's lawyers interpreted an advertisement discussing the role of Senator Norm Coleman in rebuilding infrastructure, helping the military, and making college more affordable. MUR 5988 (American Future Fund), First General Counsel's Report ("FGCR") at 8 (FEC 2008). The Commission's lawyers would have classified the speech as express advocacy because it was "candidate centered," "lack[ed] a specific legislative focus," and "requested[ed] electoral support by characterizing Coleman as an Independent Voice for Minnesota." In the eyes of the Commission, it knew what the American Future Fund really meant. Or did it?

In a similarly situated enforcement matter, MURs 5474 & 5539 (Dog Eat Dog Films, Inc.), another communication seemed to meet these standards, but was not deemed express advocacy. The film, *Farenheit 9/11*, focused on a range of issues, including the Patriot Act and the Iraq War, referred to the incumbent President by name, and made statements about his re-election. The film in question referenced two future elections in its harsh criticism of then-President Bush. MUR 5474 & 5539 (Dog Eat Dog Films), FGCR at 18 (FEC 2005). It even included a mother reading her "son's last letter to his family in which, shortly after referring to President Bush by name, he writes: 'I really hope they don't re-elect that fool, honestly.'" There, the FEC believed that statement could be read as supportive of the film's "anti-war theme" and was not express advocacy. *Id.*

The juxtaposition of American Future Fund and Dog Eat Dog Films is but a small sample of what is found when the curtain is pulled back to reveal the FEC's operations. The Commission has, in its usual freewheeling fashion, found express advocacy under Section 100.22(b) when an advertisement or communication "lacked legislative focus", did not sufficiently urge a candidate to take a specific action—or, inexplicably, urged that the wrong

specific action be taken (like "ask[ing] [the candidate] about his plans to bring our children back")—or addressed the character, qualifications or fitness of a candidate for office or after engaging in the never-ending quest to determine how an audience would "reasonably interpret" the speech in question. *See, e.g.*, MUR 5024R (Council for Responsible Government) (FEC 2004); MUR 5440 (Media Fund) (FEC 2004); MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth) (FEC 2006); MUR 5631 (Sierra Club) (FEC 2006); MURs 5910 & 5964 (Americans for Job Security) (FEC 2009); MUR 5988 (American Future Fund) (FEC 2009); MUR 5842 (Economic Freedom Fund) (FEC 2009). Though, as *Fahrenheit 9/11* showed, some speakers get a pass even when they include direct express advocacy, because the FEC invokes its multitude of fuzzy factors. It is within this multiverse of confusion and caprice that would-be speakers, like Free Speech, find themselves unable to comply with the law. Unlike wealthier and more powerful organizations, grassroots speakers simply cannot comply with this regulatory absurdity. Because of these jumbled and confusing standards, Free Speech requires facial relief. In a Republic proud of its commitment to the idea that "debate on public issues should be uninhibited, robust, and wide-open," citizens should not have to wade through 100.22(b)'s standardless standards and play FEC roulette just to speak. *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

In a prior enforcement proceeding brought by the FEC against the Christian Coalition, the DC District Court applied the limiting construction of *Buckley* to make sense of the FEC's express advocacy standard. 52 F. Supp. 2d 45. There, a strong message by Ralph Reed indicating that "[Victory] will be ours here in Montana" and "We're going to see Pat Williams sent bags packing back to Montana in November of this year" were considered "prophecy rather than advocacy." *Id.* at 63. Another communication consisted of a letter which referred to the "1994 elections for Congress" and "Christian voters . . . are going to make our voices heard in the elections this November . . . we must stand together, we must get organized, and we must stand now." This second communication included a "Congressional Scorecard" indicating the relative support or opposition to candidates. While the court understood that it would be "likely that the reader is to make his voice be heard by voting," the proper judicial focus on the entire

communication indicated that it could be reasonably read to indicate the "importance of raising the profile of issues important to 'Christian voters.'" *Id*. at 63–64. Thus, incorporating First Amendment principles, a finding of express advocacy could not be upheld.

Just this term, the U.S. Supreme Court struck down a similarly flawed regulatory regime in *Fox Television Stations*. 132 S.Ct. at 2320. It is a fundamental maxim that living under a "rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). In *Fox Television Stations*, the FCC's three factor "indecency" standard and inconsistent regulatory guidelines proved fatal because the regulations touched upon "sensitive areas of basic First Amendment freedoms." 132 S.Ct. at 2318 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

Here, the FEC maintains an infinitely more complicated, contradictory, and vague regulatory structure, subject to numerous lawsuits and invalidations over decades, that entraps political speech with its octopus-like grasp. And the communications in question are less direct than the messaging in *Christian Coalition*, which could not be reasonably construed as express advocacy. In *Citizens United*, the Supreme Court recognized that the FEC often attempts to "carve out . . . limited exemption[s] through an amorphous regulatory interpretation" rather than protect First Amendment interests. 130 S. Ct. at 889. But if potentially indecent speech received a significant degree of protection against vague regulations in *Fox*, political speech—which invokes the "fullest and most urgent application" of the First Amendment—must be protected even more robustly from the ever-shifting reach of Section 100.22(b). *Eu v. San Francisco County Democratic Central Cmte.*, 489 U.S. 214, 233 (1989). Plaintiff is entitled to restoration of its First Amendment rights now, rather than waiting for the Enforcement Division of the FEC to pay it a visit like it did in *Christian Coalition.*[8]

[8] It is important to note that this is a Commission which is consistently chided for its secretive deliberations and processes that inhibit speech. It was only just recently that the FEC, under threat of congressional subpoena, released key documents giving some public details about how its murky enforcement and audit procedures actually work. *See* http://www.politico.com/news/

2. Section 100.22(b): No Meaningful Boundaries

In the second instance, Section 100.22(b) suffers from facial overbreadth. As described earlier, the purpose of the limiting definition of express advocacy in *Buckley* was to give sensible protection to issue advocacy—largely unregulated speech deserving robust protection of the First Amendment. Invalidation of Section 100.22(b) is required in the First Amendment context if a "'substantial number' of its applications are unconstitutional, 'judged in relation to the [regulation's] plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 n.6 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982) and *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Because the ill-defined factors embodied in 100.22(b) empower the FEC to regulate broad areas of speech beyond its constitutional limit, this provision is facially unconstitutional due to overbreadth.

In no manner does Section 100.22(b) confine itself to operate only in accord with the limits set by the Supreme Court in *Buckley*, *WRTL*, and *Citizens United*. On its face, Section 100.22(b) may regulate issue advocacy if an "external event" proves significant to the Commission. Issue advocacy might also be regulated if the speech is close to an election or if the communication discusses issues deemed too "electoral" during an electoral season. Of course, the Supreme Court has already determined that timing of communications, or their proximity to an election, is irrelevant for purposes of express advocacy analysis. *Citizens United*, 130 S. Ct. at 895. Similarly, as a matter of law, deciding whether speech is too "electoral" is the same as deciding its subjective effect, an analysis already precluded by *Buckley* and *WRTL*. *WRTL*, 551 U.S. 467–68.

An example of classic FEC overreach occurred during the advisory opinion process involved in this case. Free Speech wished to publicly disseminate an advertisement critical of President Obama and his stance on policies important to the Wyoming ranching community. *See* Ver. Compl. at 6. During the resolution of the advisory opinion process, the Department of Labor issued its notice to develop controversial rules that would have prohibited children from

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stories/0512/76684.html; 1998 FEC Enforcement Manual, http://www.fec.gov/pdf/1997_ Enforcement _Manual.pdf.

performing common ranch and farm chores. *Id.* at 18–19. That proposed rule has since been withdrawn and Free Speech was unable to communicate its issue advocacy discussion because, on its face, Section 100.22(b) could apply to trigger the host of regulatory burdens overseen by the FEC. Indeed, half of the commissioners believed that the proposed communication in question morphed into express advocacy because they did not care for its criticism of the president, along with its concluding call to speech, "Talk about ranching." *See* Free Speech Verified Complaint ("Ver. Compl.") EXHIBIT C at 6–8. This is precisely the evil *Buckley* sought to cure. 424 U.S. at 42 (limiting the scope of "expenditure" because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application"). Under the speech protective rules issued by *Buckley*, *WRTL*, and *Citizens United*, this cannot stand.[9]

3. The Tenth Circuit Imposes Strict Protection for the First Amendment

In accord with *Buckley*, *WRTL*, and *Citizens United*, the Tenth Circuit has maintained strict protection for First Amendment speech under both the vagueness and overbreadth doctrines. In *CRTL*, the Tenth Circuit invalidated speech bans aimed at corporations and political committee registration requirements based on First Amendment and vagueness concerns. 498 F.3d 1137. There, the Tenth Circuit reiterated the Court's concern that:

> The general requirement that "political committees" and candidates disclose their expenditures *could raise similar vagueness problems*, for "political committee" is defined only in terms of amount of annual "contributions" and

[9] Other examples detailing the reach of Section 100.22(b) abound. *See, e.g.*, MUR 6073 (Patriot Majority 527s), First General Counsel Report at 9 (FEC 2009) (the meaning of "expenditure" and express advocacy is found through a "distillation" in the "enforcement process"); MUR 5874 (Gun Owners of America, Inc.) Statement of Reasons of Commissioner David Mason at 4 (FEC 2007) ("Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice [in *WRTL*] because it endorses an inherently vague 'rough-and-tumble of factors' approach in demarcating the line between regulated and unregulated speech"); MUR 5988 (American Future Fund) (FEC 2009) (where the Commission's lawyers found an advertisement that lacked any reference to an election or encouragement to vote to be express advocacy because it lacked a "specific legislative focus" and was "candidate centered");

> "expenditures," and could be interpreted to reach groups engaged purely in issue discussion.

Id. at 1152 (quoting *Buckley*, 424 U.S. at 79). Likewise, in *NMYO*, the Tenth Circuit explained that "speech that expressly advocates or is the functional equivalent of express advocacy for the election or defeat of a specific candidate is unambiguously related to the campaign of a candidate and thus properly subject to regulation." 611 F.3d at 676. Post-*Citizens United*, the Supreme Court has abandoned the "unambiguously campaign related" standard and insisted that the strict protections of the vagueness and overbreadth doctrines apply as recognized in *Buckley* and *WRTL*.[10] *Citizens United*, 130 S. Ct. at 896 ("a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated").

Speech routinely deemed worthy of the "fullest and most urgent application" of the First Amendment, *Eu*, 489 U.S. at 223, requires meaningful relief where movants have made a showing of facial invalidity. Political speech, like the Plaintiff's, "is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United*, 130 S. Ct. at 898. When this rare form of high-value speech collides with Byzantine regulatory systems, vague and shifting regulatory triggers, and overbroad provisions (which lead to investigations, criminal sanctions, or civil penalties for non-compliance), the appropriate remedy is to give the censor the "strong medicine" it deserves—facial invalidation. Plaintiff recognizes the atypical nature of this relief, but where prime constitutional interests are at risk and the underlying regulatory structure is so far adrift, strong infirmities demand strong medicine.

ii. Section 100.22(b)'s As-Applied Invalidity

[10] To cure the overbreadth of "electioneering communications," the "functional equivalent of express advocacy" standard was employed as a narrowing construction in *McConnell* and *WRTL*. 551 U.S. at 452. Because the electioneering communications provisions were not vague (they included bright line timing elements, for example), they still applied too broadly, necessitating that a communication would have to meet all elements of the "functional equivalent" test to be considered an electioneering communication. This did nothing to alter the requirements of express advocacy, which *Buckley* and its progeny employed to cure the different constitutional infirmities of regulable "expenditures." *See WRTL*, 551 U.S. at 474 n.7.

Because the *Buckley* Court understood that the "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," it insisted on the bright line express advocacy formulation. 424 U.S. at 42. The Court's reasoning was simple: candidates running for public office are "intimately tied to public issues," and separating the two proves nearly impossible. *Id.* Attempting to regulate express advocacy without this protection in place proves harmful to speakers' rights. *See* Ver. Compl. EXHIBIT G (AOR 2012-11 (Free Speech)). Illustrating exactly how the Commission disregarded these speech-protective standards here and against other speakers, will demonstrate the need for this protection to be maintained by this court.

1. Section 100.22(b) As Applied Is a Tool of Political Intimidation and Harassment

One of the evils arising out of the FEC's complex regulatory speech code is that vague and broad standards give anyone easy methods to suppress speech they do not like. This is because the FECA grants a private right of action to enforce it by allowing third parties to file suits to "remedy the violation involved in the original complaint." 2 U.S.C. § 437g(a)(8). If Free Speech were to violate any of the challenged provisions, an ideological opponent could challenge the Commission's dismissal of a complaint. It is easy to establish that the agency action was "contrary to law" because the FEC's refusal to enforce would be based not on a dispute over the meaning or applicability of the regulation's terms, but on the Commission's unwillingness to enforce its own rule. *See Democratic Congressional Campaign Cmte. v. FEC*, 831 F.2d 1131, 1132–34 (D.C. Cir. 1987).

Unfortunately, political operatives habitually use the FEC's system to work these very evils. This manipulation is the natural conclusion of a regulatory system the FEC makes up as it goes along. This system has led to investigations about whether World Wrestling Entertainment is corrupting the political process, if NASCAR stickers might have unduly swayed the 2004 presidential elections, and a host of routinely filed complaints during electoral seasons. "Complaint Against World Wrestling Entertainment," http://courantblogs.com/rick-green/read-journal-inquirer-fec-complaint-against-wwe/; Complaint filed against Shelmerdine Racing, LLC,

http://eqs.sdrdc.com/eqsdocsMUR/0000586A.pdf; "CREW Files IRS and FEC Complaints Against Americans for Job Security," http://www.citizensforethics.org/legal-filings/entry/irs-federal-election-commission-complaints-vs-americans-for-job-security. All this acts to logjam the marketplace of ideas and empowers the FEC as oracle of purified political speech.

This process represents the vice of the heckler's veto, where opponents and those who do not understand the speech in controversy may suppress it. *See, e.g., Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (rejecting a "reasonable person" standard for analysis of endorsement of religion claims and explaining how it invariably leads to the "Ignoramus's Veto"); *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring) (refusing "an obtuse observer's veto, parallel to a heckler's veto over unwelcome political speech"). Maintaining fuzzy speech factors that have an octopus-like reach ensures an effective, and unconstitutional, chill against many speakers.

In a recently filed complaint against Crossroads GPS, Obama for America and the Democratic National Committee alleged that the group's advertisements had an "electoral purpose" based on: what newspapers editorials said about the communications, which of the 50 states the group targeted, and what the phrase "new majority" really meant. *See* Letter from Robert F. Bauer, General Counsel to Obama for America and the Democratic National Committee, to Anthony Herman, General Counsel of the FEC, June 19, 2012, *available at* http://www.documentcloud.org/documents/370370-obama-lawyers-letter-to-crossroads.html. Of course, these are precisely the type of factors the Supreme Court held invalid in *WRTL*. 551 U.S. at 472 (to the extent the timing of advertisements spoke to WRTL's "subjective intent," such evidence was irrelevant), at 471 (expert third party analysis about what communications really meant flatly rejected), at 469 (subjective, open-ended standards "unquestionably chill a substantial amount of political speech"). Still, the FEC resurrects these standards when considering the reach of Section 100.22(b) even when the Supreme Court has rebuffed these fuzzy speech factors time and time again.

One of the challenged Crossroads GPS advertisements read as follows:

> Why isn't the economy stronger? In the seconds it takes to watch this, our national debt will increase 1.4 million. In 2008, Barack Obama said, 'we can't mortgage our children's future on a mountain of debt.' Now he's adding 4 billion in debt every day, borrowing from China for his spending. Every second, growing our debt faster than our economy. Tell Obama: stop the spending. Support the New Majority Agenda at newmajorityagenda.org.

See Letter from Robert F. Bauer, *supra*; see also Crossroads GPS: "Stopwatch," *available at* http://www.youtube.com/watch?v=DnwQAUM8D9E. To support the argument that this is regulable speech and trigger a likely investigation into Crossroads GPS's affairs, Obama for America and the Democratic National Committee rely on statements from a third party "observer," a Huffington Post analysis of Crossroads GPS spending, and statements from Crossroads GPS's communications director. *Id.* No matter what comments the national peanut gallery may provide about Crossroad GPS's (or anyone else's) speech, the First Amendment remains resolute in its protection. Under this approach, the isolated comments of Internet observers and ideologues[11], and the invocation of the ever-blurry I-know-it-when-I-see-it "electoral purpose" standard is enough to get speakers in trouble. The unfortunate result is that as Section 100.22(b) is applied over the years it grows, morphs, and becomes even less distinct, affording political opponents easy legal ammunition with which to attack their adversaries. *See* MUR 6073 (Patriot Majority 527s), First General Counsel's Report at 9 (meaning of "expenditure" is found through a "distillation" in the enforcement process). This cannot be "mere disclosure."

The very inclusion of subjective and open-ended standards in the FEC's regulatory system permits campaign finance laws to be used offensively—the heckler's veto argument—against ideological opponents. But the First Amendment acts as an absolute bar to this type of prospective intimidation and affords this court the means to invalidate the challenged sections

[11] It is apparent the FEC relies on third party comments about speech as part of its express advocacy determination. *See* MURs 5474 & 5539 (Dog Eat Dog Films) at 5 n.5 (where the FEC examines statements made at the Cannes Film Festival by Michael Moore and a *Daily Variety* interview where "Moore expressed his hope that the film would encourage the Democratic Party's voters to go to the polls on election day").

due to their unconstitutionality. There is no need for Free Speech to wait to be sufficiently irksome or noticeable for its First Amendment rights to be protected after a complaint is filed.

2. A Model of Murkiness: Illustrating Section 100.22(b)'s Invalidity Through the Advisory Opinion Process

Looking past superficial form to substantive function empowers this court to identify the truth of what is before it—the nation's largest system of prior restraint. Free Speech submitted its own advisory opinion request with the FEC to determine how the FECA applied to its prospective conduct and where regulatory triggers existed so it might structure its affairs accordingly. After all, no matter where contending parties might believe the constitutional line rests between regulable and non-regulable speech, all should agree that line must exist *somewhere*—preferably somewhere identifiable.

After more than two months of waiting, three inconsistent draft advisory opinions, two FEC hearings, two contradictory Statements of Reasons, and one "partial response" advisory opinion, the FEC could not issue a conclusive opinion about the basic legal questions presented. If the Commission cannot determine what will be considered express advocacy under its regulations and policies, then it can hardly expect individuals to do so. Through the advisory opinion process, Free Speech signaled a good faith effort to comply with the FEC's regulatory system. Free Speech simply wanted to know with some degree of certainty what the FEC's regulations meant and how to comply. The First Amendment demands nothing less. For this reason alone, this court should invalidate the challenged provisions as applied to Free Speech.

The demonstrated as-applied invalidity of Section 100.22(b) requires little conjecture or hypothetical speculation by this court. In fumbling over itself and the regulations it oversees, the Commission has provided an ample record to enable this Court to assess the as-applied invalidity of Section 100.22(b). Three Commissioners analyzed the various proposed advertisements of Free Speech and came to remarkably different conclusions about the application of Section 100.22(b) than their counterpart Commissioners. A short narrative is helpful in understanding how Section 100.22(b) invariably is applied in inconsistent and constitutionally insensitive manners.

In one draft AO, three Commissioners analyzed the "Environmental Policy" advertisement and found it to be express advocacy based on a loose mélange of factors. First, although the advertisement discusses the value of the Government Litigation Savings Act, these Commissioners believed it did not sufficiently explain the "merits of that legislation," transforming it from unregulated issue advocacy into express advocacy. Ver. Compl. EXHIBIT C at 6–8. These Commissioners believed that it contained an "electoral portion" that "expressly exhorts listeners to take action '[t]his November.'" *Id.* This mysterious "electoral portion" is never identified, and the "express exhort[ation]" described by three Commissioners is to "[t]alk about ranching." *Id.* Because Plaintiff did not discuss the legislation in a manner deemed appropriate by the FEC, mentioned the wrong month, and asked people to "talk about ranching," this somehow triggered a finding of express advocacy for half of the Commissioners.

Another three Commissioners examined the "Environmental Policy" advertisement and determined that it did not constitute express advocacy. Under this analysis, these Commissioners found the communication beyond the reach of Section 100.22(b) because it "does not urge the listener to vote nor is there any other language that causes 'This November' to be an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning." Ver. Compl. EXHIBIT B at 25. In doing so, these Commissioners understood that the advertisement had several reasonable constructions, prime among these being a call to local neighbors about the importance of ranching. Because First Amendment law required non-regulation if any reasonable construction of the advertisement could be had, a finding of issue advocacy was warranted here.

Another advertisement analyzed by the Commission was the "Gun Control" script. Ver. Compl. EXHIBIT A at 2. There, the advertisement discusses the importance of gun rights, asks the audience to doubt the qualifications of President Obama due to his support of gun control, and to get engaged, enraged, and educated this fall, and "support Wyoming candidates who will protect your gun rights." Three Commissioners believed that discussion of President Obama's qualifications, coupled with a reference to the "fall," and its discussion to "get enraged, get engaged, get educated" could only be interpreted "by a reasonable person as advocating that

viewers express their "serious[] doubt" for President Obama's qualifications by casting a vote to defeat him "this fall." Ver. Compl. EXHIBIT C at 12. Another three Commissioners found that the advertisement criticized President Obama for his stance on gun control and asked viewers to support state candidates just as the advertisement states. Ver. Compl. EXHIBIT D at 29–30. Under this approach, these commissioners gave weight to the stated text of the communication and balanced any competing interpretations in favor of the First Amendment.

The first set of Commissioners in the "Gun Control" example embraced a common tactic of the FEC, chastised by the Supreme Court—linking inference upon inference to declare any and all speech regulable. These Commissioners believed that including the word "fall," speaking negatively about the President, and asking an audience to support local candidates who favor gun rights amounted to express advocacy against President Obama. But this analysis demands that the Commissioners ignore the stated textual meaning of the communication in question ("support Wyoming state candidates who will protect your gun rights") in favor of their own hunches, inferences, and crystal ball reading about what the speech *really* meant. Such is the stuff of ordinary FEC investigations and such is the reason Section 100.22(b) cannot survive review.

That the FEC regularly fails to "give the benefit of any doubt to protecting rather than stifling speech" is hardly a new insight. *WRTL*, 551 U.S. at 469. In *WRTL*, the FEC relied on expert testimony to supplant the textual meaning of an advertisement with the Commission's (inferred) *true meaning*. There, the FEC's expert argued that the more subtle and more issue advocacy-like a communication appeared, the more likely that it constituted the functional equivalent of express advocacy. *Id* at 471. The Supreme Court flatly rejected these arguments, explaining that the "subjective intent" of the speaker was irrelevant and that investigations into the hidden meaning of speech were not justifiable.

The FEC continues the soothsaying trend exposed and dismissed in *WRTL*, 551 U.S. at 469, with one bloc of Commissioners actually supplanting the meaning of Free Speech's advertisements and forever embracing its role as authoritative experts in the true meaning of speech. Plaintiff did not intend its advisory opinion request to be the functional equivalent of a telephone call to the Psychic Friends Network. In one draft, three Commissioners read the end

of the "Environmental Policy" script ("Talk about ranching") as an "obvious non sequitur, and no reasonable person could conclude that the advertisement actually encourages listeners to '[t]alk about ranching in 'November' rather than advocating against President Obama." Ver. Compl. EXHIBIT C at 7. Likewise, when interpreting the "Gun Control" script, these same Commissioners read a statement encouraging people to support local candidates supportive of gun rights as a call to vote against President Obama. *Id.* at 12–13. While the FEC might regularly engage in Orwellian doublespeak ("Support Wyoming State Candidates" equals "Vote Against Obama"), average Americans speak, just like the First Amendment says they can, without guessing how six speech bureaucrats might doubleread their speech.

These examples illustrate a troubling tendency of the FEC: to ignore an actual, reasonable meaning of speech and supplant it with its own "contextual" meaning in favor of regulation. One set of Commissioners could not believe that the statement, "Talk about ranching," could mean talk about ranching. The same set could not believe that a request to support local candidates who favor gun rights meant just that. Instead, these Commissioners viewed such speech as "disclaimers," and cited *MCFL* for this proposition. But the *MCFL* group produced real express advocacy and included an actual disclaimer, "This special edition does not represent an endorsement of any particular candidate." *MCFL*, 479 U.S. at 243. This is dangerous First Amendment territory.

This Court faces a federal agency charged with interpretation and enforcement of federal election law and which regularly shifts, modifies, and remolds speech based on whim. Analyzing speech in "context," fishing for an "electoral portion," and "distilling" the meaning of the law through a scorched-earth enforcement process allows the Commission to do exactly this. The result here is to trap innocent speakers and grassroots groups. But the Commission lacks any constitutional authority to ignore the reasonable meaning of Plaintiff's speech, supplant its own, and constrict Free Speech in its regulatory maze. If one thing is clear after the FEC's string of losses in *Buckley, WRTL,* and *Citizens United*, any speech test tied to public perception or the government's perception about the intent, import, or effect of speech is incurably vague. That the FEC cannot, or will not, accept this lesson is manifestly before this Court.

While the FEC continues to tilt at windmills to eradicate the supposed corruption stemming from a free people speaking freely, real people are injured. Whether viewed in its facial or as-applied sense, Section 100.22(b) lacks any constitutional validity and must be stricken by this court and nationwide relief afforded so that First Amendment rights will be vindicated this electoral season.

c. The Commission's Policies and Practices Concerning Political Committee Status, the Major Purpose Test, and Definition of Solicitation Are Invalid on Their Face and As Applied

Besides the mountain of obscurity that is known as express advocacy at the FEC, other areas of regulatory morass must also be invalidated. In light of the recognized burdens of political committee registration and reporting requirements at both the United States Supreme Court and the Tenth Circuit, the FEC's policies and practices are particularly troubling when one considers its case-by-case approach to determining political committee status, the confusion over the major purpose test, and the FEC's unknown solicitation standard.

i. The Tenth Circuit Has Consistently Demanded Strict Protection Against Intrusive Political Committee Registration and Reporting Requirements

The FEC often attempts an end-run around its vague, overbroad and ever-expanding definition of express advocacy by claiming that the result—issue groups registering and reporting as political committees—is not a "direct restraint" on speech, and that Section 100.22(b) survives under an exacting scrutiny standard. *See, e.g.*, Brief of Appellees Federal Election Comm'n and United States Dep't of Justice, *Real Truth About Obama v. FEC*, 2011 WL 5006886 at 22 (Oct. 20, 2011). According to this argument, even if § 100.22(b) and its related provisions are vague and overbroad, it results in little burden. However, the Supreme Court and Tenth Circuit have consistently recognized the severe burdens of registration and reporting, and this Court should apply strict scrutiny to regulations that impose political committee status just to speak about important political issues.

In *CRTL*, 498 F.3d at 1139–41, a nonprofit ideological corporation challenged an amendment to the Colorado Constitution that, among a number of requirements, commanded it

to register and report as a political committee and file reports for electioneering communications. CRTL's mission focused on issue advocacy relating to life issues and the organization had a history of identifying and discussing the positions of candidates on these issues. *Id.* at 1141–43. When considering CRTL's challenge to the definition of "political committee," the court insisted on the inclusion of the "major purpose" test from *MCFL* to protect against burdensome registration and onerous reporting requirements. Because the major purpose test was absent from the Colorado definition, it was unconstitutional as applied to CRTL. *Id.* at 1151–54; *see MCFL*, 479 U.S. at 263–64. The court rejected the Colorado Secretary of State's contention that the major purpose test was not constitutionally compelled and also highlighted the importance of the distinction between issue advocacy and express advocacy in light of the Supreme Court's *WRTL* opinion. *CRTL*, 498 F.3d at 1153–54. The *CRTL* decision makes clear that the major purpose test and the distinction between issue advocacy and express advocacy go hand-in-hand: organizations whose major purpose is issue advocacy are not political committees, and thus the "'interest in disclosure . . . can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee . . . .'" *Id.* at 1154 (quoting *MCFL*, 479 U.S. at 262). It is settled as a matter of law, then, that political committee registration and reporting requirements for issue advocacy are an undue restraint on speech.

The Tenth Circuit recently reaffirmed the *CRTL* ruling. In *NMYO*, 611 F.3d at 671–75, a nonprofit sued the Secretary of State of New Mexico for attempting to impose political committee registration and reporting requirements under state law after the organization sent out different mailers identifying legislators' positions on issues and sources of their campaign funding, urging recipients to make their opinions heard. On appeal, the court required that New Mexico incorporate the major purpose test into its law and ruled that a spending threshold for determining committee status is unconstitutional. As illustrated below, the FEC now ignores the major purpose test and the principles behind it. The Tenth Circuit has recognized the necessity of the major purpose test and acknowledges that the government interests that justify placing registration and reporting requirements on political committees do not justify such regulation of issue advocacy. This Court should do the same for Free Speech and all issue advocacy groups.

ii. As a Matter of Law, Imposing Political Committee Requirements on Issue Advocacy Groups Is a Severe Burden Unsupported by any Legitimate Governmental Interest

As a matter of law, this Court should recognize that political committee status is a severe burden on issue advocacy organizations. *Buckley* and its progeny made clear that strict scrutiny must apply to limits on independent expenditures, since such limits posed a direct ceiling on political speech. 424 U.S. at 39–52. Although ruling that disclosure is subject to exacting scrutiny, the *Buckley* Court discussed disclosure only in the context of contributions and expenditures, not issue advocacy. *Id.* at 66–68. The Court acknowledged its decision in *NAACP v. Alabama*, which recognized the importance of associational privacy for an issue-oriented group, and distinguished disclosure of contributions and expenditures under the FECA as serving "the 'free functioning of our national institutions.'"[12] *Id.* at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)); *see NAACP v. Alabama*, 357 U.S. 449, 460–66 (1958). When construing the term "expenditure," the Court construed it 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. It did so because otherwise the definition would be so vague that it would capture issue advocacy, meaning that the political committee registration and reporting regime would be far too burdensome. *Id.* at 39–40. The Court also planted the seeds of the major purpose test for political committees for the same reason, lest registration and reporting requirements "reach groups engaged purely in issue discussion." *Id.* at 79. When discussing disclosure provisions that related to individuals,

[12] None of the specific governmental interests that followed implicated issue advocacy:

> "First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent *by the candidate*' in order to aid voters in evaluating those who seek federal office . . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing *large contributions and expenditures* to the light of publicity . . . . Third . . . disclosure requirements are an essential means of gathering the data necessary to detect *violations of the contribution limitations* discussed above."

Id. at 66–68.

the Court again limited the sweep of the law to contributions and (narrowly-defined) expenditures to avoid vagueness concerns, again out of concern that issue advocacy would be encroached. *Id.* at 77–82. The burdens and governmental interests discussed in *Buckley* relate to contributions or expenditures, and the Court worked diligently to avoid the capture of issue advocacy in the political committee registration and reporting regime. The *Buckley* decision unequivocally demands that such burdensome regulations steer clear of issue advocacy.

It is important to pause and inquire why so many courts insist on protecting against political committee registration and reporting requirements. Certainly, many would claim that this is a system that effectuates "mere disclosure" and must be upheld. But the political committee system maintained by the FEC is anything but "mere disclosure." As described in the Verified Complaint, organizations labeled as a "political committee" must comply with significant structural and compliance requirements that limit their ability to speak. *See, e.g.,* 11 C.F.R. §§ 104.3(a), 104.3(b), 104.4(b), 104.4(c); *see also MCFL*, 479 U.S. at 255 n.7 ("the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak"). While the FEC still leaves an open avenue to speak, "the avenue it leaves open is more burdensome than the one it forecloses." *Id.* at 255. This alone illustrates that the system discourages political speech and infringes the First Amendment. *Id.*

More recently, the Supreme Court affirmed disclosure in the *Citizens United* case, but the ruling only concerned electioneering communications. 130 S.Ct. at 914–16. The Court also recently upheld disclosure of signatures supporting ballot initiatives, when citizens serve as legislators in direct democracy. *Doe v. Reed*, 130 S.Ct. 2811, 2819–21 (2010). However, as the Tenth Circuit acknowledges, even in the wake of *McConnell v. FEC*, there have been no changes to the major purpose test. *CRTL*, 498 F.3d at 1153. Thus, the principles behind the major purpose test and the narrow definitions of "contribution" and "expenditure" remain sound, and indicate that these requirements are a burden not to be placed on issue advocacy organizations.

Whether a system that imposes political committee registration and reporting requirements is subject to strict scrutiny or not, no governmental interest justifies either burden. As the Court acknowledged in *MCFL* before elaborating the major purpose test:

> Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage . . . . Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

479 U.S. at 254–55. The Court also reasoned that reporting requirements for independent expenditures themselves are sufficient for organizations whose major purpose is issue advocacy: "The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the [FECA]." *Id.* at 262. Justice Kennedy, writing the majority opinion in *Citizens United*, and the dissent in *McConnell*, stated the same concern: "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations" and these "regulations are more than minor clerical requirements. Rather, they create major disincentives for speech, with the effect falling most heavily on smaller entities that often have the most difficulty bearing the costs of compliance." 130 S. Ct. at 898; 540 U.S. at 332. Of course, as with registering and reporting as a political committee, ad-specific disclosure requires an understandable standard of the type of speech regulated—"express advocacy" as well, which the Commission itself cannot articulate.

The United States Supreme Court and the Tenth Circuit have shown consistent concern against entrapping issue advocacy organizations within the political committee registration and reporting regime. This implicitly supports one of two lines of reasoning: that political committee registration and reporting requirements are a severe burden on issue advocacy unsupported by a compelling governmental interest, or that political committee registration and reporting requirements are a cognizable burden on issue advocacy unsupported by an important governmental interest. Absent either concern, there would be no major purpose test. Despite changes to campaign finance law since *MCFL*, the major purpose test remains unchanged, and the activities of issue advocacy associations have proceeded largely protected. The Tenth Circuit has justly stopped attempts in New Mexico and Colorado to ignore the major purpose test, and

this Court should acknowledge the FEC's attempt to nullify it, first by acknowledging the already-determined burden political committee status places on Free Speech and second by finding that governmental interests can be served through means more narrowly tailored than the panoply of requirements placed on political committees.

iii. The Commission's Vague and Overbroad Political Committee Practices and Policies Silence Free Speech

In practice, the FEC's determination of political committee status transforms the vague and overbroad language of § 100.22(b) into an even more vague and more overbroad regulatory scheme. Specifically, the very existence of a case-by-case approach to determining political committee status, the FEC's careless use of the major purpose test, and the unknown definition of "solicitation" silence Free Speech and other groups.

1. Political Committee Status: We'll Let the Coin Decide

The FEC maintains that it will determine political committee status on a case-by-case basis. Political Committee Status, 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007). The agency believes its roles of enforcement and rulemaking can be combined, in that "developments in the law . . . include[] the distillation of the meaning of 'expenditure' through the enforcement process . . . ." MUR 6073 (Patriot Majority 527s), First General Counsel Report ("FGCR") at 9 (FEC 2009). This "living law" approach to regulation allows the FEC to flip the proverbial coin whenever it sets out to determine whether an organization is a political committee or not. Unfortunately, this amounts to heads the FEC wins, and tails the grassroots lose. *See WRTL*, 551 U.S. at 471 (describing the flaws with the Commission's regulatory approach, this "'heads I win, tails you lose' approach cannot be correct").

In *Citizens United*, the Supreme Court issued a broad ruling recognizing political speech by both corporations and unions. One reason it did so was because the FEC's alternative "would require case-by-case determinations. But archetypal political speech would be chilled in the meantime . . . . We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned . . . ." 130 S.Ct. at 892. Just a few years earlier, in *WRTL*, the Court also dismissed a regulatory scheme that "would . . . typically

lead to a burdensome, expert-driven inquiry, with an indeterminate result . . . . [I]t will unquestionably chill a substantial amount of political speech." 551 U.S. at 469. Having established the burdens that registration and reporting place on organizations, they are only heightened by the vague and overbroad policies described herein.

The mere existence of a case-by-case approach, where the already-vague definition of express advocacy prevents grassroots groups like Free Speech from easily finding the breathing room they need to avoid cumbersome political committee reporting requirements, chills issue advocacy. Just as there must be a bright-line definition for express advocacy, so too should there be a practicable, bright-line standard throughout the FEC's determination of political committee status.

2. Major Confusion over the Major Purpose Test

Major purpose, a factor of political committee status, is also determined on a haphazard, case-by-case basis at the FEC, under the belief that both *Buckley* and *MCFL* "make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns." *See* 72 Fed. Reg. at 5597. It remains undoubtedly true that in conducting the major purpose analysis, fact-intensive inquiries are often appropriate. However, there must be comprehensible standards that guide this fact-intensive inquiry. The FEC possesses no authority for standardless discretion, shifting standards, and blurry lines in this constitutionally sensitive area.

Buckley unequivocally states that the major purpose test distinguishes issue advocacy organizations from political committees who have the major purpose of "the nomination or election of a candidate." 424 U.S. at 79–80. *MCFL* describes the same distinction, with the major purpose of political committees being "campaign advocacy," "further[ing] the election of candidates," or "campaign activity." 479 U.S. at 252, 253, 262. The Court specifically tied the definition of express advocacy to major purpose (being determined in part by the amount of express advocacy an organization engages in), but the FEC has adopted a vague and overbroad approach to determining the major purpose of an organization and relies on broad factors like whether a group intends to influence an election, influence the outcome of certain elections, or

engage in "federal campaign activity." *See, e.g.*, MUR 5753 (League of Conservation Voters), FGCR at 5 (FEC 2008); MUR 5754 (Moveon.org Voter Fund), FGCR at 5 (FEC 2006); MURs 5910 & 5694 (Americans for Job Security), FGCR at 15 (FEC 2008); MUR 5988 (American Future Fund), FGCR at 11 (FEC 2008).

As one Commissioner analyzed, under the Commission's free-floating "fact-intensive" major purpose analysis, the "FEC . . . consider[s] all sorts of non-campaign activity as evidence of a campaign purpose (regardless of whether it is a group's major purpose)." MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn at 40 (FEC 2011). Some examples of these factors include:

- Timing of an organization's formation;
- The geographic targeting of advertisements;
- Analyzing the portion of an advertising budget allocation to television, radio and print ads that reference someone who was a candidate;
- Any proportion of funds raised that were spent on speech in states with supposedly hotly contested races; and
- The number of donors to the organization.

Id. at 40–41. The District Court for the District of Columbia reprimanded the FEC for its broadening of *Buckley* and the major purpose test because such readings were beyond the FECA and constitutionally suspect. *FEC v. GOPAC*, 917 F.Supp. 851 (D.D.C. 1996). Rather than permit a host of elusive factors to determine express advocacy or the reach of the major purpose test, a "bright-line test is also necessary to enable donees and donors to easily conform to the law and to enable the FEC to take the rapid, decisive enforcement action that is called for in the highly-charged political arena." *Id.* at 861 (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)). To cure the expansive reach of the FEC's operations, the D.C. District Court examined public and non-public statements of the group and its spending and contributions to determine the major purpose.

Free Speech encountered the slipshod application of some of the FEC's expansive factors during the advisory opinion process. Although following the formula properly by first determining (however erroneously) that Free Speech was predominantly engaging in express advocacy for the election or defeat of candidates, three commissioners supported a draft that

claims "[t]he conclusion . . . that Free Speech has as its major purpose federal campaign activity is further supported by the fact that even its non-express advocacy spending will attack or oppose a clearly identified Federal candidate." Ver. Compl. EXHIBIT C at 24. This ignores the reasoning in *Buckley* that issue advocacy will often relate to candidates who support or oppose a respective issue, and further chills grassroots groups from speaking, out of fear that any praise or criticism of a candidate makes a group susceptible to registration and reporting as a political committee, or at least a rigorous "fact-intensive" inquiry into its operation.

The FEC's free-floating major purpose test is not the test mandated by the Supreme Court and Tenth Circuit to preserve important First Amendment rights. Although the major purpose test does require factual inquiries, the FEC has improperly morphed the test into one that requires broad-range, intrusive inquiries without any meaningful guidelines. But that is not the major purpose test enunciated by *Buckley*, *MCFL*, or as recognized in the Tenth Circuit. This Court should invalidate the major purpose test used by the FEC, enjoin its application nationwide, and insist on the FEC's adoption of a constitutionally-sound major purpose analysis.

3. Haphazard Hopes: Defining "Solicitations"

Beyond the uncertainties found in Section 100.22(b), political committee status, and the major purpose test, the FEC's lack of clear boundaries concerning "solicitations" is also problematic. Under the FECA, "any person" who "solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising" must include a specified disclaimer in the solicitation. *See* 2 U.S.C. § 441d(a); *see also* 11 CFR § 110.11(a)(3). In addition, some fundraising communications may be deemed "solicitations," transforming some or all of the resulting funds into regulated "contributions."

Contributions, as interpreted by the *Buckley* Court, include donations to political parties, candidates, and campaign committees, expenditures made in coordination with candidates or campaign committees, or donations given to others and "earmarked for political purposes." 424 U.S. at 24, 78. The Second Circuit limited the reach of the "earmarked for political purposes" phrase due to vagueness concerns in *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir.

1995). In doing so, only donations "that will be converted into expenditures subject to regulation under FECA" were deemed "contributions." *Id.* at 295.

Just as clarity and objectivity are important constitutional elements for other aspects of federal election law, so too must they apply in analyzing what constitutes a "solicitation." The *SEF* Court understood that many fundraising communications might have a nebulous "political purpose" and parties would "be at a loss to know when a solicitation triggered FECA disclosure requirements" that would subject "them to a potential civil penalty." *Id.* To cure these vagueness concerns, the Court explained that a request for funds is a "solicitation" if it "leaves no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year." *Id.*

Under former Section 100.57, applicable non-profits had to treat as (regulated) contributions all funds received in response to a "solicitation." This was later invalidated by the DC Circuit in *EMILY's List v. FEC* because the regulation was beyond the reach of the FECA and unconstitutional. 581 F.3d 1 (D.C. Cir. 2009). The FEC has repealed Section 100.57, but what exactly constitutes a "solicitation" remains unknown. *See* Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 Fed. Reg. 13,223 (FEC Mar. 19, 2010).

Three Commissioners in this matter noted that while Section 100.57 might have been invalidated, it still lives on because "nothing in the [*EMILY's List*] opinion undermined the general premise that a solicitation that indicates that donated funds will be used to support or oppose the election or defeat of a clearly identified federal candidate results in 'contributions.'" EXHIIT C at 17–18 n. 6. These same Commissioners instructed Plaintiff to review extensive enforcement matters to understand what might constitute a "solicitation" in the absence of any regulation or guidance by the FEC. *Id.* In light of these three Commissioners' reasoning, fundraising scripts that used the term "war chest," or "win big this fall," or references to this "coming fall" were clearly campaign references (which, apparently, triggers regulation). *Id.* at 18. Another Three Commissioners embodied the wisdom of the *Buckley*, *WRTL*, and *Citizens*

United Courts to analyze the fundraising scripts and find multiple reasonable interpretations, leaving them free of the octopus-like grasp of the FEC. *See* Ver. Compl. EXHIBIT D at 26–34.

Just as Free Speech, and others not before this Court, must have the ability to speak out about issues they care about, they must also have the ability to raise funds to support these efforts. And fundraising requires the full protection of the First Amendment. *See, e.g.*, *Riley v. National Fed. Of the Blind of North Carolina, Inc.*, 487 U.S. 781, 788 (1988) ("solicitations involve a variety of speech interests") (internal quotations and citations omitted); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) ("solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease"); *Davis v. FEC*, 554 U.S. 724, 726 (2008) (FEC regulation that required choice between "unfettered political speech" and "discriminatory fundraising limitations" violated First Amendment); *EMILY's List*, 581 F.3d at 18 ("donations to and spending by a *non-profit* cannot corrupt a candidate or officeholder").

Since the invalidation of Section 100.57 in *EMILY's List* and its apparent resurrection by some of the Commissioners here, strict protection must be given to fundraising communications under the FECA. This court must enjoin the Commission from capturing a wide variety of speech as undefined and unknown "solicitations" and instead apply the speech-protective rules described earlier in this memo.

d. The Challenged Regime, in its Entirety, Acts as a Prior Restraint

The Supreme Court already recognized what this memo makes clear: complicated and shifting regulatory systems affecting First Amendment interests act as the functional equivalent of a prior restraint. *Citizens United*, 130 S. Ct. at 895. In *Citizens United*, the Supreme Court analyzed the constitutional propriety of a two-prong, eleven-factor speech code deciding whether communications were "electioneering communications." Because average Americans would have to wade through hundreds of pages of regulatory provisions, hire expensive election law

experts, and still guess at how to comply with the law, the Court invalidated the FEC's regulations concerning what constituted an "electioneering communication."

Just as the FEC developed a prolix speech code in the context of electioneering communications, so too has it spent extensive time developing the express advocacy paradox, the unsolved political committee status riddle and related major purpose puzzle, and the enigmatic solicitation standard. Taken in their entirety, this complicated maze of ever-shifting, undefined regulatory burdens operates as the functional equivalent of a prior restraint against speakers like Free Speech. In order to speak, Free Speech must necessarily file an advisory opinion request with the FEC to get permission to speak outside of its regulatory bounds. This is no simple task, as the FEC itself could not answer the basic questions of law presented to it by Free Speech.

Any system of prior restraint comes before a court "bearing a heavy presumption against its constitutional validity." *Bantam Books*, 372 U.S. at 70. In such instances, the government carries a "heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The proper relief where a prior restraint has been identified is found "through a facial challenge." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). Though this is traditionally considered "strong medicine," *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), the evils found in systems of prior restraint require just such relief. This is because a system of prior restraint is not injurious in how it is applied, but rather it inflicts a "pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *City of Lakewood*, 486 U.S. at 758 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). In these instances, "only a facial challenge can effectively test" the challenged system. *Id.* at 758.

In rare instances, the Supreme Court has approved of licensing and prior restraint systems for certain forms of low-value speech when stringent safeguards applied. *See, e.g., Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). Some of the important procedural safeguards for licensing include: (1) immediate judicial review, (2) due process entitlements of notice and hearing at the administrative level, and (3) clear and objective regulations that are (4) given precision and consistency by the interpreting agency. *See Bantam Books*, 372 U.S. at 70–77 (in

analyzing the constitutional sufficiency of an obscenity licensing system, lack of notice and hearing coupled with vague regulations were "radically deficient"). Even prior restraint systems affecting child pornography and animal "crush" videos are routinely stricken as violative of the First Amendment. *See, e.g., Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004) (declaring state statute invalid which imposed a "prior administrative restraint" against prospective child pornography); *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (the "First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly").

While low-value speech might tolerate the stringent safeguards described above, high-value speech, like the political speech here, cannot. In addition, the FEC's procedures fail to meet even the minimal requirements imposed upon obscenity boards by the Supreme Court. While the FEC offers an advisory opinion process, requestors are not allowed to speak unless spoken to. *See* Advisory Opinion Procedure, 74 Fed. Reg. 32160, 32161 (Jul. 7, 2009) (requestors of advisory opinions may attend open meetings and "respond to any questions Commissioners may have"); *see also* Ver. Compl. EXHIBIT K (Open Meeting of the FEC, April 12, 2012) at 5 ("Benjamin Barr: May I reply to your comment Madam Vice Chair? Vice Chair Weintraub: I don't really have any questions for you"). This hardly constitutes hearing and notice. The FEC often "waives" its own rules and springs last minute advisory opinions hours or minutes before said "hearings"—further negating meaningful standards of "notice and hearing." *See* Ver. Compl. EXHIBITS B, D (cover pages noting both documents "Submitted Late"). Lastly, the FEC's fuzzy speech factors, shifting regulatory definitions, and "case by case" standards hardly represent clear and objective standards and practices. Under controlling precedent, the FEC's system fails to pass muster as a licensing system for obscene speech. But political speech enjoys the "fullest and most urgent application" of the First Amendment, necessitating the facial invalidation of the FEC's prior restraint. *Eu,* 489 U.S. at 223. As the *Lakewood* Court understood, only facial invalidation offers a meaningful remedy against a system of prior restraint. 486 U.S. at 758.

III. Nationwide Suppression Deserves Nationwide Relief

After considering the heightened protection afforded to political speech and applying it to the system in question, this Court should grant a nationwide preliminary injunction. The challenged regulations, policies, and practices are facially vague and overbroad under the First Amendment, and the Supreme Court has repeatedly recognized that such harm reaches well beyond the plaintiff in such cases. Furthermore, the Administrative Procedure Act states that regulations contrary to constitutional rights should be set aside entirely. Finally, the FEC's history of inconsistently applying the challenged provisions shows appalling disregard for First Amendment freedoms, and anything short of nationwide relief will further the FEC's strategy of avoiding Supreme Court rulings through obfuscation, prolonged litigation, and experimentation, all of which makes the system even more vague and overbroad, and thus unconstitutional.

a. The Overbreadth and Vagueness Doctrines Require Nationwide and Uniform Standards to Adequately Preserve First Amendment Freedoms

The Supreme Court has stated the general rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). However, an exception to this rule is found in cases where challenged provisions are facially invalid under the First Amendment: "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984); *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980) (the overbreadth doctrine allows "a litigant whose own activities are unprotected [to] challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court"). Vagueness challenges enjoy more expansive remedies just the same: "When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing . . . ." *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999). Thus, Free Speech is far from alone in

challenging the regulations, policies, and practices in question and represents individuals and associations across the country who would like to speak out about important political issues. The relief afforded to Free Speech must be afforded to all.

Upon determining the facial invalidity of the challenged provisions due to either overbreadth, vagueness, or both, this Court should not require other individuals or associations (many of whom do not have the means to afford experienced campaign finance attorneys) to establish the same objective determination in other circuits. *See Washington State Republican Party*, 552 U.S. at 449. The burden belongs on the FEC to establish the validity of its regulations, policies, and practices on appeal; it should not fall on Free Speech or others to battle the FEC in dozens of federal district courts and up to twelve different federal circuits to strike regulations, policies, and practices that are an affront to the First Amendment.

Federal district courts have recognized the importance of nationwide injunctive relief when the doctrines of overbreadth and vagueness are implicated. In *American Civil Liberties Union v. Reno*, 929 F.Supp. 824 (E.D. Penn. 1996), the court issued a nationwide preliminary injunction against portions of the Communications Decency Act of 1996 ("CDA"), specifically a vague provision that prohibited the transmission of "patently offensive" or "indecent" material in certain circumstances. *Id.* at 855. The court also found that the CDA was overbroad. *Reno*, 929 F.Supp. at 855–57. Its preliminary injunction spanned against "Defendant Attorney General Janet Reno, and all acting under her direction and control . . . from enforcing, prosecuting, investigating or reviewing any matter premised upon" the laws in question. *Id.* at 883. The Supreme Court affirmed this ruling, concluding that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997). As these overbroad and vague provisions abridged free speech on the Internet, the challenged regulations, policies, and practices here impose onerous requirements on all groups wishing to speak about political issues, threatening civil and criminal sanctions for noncompliance.

Recently the Southern District of New York issued a nationwide preliminary injunction against the enforcement of provisions of the National Defense Authorization Act ("NDAA") in a

facial challenge. *Hedges v. Obama* ("*Hedges II*"), No. 12 Civ. 331, 2012 WL 2044565 at *3 (S.D.N.Y. June 6, 2012). In this case, the court considered terms of who would constitute "associated forces" with al-Qaeda or the Taliban or other terrorist organizations, and what it would mean to "substantially" or "directly" "support" them. *Hedges v. Obama* (*Hedges I*), No. 12 Civ. 331, 2012 WL 1721124 at *23 (S.D.N.Y. May 16, 2012). Finding each provision vague, and causing "a chilling of specific associational and expressive conduct" against the plaintiffs, the court found a likelihood of success on the merits of a facial challenge. *Id.* at ** 17, 24. In a memorandum opinion and order, the court clarified the nationwide scope of the injunction against enforcing these provisions, noting that "the plaintiffs in this case hail from across the nation, and . . . they represent the interests of similarly situated individuals not party to this case." *Hedges II*, 2012 WL 2044565 at *3.[13] Just as Free Speech represents other speakers nationwide via *jus tertii* standing in this challenge, *Morales*, 527 U.S. at 55 n. 22, Free Speech also represents speech that will occur across the nation. With the recent donor interest it has garnered, Free Speech, if permitted to speak, will distribute its communications both locally and nationally. Its new communication outreach would target local media (newspapers, radio, Internet), and national publications like Beef Magazine and USA Today. *See* Ver. Compl. EXHIBIT N. It would be an onerous exercise to require Free Speech, or others not before the

[13] In considering the denial of nationwide injunctive relief in a previous challenge against 11 C.F.R. § 100.22(b), *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) *overruled by RTAA*, 681 F.3d 544, the *Hedges* court made an incomplete distinction: "the stakes in this case differ from those relating to a Federal Election Commission regulation. Here, plaintiffs argue that they and others could be subject to indefinite military detention under Section 1021(b)(2); accordingly, the public interest in ensuring that ordinary citizens understand the scope of such a statute justifies its breadth." *Hedges II*, 2012 WL 2044565 at *3. However, *VSHL* concerned a group distributing advertisements in Virginia, possibly the District of Columbia. The scope of remedial relief was necessarily narrow to be in line with the limited distribution of the speech. The chill inflicted by the challenged provisions here inflicts civil and criminal penalties if they are violated, and undermine the core of free speech. And while the FEC may not order indefinite detention, it may pursue vigorous criminal and civil penalties against individuals nationwide just for exercising their First Amendment freedoms.

court, to re-assert their claims in other circuits, and equally offensive to the First Amendment to carve out an exemption for one organization while others are muted under its chilling purview.[14]

b. The Administrative Procedure Act and the Inherent Remedial and Equitable Powers of this Court Support Nationwide Relief

When regulations fail to pass scrutiny under the Administrative Procedure Act ("APA"), the usual operation is to void them in their entirety. The APA specifically calls for courts reviewing regulations to set aside those that are unconstitutional:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-- . . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be-- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity;

5 U.S.C. § 706. Free Speech has asserted that the challenged provisions are contrary to the First Amendment and they are beyond the reach of the FECA. *See* Ver. Compl. at 22–33. As recognized by several courts, Section 100.22(b)'s definition of express advocacy is not authorized by the FECA as interpreted by the Supreme Court in *Buckley* and *MCFL*. *See Right to Life of Duchess Co.*, 6 F. Supp. 2d 248; *MRLC*, 914 F. Supp. at 13 (Section 100.22(b) deemed "contrary to the statute as the United States Supreme Court and First Circuit have interpreted it and thus beyond the power of the FEC"). The Tenth Circuit, and many of its sister circuits, agree with the proposition that *McConnell* did not eliminate *Buckley*'s express advocacy requirement and it still remained a viable device with which to limit a vague or overbroad provision. *See, e.g.*, *Herrera*, 611 F.3d 669; *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. denied*, *Stumbo v. Anderson*, 543 U.S. 956 (2004).

[14] If a person adversely affected by an agency rule may sue in the D.C. District Court, as is usually the case, *see* 28 U.S.C. § 1391(e), a district court's "refusal to sustain a broad injunction is likely to generate a flood of duplicative litigation" and a broad injunction "obviates such repetitious filings." *National Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1309, 1409 (D.C. Cir. 1998); *see also* 2 U.S.C. § 437g(a)(6)(A) (entrusting broad nationwide enforcement remedies with the FEC upon a showing that a speaker "transacts business" in a given region).

That Section 100.22(b), and the FEC's complicated regulatory maze, is invalid remains even truer today, given the continued expansion of the regulation by the FEC, and its vague and overbroad application as detailed in this memorandum. In short, there is no way to reconcile the Supreme Court's limiting construction of expenditure in *Buckley* and *MCFL* with the octopus-like reach of the challenged provisions.

As Justice Blackmun summarized, in certain instances relief from invalid agency actions should go beyond the plaintiffs in the case:

> In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court.

Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting). Recently, the Eastern District Court for the District of California used the APA to set aside arbitrary and capricious regulations issued by the United States Forest Service. *Sequoia Forestkeeper v. Tidwell*, 2012 WL 928703 (E.D. Cal. March 19, 2012). Taking the APA on its face, the court ruled that "this Court must hold unlawful and set aside the regulations that were impermissible interpretations of their governing statute. A geographically-restricted injunction is insufficient, as the Forest Service has no authority to continue to implement ultra vires regulations in any district of the United States." *Id.* at *9. After determining the unconstitutional overbreadth and vagueness of Section 100.22(b) and related provisions, and likewise the FEC's implementation of Section 100.22(b) from its governing statute, the APA calls for this Court to set aside the system entirely, not just as it relates to Free Speech. Given the new donor interest in Free Speech and new plans for nationwide advertisements, relief by the means of invalidation under the APA is appropriate here.[15] Section 100.22(b), and the challenged policies, are a "rule of broad applicability" and call for "programmatic" relief, ensuring that free speech, and not

[15] Plaintiff is currently filing its motion to file its First Amended Verified Complaint to include these new details. Since this process is not yet complete, Plaintiff has included copies of its new advertising plans as EXHIBIT 1 to this memo.

merely Free Speech, is protected. For either facial or as-applied vagueness and overbreadth and as a violation of the APA, the challenged provisions should be enjoined nationwide.

c. The First Amendment Is Not Subject to Experimentation by the FEC

Although the Supreme Court's First Amendment overbreadth and vagueness rulings support nationwide injunctive relief in cases of facial overbreadth or vagueness and largely confine relief in as-applied challenges to the parties in a given case, the sordid history of the FEC's experimentation with the challenged provisions call for a nationwide injunction as well. In one past challenge that ruled Section 100.22(b) unconstitutional, the court held that a nationwide injunction would be improper, and it "must allow the FEC, if it chooses, to press its position in those circuits that have not yet ruled on the constitutionality of 11 C.F.R. § 100.22(b)." *Va. Soc'y for Human Life v. FEC* ("*VSHL*"), 263 F.3d 379, 394 (4th Cir. 2001). Since *VSHL*, however, Section 100.22(b) has grown even more encompassing and oppressive of political speech, and Free Speech is but the latest in a line of organizations whose speech has fallen under the grasp of an ever-evolving definition of express advocacy. The time for the FEC to press its position is finished: its experiment is irreconcilable with the First Amendment.

Free Speech took the good faith step of asking the FEC for an advisory opinion in this matter to clarify the reach and meaning of the law. The result was complete chaos. A Statement of Reasons by Commissioner Matthew Petersen, Chair Caroline Hunter, and Commissioner Donald McGahn included an attachment that illustrates the immensity and vagueness of the regulatory reach here, totaling nearly four pages. *See* Ver. Compl. EXHIBIT I at 26–29. Even upon cursory review it is evident that the Commission charged with enforcement of the FECA maintains a freewheeling, undefined, ever growing list of nebulous factors with which to penalize speech and speakers. This cannot stand anywhere in the United States.

The challenged provisions targeted in this litigation this are but part of an ever-expanding scheme that captures all political speech, however far removed from express advocacy, when uttered by average grassroots groups. It is within the inherent equitable powers of this Court to grant nationwide injunctive relief from § 100.22(b) in the event the regulation is unconstitutional as applied to Free Speech. *See, e.g.,* FED. R. CIV. P. 65*; Stichting Mayflower Recreational Fonds*

v. Newpark Resources, 917 F.2d 1239, 1245 (10th Cir. 1990) (district courts enjoy "considerable discretion" in fashioning equitable relief); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 834 (D.C. Cir. 1984) (district court may "properly employ [ ] its inherent equitable powers ... to prevent plaintiffs from suffering irreparable injury").

In denying a nationwide injunction, the *VSHL* court relied on the fact that VSHL planned to broadcast its communications only in Virginia, possibly in the District of Columbia, thus explaining the geographically limited relief of the injunction. *See* Brief of Appellees/Cross-Appellants, *VSHL*, 2000 WL 33990680 at *7–*8. The court also stated that "[a] contrary policy" to limited injunctive relief "would 'substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.'" 263 F.3d at 393 (quoting *United States v. Mendoza*, 464 U.S. 154, 160 (1984)). However, the questions surrounding Section 100.22(b) have not only been developed; they have multiplied in the decade since *VSHL*. As the FEC has expanded the reach of 100.22(b), political committee status, and the major purpose test, so too have injuries nationwide multiplied. This is precisely the situation the *Citizens United* Court warned about when it explained that when the "FEC issues advisory opinions that prohibit speech, [m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.'" 130 S. Ct. at 896 (internal citations omitted). While the FEC might value intercircuit nonacquiesence, the Supreme Court has placed primacy in the protections offered by the First Amendment, not on novel experimentation by federal agencies with constitutional liberties.

For the time being, the Fourth Circuit holds Section 100.22(b) and related provisions as constitutionally sound. *RTAA*, 681 F.3d at 558. The regulation remains unconstitutional in the First Circuit and other federal district courts. Intercircuit development of the constitutional issues at hand has already occurred. These opinions, along with thousands of pages of FEC analysis (nearly 200 pages in the case of Free Speech alone), indicate the questions of Section 100.22(b) are as developed as they need be, and that courts must at least move to encourage final

justiciability of the definition of express advocacy while protecting core First Amendment freedoms. The Commission's speech experiment has gone far enough.

IV. Free Speech Will Be Irreparably Harmed if an Injunction Does Not Issue

Where First Amendment rights are at issue, irreparable harm is established: "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373–74; *see Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (meeting irreparable injury requirement due to deprivation of speech rights). Free Speech silenced itself for the duration of the FEC's advisory opinion process, which lasted over 60 days. It has missed a number of opportunities to speak out about important political issues. *See* Ver. Compl. at 15, 18. When the FEC could not issue a binding advisory opinion, Free Speech sought relief in this Court and has already waited for weeks during the process of filing. Free Speech continues to be irreparably harmed by the vague and overbroad reach of Section 100.22(b) and the challenged policies and practices, and absent injunctive relief will continue to suffer in silence.

V. The Balance of Hardships Favors Free Speech and Injunctive Relief

The balance of harms requirement is usually met once a First Amendment plaintiff demonstrates a likelihood of success on the merits. A threatened injury to plaintiff's constitutionally protected speech will usually outweigh the harm, if any, the defendants may incur from being unable to enforce what appears to be an unconstitutional statute. *See American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Section 100.22(b), along with the challenged policies and practices, are unconstitutionally overbroad and vague, facially and as-applied to Free Speech. It violates the First Amendment's protection of political speech, and would not pass muster even under less compelling guidelines that protect obscenity.

Since the challenged provisions serve no purpose but to erase the bright-line distinction of political committees from issue advocacy organizations, there will be no harm to the FEC from a lack of enforcement. Any "reliance harm" found in invalidating unconstitutional regulations, policies, and practices can be cured by this Court recognizing "Draft C" as interim guidance during the pending electoral cycle until the FEC is able to promulgate constitutionally

sound replacements. *See* Ver. Compl. EXHIBIT D. If anything, the FEC will have an easier time acting as a regulatory agency when it promulgates and then enforces understandable rules instead of "distilling" its rules through the enforcement process, or promulgating regulations as it enforces them. The balance of hardships favors Free Speech, and injunctive relief is necessary for its issue advocacy and advocacy of all other such organizations that just wish to speak.

VI. Issuing a Preliminary Injunction Is Not Adverse to the Public Interest

Vindicating First Amendment liberties is "clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"); *R.J. Reynolds*, 823 F.Supp.2d at 52 ("the public interest ... will be served by ensuring that plaintiffs' First Amendment rights are not infringed before the constitutionality . . . has been definitively determined") (quoting *Stewart v. District of Columbia Armory Bd.*, 789 F. Supp. 402, 406 (D.D.C. 1992)). Thus, permitting Free Speech to speak freely serves the important goal of protecting an "essential mechanism of democracy" and our safeguard to "hold officials accountable to the people." *Citizens United*, 130 S. Ct. at 898.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for preliminary injunction. Free Speech requests an expedited hearing on this matter pursuant to the goals of FED. R. CIV. P. 1. The Court should also waive the bond requirement under the FED. R. CIV. P. 65(c).

Dated: July 13, 2012

/s/ Stephen R. Klein

Stephen R. Klein