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

Page

Table of Contents i

Table of Authorities ii

Argument 1

I. Introduction 1

II. Appropriately Rigorous First Amendment Standards Must Govern 3

III. Exacting Scrutiny is Actually Exacting 9

a. Defining Exacting Scrutiny 9

b. Other Considerations Warrants Heightened Review Standards 12

IV. Free Speech is Likely to Prevail on the Merits 14

a. Hopelessly Flawed: 100.22(b) Cannot Survive Meaningful Review 14

i. The *FCC* Analogue 15

ii. A Tale of Two Commissions 16

iii A Failed Advisory Opinion Request, Vague Standards, and Thousands of Pages of Conflicting "Guidance" do not Make the Challenged System Constitutional 18

b. The Major Purpose Test Still Protects Against Burdensome PAC Requirements 22

V. Free Speech has Demonstrated Irreparable Harm 27

VI. Balance of Harms 28

VII. Conclusion 29

Certificate of Virus Protection

Certificate of Compliance

Certificate of Service

TABLE OF AUTHORITIES

Page

CASES

American Constitutional Law Foundation v. Meyer, 120 F.3d 1092 (10th Cir. 1997) 10

Ashcroft v. ACLU, 542 U.S. 656 (2004) 7, 8

Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) 7

Baggett v. Bullitt, 377 U.S. 360 (1964) 12

Bertot v. School Dist. No. 1 Albany County, Wyo., 613 F.2d 245 (10th Cir. 1979) 17, 18

Buckley v. Valeo, 424 U.S. 1 (1976) 19, 22

Burson v. Freeman, 504 U.S. 191 (1992) 9

Cantwell v. Connecticut, 310 U.S. 296 (1940) 13

Center for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012) 23, 25

Chandler v. City of Arvada, 292 F.3d 1236 (10th Cir. 2002) 9

Chicago Teachers Union, Local No. 1 AFT v. Hudson, 475 U.S. 292 (1986) 5

Citizens for Responsible Government State Political Action Cmte. v. Davidson, 236 F.3d 1174 (10th Cir. 2000) 10

Citizens United v. FEC, 130 S.Ct. 876 (2010) .... *passim*

Dombrowski v. Pfister, 380 U.S. 479 (1965) 13

Elrod v. Burns, 427 U.S. 347 (1976) 27, 28

FCC v. Fox Television Stations, 132 S.Ct. 2307 (2012) 16

FEC v. Central Long Island Tax Reform Immediately, 616 F.2d 45 (2d Cir. 1980) 18

FEC v. GOPAC, 917 F.Supp. 851 (D.D.C. 1996) 26

FEC v. Massachusetts Citizens for Life (*MCFL*), 479 U.S. 238 (1986) 8, 10, 11, 24, 25

TABLE OF AUTHORITIES – Continued

Page

FEC v. Wisconsin Right to Life (*WRTL*), 551 U.S. 449 (2007)...... 6, 7, 8, 17, 18

Fox Television Stations v. Federal Communications Comm'n (*FCC*), 613 F.3d 317 (2d Cir. 2010) 15, 16

Freedman v. Maryland, 380 U.S. 51 (1965) 16

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).................. 7, 8

Marbury v. Madison, 1 Cranch 137 (1803) 18

Minnesota Citizens Concerned for Life v. Swanson, 692 F.3d 864 (8th Cir. 2012).................. 11

NAACP v. Button, 371 U.S. 415 (1963) 13

Nat'l Organization for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011)........ 23

New Mexico Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. 2010)...... 25

New York Times v. Sullivan, 376 U.S. 254 (1964) 5

Pacific Frontier v. Pleasant Grove City, 414 F.3d 1221 (10th Cir. 2005) 27

Purcell v. Gonzalez, 549 U.S. 1 (2006).................. 4

Real Truth About Abortion v. FEC (*RTAA*), 681 F.3d 544 (4th Cir. 2012).................. 23, 26

Republican Party of Minnesota v. White, 536 U.S. 765 (2002).................. 13

Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312 (9th Cir. 1992).................. 10

Shays v. FEC, 511 F.Supp.2d 19 (D.D.C. 2007).................. 26

Smith v. California, 361 U.S. 147 (1959).................. 13

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).................. 22, 23, 24

Speiser v. Randall, 357 U.S. 513 (1958) 13

Thomas v. Collins, 323 U.S. 516 (1945) 4

Thornhill v. Alabama, 310 U.S. 88 (1940) 13

Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061 (10th Cir. 2001).................. 14, 28

TABLE OF AUTHORITIES – Continued

Page

United States v. Alvarez, 132 S.Ct. 2537 (2012) 10

United States v. Nat'l Cmte. for Impeachment, 469 F.2d 1135 (2d Cir. 1972) 1, 2

Winnebago Tribe of Nebraska v. Stovall, 341 F.3d 1202 (10th Cir. 2003) 14

STATUTES AND REGULATIONS

2 U.S.C. § 434(a)(4) 25

2 U.S.C. § 434(b) 25

2 U.S.C. §434(c) 25

2 U.S.C. § 434(f)(2) 24

2 U.S.C. § 437g(d)(1)(A)(i) 12

2 U.S.C. § 437g(d)(1)(A)(ii) 12

2 U.S.C. § 441e 23

11 CFR § 100.22(a) 17

11 CFR § 100.22(b) .... *passim*

11 CFR § 109.10 8

OTHER AUTHORITIES

11A CHARLES A. WRIGHT, ARTHUR R. MILLER AND MARY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995) 27

A. BICKEL, THE MORALITY OF CONSENT (1975) 17

FEC Advisory Opinion Request 2012-19, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3440 19

FEC's Opposition to Plaintiff's Application for a Preliminary Injunction, EMILY'S List v. FEC, 569 F.Supp.2d 18 (D.D.C. 2008) (No. 05-CV-00049), *available at* http://www.fec.gov/law/litigation/opposition_to_injunction05CV00049.pdf 3

TABLE OF AUTHORITIES – Continued

Page

FEC's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011) (No. 11-CV-00259), *available at* http://www.fec.gov/law/litigation/carey_fec_opp_to_mot_for_prelim_inj.pdf 3, 4

G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (10th ed. 1980) 5

Instructions for Preparing FEC Form 5, *available at* http://www.fec.gov/pdf/forms/fecfrm5i.pdf 8

MUR 5831 (Softer Voices) Certification (FEC 2010), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044282476.pdf 22

MUR 5842 (Economic Freedom Fund) Certification (FEC 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044282476.pdf 22

MUR 5977 (American Leadership Project) Certification (FEC 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044231595.pdf 22

Supplemental Brief for the Appellee, *Citizens United v. FEC*, 130 S.Ct. 876 (2010) (No. 08-205), 2009 WL 2219300 3

ARGUMENT

I. Introduction

Nearly 41 years ago, in one of the first judicial treatments of the Federal Election Campaign Act ("FECA"), the Second Circuit would predict the constitutional fault lines present before this Court today. On May 31, 1972, the National Committee for Impeachment thought it simple enough to run an advertisement in the *New York Times* commenting about President Nixon's character and his administration's actions in Vietnam. *United States v. Nat'l Cmte. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972). The advertisement also included an "Honor Roll" of officeholders who supported the Committee's views. But this proved too much, as the federal government initially stopped National Committee from "performing the functions of a political committee . . . including the acceptance of contributions and the disbursement of monies." *Id.* at 1137. Thus, one of the first bold attempts to ensure "disclosure" under the Act wound up dampening free speech.

The federal government was certain the National Committee should be forced to register as a political committee ("PAC") "because the advertisement is derogatory to the President's stand on the Vietnam War, the President is a candidate for re-election, and the war is a campaign issue." *Id.* at 1138. The Second Circuit flatly rejected this theory, explaining that on "this basis every

position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be *subject to proscription* unless the registration and disclosure regulations of the Act in question were complied with." *Id.* (emphasis added). This result could only be described as "abhorrent." *Id*.

Today, the Federal Election Commission ("FEC") advocates in very much the same fashion as the federal government did in *National Committee.* Without stringent limits in interpreting the FECA "every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another." *Id.* at 1142; *see also* Free Speech Br. at 30–31 (discussing its "Environmental Policy" script). With so broad an application of the Act and so vague an interpretation, any "organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributors, or the like." *Id.*

Today, we are left with a Commission empowered to declare any speech on "any issue, major or minor, taken by anyone" "subject to proscription unless the registration and disclosure regulations of the Act in question [are] complied with." *Id.* The imposition of PAC burdens constituted "proscription" for the Second Circuit, not reasonable regulation or mere disclosure. *See also Citizens United v. FEC*, 130 S.Ct. 876, 897–98 (2010) (PACs must exist before they can speak).

II. Appropriately Rigorous First Amendment Standards Must Govern

The FEC attempts to market its Byzantine regulatory machine as "eminently reasonable," a model of transparency, and one that allows Free Speech to be "free to finance and distribute each of its proposed advertisements, and to solicit and accept unlimited contributions to pay for them." FEC Br. at 18. Looking past this veneer, the functional equivalent of a prior restraint emerges.

In past challenges, the FEC routinely defended its bans and speech suppressing policies in the same way it does today—dressing up prohibitions as reasonable means to educate and inform the public. *See, e.g.*, Supplemental Brief for the Appellee at 15, *Citizens United v. FEC*, 130 S.Ct. 876 (2010) (No. 08-205), 2009 WL 2219300, at *15 (where the FEC notes that it is "simply wrong to view those [electioneering communications provisions] as a complete ban on expression rather than a regulation" (internal quotations and citations omitted)); FEC's Opposition to Plaintiff's Application for a Preliminary Injunction at 42, *EMILY's List v. FEC*, 569 F.Supp.2d 18 (D.D.C. 2008) (No. 05-CV-00049), *available at* http://www.fec.gov/law/litigation/opposition_to_injunction05CV00049.pdf (describing funding bans as mere regulatory programs because an organization "remains free to finance its political speech with all the hard money it can convince its supporters to contribute"); FEC's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 1, *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C.

2011) (No. 11-CV-00259), *available at* http://www.fec.gov/law/litigation/carey_fec_opp_to_mot_for_prelim_inj.pdf (describing a ban on fundraising and contributions as reasonable elements of a regulatory program—"This case, therefore, is not about banning plaintiffs' speech or fundraising, but about reasonable requirements that help prevent corruption and inform the public"). The FEC never sees a speech ban, even when it enforces one. Fortunately, reviewing courts have looked past superficial labels to substance and alleviated the constitutional injuries in each case. Careful attention to substantive form, not superficial labels of "disclosure," is equally important here.

The FEC goes to great lengths to convince this Court that requests for injunctive relief concerning alleged government infringement of political speech fall into the same category as any other request for injunctive relief. But this is not true. *See Thomas v. Collins*, 323 U.S. 516, 529–30 (1945) (when First Amendment interests are implicated the "usual presumption supporting legislation" is reversed in favor of the "indispensable democratic freedoms secured by the First Amendment"). To achieve its procedural sleight-of-hand, the FEC handily cites in-chambers opinions and cases unrelated to the instance at hand. For example, the FEC errantly cites *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam), for the notion that injunctions are inappropriate in the pre-election context because they might result in "voter confusion." FEC Br. at 19. But *Purcell* involved the

very mechanics of state voter identification processes, not the free speech of citizens, and any discussion of "voter confusion" and disfavored injunctive relief is properly cabined to those facts.

As discussed in Section III, exacting scrutiny is closely related to strict scrutiny. This is especially true when regulations affecting political speech carry criminal penalties. That courts regularly apply heightened scrutiny and err in favor of free speech in challenges involving political speech reflects foundational constitutional concerns. In short, First Amendment freedoms are nothing less than fundamental to our democratic system of government. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Because these freedoms are at the core of our free society and because they are so fragile and easily destroyed, "procedural safeguards often have a special bite in the First Amendment context." *Chicago Teachers Union, Local No. 1 AFT v. Hudson*, 475 U.S. 292, 303 n.12 (1986) (quoting G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1373 (10th ed. 1980)) (the "purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns"). Thus, it should come with little surprise that courts have acted to jealously guard protected First Amendment freedoms through the careful development of speech-friendly procedural rules. Here, Free Speech simply asks that these procedural safeguards be recognized.

The *Citizens United* Court explained that when citizens decide to speak out on issues they care about, the "First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." 130 S.Ct. at 889; *see also FEC v. Wisconsin Right to Life* (*WRTL*), 551 U.S. 449, 469 (2007).[1] This reflects the simple constitutional truth that regulations abutting political speech must be simple, comprehensible, and any disputes concerning them must be easily resolved. Otherwise, as the *Citizens United* Court put it, a "speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit." 130 S.Ct. at 895. For Citizens United, it took more than two years for it to learn whether the speech it wished to communicate in 2008 would have been lawful—"long after the opportunity to persuade primary votes has passed."[2] *Id.* Just the same, Free Speech has already lost its initial chance to

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[1] The FEC suggests that the operative burden-shifting rules announced in *WRTL* do not apply here, since "no speech is being censored." FEC Br. at 21 n.3. However, *WRTL* speaks 16 times to providing meaningful standards when speech is *regulated*. This is because the *WRTL* Court understood that vague and overbroad *regulations* lead to censorship. Censorship is rarely announced through banners and proclamations.

[2] True to form, the Commission argues in its brief that because Free Speech labeled its emergency request to speak just before the general election as its "last meaningful chance to speak" that this somehow proves its communications are "candidate advocacy." FEC Br. at 59 n.19. There is extreme incongruence between the principle applied by the FEC—speech close to an election must

communicate when it mattered most and must wade through litigation to secure its First Amendment freedoms.

Taking *Citizens United*, *WRTL*, and the greater body of case law involving political speech seriously means that concrete procedural rules must be in place for the adjudication of challenges to campaign finance provisions allegedly infringing upon the First Amendment rights of speakers. Following speech-sensitive standards when adjudicating requests for injunctive relief concerning the First Amendment would not create a "nation without laws." FEC Br. at 21. But, where laws allegedly infringe upon protected First Amendment freedoms, government actors would face stringent requirements to justify these results. *See, e.g.*, *WRTL*, 551 U.S. at 474. It is understandable the FEC might protest.

If the wisdom of *WRTL* and *Citizens United* is to have application, then it must be paired to existing speech-protective precedent to do so. *Ashcroft v. ACLU*, 542 U.S. 656 (2004), and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) provide just the bedrock for this. *Ashcroft* explains that where government is tasked with showing its regulation is the least restrictive alternative, burdens are properly shifted to the government in the context of a request for preliminary injunctive relief. 542 U.S. at 666; *see also Awad v. Ziriax*,

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necessarily be "candidate advocacy"—and that posited by the Supreme Court in *Citizens United*. 130 S.Ct. at 895 ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence").

670 F.3d 1111, 1129 (10th Cir. 2012). Likewise, *Gonzales* holds for the proposition that burdens at the preliminary injunctive phase track those at trial. 546 U.S. at 429. Taken together, these precedents give concrete effect to the requirements of *WRTL* and *Citizens United* by ensuring that speech-protective standards govern judicial considerations of political speech.

In this instance, controlling precedent illustrates that any court analyzing the constitutional validity of PAC regulations must inquire whether the "state interest in disclosure [] can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *FEC v. Massachusetts Citizens for Life* (*MCFL*), 479 U.S. 238, 262 (1986); *see also Citizens United*, 130 S.Ct. at 915 ("disclosure is a less restrictive alternative to more comprehensive regulations of speech"). Taken together, this means that the lower court should have presumed that Free Speech was likely to prevail unless its proposed alternatives were "less effective" than imposing the full panoply of PAC regulations. *Ashcroft*, 542 U.S. at 666. This would have demanded that the FEC bear the burden of demonstrating why three retired men from Wyoming would be required to register and report under burdensome PAC requirements when existing disclosure regimes adequately carried out the government's interest in disclosure. *See* 11 CFR § 109.10 (describing the less burdensome reporting regime applicable to non-PAC filers); *see also* Instructions

for Preparing FEC Form 5, *available at* http://www.fec.gov/pdf/forms/fecfrm5i.pdf. Because this did not occur, the lower court committed an abuse of its discretion.

III. Exacting Scrutiny is Actually Exacting

Although the FEC argues that exacting scrutiny is synonymous with intermediate scrutiny, these two standards are not the same. Exacting scrutiny, closely related to strict scrutiny, developed out of a need for the rigorous protection of political speech while intermediate scrutiny is usually applied to lesser value speech.

a. Defining Exacting Scrutiny

The FEC errs by differentiating strict and exacting scrutiny far too greatly, and appears determined to move the requirements of exacting scrutiny further away from strict scrutiny. *See* FEC Br. at 33. For many years courts—including this Court—largely considered strict and exacting scrutiny as synonymous. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (describing exacting scrutiny as requiring that the "State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end") (internal quotations omitted); *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002) ("[W]e are persuaded Ordinance No. 3590 is subject to *strict* scrutiny. Arvada even acknowledges *exacting* judicial scrutiny is the appropriate

legal standard applicable in this case." (emphasis added)); *Citizens for Responsible Government State Political Action Cmte. v. Davidson*, 236 F.3d 1174, 1198–1200 (10th Cir. 2000) (applying strict scrutiny to disclaimer provisions). Although the two types of scrutiny are distinct, exacting scrutiny remains much closer to strict scrutiny than it does intermediate scrutiny. *See Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992) ("The Supreme Court has applied a somewhat less stringent test than strict scrutiny to decide the constitutionality of contribution limitations. . . . However, the test is still a 'rigorous' one").

Specifically, exacting scrutiny has a long history in which courts consider less restrictive means when determining whether a speech-burdening law bears a substantial relation to a sufficiently important governmental interest. The best examples of this tradition as it relates to political speech are found in the Tenth Circuit in *American Constitutional Law Foundation v. Meyer* and at the Supreme Court in *MCFL*. 120 F.3d 1092, 1103–1104 (10th Cir. 1997); 479 U.S. at 262; *see* Free Speech Br. at 40–42; s*ee also United States v. Alvarez*, 132 S.Ct. 2537, 2548–51 (2012) (Ruling that the Stolen Valor Act could not survive exacting scrutiny because of many adequate alternatives to penalizing false speech). Specifically, the *MCFL* Court, in considering the constitutional validity of PAC requirements, asked whether there was a "compelling" government interest and whether any

interest in disclosure could "be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee." 479 U.S. at 262. To avoid this result, the FEC does not ask the proper initial question: is this challenge about disclosure or about the burdens of PAC status? Only by superficially categorizing the case as one about simple disclosure may it rely on precedent to support its premature assumption.

The present case calls only for an affirmation of *MCFL* as far as scrutiny and disclosure is concerned, an affirmation that a sizeable but hardly exclusive "body of authority" has overlooked. *Compare* FEC Br. at 35 *with Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) ("We question whether the Supreme Court intended exacting scrutiny to apply to laws . . . which subject associations that engage in minimal speech to 'the full panoply of regulations that accompany status as a [PAC]'"). The added step that this Court must take is to affirm that laws applying comprehensive burdens to political speech—that is, PAC status—must be understandable to a person of ordinary intelligence and properly tailored. The FEC's current regime fails these tests. Only when the PAC regime is not vague and overbroad will it meet the edicts of *MCFL* and *Citizens United*. *See MCFL*, 479 U.S. at 262 ("[T]here is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates").

b. Other Considerations Warrant Heightened Review Standards

It must not be forgotten that government efforts to criminalize speech, like those at issue here, warrant additional scrutiny by this Court. Under the FECA, individuals who knowingly and willfully spend beyond $2,000 during a calendar year for speech without properly reporting or registering with the Commission may be imprisoned for up to one year. 2 U.S.C. § 437g(d)(1)(A)(ii). Similarly, aggregating beyond $25,000 for speech without properly reporting or registering with the Commission allows for imprisonment for up to five years. 2 U.S.C. § 437g(d)(1)(A)(i). The FECA has transformed political speech, an "essential mechanism of democracy," into criminal speech. *Citizens United*, 130 S.Ct. at 898. Thus, three gentlemen from Wyoming who dare spend more than $2,000 for a newspaper advertisement criticizing the government while discussing their views may be jailed if they elect not to register with the government beforehand.

The FEC attempts to mollify the serious penal consequences of non-registration and reporting with promises of enlightened guidance and fair administrative or prosecutorial proceedings. Whatever promises the Commission might offer, a "prosecutor's sense of fairness" is insufficient to remedy the constitutional maladies here. *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964). Just the same, well-intentioned bureaucrats and administrative safeguards do not cure bedrock constitutional defects. *Id.* at 373–74. It cannot be said that the FEC's

enforcement procedure or defending against criminal sanctions in court assure the ample vindication of constitutional rights. They do not. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). The mere existence of penal penalties combined with vague and overbroad laws work a constitutional injury in the first place. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). Because First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society," courts employ strict standards of review when reviewing efforts of the government to criminalize speech. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Smith v. California*, 361 U.S. 147 (1959); *Speiser v. Randall*, 357 U.S. 513 (1958).

Further still, where laws operate to ban speech on the "basis of its content" or burden political speech at the core of our First Amendment freedoms, strict scrutiny is regularly warranted. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002) (internal quotations omitted). As the majority found in *Citizens United*, "a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak." 558 U.S. at 895. Here, prospective speakers must entrust their speech to be evaluated by bureaucrats at the FEC who will decide if an "electoral portion," contextual factors, or its proximity to an election will transform free speech into regulated or banned speech. The FEC has admitted as such. FEC

Br. at 39 (arguing that the term "expressly advocating" is "without definition or limit"). This "unprecedented governmental intervention into the realm of speech" supports the application of stricter scrutiny as was recognized in *Citizens United*. 130 S.Ct. at 896. Because the lower court failed to apply the correct scrutiny relevant to these First Amendment claims, it committed an abuse of its discretion. *See, e.g.*, *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202 (10th Cir. 2003) (applying incorrect legal standard constitutes an abuse of discretion); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061 (10th Cir. 2001) (applying incorrect First Amendment standard constitutes an abuse of discretion).

IV. Free Speech is Likely to Prevail on the Merits

a. Hopelessly Flawed: 100.22(b) Cannot Survive Meaningful Review

In order to avoid the perils of criminal prosecution and hefty civil penalties, speakers must know in advance what triggers regulation. This guarantee is especially important in the context of political speech, and that is why this Court's focus on the FEC's accordion-like interpretation and application of Section 100.22(b) is especially needed.[3]

[3] Free Speech rests on its argument submitted in its opening brief concerning the constitutional standards surrounding what constitutes regulated solicitations and contributions. *See* Free Speech Br. at 34–38. The same limiting concerns identified in construing Section 100.22(b) apply to the Commission's policy for interpreting solicitations.

Whether dealing with a "two-prong, eleven-factor balancing test," *Citizens United*, 558 U.S. at 895, a three-factor "patently offensive" test, *Fox Television Stations v. Federal Communications Comm'n* (*FCC*), 613 F.3d 317, 330 (2d Cir. 2010) (vacated on other grounds), or other similarly vague speech codes, courts have been insistent on ensuring that objectivity, fair notice, and a simple ability to understand the regulations at issue rule the day. Comparing the FEC's approach to regulating high-value, political speech to the FCC's approach to regulating low-value, indecent speech is instructive in this regard.

i. The *FCC* Analogue

For many years, the FCC focused its indecency enforcement efforts on "seven 'dirty' words" described in the infamous George Carlin monologue. *See id.* This approach, while considered anemic by some, had one clear constitutional benefit: broadcasters and those subject to the law could consult a clear list of prohibited speech to avoid penalties. *Id.* at 330–31. Under this standard, the FCC did not undertake a single enforcement action in nine years. Unsatisfied with this result, the FCC abandoned this policy in favor of a "flexible standard" because broadcasters found "offensive ways of depicting sexual or excretory organs or activities without using any of the seven words." *Id.* at 331. The FCC's argument, much like the FEC's, was simple: because speakers could "circumvent" these seven words, the agency needed the "maximum amount of flexibility to be able to

decide what is indecent." *Id.* Upon reviewing this flexible standard, it led the Second Circuit to conclude that such standards are constitutionally deficient because if the "FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so." *Id.*

Likewise, the Supreme Court found the FCC's flexible standard problematic. In short, "the due process protection against vague regulations does not leave [regulated parties] . . . at the mercy of *noblesse oblige*." *FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2318 (2012) (internal quotations and citations omitted). On top of this, conflicting enforcement actions and regulatory guidance only made the matter worse, leading to additional uncertainty about the reach and application of the regulations in question. *Id.* at 2319–20.

ii. A Tale of Two Commissions

Both the FCC and the FEC routinely trumpet the need for flexible standards lest citizens find ways to circumvent their authority, regulations, and control. The FEC is particularly problematic with its history of expanding the reach of its regulatory programs and policies while circumventing the confinement of the First Amendment. *See Citizens United*, 130 S.Ct. at 896 ("Because the FEC's business is to censor, there inheres the danger that [it] may well be less responsive than a court . . . to the constitutionally protected interests in free expression") (quoting *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965)). The purported need for these

flexible standards, as described by both commissions, is to prevent "circumvention" of regulatory authority—at the expense of breathing space for constitutional liberties.

Under the FEC's regulatory regime, 11 CFR § 100.22(a) affords citizens the type of fair notice and clear standards necessary to comply with the law. It includes a simple description of express advocacy along with explicit examples of speech that would trigger regulation. Like the FCC's prior seven dirty words list, it is narrow in its reach and easy to understand. But the FEC's flexible standard, the approach in 11 CFR § 100.22(b), suffers from the same flaws as the FCC's, but in an area of speech of much greater constitutional magnitude.

Recent losses suffered by the FEC illustrate the same point. No matter the import of government's need to regulate, rigid barriers must exist between regulated and non-regulated speech. It has been the position of the Tenth Circuit for some 34 years to "prefer that governmental officials acting in sensitive First Amendment areas err, when they do err, on the side of protecting those interests." *Bertot v. School Dist. No. 1 Albany County, Wyo.*, 613 F.2d 245, 252 (10th Cir. 1979) (citing A. BICKEL, THE MORALITY OF CONSENT 78 (1975)). This operative rule was recognized by the Supreme Court in *WRTL*. 551 U.S. at 457 ("First Amendment requires us to err on the side of protecting political speech rather than suppressing it"). In order to err in favor of First Amendment interests, government

regulations, policies, and actions must reflect and obey these judicial constructs. *See generally Marbury v. Madison*, 1 Cranch 137 (1803). But the FEC has manifestly ignored this instruction. When presented with an advisory opinion request asking whether the advertisements in question were regulated under the law, the Commission reached a three-three vote among commissioners for five of the advertisements—a tie—but failed to give the benefit of the doubt to Free Speech. 2 App. 280. Instead, the FEC left Free Speech in legal limbo, unprotected against agency action. Beyond these five advertisements, no majority bloc of commissioners could agree on the legal standards that limit the reach of Section 100.22(b). *Compare* 2 App. 197–210 *with* 2 App. 227–57.

iii. A Failed Advisory Opinion Request, Vague Standards, and Thousands of Pages of Conflicting "Guidance" do not Make the Challenged System Constitutional

Guided by its supposed need for flexible standards, the FEC implements the very inverse of the principles established in *Bertot* and *WRTL.* These principles demand breathing space, regulatory restraint, and clarity, but frustrate the regulatory ambition of the Commission. *See, e.g.*, *FEC v. Central Long Island Tax Reform Immediately*, 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, J., concurring) ("such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a political 'evil' to be tamed, muzzled, or sterilized"). If they were implemented in a meaningful way, the FEC's authority would shrink

considerably. It should come as little surprise, then, that the Commission continues to recognize regulatory flexibility and discretion over regulatory restraint and constitutional limits.

The English language enjoys no shortage of creative and clumsy ways to articulate one's perspective about politics, candidates for office, and public policies. Indeed, with each electoral cycle, new issues, new technologies, and new means of communication evolve, making the FEC's mission to capture more speech ever the more elusive. *See, e.g.*, FEC Advisory Opinion Request 2012-19, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3440 (splintered Commission vote about whether the term "Obamacare" constituted a reference to a candidate or to legislation). But along the way, the constitutional liberties of a free people are placed in greater peril. The *Buckley* Court understood this point and warned that the "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley v. Valeo*, 424 U.S. 1, 42 (1976). The proven cure, and the remedy sought all along in this litigation, is the resurrection of clear lines of regulatory demarcation for prospective speakers.

Free Speech provided detailed pleadings and references to the deep inner dissonance at the FEC over Section 100.22(b). Its experience in the slow-moving advisory opinion process produced utter confusion and illustrates the FEC's history

of consistent inconsistency. The FEC chastises Free Speech for doing "little to support its purported as-applied claims, barely mentioning Free Speech's proposed communications. . . ." FEC Br. at 24 n.4. Of course, given the length and density of the issues involved, repetitive briefing on each proposed advertisement planned by Free Speech is impossible. However, the record below, combined with Free Speech's arguments herein, demonstrates the inconsistency and constitutional chaos connected with the FEC's administration of Section 100.22(b).

When reviewing this appeal, one conclusion becomes quickly evident. The FEC is an agency deeply confused over the meaning of its own regulations, policies, and their application. FEC attorneys elected to represent the legal position of three commissioners as controlling authority in this litigation. Yet, the record below proves just the opposite—that commissioners at the FEC could not decide upon the proper standards to be applied when asked about them prospectively. This means that speakers must now guess the legal standards that the FEC's *attorneys*, not commissioners, will employ in enforcement actions, investigations, and for prospective speech—all without an ounce of meaningful guidance.

It is true that close calls happen with some frequency when interpreting well-defined regulatory criteria. But it is ever truer that complete deadlocks and chaos ensue when the regulatory agency interpreting Section 100.22(b) cannot

agree on its meaning, viability, scope, or application. *Compare* Free Speech Advisory Opinion (AO) Draft B, 2 App. 199–201 (interpreting the "Environmental Policy" advertisement to be express advocacy because it did not include enough language discussing legislation to satisfy three commissioners) *with* AO Draft C, 2 App. 249 (interpreting the same advertisement to be issue advocacy because it discusses harmful effects of legislation on ranching and could be interpreted in many reasonable ways); AO Draft B, 2 App. 204–06 (interpreting the "Gun Control" advertisement to be express advocacy because it comments on the qualifications of a candidate for federal office and mentions a particular time of year) *with* AO Draft C, 2 App. 252–53 (interpreting the same advertisement to be issue advocacy because the call to action is focused on state, not federal, candidates). But while the FEC cannot anticipate the standards it applies to determining regulated speech under Section 100.22(b), it demands that Free Speech, and speakers nationwide, do so.

The FEC argues that Free Speech's references to the Commission's confusing and contradictory enforcement examples demonstrates just how "narrow" Section 100.22(b) really is, since none of the matters involved findings of a violation of the FECA. FEC Br. at 38. What the Commission fails to understand is that First Amendment case law plainly recognizes that the mere existence of unwieldy regulatory standards chills, and injures, speakers, and being

forced to undergone lengthy FEC investigations for years just to be proven innocent hardly cures these constitutional deficiencies. *See, e.g.*, MUR 5977 (American Leadership Project) Certification (FEC 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044231595.pdf (one year enforcement process leading to no violations); MUR 5831 (Softer Voices) Certification (FEC 2010), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044282476.pdf (four year enforcement process leading to no violations); MUR 5842 (Economic Freedom Fund) Certification (FEC 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044282476.pdf (two year enforcement process leading to no violations).

Enduring this process is a constitutional harm, and it is triggered by the vagueness and overbreadth of Section 100.22(b). That the lower court did not recognize these constitutional and statutory fault lines is an abuse of its discretion.

b. The Major Purpose Test Still Protects Against Burdensome PAC Requirements

The FEC asserts that "disclosure requirements for PACs are constitutional because they 'directly serve substantial governmental interests[.]'" FEC Br. at 41 (citing *Buckley*, 424 U.S. at 68). Aside from the informational interest, the FEC cites the enforcement interest, to help "'expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.'" *Id.* (citing *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir.

2010)). Ironically, this interest only furthers Free Speech's argument that PAC status is burdensome and must be avoidable with bright-line standards. Although Free Speech will not target foreign corporations or individuals to sponsor its issue advocacy, it would gladly accept contributions from either in order to further its message. Absent clear standards for express advocacy and solicitations, this is another risk for Free Speech. *See* 2 U.S.C. § 441e (prohibiting foreign nationals from making independent expenditures or electioneering communications and soliciting contributions for the same).

The FEC refuses to differentiate disclosure from PAC status. FEC Br. at 42. It relies on court decisions that conflated the two regimes yet reiterate *Citizens United*'s reasoning that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." 130 S.Ct. at 915; *see, e.g.*, *SpeechNow*, 599 F.3d at 696; *Real Truth About Abortion v. FEC* (*RTAA*), 681 F.3d 544, 551 (4th Cir. 2012); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 477 (7th Cir. 2012); *Nat'l Organization for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011). But however many times the FEC argues it, and however many lower courts accept it, this is nonetheless an erroneous application of *Citizens United*. The case upheld disclosure for electioneering communications that, whether advocating for a candidate or not, require only a single filing with the FEC when undertaken by an association or individual. *See* Free Speech Br. at 20. PAC status was not at issue

in *Citizens United*, but the Supreme Court's discussion of disclosure repeatedly cites to *MCFL*, which makes it abundantly clear that PAC status is, in fact, *a more comprehensive regulation of speech than disclosure*. *See* Free Speech Br. at 20–24, 38–41. PAC status is burdensome as a matter of law.

The FEC further argues that PACs do not "'impose much of an additional burden' in comparison with the reporting requirements for independent expenditures and electioneering communications. . . ." FEC Br. at 44. They rely on *SpeechNow*, but neglect to mention that SpeechNow "*conceded* that 'the reporting is not really going to impose an additional burden'" on its organization. 599 F.3d at 697 (emphasis added). Free Speech will suffer heavy burdens under a complicated reporting regime against three individuals simply wishing to speak. SpeechNow was also a PAC by its own design with the major purpose of electing candidates, *id.* at 689, while Free Speech seeks to speak about issues and is only a PAC by FEC edict. *See, e.g.*, FEC Br. at 44 ("[In *SpeechNow* the] D.C. Circuit upheld PAC reporting requirements as applied to independent-expenditure-only groups *like Free Speech*" (emphasis added)). The FEC then cites the impressive figure that 2,670 PACs have registered since *Citizens United*. FEC Br. at 44. This does nothing to contradict the burdens of PAC status. Tellingly, the FEC offers anything but the laws themselves to support its argument, since they reveal a great divide between disclosure and PAC status. *Compare* 2 U.S.C. § 434(f)(2) (single-

report disclosure requirements for electioneering communications) *and* 2 U.S.C. §434(c) (single-report disclosure requirements for independent expenditures) *with* 2 U.S.C. §§ 434(a)(4), (b) (extensive, ongoing reporting requirements for PACs); *see also* Free Speech Br. at 39–41.

The FEC continues to argue that *Citizens United* and *MCFL* only held that PACs are burdensome alternatives that cannot alleviate a ban on corporate or union speech, but are simultaneously *not* burdensome when they are imposed upon groups that could otherwise speak unencumbered by such a comprehensive regulatory morass. FEC Br. at 43. The FEC goes even further and offers a citation to the recent *Madigan* decision, which allows PAC status to be imposed upon non-PACs under Illinois law. *Id.* at 41–42 (*citing Madigan*, 679 F.3d at 490). This is the inevitable conclusion of the FEC's argument: if PAC status is indeed just disclosure and is not burdensome, then there is no need for the major purpose test and any and all groups that engage in any sort of political activity may be required to register and report. But since the major purpose test has been re-affirmed by this Court since *Citizens United*, it follows that it serves to assuage at least some burden on associational freedoms and speech, and thus it must be understandable so that groups may avoid the legal burdens of being forced to register and report as a PAC. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 679 (10th Cir. 2010).

The major purpose test remains an important function for protecting issue advocacy organizations from the FEC's reach. Although the FEC claims that its Choose-Your-Own-Adventure-style approach to the test is "the law of this Court," FEC Br. at 49, this Court has never addressed the test in a manner similar to this case. Nor have the other courts the FEC relies upon. In *Shays v. FEC*, an APA challenge, the plaintiffs and the court warned of First Amendment problems related to a case-by-case, undefined major purpose test. 511 F.Supp.2d 19, 30 (D.D.C. 2007) ("Plaintiffs contend that the agency's approach . . . is vulnerable to attacks under the First Amendment or Due Process. These are also concerns expressed by the Court in 2006"). RTAA offered nothing in the way of an as-applied challenge, since the organization did not engage with the FEC prior to its suit. *RTAA*, 681 F.3d at 557 n.5 ("Real Truth does not assert that the major purpose test is unconstitutional as applied to it. Nor could it, since the Commission has never claimed that Real Truth is a PAC"). Although Free Speech's counsel incorrectly cited the venue of the *GOPAC* decision in its opening brief, its principles remain persuasive. 917 F.Supp. 851, 861 (D.D.C. 1996) ("Confining the definition of 'political committee' to an organization whose major purpose is the election of a particular federal candidate or candidates provides an appropriate 'bright-line' rule; attempting to determine what is an 'issue advocacy' group versus an 'electoral politics' group—as the Commission proposes—does not"). Free Speech brings an

extensive, contradictory record of FEC material that is made all the more confusing—and thus chilling—by the arguments of the FEC's attorneys. *Compare* 2 App. 214–19 *with* 2 App. 266–78. This record establishes the facial vagueness and overbreath of the major purpose test, and the lower court committed an abuse of discretion in failing to examine these points.

The FEC does not address Free Speech's as-applied challenge, which lays out the FEC's pick-and-choose approach to relevant factors under the major purpose test. *See* Free Speech Br. at 47–52. The FEC simply cannot defend factors that only arise when they favor regulation. The major purpose test is facially vague and overbroad, and as applied to Free Speech.

V. Free Speech has Demonstrated Irreparable Harm

It is black letter law that alleged violations of First Amendment rights are considered irreparable injuries for purpose of a preliminary injunction. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* 11A CHARLES A. WRIGHT, ARTHUR R. MILLER AND MARY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 at 161 (2d ed. 1995) (when an "alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary"). The Tenth Circuit has routinely held that deprivations of speech rights automatically constitute irreparable injuries. *See, e.g.*, *Pacific Frontier v. Pleasant Grove City*,

414 F.3d 1221, 1235–36 (10th Cir. 2005); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001). And so it is true here.

The FEC argues that Free Speech must make a showing of "reasonable probability" that its members will be harassed or threatened to satisfy the irreparable injury prong of this analysis, but its arguments are misplaced. FEC Br. at 57. The Commission attempts to paint Free Speech's challenge as one against all disclosure and cites case law involving parties seeking wholesale exemption from disclosure laws. This is not the case here, making the referenced standards inapposite to the case at hand. Free Speech, as it has routinely pled, is not challenging disclosure, but the imposition of vague and shifting regulatory standards that give rise to the application of PAC burdens. Thus, the well-settled body of case law from *Elrod* forward governs here and establishes an assumed irreparable injury.

VI. Balance of Harms

In its balance of harms argument, the FEC's attorneys conclude yet again, with no backing from a majority of the agency's commissioners, that Free Speech is a PAC. FEC Br. at 58–59. Now well past the November 2012 election cycle, and nearly one year since it filed its advisory opinion request, 2 App. 102, Free Speech remains silenced, and thus harmed. Absent a posture paralleling the FCC—that is, that understandable laws lead to less regulatory capture—the FEC

will suffer no harm from preliminary injunctive relief for Free Speech. *See* Free Speech Br. 57–58.

VII. Conclusion

Free Speech renews its request for relief as stated in its opening brief.

Dated: February 22, 2013.

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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
Dated: February 22, 2013

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 and table of authorities, as directed by Rule 32(a)(7)(B)(iii), I certify to the best of my belief and knowledge that this brief contains 6,991 words as calculated by Microsoft Word.

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CERTIFICATE OF SERVICE

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