No. 12-8078

In The United States Court of Appeals for the Tenth Circuit

FREE SPEECH,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal From United States District Court
For The District Of Wyoming-Cheyenne (Judge Skavdahl)
Case No.: 2:12-cv-00127-SWS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES, REGULATIONS AND POLICIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

There are no prior or related appeals to this action.

GLOSSARY

E&J	Explanation and Justification, statements issued by the FEC in the Federal Register to explain policies.
FECA	Federal Election Campaign Act
FGCR	First General Counsel's Report
MUR	Matter Under Review
PAC	Political Action Committee, a political committee as defined by 2 U.S.C. § 431(4)(A)

JURISDICTIONAL STATEMENT

Free Speech makes this appeal as of right from the Oral Ruling on Plaintiff's Motion for Preliminary Injunction entered by the United States District Court for the District of Wyoming dated October 3, 2012, which denied Free Speech's motion. Free Speech timely filed its Notice of Appeal on October 19, 2012, under Fed. R. App. P. 3 and 4.

The district court acquired subject matter jurisdiction under 28 U.S.C. § 1331 as a challenge arising under the First Amendment to the Constitution of the United States. 1 App. 66.

The Tenth Circuit has jurisdiction under 28 U.S.C. § 1292(a)(1) to review interlocutory orders of the United States District Court for the District of Wyoming.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in finding that Free Speech failed to establish a likelihood of success in its motion for a preliminary injunction. The lower court failed to consider the heightened protection for First Amendment issues in the preliminary injunction phase and gave no consideration to Free Speech's as-applied challenge, necessitating reversal or reconsideration here.

II. Whether the District Court erred in failing to find that 11 C.F.R. § 100.22(b) and the challenged practices here relating to "political committee" (PAC) status act as the functional equivalent of a prior restraint. *Citizens United v. FEC*, 130 S.Ct. 876, 882 (2010). Since the regulation itself provides no clear parameters and the FEC's history of enforcement and interpretation only expands their reach, First Amendment interests remain injured and require a reversal or reconsideration of the District Court's denial of the request for preliminary injunctive relief.

III. Whether the District Court erred by not finding the FEC's standard to define "solicitations" for "contributions" under 2 U.S.C. § 431(4)(A) statutorily invalid and unconstitutional because of vagueness and overbreadth.

IV. Whether the District Court erred by failing to find the FEC's expansive application of the major purpose test unconstitutional due to vagueness and overbreadth. The FEC's political committee status policy and major purpose test are in excess of the statutory authority of the FEC and unconstitutional due to their shifting and undefined nature, requiring reversal or reconsideration by this Court.

STATEMENT OF THE CASE

On June 14, 2012, Free Speech filed a verified complaint in the District Court for the District of Wyoming under 28 U.S.C. § 1331 as a challenge arising under the First Amendment to the Constitution of the United States, the Federal Election Campaign Act ("FECA"), and the Declaratory Judgment Act, 28 U.S.C. § 2201–02. Free Speech filed a Motion for Preliminary Injunction on July 13, 2012. Shortly thereafter, Free Speech filed a First Amended Verified Complaint. Free Speech complains that its First Amendment rights have been violated by various federal regulations and policies enforced by the Federal Election Commission.

Following oral arguments on September 12, 2012, District Judge Scott W. Skavdahl entered his Telephonic Oral Ruling on October 3, 2012, denying preliminary injunction. Free Speech filed this appeal on October 19, 2012. Shortly thereafter, it requested emergency injunction pending appeal, which this Court denied on October 29, 2012. Free Speech now proceeds with this appeal.

STATEMENT OF FACTS

Free Speech formed on February 21, 2012. It is comprised of three Wyoming residents with a common commitment to limited government, the rule of law, and constitutional accountability. 2 App. at 109–16. To engage and educate the public, it wishes to pay for advertisements in various media outlets that will focus on a variety of public issues such as gun rights, land rights, environmental policy, health care, and free speech, including their connection with public servants and candidates for public office at federal, state and local levels. *See* 1 App. 67–68. Free Speech intended to run several paid advertisements from early April to November, 2012 and beyond. 2 App. 123. If freed from the threat of PAC status, Free Speech plans to speak about related issues in the future. *See* 2 App. 103 ("Members of Free Speech plan to save their money to budget for additional advertisements beyond those described herein").

Pursuant to its bylaws, Free Speech will not make any contributions to federal candidates, political parties, or political committees that make contributions to federal candidates or political parties. 2 App. 112–13. Its members, officers, employees and agents are prohibited from coordinating activities with any federal candidate or political party. Free Speech will also not engage in communications expressly advocating the election or defeat of clearly identified federal candidates. *Id.* It does, however, wish to vigorously express its views on public issues, often

connected with public servants and candidates for public office, as issue advocacy. Under the present regulatory regime maintained by the FEC, it cannot.

On February 29, 2012, Free Speech submitted an advisory opinion request ("AOR") to the FEC pursuant to 2 U.S.C. § 437f. *See* 2 App. 102–131. First, the AOR asked if any of eleven proposed advertisements for radio, television, newspaper, and the Internet website Facebook constituted "express advocacy" pursuant to § I00.22(a) or (b), thus meeting the definition of "expenditure" under 11 C.F.R. § 100.11. Second, the AOR asked if any of Free Speech's proposed donation requests constituted "solicitations" for "contributions". Finally, the request asked whether these actions would trigger the major purpose test and classify Free Speech as a political committee pursuant to 11 C.F.R. § 100.5 and require it to register and report as such with the FEC. On May 8, 2012, after considering three draft advisory opinions in two open meetings, during which the Commissioners were sharply divided on the basic questions asked in the AOR, the FEC certified a limited compromise draft. *See* 2 App. 282–92. This advisory opinion failed to affirmatively provide a four-vote, binding advisory opinion with definitive answers to Free Speech's request.

Unable to make sense of the relevant FEC regulations, and without the guidance or protection of an advisory opinion, Free Speech filed suit against the FEC in the District of Wyoming on June 14, 2012. Following Free Speech's

submission of a motion for preliminary injunction, the court held oral arguments on September 12, 2012. On October 3, 2012, the court denied Free Speech's motion, agreeing largely with the interpretation of "Draft B" from the FEC's advisory opinion process. 3 App. 470–500. This draft, supported by half of the FEC's commissioners, required Free Speech to fully register and report as a PAC with the Commission based on unidentified regulatory factors. Free Speech filed its timely appeal, and a motion for emergency injunction pending appeal. The motion was denied on October 29, 2012. Nearly a year since its founding, Free Speech has remained silenced under the vague and overbroad morass of the FEC's regulations and policies. It now brings this appeal to vindicate its core First Amendment freedoms.

STATEMENT OF STANDARD OF REVIEW

The applicable standard of review in analyzing the denial of request for preliminary injunctive relief is whether the lower court committed an abuse of its discretion. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). Factual findings are reviewed for clear error while legal determinations are reviewed de novo. *Id*. In each area of substantive election law, courts employ "exacting scrutiny," closely related to strict scrutiny, in deciding whether the challenged provisions survive constitutional review. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (compelling state interest analysis), 262 (less restrictive means analysis); *Minnesota Concerned Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (discussing exacting scrutiny standard of review).

SUMMARY OF ARGUMENT

The Federal Election Commission oversees the Federal Election Campaign Act—a law that closely abuts cherished First Amendment freedoms. Violations of the Act carry stiff civil and criminal penalties. With its expertise, one would expect the Commission able to render consistent and objective advice about how federal election law works. It cannot. Stymied by multiple attempts to make sense of the law and otherwise speak, Free Speech sought judicial recourse to protect its First Amendment freedoms.

The lower court erred, and committed an abuse of its discretion, by failing to apply speech protective standards to the request for preliminary injunctive relief. Unlike other areas of the law, the First Amendment invokes heightened procedural safeguards when considering a request for injunctive relief. The District Court applied injunctive relief standards appropriate for non-First Amendment challenges to a First Amendment case. It did not presume that Free Speech was likely to prevail. *Compare Ashcroft*, 524 U.S. at 666 *with* 3 App. 484–85. It did not analyze whether Free Speech's proposed less restrictive alternatives would effectively carry out the FEC's interest in disclosure. *Compare id.* Had the lower court applied the correct standards for First Amendment challenges, Free Speech would have been able to illustrate the unconstitutional nature of the challenged regulations, policies, and practices and secured its right to speak. Furthermore, the

lower court misinterpreted the status quo of protecting First Amendment speech, and upheld a regulatory regime that is anything but consistent, or status quo.

This case calls for the protection against indiscriminate application of political committee (PAC) requirements. "Disclosure" and PAC status are two entirely different regulatory regimes not to be conflated in this challenge. *Citizens United v. FEC* upheld simple disclosure provisions for electioneering communications, a very narrowly defined form of speech. But this holding does not allow for the blanket application of PAC status, a complex system of registration and regular reporting with the FEC. The burdens of PAC status remain a heavy weight upon free speech, thus it must be narrowly tailored to only apply to actual political committees. Furthermore, each prong used to determine PAC status—the definitions of express advocacy in determining independent expenditures, solicitations for contributions, and the major purpose test—must give the person of ordinary intelligence a reasonable opportunity to comply and give explicit standards to the FEC to prevent arbitrary and discriminatory enforcement. But these regulations fail to meet either requirement. Instead, each of these prongs is vague and overbroad, facially and as-applied to Free Speech, causing the entire system of PAC status to operate as the functional equivalent of a prior restraint.

The definition of express advocacy, 11 C.F.R. § 100.22(b), is vague and overbroad facially and as-applied. On its face, it asks the Commission to make

"limited" references to external events to decide the meaning of speech, authorizes the Commission to decide how the timing of an ad influences whether or not it is express advocacy, and asks the Commission to investigate for an "electoral portion" (that is never defined) to trigger regulation. The FEC also considers its enforcement history as sufficiently illustrative, and requires speakers to wade through thousands of pages to discover the regulation's meaning. Free Speech discovered the extent of Section 100.22(b)'s vagueness and overbreadth when it asked for an advisory opinion from the FEC, a process that adds hundreds of pages to the FEC's archive, but fails to give Free Speech (or anyone else) an understanding of what constitutes express advocacy. The Commission came to diametrically opposed conclusions regarding most of Free Speech's ads, and yet the Commission's lawyers still demand that Free Speech comply with the most onerous conclusion that most of its ads are express advocacy and that it is a political committee.

Not only may contributions also trigger PAC status, so may solicitations for contributions. That is, funds raised with fundraising requests worded in a way that indicates raised funds will be used for the election or defeat of a candidate constitute contributions regardless of the intent of the donor. In determining what constitutes a solicitation, the FEC continues to utilize the formula of an already-overturned regulation, 11 C.F.R. § 100.57. Its analysis of any fundraising request

is as hazy as its analyses for express advocacy. As with express advocacy, past enforcement actions only increase the vagueness and overbreadth of the solicitation inquiry, and as-applied Free Speech was unable to secure any understandable guidance in the advisory opinion process.

The final prong for determining PAC status is the major purpose test, which is also unconstitutionally vague and overbroad. PAC status must only apply to an organization "under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1973). The Tenth Circuit has zealously enforced the requirement that state laws must consider major purpose before imposing PAC status, and Free Speech argues that such a test must be more than salutary. "There are two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (2010). Free Speech does not challenge the second method, but argues that the FEC has expanded the test's determination of "central organizational purpose" to unconstitutional lengths.

First, the FEC has expanded the scope of the major purpose inquiry to look not only at an organization's public statements and organizational papers, but

anything else it may find pertinent. Second, the FEC uses this evidence not to determine whether an organization's purpose is the nomination or election of a candidate, but believes major purpose can be a far broader conclusion, including "federal political activity" and "influenc[ing] a federal election." Finally, the factors within the FEC's inquiry are boundless and undefined: the FEC looks at the timing of an organization's formation, where it runs advertisements, whether communications identify a candidate, the timing of advertisements, the number of donors to the organization, and numerous other factors. In the advisory opinion process, some of these factors were applied to Free Speech, but only ones that favored the conclusion that Free Speech is a PAC. The major purpose test was meant as a narrowing construction to prevent issue advocacy organizations from PAC status, but it is now nothing more than a vague and overbroad tool for regulatory capture.

For these reasons, the district court erred, and this Court should reverse its denial of preliminary injunction and instruct the lower court to reconsider these issues consistent with this Court's guidance.

ARGUMENT

I. INTRODUCTION

Before this Court is a protracted and contradictory set of speech regulations so vast even the agency charged with their enforcement cannot understand them. While the Federal Election Commission ("FEC") maintains its system is one of mere disclosure, something more serious is before this Court. Looking past labels to function, the Commission operates a system of regulatory incoherence not unlike the program before the Supreme Court in *Citizens United v. FEC*, with its very real effect being suppression of speech by average Americans nationwide. Free Speech brings this challenge to secure its First Amendment freedoms and does not object to legitimate disclosure.

One principle prevails across every area of law the First Amendment touches. Government actors may not be blindly "set adrift upon a boundless sea amid a myriad of conflicting currents" with no charts guiding the scope of their regulation. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952). Laws abutting First Amendment liberties must be clear, comprehensible, and precisely targeted to whatever legitimate interest the government is pursuing. This remains true even if government merely classifies speech and is not vested with any "direct regulatory or suppressing functions." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 n.19 (1968). Because the First Amendment protects that most precious right

enjoyed by individuals in a free society—the right to unapologetically share their opinions—it must be likewise guarded with heightened protection by the courts. To be certain, the "First Amendment is a jealous mistress." *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 377 (6th Cir. 2008). Because the First Amendment places so high a value on the ability of our citizenry to freely exchange ideas, "sometimes seemingly reasonable measures enacted by our governments [must] give way." *Id.* And, sometimes, unreasonable measures must give way, too.

II. THE FIRST AMENDMENT COMPELS SPEECH PROTECTIVE STANDARDS FOR INJUNCTIVE RELIEF

Before addressing the substance of the challenged regulations, policies, and practices at issue here, the heightened procedural protection of the First Amendment must be discussed. *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"). Because special procedural rules operate in judicial considerations for First Amendment relief, further consideration must be given to the lower court's denial of preliminary injunctive relief.

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. 2011). However, where the infringement of First Amendment rights is involved, burdens are shifted to the government, rather than the movant.

Unlike other areas of the law, the Supreme Court has adopted especially stringent protection for political speech given its important function in a free society. 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)). As recognized by the *Citizens United* Court, efficient and streamlined adjudication of political speech challenges is important because 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. . . ." 130 S.Ct. at 895. Unlike other areas of the law, First Amendment challenges recognize the heightened importance of the right in question and begin with a presumption in favor of its exercise.

In tandem with substantive concerns about political speech, the Supreme Court has made clear that First Amendment challenges at the preliminary injunction stage are materially different from other areas of the law. Where free speech interests are at stake, "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]." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004). Stated another way, burdens at the preliminary injunction stage track burdens at trial, where government must prove the constitutionality of the challenged provisions in cases in which First Amendment rights are at stake. *Gonzales v. O Centro Espirita Ben. Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Lastly, the Supreme Court has explained, beyond the context of preliminary injunctions, that where speech implicating political issues is under judicial review, all doubts must be resolved in favor of the speaker. *FEC v. Wisconsin Right to Life* (*WRTL*), 551 U.S. 449 (2007).

The lower court erred, and committed an abuse of its discretion, by failing to apply speech protective standards to Free Speech's request for preliminary injunctive relief. The District Court applied, to a First Amendment case, injunctive relief standards appropriate for non-First Amendment challenges. *See* 3 App. 484–85. It did not initially presume, as required, that Free Speech was likely to prevail. *Compare Ashcroft*, 524 U.S. at 666 *with* 3 App. 484–85. It did not analyze whether Free Speech's proposed less restrictive alternatives would effectively carry out the FEC's legitimate interest in disclosure. *Compare id.* Had the lower

court applied the correct standards for First Amendment challenges,[1] Free Speech would prevailed in demonstrating the unconstitutional nature of the challenged regulations, policies, and practices and secured its right to speak.

The lower court also applied additional and inappropriate burdens against Free Speech's request for injunctive relief. In its Telephonic Oral Ruling, the court reasoned that granting the preliminary injunctive request would alter the status quo, making it a disfavored form of relief, and thus subjecting Appellant to heightened burdens. 3 App. 484–85. This determination was in error because the status quo for First Amendment cases is the preservation of free speech, not the protection of prolix regulatory programs suppressing it. As the Tenth Circuit recognized, status quo "does not mean the situation existing at the moment the law suit is filed, but the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948 (2d ed.1995)). Where government has acted to disturb the status quo, such as by creating and maintaining unconstitutional speech regulations, the invalidation of those programs

[1] A recent example of this burden shifting can be found in the sister-circuit case of *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117 (9th Cir. 2011), where that court understood the "special constitutional burden placed on the government to justify a law that restricts political speech" and upheld burden shifting to the government in political speech challenges.

acts to preserve the status quo—freedom—not disturb it. *Id.* Thus, the proper focus for determining the issuance of a preliminary injunction is on whether its grant would restore the proper *status quo ante*, not just *status quo*, to protect fundamental freedoms. *Id.* This the court below did not do, and committed an abuse of its discretion by this failure.

From the record below, it could not be argued that there was a comprehensible regulatory program that even constituted the status quo. Rather, the FEC's commissioners divided into two equal-sized blocs, each holding radically different views of the law and its application. On top of this, Free Speech presented evidence of the Commission's history of contradictory and unintelligible practices in applying the law—illustrating that to the extent a status quo exists, it is one of muddled confusion by the agency. *See* 1 App. 24–53, 73–77, 85–97. By favoring regulatory incoherence over First Amendment freedoms, the lower court erred and committed an abuse of its discretion. *See Doctor John's, Inc. v. City of Sioux City, Iowa*, 305 F. Supp. 2d 1022, 1041 (N.D. Iowa 2004) (status quo to be protected by a preliminary injunction is the "*status quo ante* potentially unconstitutional action by the [government]").

III. FREE SPEECH IS LIKELY TO SUCCEED ON THE MERITS

A. Clarity over Confusion: PAC Status and Disclosure are Very Different

One principle must be addressed very early. "Disclosure" and "PAC status" are two very different regulatory regimes. This challenge is not about uprooting legitimate disclosure in federal election law. It is focused on the FEC's haphazard speech regulations that force grassroots groups to submit to political committee regulatory burdens instead of just providing simple, legitimate disclosure.

The Supreme Court upheld disclosure provisions for electioneering communications in *Citizens United*. 130 S.Ct. at 913–17. Electioneering communications are broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office within a 60 day window before the candidate's general, special or runoff election or 30 days before his primary, preference election, or nominating convention or caucus, which is targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3). The disclosure requirements for these communications require the speaker to include a basic statement or identification with the ad and file a single, simple report with the FEC if the cost of producing and airing the communication exceeds $10,000. 2 U.S.C. §§ 441d(2), 434(f)(2). The Supreme Court upheld this narrowly tailored disclosure requirement for a narrowlly-defined form of speech because of the government's legitimate interest in providing information to the electorate. *Citizens United*, 130 S.Ct. at 915–16.

The FEC proclaims with cavalier confidence that according to this part of the ruling in *Citizens United*, PAC status is no longer burdensome. 3 App. 439–41. It claims that when the Supreme Court upheld disclosure requirements for electioneering communications, it granted authority to the FEC to impose PAC status upon issue advocacy organizations. *Id.* But this is not so. In addition to limiting its discussion to electioneering communications, in that same section of *Citizens United* the Court re-affirmed "that disclosure is a less restrictive alternative to *more comprehensive regulations of speech*," and cited the case *FEC v. Massachusetts Citizens for Life* (*MCFL*). *Citizens United*, 130 S.Ct. at 915 (citing *MCFL*, 479 U.S. at 262) (emphasis added). The Court differentiated disclosure from PAC status in this very portion of *MCFL*.

In *MCFL*, a pro-life nonprofit corporation challenged the ban on use of corporate funds for independent expenditures. 479 U.S. at 241. The Court ruled the ban unconstitutional as applied to MCFL, and carved out an exception to the ban for incorporated issue advocacy groups. *Id.* at 262–63. The FEC argued that not forcing MCFL to form a separate PAC "would open the door to massive undisclosed political spending by similar entities." *Id.* at 262. The Court responded that the individual reports for independent expenditures would satisfy the government's informational interest "in a manner less restrictive than imposing *the full panoply of regulations that accompany status as a political committee*." *Id.*

(citing 2 U.S.C. § 434(c)) (emphasis added). Issue advocacy organizations, by *MCFL's* own words and *Citizens United*'s reaffirmation, are not to be subjected to the burdens of PAC status but only to less restrictive reporting requirements, or disclosure. This holds true today, and Free Speech is still subject to—and does not object to—limited, effective reporting and identification requirements for independent expenditures and electioneering communications. Thus, this challenge is not about disclosure per se, but about the burdensome requirement of forcing three men from Wyoming to register as a PAC just to speak about political issues—something the *MCFL* and *Citizens United* Courts said the FEC lacked the authority to do. *See Minnesota Citizens Concerned for Life v. Swanson* (*MCCL*), 692 F.3d 864, 875 n.9 (8th Cir. 2012) (en banc) (Noting that "[t]he nature of the disclosure laws reviewed under exacting scrutiny in *Citizens United* were much different than Minnesota's laws," which are similar to federal PAC requirements).

MCFL also makes clear the myriad burdens that come with PAC status, listing no less than 23 different requirements for PACs in a regular reporting regime. *MCFL*, 479 U.S. at 253–54. Following the elimination of corporate expenditure bans in *Citizens United*, 22 of these burdens remain. The FEC fails to distinguish these burdens from the corporate ban, and claims that PAC status was only burdensome when it was an alternative to direct corporate speech. 3 App. 449. Unfortunately, the lower court accepted this reasoning. 3 App. 485–86. This is

nevertheless false: PACs are not only burdensome compared to bans on speech, but burdensome compared to less restrictive means that satisfy the informational interest. *MCFL*, 479 U.S. at 262. The governmental interest in imposing PAC status does not apply to issue advocacy organizations, and thus this Court retains protections to prevent its overbroad application. The lower court erred by not considering this. *See* 3 App. 486. Indeed, in its oral ruling the lower court did not discuss or even reference *MCFL*. 3 App. 497.

Free Speech is not challenging "disclosure," nor is it simply trying to speak "anonymously." 3 App. 421. It does not seek to avoid "complying with the disclaimer and disclosure obligations required for certain types of campaign-related communications." 3 App. 482. It is willing to comply with disclaimers and file reports for electioneering communications and independent expenditures. *See* 1 App. 70–71 (noting less restrictive means approved in *MCFL*). However, as an issue advocacy organization, it is entitled to speak free from the full panoply of regulations that attend PAC status and, more importantly, the civil and criminal penalties that could result from noncompliance. What is at issue, then, are the elements of determining PAC status: the definition of express advocacy, the definition of solicitations for contributions, and the policies and practices

surrounding the major purpose test.[2] Each of these elements are vague and overbroad facially and as applied to Free Speech. They do not "give the person of ordinary intelligence a reasonable opportunity to [comply]," and fail to provide "explicit standards for those who apply them" to prevent arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). In short, the FEC exercises arbitrary and discriminatory powers to chill free speech by subjecting even small grassroots issue advocacy organizations to the burdens of PAC status. In the realm of the First Amendment, the mere existence of vague and overbroad regulations as burdensome as those surrounding PAC status chill speech. *See Stromberg v. People of the State of California*, 283 U.S. 359, 369 (1931). Each vague and overbroad element of PAC status chills free speech, and as a whole the system is the functional equivalent of a prior restraint. *See Citizens United*, 130 S.Ct. at 895–96.

B. The FEC's Definition of Express Advocacy is Unconstitutional and Statutorily Infirm

To be certain, each area of First Amendment jurisprudence demands that clear boundaries must exist between regulated and free speech. Whether the speech is potentially obscene, defamatory, injurious, or somehow campaign-related,

[2] Electioneering communications, a narrowly-defined and easy-to-comply-with standard, are implicated in this case as well, since the definition of independent expenditure is so vague that Free Speech—and the FEC—cannot articulate the line between the two types of communications and, as a result, the relevant disclosure regime. *See* 1 App. 79; 2 App. 335–36.

courts have uniformly shrunken the scope of regulatory programs' reach and insisted on clarity in their operation. *See, e.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Federal Communications Comm'n v. Fox Television Stations, Inc*., 132 S. Ct. 2307 (2012); *Buckley v. Valeo*, 424 U.S. 1 (1976). The same principles remain true in the field of election law, but ever more so given that political speech is an "essential mechanism of democracy." *Citizens United*, 130 S. Ct. at 898.

Definitions matter. This is evident because whether one's speech is considered "express advocacy," a "coordinated communication," an "electioneering communication," or something else, a variety of FEC regulations then attach, mandating compliance with varying regulatory regimes. *See, e.g.*, 11 C.F.R. § 100.22(b); 11 C.F.R. § 109.21; 11 C.F.R. § 100.29. It is important to understand the operation of relevant regulatory triggers in order to comply with the law and exercise basic First Amendment rights.

If the FEC decides that speech in question is express advocacy, this may trigger the need to register and report as a PAC at certain thresholds. Additionally, express advocacy speech cannot be funded by foreign nationals, 11 C.F.R. § 110.20(i), or coordinated with federal candidates. 11 C.F.R. § 109.21. Issue advocacy speech, largely outside of the FEC's jurisdiction, would not trigger

similar compliance requirements. Understanding the boundary line between areas of regulated and non-regulated speech in the FEC's system can be rather important. *See* 2 U.S.C. § 437g(d) (detailing criminal penalties for failure to comply). But compliance has been made impossible by the FEC.

The *Buckley* Court construed the Federal Election Campaign Act's term "expenditure" in a narrow fashion to protect against it capturing too much speech (e.g., issue advocacy) or being applied in an indiscriminate manner. 424 U.S. at 44. Thus, the Court construed FECA to reach only those funds spent for communications that include "express words of advocacy of the election or defeat" of a clearly identified candidate. *Id.* at 44 n.52. In the wake of *Buckley*, this construction has been recognized as a statutory limit on the FEC's jurisdictional authority. *See Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D. Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (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")). Thus, when the FEC purports to act with the authority to regulate speech beyond these delineations, or to ignore the need for any boundaries whatsoever, it lacks the statutory basis to do so. *See* 1 App. 89.

Even with changes in election law resulting from *McConnell v. FEC* and *Citizens United*, the Tenth Circuit, and many of its sister circuits, still require some formulation of an express advocacy test as a mechanism to limit the overbroad or vague application of regulations applicable to political speech. *See, e.g.*, *New Mexico Youth Organized v. Herrera* (*NMYO*), 611 F.3d 669 (10th Cir. 2010); *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); *see generally McConnell v. FEC*, 540 U.S. 93 (2003). This is understandable; the First Amendment demands certain safeguards must be maintained for free speech to thrive.

The FEC purports to regulate speech as express advocacy if:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, [a communication] 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.

11 C.F.R. § 100.22(b). Section 100.22(b), on its face, is regulatory license to the sort of freewheeling examinations into speakers' subjective intents and listeners' subjective biases that the Supreme Court has chastised time and time again. On its

face, it asks the Commission to conduct a "limited" reference to external events to decide the meaning of speech. On its face, it authorizes the Commission to decide how many days before an election constitutes "proximity." Would-be speakers are not let in on the Commission's current assessment. On its face, it asks the Commission to probe for an "electoral portion" (that is never defined) to trigger regulation. On its face, Section 100.22(b) makes little sense.

Besides the regulation itself, the FEC also notes that its lengthy "Explanation and Justification" for section 100.22(b) controls the reach of the regulation—"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." "Explanation and Justification for Final Rules on Express Advocacy," 60 Fed. Reg. 35292 (July 6, 1995). This E&J empowers the FEC to fish for contextual considerations about the meaning of speech on a "case by case basis." *Id.* Compliance for prospective speakers then means divining the intent of section 100.22(b), and reviewing E&J statements, advisory opinions, and enforcement matters to hope to understand its reach.

Section 100.22(b) is hopelessly vague on its face and as-applied. And while these two categorical distinctions prove important, they will be considered in

tandem in this brief. The record below illustrates this lack of clarity. From Free Speech's good faith effort to work through the FEC's advisory opinion process and an examination of the FEC's enforcement history, the as-applied invalidity of the regulation is manifest. *See* 2 App. 102–356. And from examining the regulation, and the universe of ancillary documents the FEC claims give meaning to it, its facial invalidity is apparent. All this points out a deeper question: if the nation's expert in federal election law cannot consistently, or even in one case, offer consistent and sensible advice about how its regulatory system operates, how then should any citizen be expected to know how to comply with its unpredictable mandates? The only answer the FEC can muster is one the First Amendment resoundingly forbids—if citizens cannot understand whether the law applies to them, simply assume it does and forfeit First Amendment rights. This cannot be an adequate answer in a Republic dedicated to the jealous protection of free speech. *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (regulatory systems that permit individuals to speak in more burdensome alternative methods do not cure underlying constitutional flaws).

Even if one decided to comply with the FEC's regulatory system, the Commission cannot decide which reporting regime applies to the speech in question. 2 App. 331–37. This is because the FEC does not itself understand how to classify this speech. Free Speech might have to file as an individual filer with

an independent expenditure report, or as a PAC with more complicated reports, or as an individual filer with electioneering communication reports, or not at all. But no one quite knows which is required today. When regulatory lines are blurred and definitions made meaningless, compliance becomes impracticable or impossible.

Turning to the case at hand, Appellant submitted several proposed advertisement and donation request scripts to the FEC for consideration through its advisory opinion process. 2 App. 118–21. Free Speech wanted to know with some degree of certainty what the FEC's regulations meant and how to comply. The First Amendment demands nothing less. *See FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317–18 (2012). The record below fully illustrates the rampant confusion at the FEC over the scope of Section 100.22(b) and its application. 2 App. 139–170, 197–210, 227–257, 280, 282–90, 293–95, 299–324. For purposes of this appeal, one proposed script will be examined. In doing so, it is important to recall what seem to be the lynchpin factors that might trigger regulation under Section 100.22(b): (a) advocacy of the election or defeat of a federal candidate (with contextual references in making said determination) because: (b) an "electoral portion" of the speech only has one plausible meaning that (c) reasonable minds could not differ about.

One proposed advertisement, the "Environmental Policy" script, read as follows:

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

2 App. 118. Under the guiding regulation, half the Commissioners were convinced that this script constituted express advocacy because there was an "electoral portion" to take action "[t]his November." 2 App. 199–201. Never mind that the action actually requested in the script is to talk about ranching. This bloc of Commissioners felt empowered to divine the supposed true meaning of the script. The remaining Commissioners believed the advertisement did not suggest the advocacy of the election or defeat of a candidate and that the language had several reasonable constructions. 2 App. 249, 337–39. "Environmental Policy" is but one example of this trend detailed in the record below.

If having the FEC reach a deadlock over what its regulations mean and how they are to be applied is bad in this instance, the FEC's history is even worse. In order to understand § 100.22(b), the FEC invites individuals to read thousands of pages of previous enforcement matters. "Political Committee Status," 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007); MUR 6073 (Patriot Majority 527s), FGCR at 9 (FEC 2009) ("developments in the law . . . include[] the distillation of the meaning of 'expenditure' through the enforcement process . . . ."), *available at*

http://eqs.nictusa.com/eqsdocsMUR/10044264544.pdf. [3] Indeed, half of the Commissioners in the Free Speech matter pointed out these constitutional deficiencies at the end of the advisory opinion process. 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 program here, totaling nearly four pages. 2 App. 321–24. Prior to the release of the advisory opinion here, one Commissioner went to great lengths to detail the constitutional and statutory problems inherent in this system. *See* MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn (FEC 2011), *available at* http://eqs.nictusa.com/eqsdocsMUR/11044284675.pdf. It remains evident that the

[3] Other past enforcement matters illustrate this history of confusion and opacity with the Commission's approach. In one MUR, 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." MUR 5988 (American Future Fund), FGCR at 8 (FEC 2008), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044272836.pdf. Other enforcement matters have asked whether advertisements placed candidates in a "positive light." MUR 5831 (Softer Voices), FGCR at 10 (FEC 2008), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044282395.pdf. Two Commissioners have asked whether the speech in question can be said to have some "electoral nexus" that might trigger regulation. MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 4 (FEC 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044241152.pdf. Other enforcement matters suggest the Commission fashions some (undisclosed) balancing test to determine if speech is regulable. MURs 6051 and 6052 (Wal-Mart Stores, Inc.), FGCR at 10 (2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044263012.pdf.

Commission charged with enforcement of the FECA maintains a freewheeling, undefined, ever growing list of nebulous factors with which to penalize speech and speakers.

These deficiencies, and more, were detailed at length in Plaintiff's First Amended Verified Complaint and Memorandum in Support of Motion for Preliminary Injunctive Relief. 1 App. 32, 87–89. However, even with the practice of "distillation," the FEC could not adequately answer any of Free Speech's basic questions in its advisory opinion process. 2 App. 282– 92. The court below erred in evaluating the likelihood of Appellant's success given the stark constitutional deficiencies inherent in Section 100.22(b).

This is not, as the lower court suggests, a case involving close calls interpreting regulatory boundaries. 3 App. 487. This is rather about a Commission that has empowered itself with an overbroad and vague regulation that permits it to make up its regulatory standards as it goes along. This singular regulation, 100.22(b), has created the ensuing constitutional chaos: lengthy E&J statements purporting to define the regulation, advisory opinions that offer no advice, and nothing short of a tome of enforcement matters offering contradictory advice about the reach and scope of the law. The First Amendment, even in dealing with potentially obscene speech, demands clear, comprehensible, and precise standards. These principles are glaringly absent on the face of 100.22(b) and in the manner

the Commission applies the regulation, necessitating it be stricken as constitutionally and statutorily invalid.

Free Speech is thus left, as half the Commissioners noted, in "legal limbo." 2 App. 298. The FEC's only response to this limbo is to suggest that Appellant simply comply because this is just disclosure. 3 App. 413. Whatever benefit disclosure may have, it is not a sufficient excuse for the maintenance of an unwieldy, unconstitutional, and contradictory regulatory maze that suppresses First Amendment freedoms. Certainly some speech must exist outside of the purview of the FEC's watchful eye. Free Speech would simply like to know where the line between regulated and free speech exists.

C. The FEC's Practice for Determining Regulated Contributions is Invalid

To be effective in its messaging and operations, Free Speech must be able to request donations supportive of its mission. Like other areas of FEC regulation, this conduct becomes hazardous due to the FEC's lack of clarity about which requests for funds are solicitations and which funds received from them are regulable contributions. 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 C.F.R. § 110.11(a)(3). In addition, some fundraising requests

may be interpreted as solicitations, transforming some or all of the resulting funds into regulated contributions. However, like the express advocacy determination, no one knows where those lines exist.

Speaking broadly, fundraising is fully protected under the ambit 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). Thus, just as in other areas of First Amendment concerns, attendant regulations touching on fundraising activities must comply with basic constitutional demands.

The *Buckley* Court explained that contributions 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*, 65 F.3d 285 (2d Cir. 1995). Under that ruling, only donations "that will be converted into expenditures subject to regulation under FECA" were deemed contributions. *Id.* at 295. The *SEF* court recognized that vague and overbroad definitions of solicitations would cause similar problems to those with express advocacy. It explained that individuals would "be at a loss to know when a solicitation triggered FECA disclosure requirements" that would subject "them to a potential civil penalty." *Id*. Just like the express advocacy formulation for expenditures, the *SEF* Court limited the term solicitation to a request that "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.*

Former FEC regulation Section 100.57, now invalidated by *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), previously defined when funds received from a solicitation would be treated as contributions under the FECA. It remains unclear what singular, uniform standard the FEC follows and applies when deciding which fundraising requests are solicitations and which funds from solicitations will be deemed contributions. Indeed, half the Commissioners breathed new life into invalidated Section 100.57, believing that ""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.'" 2 App. 210–11. These same Commissioners suggested that individuals should peruse lengthy enforcement proceedings issued by the FEC to decide whether fundraising requests might be considered solicitations. *Id.*

When attempting to resolve the AOR before the FEC, three Commissioners found the language in the "War Chest" and "Make Them Listen" scripts to be capable of different interpretations and thus outside of its regulatory authority. 2 App. 261–62, 265–66. Another three found the scripts to be regulable solicitations—presumably by resurrecting former Section 100.57 or wading through past enforcement matters. 2 App. 211, 213–14. As with the express advocacy discussion, no one quite seems to know where the line between regulated speech and free speech might exist. And while this scenario might work well for established and wealthy political speakers able to afford the high cost of compliance (and to pay the fines when they misjudge), average speakers remain lost in legal limbo as a result. The FEC's maintenance of hazy, ever-changing standards to trigger regulation of solicitations by applying an invalidated agency regulation and referencing unwieldy past enforcement actions demonstrates the basic lack of clarity and guidance needed by interested persons who wish to tailor

their conduct in compliance with the law. The lower court failed to consider these burdens against Free Speech and committed an abuse of its discretion in doing so.

D. The FEC's Policies and Practices for Determining PAC Status are Unconstitutional

The last prong in determining PAC status is the major purpose test. In *Buckley*, to prevent vagueness and overbreadth, the Supreme Court narrowed the scope of PAC status to prevent the inclusion of issue advocacy organizations. 424 U.S. at 79. PAC status can only apply to an organization "under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate." *Id.* (emphasis added). Since then, Congress has never defined a major purpose test and the FEC has never promulgated regulations to guide its determination of an organization's major purpose. Instead, courts and the FEC have determined an organization's major purpose on a case-by-case basis; this is the FEC's official policy. 72 Fed. Reg. at 5601–02. After decades of administrative enforcement actions and advisory opinions, along with myriad court cases, the major purpose test actually adopted by the FEC is hopelessly vague and overbroad, facially and as applied to Free Speech. Absent clear standards, the test does not serve to prevent the application of burdensome PAC status to issue advocacy organizations such as Free Speech, but gives the FEC arbitrary and discriminatory authority to apply the requirements of PAC status to almost any organization it chooses.

Before discussing the major purpose test, it is necessary to turn again to the difference between "disclosure" and PAC status, the two distinct—and far from equivalent—outcomes of the major purpose test. While disclosure is meant to serve the government's legitimate informational interest with simple identification and reporting for advertisements that constitute express advocacy or electioneering communications, PAC status constitutes the full "panoply of regulations." *MCFL*, 479 U.S. at 262. As the Supreme Court recently described in *Citizens United*,

> PACs . . . are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. . . . And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur. . . . *PACs have to comply with these regulations just to speak.*

130 S.Ct. at 897 (emphasis added). PAC status is not a regime that "do[es] not prevent anyone from speaking." 3 App. 485; *see MCFL*, 479 U.S. at 255 ("Faced with the need to assume a more sophisticated organizational form . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it."). As it did in its discussion of disclosure, the *Citizens United* Court also cited back to *MCFL*, via *McConnell*. *Citizens United*, 130 S.Ct. at 897 (citing *McConnell*, 540 U.S. at 330–32 (citing *MCFL*, 479 U.S. at

253–54)). *MCFL* cannot escape this discussion, for *Citizens United* only reinforced the decision.

MCFL did not discuss the major purpose test in detail; it was clear to all parties that MCFL's major purpose was not the election or defeat of candidates. 479 U.S. at 252 n.6. However, the case informs the importance of separating issue advocacy organizations from PACs. The Court was concerned that PAC status was not a meaningful alternative to the corporate ban, but was also concerned that MCFL was "regulated *as though* the organization's major purpose is to further the election of candidates." *Id.* at 253 (emphasis added). Furthermore, though the Court carved out an exception to the ban for MCFL-type organizations, the Court left the door open to MCFL itself becoming a PAC: "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. It is important that, until that point is reached, MCFL, and all issue advocacy groups, remain free from PAC burdens. If that point is not reached, organizations remain subject to narrow, effective disclosure for independent expenditures and electioneering communications. *See id. Citizens United* favorably cited *MCFL* for its assessment of the problems of PAC burdens and the use of less restrictive means to facilitate disclosure: in *Citizens United*, *MCFL* was not overturned, but reaffirmed. The court below did not recognize this,

and opined that Free Speech "appears to seek to expand the discussion in *Citizens United* as to the formation of a PAC." 3 App. 488. The expansion, in fact, lies with the FEC, whose arguments suggest that *MCFL* is no longer relevant. This is wrong: PAC status remains far more burdensome than disclosure, and there must be understandable regulations to guide organizations seeking to avoid its burdens. This error alone constitutes an abuse of the lower court's discretion in denying Free Speech's request for injunctive relief.

The Tenth Circuit has a long tradition of protecting political speech, and its precedents give the lie to blanket affirmations of so-called "disclosure" regimes. Specifically, this Court has addressed disclosure in light of issue advocacy in the public square and issue advocacy through advertising. In each instance, the Court has ruled against extensive reporting regimes like PAC status in light of less restrictive means, even under the "exacting scrutiny" standard.

In *American Constitutional Law Foundation v. Buckley* (*ACLF I*), this Court upheld part of a ruling from the District of Colorado that overturned numerous reporting and disclosure requirements for circulators of ballot petitions. *ACLF I*, 120 F.3d 1092 (10th Cir. 1997). Applying exacting scrutiny and considering the government's interest in identifying misconduct, this Court nevertheless struck down provisions of Colorado law that required petition circulators to wear name badges. Part of their reasoning is illuminating: the law "provides other tools that

are much more *narrowly tailored* to serve the state's interest." *Id.* (emphasis added). Accepting an argument that provided what today is considered the government's "informational interest," this Court also found that provisions requiring organizations to submit monthly reports that included "disclosure of information specific to each paid circulator" could not survive exacting scrutiny. *Id.* at 1105. They did so because this "shed[] little light on the relative merit of the ballot issue" and the informational interest was already served by other provisions in the law or could be "protected by *less intrusive* measures." *Id.* (emphasis added). The United States Supreme Court affirmed this ruling in its entirety. *See Buckley v. ACLF* (*ACLF II*), 525 U.S. 182 (1999). "Requiring circulators to identify themselves against their will is more intrusive than simply disclosing an expenditure." *ACLF I*, 120 F.3d at 1103. Likewise, requiring organizations to form PACs against their will (or, at least, understanding) is more intrusive than simply disclosing electioneering communications and independent expenditures. For issue advocacy organizations like Free Speech, the simple disclosure regime is narrowly tailored to meet the government's informational interest; PAC status is not.

More recently, this Court addressed the plethora of burdens that come with PAC-like registration and reporting requirements, and how these cannot be applied to issue advocacy organizations. In *Sampson v. Buescher*, this Court ruled that

portions of the Colorado Constitution violated the First Amendment as applied to a small group of citizens opposing a ballot measure. 625 F.3d 1247, 1261 (10th Cir. 2010). Specifically, this Court found that PAC-like registration was substantially burdensome when imposed upon a small group, and that such burdens were not justified by a governmental interest. *Id.* at 1260–61. The FEC has already argued that *Sampson* is irrelevant, since the committee at issue was engaged in ballot measure issue advocacy. FEC Opp'n to Emergency Injunction (Docket No. 10014280) at 16–17. This distinction reinforces the FEC's misunderstanding of *Citizens United*, and assumes that there is a legitimate governmental interest—or, at least, no burden—in regulating issue advocacy beyond the narrow disclosure the Supreme Court approved for electioneering communications. Outside of the electioneering communications window, issue advocacy that criticizes a candidate without expressly advocating for the election or defeat of said candidate is entirely walled off from federal regulation as a matter of law. *See Buckley*, 424 U.S. at 78–80. Whether it is for ballot measures, specific issues in legislature or broad issues with many implications (such as ranching), issue advocacy does not fall within the FEC's purview outside of electioneering communications, and the burdens of PAC status are not to be haphazardly assigned to groups like Free Speech.

Having established the long-recognized and still-recognized burdens that attend PAC status, we now turn back to the major purpose test itself, which should

be a "bright line" guard against PAC status. *See FEC v. GOPAC*, 917 F.Supp. 851, 861 (D.C. Cir. 1996). The Tenth Circuit has consistently required that major purpose be considered when determining PAC status under state laws. In *Colorado Right to Life Cmte. v. Coffman* (*CRTL*), this Court upheld summary judgment against a Colorado law that defined political committee without a major purpose test. 498 F.3d 1137, 1153–54 (10th Cir. 2007). More recently, in *New Mexico Youth Organized v. Herrera* (*NMYO*), this Court upheld nearly the same judgment against a New Mexico law with the same deficiency. 611 F.3d 669, 678–79 (10th Cir. 2010). Free Speech now asks this Court to review the FEC's altered major purpose test facially and as-applied, arguing that its existence must be more than symbolic, that is, it must serve as an actual bright-line guard against PAC status. Since the FEC's major purpose test is vague and overbroad both facially and as-applied, it is unconstitutional.

Since the major purpose test is nowhere defined in law, a facial challenge is rather difficult. However, the Tenth Circuit's recent formulation follows generally accepted practice: "There are two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *NMYO*, 611 F.3d at 678, *citing CRTL*, 498 F.3d at

1152. The latter method is not at issue (save for the definitions of "express advocacy" and other provisions at issue in this case), but the FEC's policies and practices for determining an organization's central organizational purpose are facially vague and overbroad.

The FEC insists that it may determine the major purpose of an organization on a case-by-case basis. 1 App. 445. By itself, this is a truism. However, the FEC does not merely conduct major purpose analysis on a case-by-case basis, but formulates the methodology on a case-by-case basis. From that perspective, the method is the very definition of arbitrary and discriminatory enforcement. To find the central organization purpose, the FEC consults "sources *such as* the group's public statements, fundraising appeals, government filings . . . charters, and bylaws." *Id.* (emphasis added). It fails to limit this inquiry, and insists that its previous enforcement matters give groups reasonable understanding. 72 Fed. Reg. at 5604 ("Any organization can look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases, for guidance as to how the Commission has applied the . . . major purpose doctrine."). After reading what amounts to thousands of pages, groups may take heart that other groups have, in fact, found favorable treatment under the major purpose test, but this will bring them no closer to understanding it. *See* 3 App. 445 n.28.

In addition to its undefined scope for determining major purpose, the FEC's objective is facially vague and overbroad as well. Previous cases have guarded the objective of the major purpose test stringently. In *GOPAC*, the D.C. Circuit struck down the FEC's attempt to expand the capture of the test by determining a group's major purpose could be "partisan politics" or "electoral activity." 917 F.Supp. at 859–60. The court, reiterating the appropriateness of bright-line rules, kept the objective to "the election of a particular federal candidate or candidates." *Id.* at 861; *see also Unity08 v. FEC*, 596 F.3d 861, 868–69 (D.C. Cir. 2010) (rejecting the FEC's attempt to impose PAC status on a draft group that had not selected a clearly identified candidate); *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287–90 (4th Cir. 2008) (striking down state law that only required finding a group had "a major purpose" rather than "the major purpose" of supporting or opposing a candidate). Rather than follow this precedent, the FEC now still identifies similarly vague and overbroad objectives and *then* concludes that the major purpose is satisfied under its original formulation in *Buckley*. *See* MUR 5831 (Softer Voices) Statement of Reasons of Commissioner Donald F. McGahn II at 38–39 (FEC 2011), *available at* http://eqs.nictusa.com/eqsdocsMUR/11044284675.pdf (listing several amorphous purposes determined by the FEC in numerous Matters Under Review, including "influence a federal election") (hereinafter "McGahn Softer Voices SOR").

Finally, the factors the FEC utilizes to determine major purpose—that is, what it actually looks for in its vague and overbroad scope to reach a vague and overbroad objective—are also vague and overbroad. The FEC has considered the timing of an organization's formation, in what media outlets it runs advertisements, whether communications identify a candidate, the timing of advertisements, the number of donors to the organization, and numerous other factors. McGahn Softer Voices SOR at 40–41 (citing numerous Matters Under Review). There is also no time restraint on the inquiry, allowing the FEC to consider factors within any time window it chooses. *Id.* at 44–45. Finally, these factors usually are given weight when they weigh in favor of PAC status; there is no consistent use of factors or balancing analysis.[4] The major purpose test is a judicial construct entrusted to an executive agency nearly forty years ago: time has only expanded it to a facially vague and overbroad tool for regulatory capture. As it is currently implemented, there is no constitutional application of the test by the FEC.

The FEC's application of the major purpose test to Free Speech further emphasizes its unconstitutional vagueness and overbreadth. At the very least, the

[4] However, given how complicated this balancing test would be if it were articulated, it would likely give rise to constitutional problems of its own. *Citizens United*, 130 S.Ct. at 895 (Criticizing the complexity of the FEC's regime, noting "In fact, after this Court in *WRTL* adopted an objective 'appeal to vote' test for determining whether a communication was the functional equivalent of express advocacy . . . the FEC adopted a two-part, 11–factor balancing test to implement *WRTL* 's ruling.").

major purpose test is unconstitutional as-applied. However, Free Speech's experience reveals how arbitrary the FEC's application of the major purpose test is, and this should also add to this Court's consideration of Free Speech's facial challenge against the unwritten law.

Draft B, the opinion of half the Commission advocated by the Office of General Counsel, largely relies on the prong of the major purpose test that can be reasonably understood, that is, simple math. *See* 2 App. 215–19. If Free Speech's spending contains a preponderance of independent expenditures, its major purpose will be the election or defeat of candidates. This is an acceptable practice, but for the vague and overbroad regulations that define independent expenditures. Draft B concluded that the majority of Free Speech's advertisements constituted express advocacy, and that the spending on these ads amounted to a majority of its funds. Thus, the draft concluded, Free Speech's major purpose is the election or defeat of federal candidates. 2 App. 216–17. Although the major purpose analysis could have ended there, Draft B also looked into Free Speech's central organizational purpose. This adds confusion—indeed, bewilderment—where the advisory opinion process is meant to guide, and seems an effort to foreclose Free Speech from avoiding PAC status. *See* 2 App. 217–18.

Draft B continues into the central organizational purpose inquiry: "The 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 [f]ederal candidate." 2 App. 217. The first trigger of PAC status—$1,000 of independent expenditures or contributions—is differentiated on the basis of express advocacy versus issue advocacy. The major purpose test, likewise, is meant to differentiate between actual PACs and issue organizations. *See Buckley*, 424 U.S. at 79. Yet, according to Draft B, the major purpose analysis is informed by "non-express advocacy spending." This is a blatant contradiction: an issue organization cannot be forced to become a PAC by engaging in issue advocacy, even if that advocacy is critical of candidates.[5] *See id.* at 42 ("Candidates . . . are intimately tied to public issues involving legislative proposals and government actions."). Nevertheless, by the time Draft B completes its regulatory acrobatics, it concludes that "Free Speech will spend its *entire budget* on [f]ederal campaign activity." 2 App. 218 (emphasis added). This conclusion is a blatant affront to the D.C. Circuit's ruling in *GOPAC*. *See* 917 F.Supp. at 861 (requiring that major purpose must be narrowly construed to the election or defeat of clearly identified candidates). If issue advocacy that avoids the initial trigger of

[5] The only provisions ever placed on what would otherwise be issue advocacy under federal law are through electioneering communications, a very narrow type of communication discussed earlier. By the very words of the law, "electioneering communication[s] *do[] not include* . . . communication[s] which constitute[] . . . expenditure[s] or . . . independent expenditure[s] under this Act." 2 U.S.C. § 434(f)(3)(B) (emphasis added).

PAC status can later be utilized to impose PAC status, then the major purpose test is vague and overbroad and fails to serve its purpose.

Draft B exposes the vagueness and overbreadth of the major purpose test as much by its omissions as its contents. The draft notes that "[a]ll of Free Speech's proposed advertising would occur during the 2012 Presidential election year." 2 App. 218. However, Free Speech stated in its request that it intended to fundraise and take out additional ads. 2 App. 103; *see also* 1 App. 67. Since an organization remains a PAC until the FEC permits its dissolution, the agency should not assume such a limited timeframe when imposing such a sweeping regulatory regime. *See* 11 C.F.R. § 102.4. If timing is to be considered, Free Speech is entitled to know the breadth of the timeframe. Another conspicuously absent factor from Draft B's analysis is a point potentially favorable to Free Speech: at the time of the advisory opinion request, Free Speech's ads were to run only in Wyoming. 2 App. 123. Unlike some previous organizations reviewed by the FEC, Free Speech would not target its ads to swing states or, for that matter, a remotely contested state. *See, e.g.*, MUR 5977 (American Leadership Project) FGCR at 11–12 (FEC 2008), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044264601.pdf. Even when Free Speech modified its plans during this litigation, it did not target contested states. Its media outlets outside of Wyoming were to be nationwide. *See* 2 App. 360–61. If targeting contested races or swing states with advertising is an indicator

of the major purpose of electing or defeating candidates, then avoiding this practice should buttress Free Speech's position that it seeks to discuss political issues, but this is not discussed. If a factor under the major purpose test is only to be considered when the factor favors regulation, then the law is vague and overbroad. Draft B makes no attempt to consider factors consistently with previous FEC matters, much less describe the factors the FEC considers for central organizational purpose, leaving the major purpose test as nothing more than a tool for arbitrary and discriminatory enforcement against Free Speech.

Once again, this is not a case that just happens to "fall close to the line." 3 App. 487. Draft C, supported by the other half of the FEC's commissioners, diametrically opposes Draft B's major purpose analysis. Since it comes to drastically different conclusions about the content of Free Speech's ads, the comparison method leads to the conclusion that Free Speech's spending is not predominantly for independent expenditures. 2 App. 272–78. Draft C also addresses the central organizational purpose analysis, and concludes that

> official statements from a group, including a group's organizing documents or statement of purpose, or other materials put forth under the group's name . . . are to be used to determine an entity's central organizational purpose, rather than articles and other statements that do not have the imprimatur of the group in question.

2 App. 271. This is a much narrower approach that forecloses the re-purposing of a group's issue advocacy or delving into undefined areas of timing, where

geographically a group runs ads, or the like. Draft C properly entrusts an organization's purpose primarily to said organization, and only allows well-defined empirical evidence to prove otherwise.

Once the definitions of express advocacy and the solicitation standard are understood, major purpose can be determined by simply weighing the amount of spending an organization puts into express advocacy versus its other spending. This is already recognized as the second prong of the major purpose test. However, for central organizational purpose, if the prong is to remain at all it must be narrowly construed to the founding documents of an organization and to public statements. This would recognize that, absent specific accounting evidence to the contrary, it is an organization's right to determine its central organizational purpose, not the FEC's. However, absent an understanding of what constitutes "express advocacy," even the accounting method will not work.

The major purpose test, or any test, will always be case-by-case. Free Speech does not challenge this. However, for any test meant to differentiate heavy justified burdens on political speech from heavy unjustified burdens, there must be articulable standards. Free Speech is an issue advocacy organization, and it wants to criticize or praise politicians without being a PAC. This must be possible, or

there would be no need for the major purpose test at all.[6] When an organization is not a PAC, it is still subject to disclosure of electioneering communications and independent expenditures: this is the less restrictive means approved by *MCFL*, which was favorably affirmed in *Citizens United* and conforms with Tenth Circuit precedent such as *ACLF*.

On the FEC's present course, the major purpose test will become only vaguer and all-encompassing as the FEC continues to invent new considerations for divining a group's central organizational purpose. This Court must examine the test in its entirety, facially and as-applied, and should find that the test satisfies the very definition of unconstitutional vagueness and overbreadth.

E. Something More Troubling than Mere Disclosure: a Prior Restraint Against Grassroots Speakers

In *Citizens United*, the Supreme Court explained that complicated regulatory schemes affecting speakers often acted like prior restraints. 558 U.S. at 895. When citizens are fearful of civil and criminal penalties and are forced to defend the heavy costs of FEC enforcement actions, it is the unfortunate result that they will tend to seek prior government approval before speaking. *Id.* And, as the *Citizens United* Court reminded, this practice closely resembles the "licensing laws implemented in 16th- and 17th-century England, laws and governmental practices

[6] Nor would there be a need for separate regulation of electioneering communications.

of the sort that the First Amendment was drawn to prohibit." *Id.* at 896. What the Supreme Court realized holds equally true here—"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.'" *Id.* (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

True enough, *Citizens United* concerned electioneering communications and this case touches upon other areas of the FEC's regulatory system. But the same maladies present in *Citizens United* for purposes of prior restraint analysis are present here. The FEC has spent extensive time, money and energy 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, ill-defined regulatory burdens operates as the functional equivalent of a prior restraint against speakers like Free Speech. In order to speak without fear of retribution, and each time it wishes to speak, Free Speech must necessarily file an advisory opinion request with the FEC to get permission to speak outside of its regulatory programs. Even in the present case, when it did so, the FEC could not answer the basic questions of law presented to it by Free Speech.

Prior restraints come before a court "bearing a heavy presumption against [their] constitutional validity." *Bantam Books*, 372 U.S. at 70. When one is present, 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). And while, rarely, some forms of prior restraint have been approved in areas of "low value" First Amendment speech, 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").

Like the challengers in *Citizens United*, Free Speech would simply like to gather funds together to speak effectively about issues and candidates they care about. But because of the promulgation and maintenance of Section 100.22(b), the elongated E&J statements purporting to define the law, manifold advisory opinions

and enforcement actions offering contradictory and confusing advice, and, above all, lack of clarity, Free Speech must seek permission from the government to speak freely. Even when it did so in this case, the FEC could only muster a shrug, itself unable to articulate the meaning of its complicated regulations and how to comply with them. This then leaves the FEC with its only argument—that this is just about disclosure—while leaving the very real constitutional issues untouched.

Free Speech believes that there must be consistent, objective, articulable standards that can illustrate when FEC regulation is triggered. It believes such standards can be found in the "Draft C" advisory opinion issued by the FEC in this case and a judicial affirmation of those guiding principles would move to dispel the confusion apparent in this system.

IV. FREE SPEECH SUFFERED IRREPARABLE HARM

Where First Amendment rights are lost, 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). Other federal courts generally agree that in cases involving political speech where the likelihood of success is established, the irreparable harm inquiry is satisfied. *See, e.g., Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d

139, 145-46 (7th Cir. 2011); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) (violations of First Amendment rights "constitute per se irreparable injury"); *Center for Individual Freedom, Inc. v. Ireland*, 613 F.Supp.2d 777, 784 (S.D. W.Va. 2009); *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F.Supp.2d 1224 (M.D. Ala. 2000) (detailing chill and speech suppression as irreparable injury).

In this case, Free Speech silenced itself for the duration of the FEC's advisory opinion process, which lasted over 60 days. It silenced itself during the 2012 electoral cycle and missed a number of opportunities to speak out about important political issues. 1 App. 77, 80. Without relief, Free Speech, and many other speakers nationwide, will continue to suffer irreparable injury through the deprivation of their First Amendment rights.

V. THE BALANCE OF HARMS FAVORS 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 right to speak 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 between political committees and issue advocacy organizations, there will be no harm to the FEC from a lack of enforcement. If anything, the FEC will have an easier time acting as a regulatory agency when it promulgates and then enforces consistent and understandable rules instead of "distilling" its rules through the enforcement process, or promulgating regulations as it enforces them. The 2012 election cycle has passed—with no participation from Free Speech—and the FEC has ample time to implement standards before the 2014 election cycle. The balance of hardships favors Free Speech, and injunctive relief is necessary for its issue advocacy and issue advocacy of all other such organizations that just wish to speak.

VI. INJUNCTIVE RELIEF WOULD PROMOTE 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 v. United States Food and Drug Admin.*, 823 F.Supp.2d 36, 52 (D.C. Cir.

2012) ("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.

VII. CONCLUSION

For these reasons, the district court erred, and this Court should reverse its denial of preliminary injunction and instruct the lower court to reconsider these issues consistent with this Court's guidance.

Dated: January 2, 2013.

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STATEMENT REGARDING ORAL ARGUMENT

Free Speech respectfully requests oral argument in this appeal. With the number, complexity and novelty of the issues involved, oral argument would help materially advance this appeal by providing this Court with the opportunity to focus and clarify the issues that concern it the most. Both sides are represented by able counsel who can assist the court in resolving issues that will likely have an impact beyond the parties to this controversy.

CERTIFICATE OF VIRUS PROTECTION

I certify that the digital version of the foregoing is an exact copy of what has been submitted to the Court in written form and e-mailed to counsel of record. There are no privacy redactions to be made. The digital submission has been scanned with the most recent version of Trend Micro PC, which daily scans for updates, and according to the program is virus free.

____/s/_____
Stephen Klein
Attorney for Free Speech

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

Excluding the table of contents, table of authorities and statement regarding oral argument, as directed by Rule 32(a)(7)(B)(iii), I certify to the best of my belief and knowledge that this brief contains 13,576 words as calculated by Microsoft Word.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, size 14.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/
Stephen Klein
Attorney for Free Speech
Dated: January 2, 2013.

ADDENDUM (10TH CIR. R. 28.2(A))

1. District Court's October 3, 2012 Ruling on Plaintiff's Motion for Preliminary Injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH,

Plaintiff,

VS.

FEDERAL ELECTION COMMISSION,

Defendant.

CASE NO. 12-CV-127-SWS

OCTOBER 3, 2012
8:28 A.M. - 9:05 A.M.

CASPER, WYOMING

TRANSCRIPT OF TELEPHONIC ORAL RULING
ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE SCOTT W. SKAVDAHL
UNITED STATES DISTRICT JUDGE

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CITATION INDEX

THE COURT: Good morning, counsel.

MR. BARR: Good morning, Your Honor.

MS. CHLOPAK: Good morning.

THE COURT: Court is in session in the matter of Free Speech versus the Federal Election Commission, Case Number 12-CV-127. I note the presence of Mr. Speight, Mr. Klein and Mr. Barr on behalf of plaintiffs -- plaintiff and the presence of Mr. Kolker, Ms. Chlopak and Mr. Noti on behalf of the defendant, Federal Election Commission.

This matter comes before the Court on plaintiff's motion for preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiff, based upon alleged infringement of its constitutional rights, seeks to have this Court enjoin defendant, the Federal Election Commission, from enforcement of various regulatory provisions and policies. The Court finds and orders as follows:

As to the background in this matter, Plaintiff Free Speech is an unincorporated, nonprofit association formed on February 21, 2012, and is comprised of three Wyoming residents. Free Speech's stated mission is to promote and protect free speech, limited government and constitutionally -- constitutional accountability and to advocate positions on various political issues, including free speech, environmental policy, gun rights, land rights and control over personal healthcare. Its bylaws require that it operate independently

of political candidates, committees and political parties. See the *Complaint*, Paragraphs 1 and 10, and Exhibit A to Exhibit 1. Free Speech seeks to run various advertisements addressing political issues and seeks to engage in fundraising from other like-minded individuals to support its positions through public media.

On July 26, 2012, plaintiff filed this action, challenging certain FEC regulations that plaintiff alleges abridge its First Amendment freedoms. Specifically, plaintiff brings facial and "as applied" challenges against 11 C.F.R, Section 100.22(b), alleging its definition of "express advocacy" is unconstitutionally vague and overly broad and triggers burdensome registration and reporting requirements which act as the functional equivalent of a prior restraint of political speech.

Plaintiff further challenges the constitutionality of the FEC's interpretation and enforcement process regarding political committee status, solicitation tests, the "major purpose" test and express advocacy determinations. See *Complaint*, Paragraph 2.

In order to understand and analyze the issues raised, it is helpful to lay out the applicable statutory and regulatory framework and evolution of law affecting political campaigns and elections. It is also helpful to identify, to the extent able, the perceived evils sought to be curtailed by

this set of campaign laws. The primary purpose of the Federal Election Campaign Act of 1971, hereinafter "The Act" or "FECA," was to limit the actuality and appearance of corruption resulting from the giving of large sums of money and the spending of money in political campaigns for federal office.

Thus, under Title 2, United States Code, Section 441a, limitations are imposed upon the amount of contributions that can be made directly to candidates for federal office and the expenditures that a candidate may make in running for office. There were also concerns regarding independent expenditures which were not made by a candidate for federal office but nonetheless a person advocating for the election or defeat of a clearly identified candidate. These independent expenditures, in part, give rise to the issues before the Court in this case.

Prior to the United States Supreme Court's decision in *Citizens United versus Federal Election Commission*, 130 Supreme Court 876, 2010, the federal law prohibited corporations and unions from using treasury funds, money, to make independent expenditures for speech that was either defined as electioneering communication or for speech expressly advocating the election or defeat of a candidate. This preclusion on corporate expenditures for electioneering communications was upheld in *McConnell versus Federal Election Commission*, 540 U.S. 93, 2003. However, in doing so, the Supreme Court relied upon its prior holding in *Austin versus Michigan Chamber of*

Commerce, 494 U.S. 652, 1990 Supreme Court decision which upheld the State of Michigan's direct restriction on the independent expenditures of funds by a corporation that supported or opposed any candidate for state office.

In *Citizens United*, the Supreme Court overruled its decision in *Austin* and held unconstitutional Title 2, United States Code, Section 441b's restrictions on corporate independent expenditures. In addition, the Court in Citizens United overruled that portion of *McConnell* which had upheld amendments to Section 316(b) of FECA, precluding corporations and unions from using their general treasury funds, money, to finance electioneering communications. See *Citizens United* at 913; *McConnell* at 203 through 205.

Despite this conclusion on the preclusion of expenditures, it is equally if not more significant to the claims in this case to note what the Court in *Citizens United* found was constitutionally permissible. In *Citizens United*, there was also a challenge made to the disclaimer and disclosure requirements under Title 2, United States Code, Section 441d. In analyzing these disclaimer and disclosure requirements, the Court in *Citizens United* noted: "Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities," citing *Buckley*, 424 U.S. at 64, and "do not prevent anyone from speaking," citing *McConnell*, *supra*, at 201. The Court has

subjected these requirements to "exacting scrutiny" which requires a "substantial relation" between the disclosure required and a "sufficiently important" governmental interest. *Buckley*, *supra*, at 64. The Court went on, in *Citizens United*, to conclude that the disclosure and disclaimer requirements were constitutional, reaffirming its analysis in *McConnell* as it pertained to the disclosure provisions. *Id.* at 915.

The case law has also drawn distinctions between campaign advocacy and issue advocacy. To that extent, in *Federal Election Commission versus Wisconsin Right to Life*, 551 U.S. 449, the Supreme Court, in 2007, held that statutory restrictions on the use of corporate funds to advertisements that were "issue advocacy" advertisements as opposed to "express advocacy" were unconstitutional.

In reaching that conclusion, the Court noted that the speech at issue was not the "functional equivalent of express campaign speech." Thus, the interests held to justify restricting corporate campaign speech or its functional equivalent did not justify restricting the "issue advocacy" speech involved in *Wisconsin Right to Life*. In making this distinction, the Court noted that the dangers associated with advocacy or campaign speech or its functional equivalent does not exist with respect to issue advocacy. See *Wisconsin Right to Life*, at 470. It is behind this wall of precedent that the merit of plaintiff's claims must be measured. The definition

of these terms is important to the analysis of the issues presented.

Under the Federal Election Campaign Act of 1971, "independent expenditure" is defined as "an expenditure expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party or committee. See Title 2, United States Code, Section 431(17).

An "expenditure" is defined as "any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by any person for the purposes of influencing any election for federal office." See Section 431(9)(A)(i), Title 2.

Under 11 C.F.R, Section 1OO.22, "expressly advocating" is defined as any communication that (a) uses phrases such as "vote for the president," "reelect your congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote pro-life" or "vote pro-choice" accompanied by a listing of clearly identified candidates described as pro-life or pro-choice, "vote against Old Hickory;" "defeat" accompanied by a picture of one or more candidates; "reject the incumbent" or communications of campaign slogans or individual words which in context can have no other reasonable meaning than to urge the election or defeat

of one or more clearly identified candidates such as posters, bumper stickers, advertisements, et cetera, which say, "Nixon's the one"; "Carter '76"; "Reagan/Bush" or "Mondale!"; or Subsection (b) of Section 100.22 which provides: "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 candidates because, one, the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and, two, reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action.

A person or organization, other than a political committee, that finances independent expenditures aggregating more than $250 a calendar year is required to file with the FEC a disclosure report that identifies, *inter alia*, the date and amount of each expenditure and anyone who contributed over $200 to further it. See United States Code, Section 434(c) of Title 2; and 11 C.F.R., Section 109.10(e).

The Act further defines a "political committee," commonly known as a "PAC," as "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a

calendar year." Title 2, United States Code, Section 431(4)(A). The terms "expenditures" and "contributions" are, in turn, defined to encompass any spending or fundraising "for the purpose of influencing any election for federal office." See Sections 431(8)(A)(i) and 431(9)(A)(i).

In *Buckley versus Valeo*, 424 U.S. 1, 1976, the Supreme Court narrowed the statutory definition of a PAC, limiting its reach 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. An organization that is not controlled by a candidate must therefore register as a PAC if its contributions or expenditures exceed $1,000 and its 'major purpose' is the nomination or election of a federal candidate." See *The Real Truth About Abortion, Inc. versus Federal Election Commission*, 681 F.3d 544, 555, Fourth Circuit 2012 decision, hereinafter "*RTAA*."

Political committees must comply with certain organizational and disclosure requirements. They must register with the FEC and file periodic reports for disclosure to the public of their total operating expenses and cash on hand as well as their receipts and disbursements with limited exceptions for most transactions below a 200-dollar threshold. See Title 2, United States Code, Sections 433 and 434. Each PAC must have a treasurer who maintains its records and a separately designated bank account. PACs also must disclose,

in their regularly scheduled reports, additional information about their independent expenditures, including the date, amount and candidates supported or opposed for each independent expenditure over $200, Sections 434(b)(4)(H)(iii), (6)(B)(iii). Additionally, PACs must identify themselves through disclaimers on all of their public political advertising, on their website and in mass emails. 11 C.F.R, Section 110.11(a)(1).

In 2007, after considering and receiving public comments, the FEC decided not to promulgate a new definition of "political committee" but instead to continue its longstanding practice of determining each organization's major purpose through a case-by-case analysis of an organization's conduct. The published notice of this decision explained that while the "major purpose" test can be satisfied "through sufficiently extensive spending on federal campaign activity," 72 Federal Register 5595, 5601, a fact-intensive analysis of each organization's conduct, including public statements, fundraising appeals and spending on other activity, can be instructive in evaluating the organization's campaign activities compared to its activities unrelated to campaigns. *Id.* at 5601 through 602.

The Act defines "contribution" to include "any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purposes of influencing any election for federal office." 2 United States Code, Section

431(8)(A)(i). The Act requires "any person" who "solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing or any other type of general public political advertising" to include a specified disclaimer in the solicitation. *Id.*, Section 441d(a); and see also 11 C.F.R., Section 110.11(a)(3).

Plaintiff wishes to pay for advertisements in various media outlets that will bring to light a variety of public issues such as gun rights, land rights, environmental policy, healthcare and free speech, including their connection with public servants and candidates for public office. Free Speech plans to run these advertisements from the present to November and further speak about related issues as they arise between November as well. See the *Complaint*, at Paragraph 13.

Plaintiff seeks to finance and distribute these communications without registering as a political committee or complying with the disclaimer and disclosure obligations required for certain types of campaign-related communications. Free Speech also intends to solicit donations of funds to finance additional unidentified advertisements well beyond the 2012 electoral cycle. Plaintiff represents it is not under the control of any federal candidate nor does it have, as its major purpose, the election or defeat of clearly identified candidates for federal office -- see *Complaint*, Paragraph 14 -- and plaintiff insists it intends to engage solely in "issue

advocacy." Plaintiff's first cause of action alleges Section 100.22(b) is unconstitutional on its face because it goes "beyond any proper construction of express advocacy and offers no clear guidance -- or guidelines for speakers to tailor their constitutionally protected conduct and speech, and it fails "to limit its application to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" in accordance with *Buckley*. See *Complaint*, Paragraphs 74 and 75.

Plaintiff alleges that Section 100.22(b) is unconstitutional as applied because the FEC "maintains a practice of applying a variety of *ad hoc*, case-by-case factors in each enforcement matter, advisory opinion and consideration of the regulation in question." See *Complaint* at Paragraph 76; and the FEC applies it to cover protected "issue advocacy" communications. *Complaint*, at Paragraph 77.

Plaintiff's second cause of action alleges that Section 100.22(b) is unconstitutional because the "heavy regulations and compliance requirements" associated with the FEC's arbitrary classification of some speech as express advocacy acts as the functional equivalent of a prior restraint. See *Complaint*, Paragraphs 81 and 82. Plaintiff's third cause of action alleges it cannot realistically raise funds or seek donations due to the cumbersome application of the FEC's unconstitutionally vague solicitation standards,

inhibiting it from "associating with like-minded individuals and speaking out to raise awareness of issues." *Complaint*, at Paragraph 87.

Finally, plaintiff's fourth cause of action alleges that the FEC's application of the "major purpose" test to determine political committee status is unconstitutional because it evaluates more than an organization's independent expenditures and founding documents. See *Complaint*, at Paragraph 103. By the present motion, plaintiff seeks a preliminary injunction enjoining the FEC from enforcing the challenged provisions and policies facially and as applied until a final hearing on the merits may be held.

The standard of review applicable to this matter requires that to obtain an extraordinary remedy of a preliminary injunction, plaintiff must show that four factors weigh in its favor: One, it is substantially likely to succeed on the merits; two, it will suffer irreparable injury if the injunction is denied; three, its threatened injury outweighs the injury the opposing party will suffer under the injunction; and, four, the injunction would not be adverse to the public interest. See *Awad, A-W-A-D, versus Ziriax, Z-I-R-I-A-X*, 670 F.3d 1111, at 1125, Tenth Circuit 2012, citing *Winter versus Natural Resource Defense Council*, 555 U.S. 7 at 20, 2008. Preliminary injunctions that alter the status quo or afford the movant all the relief that it will recover at the

conclusion of a full trial on the merits are disfavored and must be more closely scrutinized. *Id.* In such instances, the moving party must make "a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id.*

Plaintiff argues that because the FEC's regulatory structure acts as the functional equivalent of a prior restraint, it asserts that strict scrutiny is warranted to review of its claims. At the core of plaintiff's challenges, however, are rules and policies which implement only the disclosure requirements. The question before the Court is not whether plaintiff can make expenditures for the speech it proposes nor raise money without limitation but simply whether it must provide disclosure of it's electoral advocacy.

Controlling precedent does not support an argument that strict scrutiny is applicable. As noted, "disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. The Court has subjected these requirements to 'exacting scrutiny', which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest. See *Citizens United versus FEC*, 558 U.S. 310. See also *RTAA versus FEC*, 681 F.3d 544. Similarly, the Tenth Circuit has noted that regulations requiring disclosure, as distinguished from

regulations that limit the amount of speech a group may undertake, are subject to the "exacting scrutiny." See *New Mexico Youth Organized versus Herrera*, 611 F.3d 669, 676, 2010 Tenth Circuit decision.

The disclosure and organizational requirements for independent expenditures and political committees "are not as burdensome on speech as are limits imposed on campaign activities or limits imposed on contributions to the expenditures by campaigns." *RTAA*, 681 F.3d, at 548. Accordingly, an intermediate level of scrutiny known as "exacting scrutiny" is the appropriate standard to apply in reviewing provisions that impose disclosure requirements such as the regulation and policy at issue here. See *RTAA*, at 549.

In terms of the issue as to the constitutionality of 11 C.F.R., Section 1000 -- or 100.22(b), "*Citizens United* supports the FEC's use of a functional equivalent test in defining 'express advocacy.' If mandatory disclosure requirements are permissible when applied to ads that merely mention a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible." See *RTAA*, 681 F.3d 551-52.

"The language of Section 100.22(b) is consistent with the test for the functional equivalent of express advocacy that was adopted in *Wisconsin Right to Life*, a test that the

controlling opinion specifically stated was not impermissibly vague." *Id.*, at 552, citing *FEC versus Wisconsin Right to Life*, at 474, Footnote 7.

"Although it is true that the language of Section 100.22(b) does not exactly mirror the functional equivalent definition in *Wisconsin Right to Life*, the difference between the two tests are not meaningful. Indeed, the test under Section 100.22(b) is likely narrower than the one articulated in *Wisconsin Right to Life* since it requires a communication to have an 'electoral portion' that is unmistakable and unambiguous." *RTAA*, at 552.

The fact that the FEC could not conclusively agree as to whether certain of plaintiff's proposed ads constituted express advocacy under its regulations and policies does not make Section 100.22(b) unconstitutionally vague. This fact proves little because cases that fall close to the line will inevitably arise when applying Section 100.22(b). This kind of difficulty is simply inherent in any kind of standards-based test. See *RTAA*, at 554. It also may reflect the inherent problem in an equal number of commissioners and the unfortunate political divide; but, in any event, that does not invalidate the process.

Turning to whether the disclosure requirements triggered by 100.22(b) act as a prior restraint. "In *Buckley*, the Supreme Court explained that disclosure could be justified

based on a governmental interest in providing the electorate with information about the sources of election-related spending." See *Citizens United* at 914. It "upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures." See *Citizens United* at 915.

In this case, plaintiff fails to demonstrate how any of the challenged provisions, none of which impose any restrictions or limitations on its speech, function as a prior restraint. The plaintiff appears to seek to expand the discussion in *Citizens United* as to the formation of a PAC and the burdens imposed upon going through that process, but this Court does not find that those same burdens are analogous in this case and thus do not act as a prior restraint or the equivalent of the same.

As to the constitutionality of the solicitation standard, in evaluating whether plaintiff's donation requests would constitute "solicitations" of contributions, the FEC employed the Second Circuit's test: Disclosure is required "if a communication contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *FEC versus Survival Education Fund, Incorporated*, 65 F.3d 285, at 295; Second Circuit 1995, "*SEF*" hereinafter. Draft B found two of plaintiff's proposed donation requests will solicit

contributions and two will not. *Complaint*, Exhibit C, at page 17. Draft B of the opinion of the FEC reasonably applies -- of the advisory opinion, I should state, reasonably applies the *SEF* standard for solicitations in reaching this conclusion.

The Second Circuit, in *SEF*, recognized that the disclosure requirements for solicitations "serve important First Amendment values. Potential contributors are entitled to know that they are supporting independent critics of a candidate and not a group that may be in league with that candidate's opponent. Section 441d(a)(3) is thus 'a reasonable and minimally restrictive method,' *Buckley*, 424 U.S., at 82, of ensuring open electoral competition that does not unduly trench upon an individual's First Amendment rights." *SEF*, 65 F.3d at 296.

I would add: Based upon *Citizens United*'s analysis and the allowance of corporate contributions, the reporting requirements become even more significant because the corporate structure does not allow identification of the individual who is making the speech at issue.

The constitutionality -- as to the constitutionality of the "major purpose" test and "political committee status": "Following *Buckley*, the Commission adopted a policy of determining PAC status on a case-by-case basis. See Political Committee Status, 72 Federal Register 5595, 5596-97, this '2007 Notice.' Under this approach, the Commission first considers a

group's political activities such as spending on a particular 'electoral' or 'issue advocacy' campaign -- see *Id.* at 5601 -- and then it evaluates an organization's 'major purpose' as revealed by that group's public statements, fundraising appeals, government filings and organizational documents." See *Id.*, *RTAA*, 681 F.3d at 555.

In deciding not to adopt a statutory definition of a PAC, the FEC explained that "applying the 'major purpose' doctrine requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." 72 Federal Register at 5601. The 2007 notice also "explained the framework for establishing political committee status under FECA and discussed several recently resolved administrative matters that provide considerable guidance to all organizations regarding political committee status." 72 Federal Register, at 5595-96.

"Although *Buckley* did create the 'major purpose' test, it did not mandate a particular methodology for determining an organization's major purpose, and thus the Commission was free to administer FECA political committee regulations either through categorical rules or through individualized adjudications." See *RTAA*, 681 F.3d, at 556.

"The necessity of a contextual inquiry is supported by judicial decisions applying the 'major purpose' test which have used the same fact-intensive analysis that the Commission has

adopted." *RTAA* at 557. The Commission, in its policy, adopted a sensible approach to determining whether an organization qualifies for PAC status; and, more importantly, the Commission's multi-factor 'major purpose' test is consistent with Supreme Court precedent and does not unlawfully deter protected speech. Accordingly, we find the policy constitutional." That's *RTAA* at 558.

This Court similarly finds the policy constitutional in this matter; and because the Court finds the plaintiff has failed to establish a substantial likelihood of success on the merits of its actions, the plaintiff is not entitled to a preliminary injunction in this matter and will therefore deny the requested preliminary injunction.

I will direct a minute order be entered, incorporating by reference this Court's oral ruling which has been transcribed or placed on transcript by the court reporter.

Are there any questions regarding the matter at this point in time, Mr. Barr?

MR. BARR: There are no questions on plaintiff's end.

THE COURT: All right. Mr. Kolker or Ms. Chlopak?

MS. CHLOPAK: No. No questions here, Your Honor.

THE COURT: Very well.

MR. VASSALLO: Your Honor, this is Nick Vassallo. I just wanted to note for the record that I had joined the call a few minutes before you came on the line.

THE COURT: Very well, Mr. Vassallo. So noted. Thank you all. Have a good day.

MR. BARR: Thank you.

MS. CHLOPAK: Thank you.

THE COURT: Court will stand in recess.

(The proceedings conclude at 9:05 a.m.)

REPORTER CERTIFICATE

I, JAMIE L. HENDRICH, Official Federal Court Reporter in the United States District Court for the District of Wyoming, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

___10.17.12____
Date

_____/S/_____
JAMIE L. HENDRICH, CSR-RPR-CRR
Official Federal Court Reporter

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy hereof was served electronically by electronic filing or e-mail this 2nd day of January, 2013 to:

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