ORAL ARGUMENT REQUESTED

No. 12-8078

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREE SPEECH,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(JUDGE SCOTT W. SKAVDAHL)

BRIEF FOR APPELLEE FEDERAL ELECTION COMMISSION

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February 4, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Miscellaneous

STATEMENT OF RELATED CASES

There are no prior or related appeals to this case.

GLOSSARY

BCRA	Bipartisan Campaign Reform Act
Commission	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
PAC	Political Committee

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) over the interlocutory appeal of the district court's denial of appellant Free Speech's motion for a preliminary injunction. The district court denied that motion in its October 3, 2012 Oral Ruling on Plaintiff's Motion for Preliminary Injunction. (App. 468-92.) Free Speech filed a notice of appeal on October 19, 2012. (App. 501-03.)

COUNTERSTATEMENT OF THE ISSUES

Whether the district court abused its discretion in declining to preliminarily enjoin the Federal Election Commission from enforcing: (1) a Commission regulation, 11 C.F.R. § 100.22(b), that defines the statutory term "expressly advocating," 2 U.S.C. § 431(17); (2) the Commission's method of determining whether an entity is a "political committee," including the Commission's method of determining an entity's "major purpose"; and (3) the Commission's method of determining whether a request for donations is a regulable "solicitation" for "contributions" under 2 U.S.C. § 441d(a).

COUNTERSTATEMENT OF THE CASE

This case presents constitutional challenges to a regulation and two Commission policies that govern federal election campaign activity and facilitate campaign-related public disclosures. At the peak of the 2012 election season, Free

Speech sought a preliminary injunction to prevent the Commission from enforcing the challenged regulation and policies on their face and as applied to Free Speech. The district court denied Free Speech's preliminary-injunction motion on October 3, 2012, holding that Free Speech was unlikely to prevail on the merits of its challenges. Free Speech appealed and filed motions for injunctions pending appeal in the district court and this Court, both of which were denied.

COUNTERSTATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Express Advocacy and Electioneering Communications

Before the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Federal Election Campaign Act ("FECA") prohibited corporations and labor unions from making "expenditures." 2 U.S.C. §§ 431(9)(A)(i), 441b(a). To preserve the original statutory definition of an independent "expenditure" from "invalidation on vagueness grounds," the Supreme Court in *Buckley v. Valeo*, construed the definition "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 44 (1976). Congress then amended FECA to reflect *Buckley*'s construction by defining an "independent expenditure" as a communication "expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party.

See FECA Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 2 U.S.C. § 431(17)).

Exercising its authority "to make . . . such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8), the Commission in 1995 promulgated 11 C.F.R. § 100.22, which defines the statutory term "expressly advocating." Part (a) of the regulation includes communications that use phrases — such as "vote for" or "reject" — "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. § 100.22(a). This is sometimes referred to as "magic words" express advocacy. *See McConnell v. FEC*, 540 U.S. 93, 126 (2003) (citing *Buckley*, 424 U.S. at 44 n.52), *overruled in part*, *Citizens United*, 130 S. Ct. at 913. Part (b) defines express advocacy as a communication that has an unambiguous "electoral portion" as to which "[r]easonable minds could not differ [that] it encourages actions to elect or defeat one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b).[1] A person or

[1] Section 100.22(b) defines as express advocacy as a communication that:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

entity that finances independent expenditures aggregating more than $250 must file with the Commission a disclosure report that identifies, *inter alia*, the date and amount of each expenditure and anyone who contributed over $200 to further it. *See* 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(e).

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), which introduced new financing and disclosure requirements for "electioneering communications." Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002). BCRA prohibited corporations and unions from making any "direct or indirect payment . . . for any applicable electioneering communication," 2 U.S.C. § 441b(b)(2), which is defined in the context of a presidential election as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within 60 days before the general election or 30 days before a primary election or convention. 2 U.S.C. § 434(f)(3)(A)(i). BCRA also mandated disclosure for electioneering communications, including a requirement that every person who makes disbursements to produce or broadcast electioneering communications aggregating in excess of $10,000 during a calendar year must file within 24 hours of meeting that threshold a statement that identifies the maker, amount, and recipient of each such disbursement over $200, as well as information

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(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidiate(s) or encourages some other kind of action.

about donors who contributed to the person making the disbursements. 2 U.S.C. § 434(f)(1)-(2).

The Supreme Court initially upheld the constitutionality of the financing restriction for electioneering communications "to the extent that the issue ads . . . are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08 (quotation at 206). Later, in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), the Chief Justice's controlling opinion defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. 449, 469-70 (2007).

Ultimately, in *Citizens United*, the Court held unconstitutional both BCRA's ban on corporate financing of electioneering communications and FECA's ban on corporate financing of independent expenditures. 130 S. Ct. at 913. But eight Justices upheld BCRA's *disclosure* requirements for electioneering communications, even for communications that are *not* the functional equivalent of express advocacy. 130 S. Ct. at 914-15. The Court recognized that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'" *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64). The Court thus declined to review such disclosure requirements through the lens of strict scrutiny and instead "subjected these requirements to 'exacting

scrutiny,' which requires 'a substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (quoting *Buckley*, 424 U.S. at 64, 66). The Court also explained that disclosure is "less restrictive" than a limit on spending, and that the public has an interest in knowing who is responsible for pre-election communications that speak about candidates, even if the ads do not advocate for or against them. *Id.* at 915-16.

Because *Citizens United* struck down the ban on corporate independent expenditures in 2 U.S.C. § 441b as unconstitutional, the Commission's regulatory definition of express advocacy in 11 C.F.R. § 100.22, which had helped to implement that ban, no longer operates to restrict such corporate speech. It does, however, continue to trigger FECA's disclosure obligations for express candidate advocacy.

B. Political Committee Status

The statutory definition of a "political committee" — commonly known as a "PAC" — includes any "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." 2 U.S.C. § 431(4)(A). In *Buckley*, however, the Supreme Court narrowed this statutory definition because defining PAC status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application by

reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the definition "need only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate*." *Id.* (emphasis added). Under the statute as thus construed, an organization that is not controlled by a candidate must register as a PAC only if the entity (1) crosses the $1,000 threshold of contributions or expenditures and (2) has as its "major purpose" the nomination or election of federal candidates.

1. Organizational and Reporting Requirements; Contribution Limits

PACs must comply with certain organizational and reporting requirements. They must register with the Commission 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 threshold. *See* 2 U.S.C. §§ 433, 434. Each PAC must have a treasurer who maintains and preserves its records. 2 U.S.C. § 432(a)-(d). PACs also must disclose in their regular reports additional information about their independent expenditures, including the date, amount, and candidates supported or opposed for each independent expenditure over $200. 2 U.S.C. § 434(b)(4)(H)(iii), (6)(B)(iii). In addition, PACs must identify themselves through "disclaimers" on their public

political advertising, on their websites, and in mass emails. 11 C.F.R. § 110.11(a)(1).

As enacted, FECA permitted PACs to accept contributions only from individuals in amounts up to $5,000 per individual per year. *See* 2 U.S.C. §§ 441a(a)(1)(C), 441b(a). In *SpeechNow.org v. FEC*, however, the D.C. Circuit invalidated this restriction as applied to PACs whose campaign-related activity consists only of independent expenditures. 599 F.3d 686, 692-97 (D.C. Cir.) (en banc), *cert. denied*, 131 S. Ct. 553 (2010). But *SpeechNow* upheld the application of FECA's reporting and organizational requirements to these independent-expenditure-only PACs, *id.* at 696-98, which have come to be known as "super PACs." The court reasoned that "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures." *Id.* at 698. And the court found that the reporting required of political committees does not "impose much of an additional burden" compared with the reporting requirements for persons making independent expenditures. *Id.* at 697.[2]

[2] The Commission has since concluded, in several advisory opinions, that super PACs may also generally accept unlimited contributions from corporations, labor organizations, and other political committees. (*See* App. 418-19 n.4.)

2. The Major-Purpose Test

In 2004, the Commission issued a notice of proposed rulemaking that asked whether the agency should promulgate a regulatory definition of "political committee" to establish categorical rules regarding the application of *Buckley*'s "major purpose" requirement to certain tax-exempt organizations. *See* FEC, *Political Committee Status*, 69 Fed. Reg. 11,736, 11,743-49 (Mar. 11, 2004). In 2007, after receiving public comments, the Commission explained its decision not to promulgate such a regulation, which would have classified groups like Free Speech as political committees *per se* based on their registration as "political organizations" under section 527 of the Internal Revenue Code. FEC, *Supplemental Explanation & Justification for the Regulations on Political Committee Status*, 72 Fed Reg. 5595 (Feb. 7, 2007); *see* 26 U.S.C. § 527. This notice stated that instead of creating categorical regulations that might have led to overbroad or underinclusive PAC-status determinations, 72 Fed. Reg. at 5,598-5,601, the Commission would continue its longstanding practice of determining an organization's major purpose on a case-by-case basis. *See id*. at 5596-97.

The notice explained that while the major-purpose requirement can be satisfied "through sufficiently extensive spending on Federal campaign activity," *id.* at 5601 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*")), a fact-intensive analysis of each organization's conduct, including

public statements, fundraising appeals, and spending on other activity, can help evaluate the organization's campaign activities compared to its other activities. *Id.* The notice also discussed several matters in which the Commission or a court had analyzed a group's major purpose, explaining that those matters cumulatively "provid[ed] considerable guidance to all organizations" regarding application of the major-purpose doctrine. *See id*. at 5595, 5605-06.

The Commission's case-by-case approach was challenged under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and upheld in *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007). More recently, the Fourth Circuit upheld the constitutionality of the Commission's approach to determining a group's major purpose, finding that *Buckley* "did not mandate a particular methodology for determining an organization's major purpose," so the Commission is free to make that determination "either through categorical rules or through individualized adjudications." *Real Truth About Abortion, Inc. f/k/a Real Truth About Obama, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)), *cert. denied*, No. 12-311, --- S. Ct. ---, 2013 WL 57574 (Jan. 7, 2013).

C. Solicitation of Contributions

FECA defines "contribution" to include "any gift . . . or deposit of money or anything of value made by any person for the purpose of influencing any election

for Federal office." 2 U.S.C. § 431(8)(A)(i); *see* 11 C.F.R. § 100.52(a). In 1979, Congress extended certain disclaimer requirements — which had previously applied only to express-advocacy communications — to *solicitations* for contributions. 2 U.S.C. § 441d(a); FECA Amendments of 1979, Pub. L. No. 96-187, § 111, 93 Stat. 1339, 1365-66 (1980); *see FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 293 (2d Cir. 1995) ("*SEF*") (rejecting construction of § 441d(a) as applying only to express-advocacy communications in light of Congress's "specific[] exten[sion]" of that provision to solicitations). Requests for funds that "clearly indicat[e] that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office" are solicitations for contributions under FECA. *SEF*, 65 F.3d at 295.

As amended, FECA 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. 2 U.S.C. § 441d(a); *see* 11 C.F.R. § 110.11(a)(3). If the solicitation was not paid for or authorized by a candidate, the disclaimer must clearly state "who paid for the communication and . . . that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. *See generally* 2 U.S.C. §§ 437c, 437d.

Free Speech is an unincorporated nonprofit association that was formed on February 21, 2012. (App. 66-67.) It does not intend to make contributions but seeks to distribute certain political advertisements anonymously, without registering as a PAC or complying with FECA's disclosure requirements. (App. 70-71, 78-79.) Free Speech also wishes to solicit donations to finance additional advertisements. (App. 67-68.)

On February 29, 2012, Free Speech requested from the Commission an advisory opinion as to whether (a) any of eleven proposed advertisements would be deemed express advocacy; (b) any of four proposed donation requests would be deemed "solicitations"; and (c) its proposed activities would require it to register with the Commission as a political committee. (App. 102-07.)

The only one of the eleven advertisements Free Speech mentions in its appellate brief (Appellant's Br. 30-31), titled "Environmental Policy," reads:

> 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.

(App. 68 (emphasis in original).) Free Speech represented in its advisory opinion request that it intended to broadcast this advertisement approximately 60 times through November 3, 2012. (*Id.*) The two donation requests Free Speech mentions in its appellate brief (Appellant's Br. 37) are "War Chest," which states:

> Friends of freedom celebrated when the Supreme Court decided *Citizens United*. Now, more than ever, we can make the most effective use of your donations this coming fall. Donations given to Free Speech are funds spent on beating back the Obama agenda. Beating back Obama in the newspapers, on the airwaves, and against his $1 billion war chest.

(App. 104); and "Make Them Listen," which reads:

> In 2010, the Tea Party movement ushered in an historic number of liberty-friendly legislators. But President Obama and his pals in Congress didn't get the message. Stop the bailouts. No socialized healthcare. End oppressive taxes. But we won't be silenced. Let's win big this fall. Donate to Free Speech today.

(App. 105.)

On April 26, 2012, the Commission approved a response to Free Speech's request, unanimously concluding that two of Free Speech's eleven proposed advertisements are express advocacy, four of the ads are not express advocacy, and two of Free Speech's four proposed donation requests are not solicitations under FECA. App. 282; *see In the Matter of Free Speech*, Advisory Opinion 2012-11, Certification (May 8, 2012), *available at* http://saos.nictusa.com/aodocs/1209338.pdf (last visited Feb. 4, 2013). The

advisory opinion explained that the Commission was unable to approve a response by the statutorily required four affirmative votes, 2 U.S.C. §§ 437c(c), 437d(a)(7), as to Free Speech's remaining five proposed advertisements (including "Environmental Policy"), its two other proposed donation requests ("War Chest" and "Make Them Listen"), and the question of whether Free Speech must register as a political committee. (App. 282.)

Free Speech filed its civil complaint and motion for a preliminary injunction on June 14, 2012, and an amended complaint on July 26. The amended complaint challenges the constitutionality of the Commission's regulatory definition of express advocacy in section 100.22(b); the Commission's method of determining PAC status, including the Commission's approach to determining a group's major purpose; and the Commission's method of determining whether a request for donations is a solicitation for contributions. (App. 85-97.) The amended complaint describes some of the communications that were at issue in Free Speech's advisory opinion request and alleges that the challenged regulation and policies are unconstitutional on their face and as applied to Free Speech. (App. 68-69, 80-81.)

The district court heard oral argument on the preliminary-injunction motion on September 12 and denied the motion orally in a transcribed teleconference on October 3. On October 19, Free Speech noticed this appeal and filed a motion in

the district court seeking an injunction pending appeal. On October 24, Free Speech moved for an emergency injunction pending appeal in this Court. The district court and this Court denied Free Speech's motions on October 25 and October 29, respectively.

COUNTERSTATEMENT OF STANDARD OF REVIEW

This Court "'review[s] the grant [or denial] of a preliminary injunction for an abuse of discretion,'" recognizing that "'a preliminary injunction is an extraordinary remedy, [and] the movant's right to relief must be clear and unequivocal.'" *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012). "An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Northern Natural Gas Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259, 1266 (10th Cir. 2012) (internal quotation marks omitted). The district court's legal conclusions are reviewed *de novo*. *Horne*, 698 F.3d at 1301.

Disclosure requirements for political speech are subject to intermediate or "exacting" scrutiny, "which requires 'a substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66); *see infra* pp. 21-23.

SUMMARY OF ARGUMENT

Free Speech has failed to meet its heavy burden to obtain a preliminary injunction, and the district court did not abuse its discretion in denying that relief. The district court correctly recognized that the question presented in this case "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 its electoral advocacy." (App. 485.) Specifically, the regulation and policies at issue here impose disclosure requirements on unambiguous campaign advocacy, on groups whose "major purpose" is to nominate or elect federal candidates, and on solicitations of contributions targeted to elect or defeat federal candidates. Such disclosure requirements for candidate-related speech are constitutional because they help prevent political corruption and "'insure that the voters are fully informed' about the person or group who is speaking." *Citizens United*, 130 S. Ct. at 915 (quoting *Buckley*, 424 U.S. at 76). Disclosure requirements "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Id*. at 914 (quoting *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201).

The Commission's regulatory definition of express advocacy is strikingly similar to the definition of the "functional equivalent of express advocacy" that the Supreme Court adopted in *WRTL*. As the Fourth Circuit recently noted in

affirming the constitutionality of the same regulation, the Supreme Court's standard is by definition constitutional, and so the similarity between that standard and the Commission's regulation necessarily forecloses any argument the regulation is vague, overbroad, or otherwise unconstitutional.

The Commission's case-by-case methodology for determining PAC status is an eminently reasonable application of *Buckley*'s major-purpose requirement. The major-purpose determination is inherently comparative, requiring the Commission to examine how much of an organization's purpose is dedicated to nominating or electing federal candidates versus other activities. Thus, there is no constitutional flaw in the Commission's decades-old practice of determining a group's major purpose based on the specific characteristics and actions of that group. And the Commission's practice of publicly releasing the results of such determinations provides extensive guidance to all interested parties regarding precisely how the Commission analyzes PAC status.

Free Speech's request to halt enforcement — at the peak of a presidential election season — of a longstanding campaign-finance regulation and policies that facilitate campaign-related disclosures would have deprived the public of essential information about the sources of electoral advocacy. Any logistical inconvenience Free Speech might have experienced in disclosing that information does not constitute irreparable harm. Free Speech is and has always been free to finance

and distribute each of its proposed advertisements, and to solicit and accept unlimited contributions to pay for them. But it has no constitutional right to avoid FECA's disclosure requirements for federal campaign activity. The district court's order denying Free Speech's motion for a preliminary injunction should be affirmed.

ARGUMENT

I. LEGAL STANDARDS

A. A Preliminary Injunction that Alters the Status Quo Is an Extraordinary and Disfavored Remedy that Requires Free Speech to Meet a Heavy Burden

The district court correctly concluded that Free Speech was not entitled to a preliminary injunction, and the court applied the proper standard in reaching that conclusion. (App. 484-485.) A movant seeking a preliminary injunction must demonstrate that: (1) it is substantially likely to succeed on the merits; (2) it would suffer irreparable injury absent the requested injunction; (3) its threatened injury outweighs the injury to the opposing party; and (4) the requested injunction would not harm the public interest. *Northern Natural Gas*, 697 F.3d at 1266; *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009; *see Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The purpose of a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*,

451 U.S. 390, 395 (1981); *see also Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement statute despite First Amendment claim and noting that "applicants request that I issue an order *altering* the legal status quo") (emphasis in original). Thus, in this Circuit, a movant seeking a "disfavored" injunction that "alters the status quo" is subject to an even "more stringent standard" under which it must "make a 'strong showing' of both the likelihood of success on the merits of its . . . claim and that the balance of the harms favored issuing the requested injunction." *Northern Natural Gas*, 697 F.3d at 1266. Such an injunction is especially inappropriate in the pre-election context, where "considerations specific to election cases" weigh heavily against the issuance of injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) ("Court orders affecting elections . . . can themselves result in voter confusion . . . . As an election draws closer, that risk will increase."); *Iowa Right to Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1049 (S.D. Iowa 2010) (declining to issue preliminary injunction that would "radically change . . . campaign finance rules mid-stream during an election").

Free Speech attempts to redefine these well-settled preliminary-injunction standards beyond recognition. First, Free Speech erroneously claims that the mere act of moving for a preliminary injunction in the First Amendment context establishes a *presumption* that the movant is likely to succeed on the merits.

(Appellant's Br. 9, 17.) That argument is fundamentally inconsistent with the "presumption of constitutionality" accorded to federal statutes, *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers), and with the "close[] scrutin[y]" this Court requires for the "disfavored" relief Free Speech seeks. *Awad v. Ziriax*, 670 F.3d 111, 1125 (10th Cir. 2012) (holding that injunctions that would alter status quo "must be more closely scrutinized to assure that the exigencies of the case support granting of a remedy that is extraordinary even in the normal course"). The only authority upon which Free Speech relies for its proposition is *Ashcroft v. ACLU*, which noted the established principle that the government "bears the burden of proof on the ultimate question of [a statute's] constitutionality" under strict scrutiny. 542 U.S. 656, 666 (2004). But strict scrutiny does not apply here, *see infra* pp. 22-23, and nothing in *Ashcroft* purported to hold that merely by alleging a First Amendment violation a plaintiff becomes presumptively entitled to halt all governmental enforcement of the challenged provisions while the case is pending. To the contrary, "[a] preliminary injunction is an extraordinary remedy *never* awarded as of right." *Winter*, 555 U.S. at 24 (emphasis added).[3]

[3] Free Speech cites *WRTL* but admits that case was not decided in "the context of preliminary injunctions." (Appellant's Br. 17 (citing *WRTL*, 551 U.S. 449).) More importantly, *WRTL* simply does not say what Free Speech claims, *i.e.*, that "all doubts must be resolved in favor of the speaker" whenever "speech implicating political issues is under judicial review." (*Id.*) Instead, the controlling

Free Speech also speciously asserts that the requested injunction against the Commission's enforcement of a longstanding federal regulation and policies would not alter the status quo, but instead would "restore the proper *status quo ante*," *i.e.* "freedom." (Appellant's Br. 18-19 (citing *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (McConnell, J., concurring), *aff'd* 546 U.S. 418 (2006)).) But Free Speech's own purported authority for this assertion refutes it: "When a statute has long been on the books and enforced, . . . it is *exceedingly unusual* for a litigant who challenges its constitutionality to obtain (or even to seek) a preliminary injunction against its continued enforcement." *O Centro*, 389 F.3d at 1018 (McConnell, J., concurring) (emphasis added). Moreover, Free Speech's argument proves far too much: If the relevant "status quo ante" were a nation without laws, then *every* statute or regulation would be presumptively subject to an injunction whenever challenged — a result that cannot be reconciled with the binding precedent discussed above.

B. Constitutional Standards

1. Disclaimer and Disclosure Requirements Are Subject to Intermediate Scrutiny

As the Supreme Court explicitly confirmed in *Citizens United*, "[d]isclaimer and disclosure requirements" are subject to "'exacting scrutiny,' which requires a

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opinion in *WRTL* noted that in the context of laws that *ban* speech, "the tie goes to the speaker, not the censor." *WRTL*, 551 U.S. at 474. That statement is plainly inapplicable here, where no speech is being censored.

'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." 130 S. Ct. at 914. This Court has recognized the same, *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010), as have its sister circuits, *see RTAA*, 681 F.3d at 555, 558 (upholding section 100.22(b) and Commission's method of determining PAC status under exacting scrutiny); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 56-70 (1st Cir. 2011) (upholding state-law definitions of and disclosure requirements for independent expenditures and PACs under exacting scrutiny), *cert. denied*, 132 S. Ct. 1635 (2012); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1003-19 (9th Cir. 2010) (same), *cert. denied*, 131 S. Ct. 1477 (2011); *SpeechNow*, 599 F.3d at 698 (upholding federal PAC requirements under exacting scrutiny); *see also Nat'l Org. for Marriage Inc. v. Sec'y, State of Fla.*, 477 F. App'x 584, 585 (11th Cir. 2012) (citing *McKee*). The district court thus correctly found that "[c]ontrolling precedent does not support [Free Speech's] argument that strict scrutiny is applicable" here. (App. 485.)

Free Speech appears to concede that the district court appropriately rejected its argument for strict scrutiny, as it now acknowledges that exacting scrutiny applies to "each area of substantive election law" that it challenges. (Appellant's Br. 8.) But despite embracing "exacting scrutiny" in name, Free Speech misrepresents the content of that constitutional standard, inaccurately claiming that

exacting scrutiny is "closely related" to the more rigorous strict-scrutiny standard (Appellant's Br. 8), and improperly applying the elements of strict scrutiny to the challenged disclosure rules. Contrary to Free Speech's assertions, disclosure requirements need not be "narrowly tailored" (*id.* at 10, 20, 42), nor must they be the "le[ast] restrictive alternative[] [that] would effectively carry out the FEC's legitimate interest in disclosure" (*id.* at 9, 17). Such requirements apply in the context of strict scrutiny, *see United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *United States v. Friday*, 525 F.3d 938, 949 (10th Cir. 2008), not to the "substantial relation" test of exacting scrutiny. *See, e.g.*, *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (citing "series of precedents considering First Amendment challenges to disclosure requirements in the electoral context" that establish "'exacting scrutiny'" as applicable constitutional standard); *RTAA*, 681 F.3d at 548-49 (distinguishing between strict scrutiny and "less stringent 'exacting scrutiny' standard" and declining to apply strict scrutiny to section 100.22(b) or Commission's method of determining PAC status); *McKee*, 649 F.3d at 55 ("[D]isclosure requirements have not been subjected to strict scrutiny, but rather to "'exacting scrutiny . . . .'").

2. Free Speech's Burden for Its Facial Challenges

Free Speech's facial challenges include claims of both overbreadth and vagueness.[4] This Court has held that a plaintiff bringing a facial challenge "must establish that the law, in *every* application, 'creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.'" *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1155 (10th Cir. 2007) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992)). Thus, Free Speech carries the "heavy burden of proving" that the alleged "overbreadth [is] *substantial*, not only in an absolute sense, but also relative to [the challenged provisions'] plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008).

[4] Free Speech does little to support its purported as-applied claims, barely mentioning Free Speech's proposed communications, let alone explaining how the challenged provisions cannot constitutionally be applied to them. (*See* Appellant's Br. 28-29 (acknowledging distinction between facial and as-applied challenges but stating that "they will be considered in tandem in this brief").) A plaintiff's characterization of its own challenge as "as-applied" is not controlling, *Citizens United*, 130 S. Ct. at 893, and because Free Speech fails to identify any unusual feature of its own circumstances that would render the challenged provisions invalid as applied, the Court can "reject those claims summarily." *McKee*, 649 F.3d at 41; *see also Iowa Right to Life Comm., Inc. v. Tooker*, 795 F. Supp. 2d 852, 862 n.16 (S.D. Iowa 2011) (noting requirement that plaintiff "distinguish between its facial and as-applied arguments").

Free Speech also argues that the challenged regulation and policies are unconstitutionally vague. To prevail on this theory, Free Speech must show that they fail to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and that they permit "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

II. FREE SPEECH CANNOT SHOW THAT IT IS LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS

A. Section 100.22(b) Is Constitutional

Section 100.22 defines "expressly advocating" and thus provides guidance on whether a communication is an "independent expenditure" under FECA. The regulation originally functioned in part to implement FECA's ban on corporate and union independent expenditures, 2 U.S.C. § 441b, which the Supreme Court struck down in *Citizens United*. Because such prohibitions no longer exist, section 100.22(b) no longer implements spending restrictions. *See RTAA*, 681 F.3d at 548. Thus, contrary to Free Speech's hyperbolic assertions, section 100.22(b) does not "penalize" or "suppress[] . . . speech by average Americans." (Appellant's Br. 14, 33.)[5] It simply triggers disclosure requirements for communications that

[5] Indeed, as Free Speech ultimately admits, "[i]n this case, Free Speech *silenced itself*" (Appellant's Br. 57 (emphasis added)), and its reliance on cases addressing government-imposed speech restrictions (*id.* at 25) is therefore entirely misplaced. *See infra* pp. 55-56.

unambiguously advocate the election or defeat of a federal candidate and helps determine whether an organization must register and report as a PAC. Moreover, as the district court correctly noted in agreement with the Fourth Circuit, the regulation is narrow, objective, and consistent with Supreme Court precedent. App. 17-18; *RTAA*, 681 F.3d at 552.

1. Section 100.22(b) Is Not Unconstitutionally Vague

a. The Regulation Is Consistent with WRTL*'s Definition of the Functional Equivalent of Express Advocacy*

A communication is "express advocacy" under section 100.22(b) only if it contains an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning," as to which "[r]easonable minds could not differ [that] it encourages actions to elect or defeat one or more clearly identified candidate(s)." As the district court explained (App. 486-87), that definition comports with the definition of the "functional equivalent of express advocacy" that the Supreme Court articulated in *WRTL*, 551 U.S. at 469-70, and applied in *Citizens United*, 130 S. Ct. at 890. Section 100.22(b) — like the *WRTL* test — excludes from regulation any communication that can reasonably be interpreted as non-candidate advocacy. *Compare* 11 C.F.R. § 100.22(b) ("[r]easonable minds could not differ"), *with WRTL*, 551 U.S. at 469-70 ("susceptible of no [other] reasonable interpretation"). And contrary to Free Speech's characterization of the regulation as a "freewheeling examination[] into speakers' subjective intents and listeners' subjective biases"

(Appellant's Br. 27), both definitions are objective, precluding consideration of the speaker's "subjective intent." *Compare WRTL*, 551 U.S. at 472, *with* FEC, *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) ("[T]he subjective intent of the speaker is not a relevant consideration [under § 100.22(b)] . . . ."); *see also Citizens United*, 130 S. Ct. at 895, 889-90 (describing *WRTL* test as "objective").[6]

Relying on the striking similarity between the standard in section 100.22(b) and the *WRTL* test, the Fourth Circuit flatly rejected a constitutional challenge to section 100.22(b) indistinguishable from the challenge put forward in the instant case. In *RTAA*, the court held that "§ 100.22(b) is constitutional . . . and . . . consistent with the test developed in *Wisconsin Right to Life* and is not unduly vague" or overbroad. 681 F.3d at 551-52, 555.[7] Free Speech's appellate brief fails even to mention the Fourth Circuit's holding, even though the court below cited *RTAA* extensively. (*See* App. 480, 485-87, 490-91.) Like the Fourth Circuit, the

[6] The regulation's "reasonable person" test is like other objective constitutional tests. *See, e.g.*, *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity depends upon a "wholly objective standard" based on whether a "reasonable person" would have known of clearly established rights); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("[C]onsent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

[7] Less than one month ago, the Fourth Circuit reaffirmed the holding of *RTAA* and concluded that a state-law definition of "expressly advocating" that tracks the *WRTL* test "is not unconstitutionally vague." *Ctr. for Individual Freedom, Inc. v. Tennant*, No. 11-1952, --- F.3d ---, 2013 WL 208912, at *7 (4th Cir. Jan. 18, 2013).

district court observed that although the regulation "does not exactly mirror the functional equivalent definition in *Wisconsin Right to Life*, the difference between the two tests [is] not meaningful"; if anything, "the test under § 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.'" (App. 487 (quoting *RTAA*, 681 F.3d at 552).)

Despite the similarities between the Commission's and the Supreme Court's definitions of express advocacy and its functional equivalent, Free Speech asserts that section 100.22(b) is "hopelessly vague." (Appellant's Br. 28.) In *WRTL*, however, the Chief Justice's controlling opinion specifically rejected Justice Scalia's argument in a separate opinion that the "no reasonable interpretation" test was "impermissibly vague." 551 U.S. at 474 n.7. And the Court's subsequent application of the *WRTL* test in *Citizens United* puts to rest any credible claim that the standard is constitutionally infirm. *See Citizens United*, 130 S. Ct. at 889-90 (applying "the standard stated in *McConnell* and further elaborated in *WRTL*" to conclude that film criticizing presidential candidate Hillary Clinton "qualifie[d] as the functional equivalent of express advocacy"). The district court was therefore correct — and certainly did not abuse its discretion — when it reached the same conclusion as the Fourth Circuit and held that section 100.22(b) cannot be

unconstitutionally vague in light of the Supreme Court's adoption and application of a highly similar standard. (App. 486-87.)

b. Disagreements About the Application of Section 100.22(b) Do Not Demonstrate Unconstitutional Vagueness

The district court correctly rejected Free Speech's contention that the lack of unanimity among the FEC's six Commissioners in analyzing some of Free Speech's proposed communications demonstrates that section 100.22(b) is unconstitutionally vague.[8] (App. 487.) As the Supreme Court has noted, "[c]lose cases can be imagined under virtually any statute. The problem that poses is [not] addressed . . . by the doctrine of vagueness." *Williams*, 553 U.S. at 306; *see also United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (holding that Federal Corrupt Practices Act was not facially vague because "[w]herever the law draws a line there will be cases very near each other on opposite sides"). The Fourth Circuit relied on these holdings in rejecting the argument that section 100.22(b) is vague simply because different people can reach different results regarding a given communication. *RTAA*, 681 F.3d at 554 (citing *Williams* and *Wurzbach* and holding that disagreement between district court and Commission regarding

[8] Free Speech erroneously states that the Commissioners reached "diametrically opposed conclusions regarding most of Free Speech's ads." (Appellant's Br. 11.) To the contrary, the Commissioners agreed *unanimously* regarding the application of section 100.22(b) to six of Free Speech's eleven proposed ads. (*See* App. 282; *supra* p. 13.)

whether one communication met § 100.22(b) test did not demonstrate vagueness in regulation). As the district court in this case correctly observed, such disagreement "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." (App. 487 (citing *RTAA*, 681 F.3d at 554).)

Moreover, Free Speech's limited discussion of the Commissioners' analyses of its ads is misleading. Free Speech describes the "Environmental Policy" advertisement — the only ad it mentions here — as simply requesting that people "talk about ranching," and Free Speech asserts that the three Commissioners who voted to find this ad express advocacy "felt empowered to divine [its] supposed true meaning." (Appellant's Br. 31.) Free Speech fails to note that "Environmental Policy" explicitly links criticism of a presidential candidate with a call to action for the month of the upcoming election: "Obama cannot be counted on to represent Wyoming values and voices as President. *This November*, call your neighbors." (App. 68.) As the Supreme Court has held, a communication with such elements meets the *WRTL* test. *See Citizens United*, 130 S. Ct. at 890 (concluding that film providing "extended criticism of Senator Clinton's character and her fitness for the office of the Presidency" was "equivalent to express advocacy"); *WRTL*, 551 U.S. at 470 (identifying certain "indicia of express advocacy" such as whether a communication "mention[s] an election [or]

candidacy" or "take[s] a position on a candidate's character, qualifications, or fitness for office");[9] *see also Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736, 749-50 (E.D. Va. 2011) (concluding that ad "focus[ing] entirely on then-Senator Obama's position on abortion, . . . call[ing] Senator Obama's votes on state abortion legislation 'horrendous,' . . . claim[ing] he 'tried to cover-up' those votes and lied about them," and "call[ing] Senator Obama 'callous'" was express advocacy under section 100.22(b)), *aff'd*, *RTAA*, 681 F.3d 544, *cert. denied*, No. 12-311, --- S. Ct. ---, 2013 WL 57574 (Jan. 7, 2013).[10]

2. Section 100.22(b) Is Not Overbroad

Supreme Court decisions culminating in *Citizens United* and *Doe v. Reed* have held that disclosure requirements may constitutionally reach even beyond express advocacy or its functional equivalent. After clarifying that *Buckley*'s

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[9] In light of *WRTL*'s clear description of "indicia of express advocacy," there is no merit to Free Speech's criticism of the Commission's statement that communications discussing "'a candidate's character, qualifications or accomplishments'" may be express advocacy under 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.'" (Appellant's Br. 28 (quoting 60 Fed. Reg. at 35,295).)

[10] Although "Environmental Policy" also mentions President Obama's opposition to "the Government Litigation Savings Act," it neither explains what that bill concerns nor identifies any means by which one could find out. The ad is thus *not* what the controlling opinion in *WRTL* identified as "a genuine issue ad." *See WRTL*, 551 U.S. at 469-70 & n.6 (distinguishing "genuine issue ad," which "conveys information and educates," from ads that "condemn [a candidate's] record on a particular issue") (citation omitted).

"express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command," *McConnell* upheld BCRA's disclosure requirements for electioneering communications.[11] 540 U.S. at 191-92, 194-99. The Court reiterated the "important state interests" served by disclosure requirements — interests that include "providing the electorate with information" and "deterring actual corruption and avoiding any appearance thereof." *Id.* at 196. And the Court noted that the only constitutional challenges it had ever sustained to such disclosure provisions involved situations in which disclosure led to "threats, harassment, or reprisals" against individuals engaged in First Amendment activity. *See id.* at 197-98. The Court held that absent evidence showing a "reasonable probability" of such incidents occurring, *id.* at 198-99, a constitutional challenge to disclosure of electioneering communications is "foreclose[d]." *Id.* at 197.

In *Citizens United*, the Court upheld BCRA's disclosure requirements as applied to a movie that was the functional equivalent of express advocacy. 130 S. Ct. at 889-90. But the Court also upheld these disclosure requirements even as

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[11] Free Speech claims that it "might have to file . . . electioneering communications reports" (Appellant's Br. 24 n.2, 29-30), but the relatively low cost of its proposed broadcast advertisements falls below the statutory threshold of FECA's reporting requirements for electioneering communications. *Compare* App. 360-61 (noting $1,500 cost of broadcast advertisements), *with* 2 U.S.C. § 434(f) (establishing $10,000 reporting threshold and excluding non-broadcast advertising).

applied to electioneering communications that merely *advertised* the movie — communications that the Commission had conceded were *not* the functional equivalent of express advocacy. *Id.* at 914-16. Eight Justices held that disclosure requirements are a constitutionally permissible method of furthering the public's important interest in knowing who is responsible for pre-election communications that speak about candidates. *See id.* at 915-16. As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916. Thus, when asked to confine the "disclosure requirements . . . to speech that is the functional equivalent of express advocacy," the Court flatly "reject[ed] this contention." *Id.* at 915. Mandatory disclosure is constitutional even if the communications contain no direct candidate advocacy but "only pertain to a commercial transaction." *Id.* (citing *Buckley*, 424 U.S. at 75-76; *McConnell*, 540 U.S. at 321).

That holding is of a piece with the Supreme Court's long history of applying intermediate scrutiny and upholding disclosure requirements for issue advocacy. Decades before *Citizens United*, the Court had upheld the constitutionality of lobbying disclosure laws that "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds

for that purpose." *United States v. Harriss*, 347 U.S. 612, 625 (1954). Later, in *First National Bank of Boston v. Bellotti*, the Court struck down *spending* restrictions on ballot measures but noted that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. 765, 792 n.32 (1978). And shortly after deciding *Citizens United*, the Court held that a state's interest in preserving the integrity of the electoral process is sufficient to justify a requirement that individuals who sign petitions to place referenda on state ballots disclose their names and addresses. *Reed*, 130 S. Ct. at 2819-22.

In light of these decisions and *Citizens United*'s endorsement of "[a] campaign finance system that pairs corporate independent expenditures with *effective disclosure*," 130 S. Ct. at 916 (emphasis added), Free Speech's qualified concession (Appellant's Br. 10) that *Citizens United* upheld only "simple disclosure" and only for "a very narrowly defined form of speech" is woefully deficient. As the Fourth Circuit and the district court concluded, "'[i]f 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.'" App. 486 (quoting *RTAA*, 681 F.3d at 551-52); *see Tennant*, 2013 WL 208912, at *7 (citing *Citizens United*'s holding that disclosure

requirements need not be limited to "'speech that is the functional equivalent of express advocacy'" and concluding that state-law provision that mirrors *WRTL* test "cannot be overbroad"). In addition to the Fourth Circuit, at least four other Courts of Appeals have reached similar conclusions. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny."); *Nat'l Org. for Marriage*, 477 F. App'x at 585 (11th Cir.) (adopting rationale of First Circuit in *McKee*); *McKee*, 649 F.3d at 54-55 (1st Cir.) ("[I]t [is] reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); *Brumsickle*, 624 F.3d at 1016 (9th Cir.) ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.").

Free Speech ignores this unanimous body of authority that interprets *Citizens United* as permitting disclosure requirements for a broad range of speech that includes, but is not limited to, express advocacy and its functional equivalent. Instead, Free Speech asserts that even after *Citizens United*, "the Tenth Circuit, and

many of its sister circuits, still require some . . . express advocacy test . . . to limit the overbroad or vague application of regulations . . . to political speech." (Appellant's Br. 27.) But none of the decisions Free Speech cites casts any doubt on the constitutionality of requiring disclosure for communications that meet the definition of section 100.22(b).

In *Herrera*, this Court held that "speech that expressly advocates *or is the functional equivalent of express advocacy* . . . is unambiguously related to the campaign of a candidate and thus *properly subject to regulation regardless of its origination*." 611 F.3d at 678 (citing *WRTL*, 551 U.S. at 476; emphases added). The ads at issue in *Herrera* were not express advocacy or its functional equivalent because, unlike Free Speech's proposed ads, they "highlighted the legislators' voting records, . . . warned that corporate interests were likely to try to influence legislators' positions on . . . legislation and urged recipients to contact their legislators so that their voices could be heard." *Id.* at 674. In other words, the ads in *Herrera* could reasonably be interpreted as what the controlling opinion in *WRTL* identified as "a genuine issue ad." *See WRTL*, 551 U.S. at 469-70 & n.6. As explained *supra* pp. 26-29, a communication that has no reasonable interpretation other than as encouraging the election or defeat of a candidate — *i.e.*, a communicate-on meeting the *WRTL* and section 100.22(b) tests — is by definition not a "genuine issue ad" for constitutional purposes. And Free Speech

fails to identify *any*, let alone "many," decisions from other circuits identifying what alternative "formulation of an express advocacy test" is required after *Citizens United*. (Appellant's Br. 27.) The only two circuit decisions it cites are *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), and *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), both of which were decided years before *Citizens United*.

In sum, after *WRTL* and *Citizens United*, requiring disclosure of communications that meet section 100.22(b)'s definition of "expressly advocating" is plainly constitutional.

3. Free Speech's Mischaracterizations of the Commission's Enforcement Matters Fail to Demonstrate Any Flaw in Section 100.22(b)

Free Speech's attacks on the Commission's history of enforcing section 100.22(b) are completely off-base. Free Speech's description of that history consists exclusively of statements by a non-majority of Commissioners (or "the Commission's lawyers") in matters in which the Commission did *not* vote to find a violation premised on section 100.22(b). (Appellant's Br. 32 & n.3 (citing, *inter alia*, statement of three Commissioners, statement of two Commissioners, and recommendations from Commission's General Counsel).) Such statements that have not been adopted by a majority of the Commission do not constitute official Commission interpretations. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313,

1321 (D.C. Cir. 1998) ("*Chevron* deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to each individual agency employee . . . ."); *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1327 (D.C. Cir. 1984) (observing that NRC majority is not "required to accept the advice of some members of their legal and technical staff"), *aff'd in relevant part sub nom., San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C Cir. 1986) (en banc); *cf. Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002) (explaining that judicial review is not based on predecisional process). To the extent these enforcement matters are relevant here, they demonstrate the narrowness with which the Commission applies section 100.22(b). Indeed, far from representing a "freewheeling, undefined" approach "with which to penalize speech and speakers" (Appellant's Br. 32 n.3, 33), the Commission's enforcement history is so reserved that Free Speech does not identify a single enforcement matter in which it alleges the Commission applied the regulation improperly to find a violation of FECA.

Free Speech also complains that the Commission's enforcement decisions regarding section 100.22(b) — along with the 1995 Federal Register notice regarding its promulgation, 60 Fed. Reg. 35,292 — have provided *too much* guidance on the Commission's interpretation and application of that regulation. (*See* Appellant's Br. 28 (criticizing "lengthy" Federal Register notice); *id.* at 31

(complaining that Commission "invites individuals to read thousands of pages of previous enforcement matters").) Such assertions cannot be reconciled with Free Speech's contradictory (and equally unsupported) allegations that the Commission applies section 100.22(b) in an "undefined" manner that precludes "[w]ould-be speakers" from being "let in on the Commission's current assessment." (*Id.* at 28; *see id.* at 37-38 (alleging "lack of clarity and guidance" for "interested persons who wish to tailor their conduct in compliance with the law").) Because every enforcement matter provides guidance to potential advertisers regarding "the Commission's current assessment," Free Speech's claims regarding the paucity or overabundance of information regarding the Commission's application of section 100.22(b) have no basis in law or fact.

4. Section 100.22(b) Is Within the Commission's Authority and Consistent with Congressional Intent

Free Speech's perfunctory argument that the Commission lacked statutory authority to promulgate section 100.22(b) (Appellant's Br. 26) does not even mention — much less make any effort to satisfy — the required elements of such a claim. *See generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Congress codified the term "expressly advocating" without definition or limit, *see* 2 U.S.C. § 431(17), and the Commission's regulatory construction of the statutory term is a lawful exercise of its administrative duty to "prescribe rules [and] regulations . . . to carry out the provisions of [FECA]."

2 U.S.C. § 438(a)(8); *see Chevron*, 467 U.S. at 842-45. Moreover, Congress later explicitly provided by statute that BCRA's amendments to FECA would not affect section 100.22(b). *See* BCRA § 201(a), 116 Stat. 89 (codified at 2 U.S.C. 434(f)(3)(A)(ii)) ("Nothing in [the statutory definition of 'electioneering communication'] shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations."). In light of this congressional enactment singling out the Commission's express-advocacy regulation for protection, Free Speech's statutory-authority argument is makeweight at best.[12]

B. PAC Status Entails Constitutional Disclosure Requirements, Not Spending Limits, and the Commission's Method of Determining Such Status Is Constitutional

1. FECA's Reporting Requirements for PACs Are Constitutional

As explained *supra* p. 6, a "political committee" includes any organization that receives more than $1,000 in contributions or more makes more than $1,000 in expenditures, 2 U.S.C. § 431(4)(A), and is "under the control of a candidate" or

[12] The two decisions Free Speech cites to support this argument have been superseded. (App. 26 (citing *Me. Right to Life Comm. v. FEC*, 914 F. Supp. 8 (D. Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess Cnty. Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998)).) These decisions predated both Congress's explicit protection of the regulation when it enacted BCRA and the Supreme Court's subsequent recognition in *WRTL* and *Citizens United* that communications susceptible of no reasonable interpretation other than as appeals to elect or defeat a candidate are functionally equivalent to express advocacy. *Citizens United*, 130 S. Ct. at 890; *WRTL*, 551 U.S. at 470.

has as its "major purpose" "the nomination or election of a candidate," *Buckley*, 424 U.S. at 79. FECA imposes on PACs reporting obligations, 2 U.S.C. § 434, which, like all disclosure requirements, are subject to exacting scrutiny. *Herrera*, 611 F.3d at 676; *RTAA*, 681 F.3d at 548-49; *Madigan*, 697 F.3d at 477; *McKee*, 649 F.3d at 55-57; *Brumsickle*, 624 F.3d at 1003-05; *SpeechNow*, 599 F.3d at 696-98.[13] FECA imposes no limit on what PACs can spend on independent campaign-related speech.

FECA's disclosure requirements for PACs are constitutional because they "directly serve substantial governmental interests," *Buckley*, 424 U.S. at 68, by furthering the "public . . . interest in knowing who is speaking about a candidate and who is funding that speech," and by "deter[ring] and help[ing] expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals." *SpeechNow*, 599 F.3d at 698. Indeed, "[t]he need for an effective and comprehensive disclosure system is especially valuable after *Citizens United*, since individuals and outside business entities may engage in unlimited political advertising so long as they do not coordinate tactics with a political campaign or political party." *Madigan*, 697 F.3d

[13] As discussed *supra* pp. 22-23, Free Speech's assertions that the PAC disclosure requirements must be the "le[ast] restrictive alternative" (Appellant's Br. 17) and "narrowly tailored" (*id*. at 42) erroneously import strict-scrutiny requirements into the exacting-scrutiny analysis.

at 490 (upholding PAC requirements even for groups "whose major purpose is *not* electoral politics").[14]

Free Speech repeatedly asserts that PAC status and PAC disclosure are "two very different regulatory regimes" (Appellant's Br. 10, 20) because "PAC status is not a regime that 'do[es] not prevent anyone from speaking'" (*id*. at 39 (alterations in original)). As this Court and numerous others have recognized, however, the obligations attendant upon PAC status "require disclosure, thus distinguishing them from regulations that limit the amount of speech a group may undertake." *Herrera*, 611 F.3d at 676 (citing *Buckley*, 424 U.S. at 64); *see RTAA*, 681 F.3d at 548-49; *Madigan*, 697 F.3d at 486-91; *McKee*, 649 F.3d at 55-57; *Brumsickle*, 624 F.3d at 1003-05; *SpeechNow*, 599 F.3d at 698; *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1048 (D. Haw. 2012) ("Many decisions since *Citizens United* have analyzed various definitions of a 'political committee,' which include the burdens associated with such classification, and considered them to be 'disclosure requirements.'" (collecting cases)).

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[14] In *Minnesota Citizens Concerned for Life v. Swanson*, the Eighth Circuit struck down a state statute that imposed PAC reporting requirements on groups *without* any consideration of their major purpose. 692 F.3d 864, 877 (8th Cir. 2012) (en banc). Contrary to Free Speech's claim that the voided provision was "similar to federal PAC requirements" (Appellant's Br. 22), the Eighth Circuit explicitly distinguished FECA's constitutional reporting obligations from the challenged Minnesota provision. *See Swanson*, 692 F.3d at 875 nn.9-10 (citing *SpeechNow*).

Free Speech's reliance on the discussion of PAC burdens in *Citizens United* and *MCFL* is misplaced. Those cases described *speaking* through a corporate PAC as a burdensome alternative to *speaking* directly with corporate treasury funds. *See Citizens United*, 130 S. Ct. at 897; *MCFL*, 479 U.S. at 253. That context is "significantly different" from the one facing political organizations like Free Speech — entities that, after *Citizens United* and *SpeechNow*, can directly finance advocacy for and against candidates and receive unlimited contributions to do so. *RTAA*, 681 F.3d at 549; *see McKee*, 649 F.3d at 56 (distinguishing *Citizens United* and *MCFL* as involving statutes that "condition[ed] political speech on the creation of a separate organization or fund," not disclosure requirements). As the Fourth Circuit explained in response to an argument similar to Free Speech's:

> The regulation invalidated in *Citizens United* required corporations to set up a separate PAC with segregated funds before making any direct political speech. These corporate PACs were subject to several limitations on allowable contributions, including a prohibition on the acceptance of funds from the corporation itself. The Court accordingly held that the option to create a separate corporate PAC did not alleviate the burden imposed by § 441b *on the corporation's own speech*. In contrast, the PAC disclosure requirements at issue here neither prevent Real Truth from speaking nor "impose [a] ceiling on campaign-related activities."

RTAA, 681 F.3d at 549 (citations omitted). The court below thus correctly rejected Free Speech's attempt to "expand the discussion in *Citizens United* as to the formation of a PAC and the burdens imposed upon going through that process"

because "those same burdens are [not] analogous in this case and thus do not act as a prior restraint or the equivalent of the same." (App. 488; *see also infra* pp. 55-56.)

Moreover, FECA's organizational and reporting obligations for PACs do not "impose much of an additional burden" in comparison with the reporting requirements for independent expenditures and electioneering communications that the Supreme Court upheld in *Citizens United*. *SpeechNow*, 599 F.3d at 697-98. Indeed, relying on *Citizens United*, the en banc D.C. Circuit upheld the PAC reporting requirements as applied to independent-expenditure-only groups like Free Speech, noting that the additional reporting requirements that are triggered for such a group when it qualifies as a PAC "are minimal." *Id.* at 697-98; *see also RTAA*, 681 F.3d at 558. Empirical data support the court's conclusion: Of the 6,975 PACs that were registered with the Commission as of November 2012, more than 2,670 registered after *Citizens United* was decided in January 2010, and these PACs spent more than $687 million on independent expenditures to influence federal elections over the past three years.[15] Free Speech's generalized arguments

[15] PAC-registration and independent-expenditure figures can be found in the FEC's public databases. *See Detailed Files About Candidates, Parties and Other Committees; 2011-2012 Committee Master File*, http://www.fec.gov/finance/disclosure/ftpdet.shtml (last visited Feb. 4, 2013); *New Statements of Organization*, http://www.fec.gov/press/press2011/new_form1dt.shtml (last visited Feb. 4, 2013); *Committee Report Summary*,

about the burdens of PAC status are thus inconsistent with both the significant body of case law upholding PAC disclosure requirements in light of *Citizens United*, as well as the sheer quantity of PAC registrations and speech post-dating that decision.

2. The Commission's Method of Determining a Group's Major Purpose Is Constitutional

As the court below correctly recognized, "[a]lthough *Buckley* . . . create[d] the 'major purpose' test, it did not mandate a particular methodology for determining an organization's major purpose." (App. 490-91.) Accordingly, the Commission has the administrative discretion to determine PAC status "either through categorical rules or through individualized adjudications." *Id*. (quoting *RTAA*, 681 F.3d at 556); *Shays*, 511 F. Supp. 2d at 29-31.

The Commission's method of determining on a case-by-case basis whether an organization is a political committee — including whether its major purpose is the nomination or election of candidates — has been consistent for decades. *See generally* 72 Fed. Reg. 5,595. First, the Commission determines whether the group has met the statutory criteria for political-committee status either by making more than $1,000 in expenditures or receiving more than $1,000 in contributions. *See id.*

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http://www.fec.gov/data/CampaignAndCommitteeSummary.do?format=html&election_yr=2012 (last visited Feb. 4, 2013). At the time of this filing, these databases reflect PAC registrations and independent expenditures reported through November 2012.

at 5,603-04; 2 U.S.C. § 431(4)(A). Only if one of these financial criteria is satisfied does the Commission consider the group's major purpose. In determining that major purpose, the Commission consults sources such as the group's public statements, government filings (*e.g.*, IRS notices), charters, and bylaws. *See* 72 Fed. Reg. at 5,601, 5,605 (describing sources). Because no two organizations are exactly alike, the Commission's analysis has frequently turned on a group's specific activities, such as its spending on a particular election or issue-advocacy campaign.[16] *See id.* at 5,601-02, 5,605.

All three courts to have considered this methodology (including the district court below) have upheld it. Indeed, the Commission's decision to make PAC-status determinations on a case-by-case basis was specifically challenged and upheld in *Shays*, 511 F. Supp. 2d at 29-31. And the Fourth Circuit in *RTAA* concluded that the Commission's case-by-case approach to determining an organization's major purpose is "sensible, . . . consistent with Supreme Court precedent," and, most importantly, "constitutional." *RTAA*, 681 F.3d at 558.

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[16] Once again, *see supra* pp. 37-38, Free Speech erroneously relies on enforcement documents that were never adopted by a majority of the Commission. *Compare* Appellant's Br. 50-51 (citing FEC General Counsel's report in Matter Under Review 5977), *with In the Matter of American Leadership Project*, MUR 5977, Certification (Feb. 25, 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044231595.pdf (noting that only two Commissioners voted to approve General Counsel's report) (last visited Feb. 4, 2013).

Free Speech completely ignores *RTAA*'s instructive analysis, which the district court adopted. (App. 491.) Instead, Free Speech attempts to caricature the Commission's approach as permitting "arbitrary and discriminatory . . . appl[ication of] the requirements of PAC status to almost any organization [the FEC] chooses." (Appellant's Br. 38; *see also id*. at 47-51 (criticizing fact-intensive nature of Commission's inquiry).) But Free Speech conceded below that it is "undoubtedly true that in conducting the major purpose analysis, fact-intensive inquiries are often appropriate." (App. 47, 49.) And as the Fourth Circuit recognized, the "determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others." *RTAA*, 681 F.3d at 556.[17] Indeed, "[t]he 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." *Id.* at 557; *see*

[17] Free Speech cites *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), but, as Free Speech acknowledges, that case concerned a state law that imposed PAC status on groups with "'*a* major purpose' rather than '*the* major purpose' of supporting or opposing a candidate" (Appellant's Br. 46 (emphases added)), and it is therefore inapposite. *See RTAA*, 681 F.3d at 557 (holding that plaintiff's reliance on *Leake* in challenge to Commission's major-purpose determination was "misplaced"). Equally irrelevant is *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010) (cited at Appellant's Br. 46), which concerned application of the major-purpose test to a group that, unlike Free Speech, had not yet identified any federal candidates it planned to support or oppose.

Koerber v. FEC, 583 F. Supp. 2d 740, 748 (E.D.N.C. 2008) (denying preliminary injunction in challenge to Commission's approach to determining PAC status and noting that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose"); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."); *id.* at 864, 866 (describing organization's meetings and "Political Strategy Campaign Plan and Budget").[18] These decisions therefore belie Free Speech's attack on the Commission's case-by-case methodology, as well as Free Speech's unsupported assertion (Appellant's Br. 52) that the major-purpose inquiry must be limited to "the founding documents of an organization and to public statements."

[18] *GOPAC* (which Free Speech repeatedly and incorrectly labels as a D.C. Circuit decision (Appellant's Br. 44, 46, 49)), did not "strike down" any attempt to "expand the capture of the [major-purpose] test" (*id.* at 46). Rather, the district court in that case itself undertook a highly fact-intensive inquiry to determine GOPAC's major purpose, *see* 917 F. Supp. at 853-58, ultimately concluding that the organization did not have as its major purpose the election of federal candidates, *id.* at 862-66.

The Commission's approach is also entirely consistent with the law of this Court. Free Speech cites (Appellant's Br. 41-44) *Coffman* and *Herrera*, which struck down state statutes that, unlike the federal policy challenged here, defined groups as PACs based solely on their meeting an expenditure threshold, without *any* consideration of their major purpose. *Coffman*, 498 F.3d at 1153; *Herrera*, 611 F.3d at 673. In describing the major-purpose requirement missing from these state provisions, *Coffman* and *Herrera* noted the Supreme Court's endorsement of "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 independent [express advocacy] spending with overall spending." *Coffman*, 498 F.3d at 1152 (citing *MCFL*, 479 U.S. at 252 n.6); *Herrera*, 611 F.3d at 677-78 (citing *Coffman*). Because the Commission determines a group's major purpose by analyzing each "organization's central organizational purpose," the Commission's approach conforms not only to *Buckley*, but also to this Court's relevant precedent. Although Free Speech characterizes (Appellant's Br. 48) the "central organizational purpose" approach to determining a group's major purpose as "confusi[ng]" and "indeed, bewilder[ing]" — especially in comparison to the "simple math" of adding up a group's spending — that standard is the law of this Court.

Free Speech's discussion (Appellant's Br. 41-43) of *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), and *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (10th Cir. 1997) ("*ACLF*"), *aff'd sub nom.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999), is completely off-point. Both of those decisions addressed disclosure laws for persons or groups involved in *ballot initiatives*, which this Court in both cases emphatically distinguished from candidate elections:

> The great bulk of th[e] [judicial] decisions [about disclosure requirements] . . . concern committees that are working for or against candidates for public office. Reporting requirements are justified as necessary . . . to give the electorate useful information concerning . . . those to whom the candidate is likely to be beholden.
>
> At issue on this appeal is *a different type of campaign committee*, . . . one seeking to prevail on a *ballot initiative*.

Sampson, 625 F.3d at 1248-49 (emphases added); *see also id.* at 1255-57 (distinguishing government's "legitimate reasons for regulating candidate campaigns" from ballot initiatives); *ACLF*, 120 F.3d at 1104-05 (holding that reporting and disclosure provisions upheld in *Buckley* were "dissimilar" from disclosure requirements for ballot circulators because the former "regulate candidate elections but [the law challenged in *ACLF*] does not").

Because the disclosure interests that the Supreme Court found sufficient in *Buckley* are different from those relevant to groups advocating for or against ballot

initiatives — specifically, because "'[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue,'" *ACLF*, 120 F.3d at 1105 (quoting *Bellotti*, 435 U.S. at 790) — *Sampson* and *ACLF* by their own terms have no application here. Free Speech nonetheless claims that *Citizens United*'s validation of disclosure for all electioneering communications somehow undermines this Court's (and thus the Supreme Court's) distinction between candidate and ballot advocacy. (*See* Appellant's Br. 43.) That assertion makes no sense, given that *Citizens United* had nothing to do with ballot initiatives. *See* 130 S. Ct. at 922 (Roberts, C.J., concurring) ("*Bellotti* involved a referendum rather than a candidate election, and . . . *Bellotti* itself noted this factual distinction . . . ."). In any event, the Supreme Court has *upheld* most disclosure requirements even in the context of ballot initiatives, *e.g.*, *Reed*, 130 S. Ct. 2811; *Bellotti*, 435 U.S. at 792 n.32, and, as discussed above, *Citizens United* expressly "reject[ed] th[e] contention" that disclosure requirements can only reach express advocacy or its functional equivalent, 130 S. Ct. at 915-16. Thus, nothing in the ballot-initiative cases Free Speech relies on or the more relevant precedent discussed above calls into question the Commission's constitutional implementation of the Supreme Court's major-purpose requirement.

C. The Commission's Solicitation Standard is Constitutional

FECA requires disclaimers for communications that "solicit[] any contribution," 2 U.S.C. § 441d(a), but it does not define when a request for donations constitutes such a solicitation. In *SEF*, the Second Circuit held that a communication may "fall within the reach of § 441d(a) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." 65 F.3d at 295. The court analyzed a solicitation that was distributed shortly before the 1984 presidential election and that stated, "'[Y]our special election-year contribution today will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies *must* be stopped.'" *Id.* at 288-89, 295. The Second Circuit concluded that this solicitation left "no doubt that that the funds contributed would be used to advocate President Reagan's defeat at the polls, [and] not simply to criticize his policies during the election year," and it was thus properly subject to FECA's disclaimer requirements for solicitations for contributions. *Id.* at 295.

The Commission and Free Speech agree that the Second Circuit's test for solicitations is the proper standard for determining whether section 441d applies to a particular request for donations. (Appellant's Br. 35-36 (invoking *SEF* standard); App. 290 (Advisory Opinion applying *SEF* standard to Free Speech's proposed

donation requests).) Despite the parties' agreement, however, Free Speech baselessly accuses the Commission of "maint[aining] . . . hazy, ever-changing standards to trigger regulation of solicitations." (Appellant's Br. 37.) This assertion appears to rest purely on Free Speech's disagreement with certain Commissioners' analysis of Free Speech's proposed "War Chest" and "Make Them Listen" donation requests. (*See id.*) But, under the *SEF* standard, it would have been reasonable for the Commission to conclude that these two donation requests are solicitations for contributions. (*See* App. 210-14 (describing analysis and conclusions of Commissioners who voted to find that communications were solicitations).) The language in both "War Chest" and "Make Them Listen" "make[s] plain that funds received in response to the request[s] will be used to advocate the electoral defeat of President Obama," *i.e.* by "beating back the Obama agenda" and "his $1 billion war chest," and "win[ning] big this fall." (App. 211, 213.) Whatever quarrel Free Speech may have with the particulars of this analysis, the Commissioners who adopted it reasonably applied *SEF*, and the Commission's use of that standard constitutionally determines — both facially and as-applied — whether communications are solicitations.

Free Speech also suggests that the three Commissioners who voted to find that its requests for donations were solicitations violated *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), by "resurrect[ing]" 11 C.F.R. § 100.57 — the

Commission's former regulatory implementation of the *SEF* standard. (Appellant's Br. 36-37.) That regulation provided that "all funds given in response to solicitations indicating that 'any portion' of the funds received will be used to support or oppose the election of a federal candidate" constituted regulable "contributions" under FECA, even if the solicitation explained that some of the money would be used for non-federal elections. *EMILY's List*, 581 F.3d at 21. The D.C. Circuit struck down this regulation because it brought *non-federal* donations within the reach of FECA's "contribution" definition. *See id.* The Commission therefore announced that, pending formal removal of section 100.57, it "will not be enforced." Press Release, *FEC Statement on the D.C. Circuit Court of Appeals Decision in* EMILY's List v. FEC, http://www.fec.gov/press/press2010/20100112EmilyList.shtml (Jan. 12, 2010). But *EMILY's List* did not undermine — or even address — *SEF*'s holding "that a solicitation that indicates that donated funds will be used to support or oppose the election of a clearly identified federal candidate results in 'contributions.'" (App. 210-11 n.6.) Thus, the fact that the Commission has ceased applying section 100.57 because of its application to non-federal donations has no bearing on the continued application of the *SEF* standard for defining solicitations, either in general or as applied to Free Speech's donation requests.

Finally, Free Speech suggests that the Commission's solicitation standard hinders Free Speech's ability "to request donations supportive of its mission." (Appellant's Br. 34.) Free Speech is free, however, to spend unlimited funds on its solicitations and to solicit unlimited funds for its express advocacy, so the cases it cites concerning fundraising restrictions are inapposite. More importantly, the disclaimers required for solicitations are substantially related to the governmental interest in providing information to the public. As *Citizens United* explained, "[a]t the very least, . . . disclaimers avoid confusion by making clear that [communications] are not funded by a candidate or political party." 130 S. Ct. at 915. The Second Circuit in *SEF* similarly recognized that the disclaimer 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." 65 F.3d at 296. Disclaimers for solicitations are "'a reasonable and minimally restrictive method' of ensuring open electoral competition that does not unduly trench upon [individuals'] First Amendment rights." *Id.* (quoting *Buckley*, 424 U.S. at 82).

D. No Provision or Policy at Issue in this Case Imposes a "Prior Restraint" on Speech

There is no basis for Free Speech's assertion that the regulation or policies at issue here function as a "prior restraint" on its speech. (Appellant's Br. 53-56.)

"At the core of [Free Speech's] challenges . . . are rules and policies which implement only . . . disclosure requirements" (App. 485) — requirements that "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 130 S. Ct. at 914-15 (quoting *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201). Although *Citizens United* described requirements that *actually* prohibited speech as "the equivalent of prior restraint," *id*. at 896, the Court refused to "import" its analysis regarding restrictions on independent expenditures into the separate context of disclosure requirements, *id*. at 915. Thus, because FECA's disclosure requirements indisputably leave Free Speech free to run all of its ads and distribute all of its donation requests, Free Speech's entire discussion of prior restraints is misplaced.

III. FREE SPEECH FAILS TO DEMONSTRATE IRREPARABLE HARM

Free Speech has failed to identify any irreparable harm that would result from compliance with FECA's registration and disclosure requirements. As demonstrated above, the regulation and policies challenged here do not silence any speech. Because Free Speech has not suffered any "loss of First Amendment freedoms," the presumption of irreparable harm from a law that "deprives" speech rights, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), is inapplicable. While Free Speech complains about "having to expend time and money complying with" the disclosure requirements (App. 77), such "simple economic loss[es]" are not

irreparable. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005). And Free Speech has not produced any evidence — or even alleged specific facts — demonstrating that complying with the PAC registration and reporting requirements would be unduly burdensome *to itself*. *See Tooker*, 795 F. Supp. 2d at 862 n.16 (noting plaintiff's failure to explain how challenged disclosure requirements "'impinge[ ] upon its associational freedoms'" or why plaintiff "by its nature . . . is unable to comply with [state PAC] requirements'" (citing *Brumsickle*, 624 F.3d at 1021-22)).

The Supreme Court has repeatedly held that a party claiming irreparable harm from disclosure must show a "reasonable probability" that there will be "threats, harassment, and reprisals" against the entities or people whose identities are disclosed. *See Citizens United*, 130 S. Ct. at 914; *McConnell*, 540 U.S. at 197-99. Serious harm of this kind has been demonstrated only by organizations — such as the NAACP and the Socialist Workers Party — whose members faced actual, documented danger at the relevant time. *See McConnell*, 540 U.S. at 198-99 (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S 87 (1982), in which Court found "'reasonable probability'" of "'threats, harassment, and reprisals'"); *Buckley*, 424 U.S. at 69 (noting that NAACP members faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility") (citation omitted); *see also Nat'l Ass'n of Mfrs.*

v. Taylor, 549 F. Supp. 2d 68, 75-76 (D.D.C. 2008) (trade association suffers no irreparable harm in disclosing membership list under lobbying-disclosure provisions). Because Free Speech has not even alleged such harm — much less demonstrated a "reasonable probability" thereof — its challenge to FECA's disclosure requirements is "foreclose[d]." *McConnell*, 540 U.S. at 197-98.

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

In contrast to the relatively modest administrative burdens Free Speech seeks to avoid, enjoining the Commission from enforcing its regulation and policies would substantially harm the Commission and the public. A "presumption of constitutionality . . . attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters*, 468 U.S. at 1324.

The public harm that would have resulted from enjoining the Commission's enforcement of the relevant disclosure requirements in the days leading up to a nationwide election far outweighs Free Speech's interest in avoiding the administrative burdens of complying with those requirements. Indeed, for the same reasons that Free Speech wanted to distribute its ads at the peak of the 2012 election season, the public had "a heightened interest in knowing who was trying to sway [its] views on the [candidates] and how much they were willing to spend to

achieve that goal."[19] *Brumsickle*, 624 F.3d at 1019. The requested injunction could have caused confusion among political actors and undermined the public's confidence in the federal campaign finance system. *See Purcell*, 549 U.S. at 4-5 ("Court orders affecting elections . . . can themselves result in voter confusion . . . . As an election draws closer, that risk will increase."); *Smithson*, 750 F. Supp. 2d at 1049 (declining to impose preliminary injunction that would "radically change . . . campaign finance rules mid-stream during an election").

Free Speech has failed to make any showing, much less a strong one, that the balance of harms tips in its favor. *See Northern Natural Gas*, 697 F.3d at 1266. For this reason — as well as all of the others discussed above — the district court's denial of Free Speech's motion for a preliminary injunction should be affirmed.

CONCLUSION

Three decades of judicial opinions culminating in *Citizens United* indisputably establish the importance of the government's interest in ensuring public access to information regarding the financing of candidate advocacy and other campaign activity. The Commission's regulatory definition of express

[19] In asking this Court to issue an "emergency" injunction pending appeal, Free Speech tellingly described the then-imminent general election as its "last meaningful chance to speak." (Appellant's Motion for Emergency Injunction on Appeal, Local Rule 8.2 and 27.3(C) Certificates (Oct. 24, 2012); *id.* at 4.) Free Speech's admission that the proposed advertisements would not be "meaningful" after the 2012 election appears to undermine the fundamental premise of Free Speech's claims — *i.e.*, that its communications are not candidate advocacy.

advocacy, its method of determining political-committee status, and its standard for whether a request for donations is a solicitation for contributions each implement Congress's statutory directives in this area narrowly and transparently. Nothing in the Constitution prohibits these reasonable means of furthering the First Amendment goal of promoting an informed public. Free Speech's desire to avoid the logistics of compliance does not nearly outweigh the public harm that would result from the requested injunction.

The district court's order denying Free Speech's motion for a preliminary injunction should be affirmed.

Respectfully submitted,

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February 4, 2013

STATEMENT REGARDING ORAL ARGUMENT

Because this case challenges the constitutionality of a federal regulation and two federal agency policies, the Commission believes that oral argument is warranted.

CERTIFICATE OF DIGITAL SUBMISSION

I certify that no privacy redactions were required for this Brief and that the digital ECF version of the foregoing is an exact copy of the written document filed with the Clerk of the Court. I further certify that the digital submission has been scanned for viruses with the most recent version of McAfee VirusScan Enterprise Version 8.7i, a commercial virus scanning program, and according to the program, the digital submission is virus-free.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,873 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. Rule 23(b).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 2013, I caused appellee Federal Election Commission's brief in *Free Speech v. FEC*, No. 12-8078, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

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I further certify that I caused 7 copies to be delivered to the Clerk of the Court by FedEx Overnight Delivery.

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