IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREE SPEECH, Plaintiff-Appellant, v. FEDERAL ELECTION COMMISSION, Defendant-Appellee.	Case No. 12-8078 OPPOSITION TO MOTION FOR EMERGENCY INJUNCTION

APPELLEE FEDERAL ELECTION COMMISSION'S OPPOSITION TO APPELLANT'S MOTION FOR EMERGENCY INJUNCTION

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INTRODUCTION

The district court correctly held that Free Speech failed to meet its heavy burden to obtain a preliminary injunction. In so holding, the court recognized that "[a]t the core of plaintiff's challenges . . . are rules and policies which implement only . . . disclosure requirements. The question before the Court is *not whether plaintiff can make expenditures for the speech it proposes* nor raise money without limitation but simply *whether it must provide disclosure of its electoral advocacy*." (Mot. for Emer. Inj. Exh. 5 at 16 (Tr. of Telephonic Oral Ruling on Pl.'s Mot. for Prelim. Inj.) (hereinafter "Ruling Tr.") (emphases added).) Such disclosure requirements help prevent political corruption and inform the electorate about the source of funds used to influence federal elections. They do not ban or suppress speech. Thus, as the Supreme Court has explicitly and repeatedly noted, disclosure requirements for electoral advocacy are constitutional because they "'provid[e] the electorate with information' and 'insure that the voters are fully informed' about the person or group who is speaking" about a candidate, while they "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Citizens United v. FEC*, 130 S. Ct. 876, 914-15 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McConnell v. FEC*, 540 U.S. 93, 201 (2003)); *see also Real Truth About Abortion, Inc. f/k/a Real Truth About Obama, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*RTAA*") (rejecting constitutional challenges to same regulation and policy at issue here).

Free Speech did not satisfy the requirements for a preliminary injunction in the proceedings below, and it utterly fails to satisfy them here. Appellant does not and cannot demonstrate that it will likely succeed on the merits of its challenge to political disclosure requirements, that it will suffer irreparable harm without an injunction, or that the balance of harms and the public interest weigh in favor of enjoining the enforcement of decades-old disclosure provisions just one week before a nationwide general election.

The instant motion also flagrantly abuses this Court's procedures for emergency relief. Free Speech first waited 16 days to file its appeal of the decision below, and then it delayed another 5 days before filing its motion for an injunction pending appeal — ultimately doing so under the Court's procedure for movants who need relief within 48 hours. To wait three weeks (for the proffered reason that appellant's counsel has been busy with "pressing election law matters for other clients" (Appellant's Local Rule 8.2 and 27.3(C) Certificates)) and then claim a need for Court action within two days not only belies Free Speech's "emergency," it also places this case so far outside the bounds of properly invoking Tenth Circuit Rule 8.2 that the Court should deny the motion on that basis alone.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. Express Advocacy and Electioneering Communications

Before *Citizens United*, the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), prohibited corporations and labor unions from directly making "expenditures." 2 U.S.C. §§ 431(9)(A)(i), 441b(a). In *Buckley v. Valeo*, the Supreme Court construed the term "expenditures" in the context of independent political spending — *i.e.*, spending by an entity other than a candidate or political party — "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 incorporated *Buckley*'s holding into FECA by defining an "independent expenditure" as a communication "expressly advocating the election or defeat of a clearly identified candidate" and not made 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)).

In 1995, defendant-appellee Federal Election Commission ("Commission") promulgated

a regulatory definition of the statutory term "expressly advocating." 11 C.F.R. § 100.22. Paragraph (a) of the regulation encompasses 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). Paragraph (b) of section 100.22 defines a communication as "expressly advocating" if it has an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning," and 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). An entity that finances express advocacy expenditures must identify itself within the communication, 2 U.S.C. § 441d(a), (d)(2), and must file with the Commission a disclosure report identifying, *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 enacted 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 defined an electioneering communication 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 prohibited corporations and labor unions from financing electioneering communications. 2 U.S.C. § 441b(b)(2). It also required entities that finance more than $10,000 of electioneering communications in a calendar year to report the maker, amount, and recipient of each disbursement over $200 for the communications, as well as

information about contributors to the entity making the disbursements. 2 U.S.C. § 434(f)(1)-(2).

The Supreme Court first upheld the constitutionality of the corporate 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). In *Citizens United*, the Court held unconstitutional BCRA's and FECA's respective bans on corporate financing of electioneering communications and independent expenditures. 130 S. Ct. at 913. But an eight-Justice majority upheld BCRA's disclosure requirements for all electioneering communications, even those that are not the functional equivalent of express advocacy. 130 S. Ct. at 914-15.

B. Political Committee Status

FECA defines a "political committee" — commonly known as a "PAC" — as any organization or group that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" during a calendar year. 2 U.S.C. § 431(4)(A); *see also* 2 U.S.C. § 431(8) (defining "contribution"). In *Buckley*, however, the Supreme Court narrowed this statutory definition to "only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). Thus, an organization that is not controlled by a candidate becomes a PAC only if (1) the entity crosses the $1,000 threshold of contributions or expenditures, and (2) its "major purpose" is the nomination or election of federal candidates.

FECA provides that PACs 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. In addition, PACs must identify themselves on their public political advertising, websites, and 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 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 political committees 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* expressly upheld the application of FECA's PAC reporting and organizational requirements to these independent-expenditure-only PACs, *id.* at 696-98, which have come to be known as "super PACs."

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" test 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 comment, the Commission explained its decision not to promulgate such a regulation. FEC, *Supplemental Explanation & Justification for the Regulations on Political Committee Status*, 72 Fed Reg. 5595 (Feb. 7, 2007). This notice stated that the Commission would instead continue its longstanding practice of determining an organization's major purpose through case-by-case adjudication. *See id*. at 5596-97. The notice then discussed several matters in which the Commission or a court had analyzed a group's major purpose, and it explained that those descriptions cumulatively "provid[ed] considerable guidance to all organizations" regarding application of the major-purpose test. *See id*. at 5595, 5605-06.

The Commission's case-by-case methodology was upheld in *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007). More recently, the Fourth Circuit upheld the Commission's approach to applying the major-purpose test, finding that *Buckley* "did not mandate a particular methodology for determining an organization's major purpose," and so the Commission is free to make that determination "either through categorical rules or through individualized adjudications." *RTAA*, 681 F.3d at 556 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

II. ADMINISTRATIVE 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. (Mot. Exh. 1 ¶¶ 10, 13.) 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. (Mot. Exh. 1 ¶¶ 24-25, 47-50.)

On February 29, 2012, Free Speech requested from the Commission an advisory opinion as to, *inter alia*, (a) whether certain proposed advertisements were express advocacy; and (b) whether certain proposed activities would require Free Speech to register as a PAC. (Mot. Exh. 1, Exh. A.) On April 26, 2012, the Commission approved a response to this request, concluding that two of Free Speech's eleven proposed advertisements would expressly advocate the election or defeat of a clearly identified federal candidate. (Mot. Exh. 1, Exh. G at 1 (FEC Advisory Op. 2012-11 (May 8, 2012)).)[1] The response explained that the Commission was unable to approve an advisory opinion by the required four affirmative votes of the FEC's six Commissioners, *see* 2 U.S.C. §§ 437c(c), 437d(a)(7), as to Free Speech's remaining ads and

[1] Free Speech's request (and its subsequent civil complaint) also asked whether certain planned communications would constitute regulable "solicitations" under FECA, (Mot. Exh. 1, Exh. A at 5; Mot. Exh. 1 ¶¶ 86-96), but its instant motion presents no argument on that issue.

whether Free Speech would be required to register as a PAC. (Mot. Exh. 1, Exh. G.)

Free Speech filed its complaint and a motion for a preliminary injunction in the district court on June 14, 2012. (The complaint was then amended on July 26.) The court heard oral argument on plaintiff's motion on September 12 and denied the motion in an oral ruling announced during a transcribed teleconference on October 3. More than two weeks later, on October 19, Free Speech filed a notice of appeal and a motion in the district court seeking an injunction pending appeal. Free Speech filed the instant motion for an injunction pending appeal on October 24; the district court denied Free Speech's similar motion on October 25.

ARGUMENT

I. AN INJUNCTION PENDING APPEAL IS AN EXTRAORDINARY REMEDY THAT REQUIRES APPELLANT TO DEMONSTRATE A CLEAR AND UNEQUIVOCAL RIGHT TO RELIEF

To obtain an injunction pending appeal, an appellant bears a heavy burden. Free Speech must address: "(1) the likelihood that [it] will succeed on appeal; (2) the threat that [it] will be irreparably harmed if the injunction is not granted; (3) the absence of harm to appellee[ ] if the injunction is granted; and (4) any risk of harm to the public interest." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (per curiam) (citing 10th Cir. R. 8.1). This Court's inquiry is "the same inquiry [it would make] when reviewing a district court's grant or denial of a preliminary injunction." *Id.* (citing *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 n.1 (10th Cir. 1996)). Free Speech's motion thus presents the questions of whether "based on a preliminary record . . . the district court abused its discretion and whether the movant has demonstrated a clear and unequivocal right to relief." *Id.*

The answer to each of those questions is no. In concluding that appellant was not entitled to a preliminary injunction, the district court properly applied the standard articulated by this Court in *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012), consistent with Supreme Court

precedent. *Compare Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), *with* Ruling Tr. at 15 (listing preliminary-injunction factors and citing *Awad*, 670 F.3d at 1125; *Winter*, 555 U.S. at 20). Free Speech suggests (Mot. at 6) that the district court abused its discretion because "[i]t did not *presume* that Free Speech was likely to prevail" (emphasis added), but the Supreme Court has unambiguously foreclosed any such "presumption." The "*plaintiff* seeking a preliminary injunction *must establish* that he is likely to succeed on the merits." *Winter*, 555 U.S. at 20 (emphases added); *see also id*. at 22, 24 (holding that preliminary injunction is "an extraordinary remedy that. . . . [is] *never awarded as of right*") (emphasis added); *Awad*, 670 F.3d at 1125.

Moreover, an injunction that seeks to "alter the status quo" is "disfavored" and "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." *Awad*, 670 F.3d at 1125; *see 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); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Notwithstanding its specious assertion to the contrary (Mot. at 6 n.1), Free Speech seeks to alter the status quo by enjoining enforcement of a federal regulation and policy that have been in effect for many years. Such an injunction is even more 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 (2006) (per curiam).

Besides ignoring *Winter* and *Awad* regarding the first prong of the standard, Free Speech gives short shrift to the other three criteria it must demonstrate to obtain injunctive relief. (*See* Mot. at 20 (stating that other criteria "largely" follow from merits and mentioning each prong in

one conclusory sentence).) Such cursory treatment neither satisfies the Rules of this Court, *see* 10th Cir. R. 8.1 (requiring movant to "address[ ]" each factor), nor constitutes the requisite "strong showing" Free Speech must make "with regard to the balance of harms." *Awad*, 670 F.3d at 1125.

II. FREE SPEECH IS UNLIKELY TO PREVAIL ON THE MERITS OF ITS CASE

A. The Disclosure Provisions at Issue Are Subject to Intermediate Scrutiny

The Supreme Court has long distinguished disclosure provisions, which are subject to intermediate (sometimes referred to as "exacting") scrutiny, from expenditure limits, which are subject to strict scrutiny. *See, e.g.*, *Buckley*, 424 U.S. at 64. To be upheld, disclosure provisions require only "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); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010).

The district court correctly recognized that intermediate scrutiny applies here because, after *Citizens United*, section 100.22's definition of express advocacy implicates only disclosure requirements. (Ruling Tr. at 7-8, 16.) A communication that meets the definition of "expressly advocating" in section 100.22 must include certain disclaimers within the communication, and its financing must be publicly reported. *See supra* p. 3. The express-advocacy determination may also be relevant to whether a group has made more than $1,000 in expenditures for purposes of triggering PAC status. *See* 2 U.S.C. § 431(4)(A); *RTAA*, 681 F.3d at 548. But for entities like Free Speech that do not make contributions, PAC status gives rise only to disclosure and organizational requirements. *See supra* p. 5. Such "super PACs" remain free to make unlimited expenditures and to receive unlimited individual and corporate contributions. *Id.* Thus, contrary to appellant's hyperbolic assertion, section 100.22(b) does not deny any "free people . . . the

right of political expression" (Mot. at 1).[2] The regulation simply triggers disclosure requirements, which are subject to intermediate scrutiny. *Citizens United*, 130 S. Ct. at 914.

B. Section 100.22(b) Is Constitutional

1. Section 100.22(b) Is Not Unconstitutionally Vague

As the court below concluded, section 100.22(b)'s definition of "express advocacy" is not vague because it is almost identical to the definition of the "functional equivalent of express advocacy" that the Supreme Court recognized in *WRTL* and applied in *Citizens United*. Ruling Tr. at 17-18; *see RTAA*, 681 F.3d at 552-55. Section 100.22(b) — like the Supreme Court's test from *WRTL* — provides that any communication that can reasonably be interpreted as something other than candidate advocacy is excluded from the regulation. *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 both definitions are objective, precluding consideration of the speaker's "subjective intent." *Compare WRTL*, 551 U.S. at 472, *with Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995); *see also Citizens United*, 130 S. Ct. at 895, 889-90 (describing *WRTL*'s "functional equivalent of express advocacy" test as "objective"). To the extent the standards differ, section 100.22(b) is narrower than the *WRTL* test, as the regulation requires an "unambiguous" electoral portion, 11 C.F.R. 100.22(b)(1), while the lead opinion in *WRTL* looks to the "mention" of an election and similar "indicia of express advocacy." *See* 551 U.S. at 470.

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[2] For the same reason, Free Speech is wrong to assert that the Commission must demonstrate that any "less restrictive alternatives would not effectively carry out the FEC's interest in disclosure." (Mot. at 6, 14 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).) The "less restrictive alternative" test is a hallmark of strict scrutiny, *see, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000), which *Ashcroft* applied because it concerned an "attempt by Congress to . . . criminaliz[e] certain Internet speech" through "[c]ontent-based *prohibitions*." 542 U.S. at 660-61 (emphasis added). There is no "prohibition" at issue in this case, as disclosure requirements "do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks omitted).

The controlling opinion in *WRTL* specifically rejected the argument raised by Justice Scalia in a separate opinion that the "functional equivalent" test was "impermissibly vague." *WRTL*, 551 U.S. at 474 n.7. Free Speech nonetheless seeks to argue otherwise by attaching controlling significance to the fact that the particular statute at issue in *WRTL* was BCRA's definition of "electioneering communications." (*See* Mot. at 9-10 (citing *WRTL*, 551 U.S. at 464 n.7).)[3] But the lead opinion did not hold that its own constitutional test would be impermissibly vague if not tethered to BCRA's statutory criteria for electioneering communications; to the contrary, the entire footnote on which Free Speech relies is dedicated to providing multiple reasons why the "no reasonable interpretation" standard is *not* vague. And as both *RTAA* and the decision below recognized, what matters for the First Amendment analysis is that the communications the Supreme Court has defined as "the functional equivalent of express advocacy" are constitutionally indistinguishable from the communications the Commission has defined as "expressly advocating"; neither test, therefore, is "impermissibly vague." Ruling Tr. at 17-18 (citing *WRTL*, 551 U.S. at 474 n.7); *RTAA*, 681 F.3d at 551-52, 555 (holding that "§ 100.22(b) is constitutional . . . and consistent with the test developed in *Wisconsin Right to Life* and is not unduly vague");[4] *see also Herrera*, 611 F.3d at 676 ("[T]he functional equivalent

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[3] Although Free Speech seeks to avoid the holding of *WRTL* that demonstrates the constitutionality of section 100.22(b), it nonetheless refers to *WRTL*'s statement that, when assessing laws that *ban* speech, "the tie goes to the speaker, not the censor." (Mot. at 5 (citing *WRTL*).) *WRTL*'s statement plainly has no application in this case, where no speech is "censor[ed]."

[4] Free Speech asks this Court to disregard *RTAA* as "fundamentally different" from the instant case. (Mot. at 15.) Yet the two cases are nearly identical: They both entail facial vagueness and overbreadth challenges to 11 C.F.R. § 100.22(b) based on the text of particular advertisements that the respective plaintiffs propose to run. Every major argument appellant raises regarding that regulation was also raised by the appellant in *RTAA*, such as alleged vagueness in the *WRTL* test, *supra* pp. 10-11, as purportedly demonstrated by disagreement regarding its application to particular advertisements, *infra* p. 12. Thus, although *RTAA*'s analysis does not control here, it directly refutes appellant's arguments. Free Speech's separate

of express advocacy for the election or defeat of a specific candidate is . . . properly subject to regulation regardless of its origination.") (citing *WRTL*, 551 U.S. at 476). And in *Citizens United* the Supreme Court applied "the standard . . . elaborated in *WRTL*" and concluded that a film criticizing Hillary Clinton "qualifie[d] as the functional equivalent of express advocacy"), 130 S. Ct. at 889-90 — thus putting to rest any claim that the standard is constitutionally infirm.

Free Speech refers repeatedly to the fact that the FEC's Commissioners were not unanimous in opining on how section 100.22(b) would apply to some of Free Speech's proposed communications, arguing that this demonstrates vagueness in the regulation. (Mot. at 2-3, 8, 10-12.) But as the Fourth Circuit held in addressing essentially the same argument, such disagreement "proves little because cases that fall close to the line will inevitably arise when applying § 100.22(b). This kind of difficulty is simply inherent in any kind of standards-based test." *RTAA*, 681 F.3d at 554; *United States v. Williams*, 553 U.S. 285, 306 (2008) ("Close cases can be imagined under virtually any statute. The problem that poses is [not] addressed . . . by the doctrine of vagueness."); *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) ("Wherever the law draws a line there will be cases very near each other on opposite sides.").

2. Section 100.22(b) Is Not Overbroad

The disclosure requirements triggered by section 100.22(b) do not sweep too broadly. Indeed, Supreme Court decisions culminating in *Citizens United* have held that such provisions may constitutionally reach even *beyond* express advocacy or its functional equivalent.

In *McConnell*, the Court clarified that *Buckley's* "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation, rather than a constitutional command." *McConnell*, 540 U.S. at 191-92. *McConnell* accordingly upheld

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(and incorrect) argument that *RTAA* conflicts with opinions of this Court in relation to the major purpose test (Mot. at 14-15) is addressed *infra* pp. 15-16.

BCRA's disclosure requirements for all electioneering communications, *id*. at 194-99, in light of 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 (citing *Buckley*).

Citizens United then upheld the same disclosure requirements as applied to a movie that was the functional equivalent of express advocacy, 130 S. Ct. at 889-90, *and* three advertisements that mentioned a candidate but were *not* the functional equivalent of express advocacy, *id.* at 914-16. Eight Justices agreed that disclosure is constitutionally permissible to further the public's important interest in knowing who is responsible for pre-election communications that speak about candidates. *See id.* at 915-16. Such mandatory disclosure is constitutional even if the communications contain no direct candidate advocacy. *See id.* (citing *Buckley*, 424 U.S. at 75-76; *McConnell*, 540 U.S. at 321).[5]

As *RTAA* correctly reasoned, if mandatory disclosure requirements are constitutional "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." *RTAA*, 681 F.3d at 552. Three other Courts of Appeals have reached similar conclusions. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012) ("[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."); *Ctr. for Individual Freedom v. Madigan*, ---

[5] That holding is of a piece with the Supreme Court's long history of applying intermediate scrutiny to and upholding disclosure requirements for issue advocacy. Decades before *Citizens United*, the Supreme 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); *see also infra* p. 17 (noting constitutionality of disclosure for ballot initiatives).

F.3d ---, 2012 WL 3930437, at *13 (7th Cir. Sept. 10, 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."); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011) ("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.").[6]

In sum, *WRTL* and *Citizens United* confirm that the First Amendment permits the government to require disclosure regarding communications that can be reasonably interpreted only as encouraging the election or defeat of federal candidates.

C. The Commission's Method of Determining PAC Status and the Registration and Disclosure Requirements for PACs Are Constitutional

FECA's organizational and disclosure requirements for political committees "directly serve substantial government interests." *Buckley*, 424 U.S. at 68. Such requirements further the "public . . . interest in knowing who is speaking about a candidate and who is funding that speech"; they also "deter[ ] and help[ ] expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations and individuals." *SpeechNow*, 599 F.3d at 698; *see Brumsickle*, 624 F.3d at 1013.

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[6] Appellant's reliance (Mot. at 11-12) on *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), is misplaced. That decision, like others Free Speech relied on below, predated the Supreme Court's recognition in *McConnell*, *WRTL*, and *Citizens United* that the regulation of the "functional equivalent" of express advocacy is permissible. As Justice Thomas observed in dissent, *McConnell* "overturned" all of the courts of appeals decisions that had interpreted *Buckley* as limiting government regulation to magic words of advocacy. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting) (collecting cases). And those earlier cases were predicated on certain express advocacy being *banned* — a function the regulation no longer serves — so they had no occasion to consider the constitutionality of section 100.22(b)'s application to disclosure requirements. Recognizing this, the Fourth Circuit in *RTAA*, 681 F.3d at 550 n.2, overruled its earlier decision in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001).

1. The Commission's Approach to PAC Status Is Constitutional

For decades, the Commission has determined 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. *See* 72 Fed. Reg. at 5596. To apply the major-purpose test, the Commission has consulted sources such as a group's public statements, fundraising appeals, government filings (*e.g.*, IRS notices), charters, and bylaws. *See id.* at 5601, 5605. The Commission decided in 2007 not to promulgate a *per se* rule classifying certain tax-exempt groups as political committees. *See id.* The Commission thus rejected categorical regulations that might have led to overbroad or underinclusive PAC determinations. *See id*. at 5595-602 (analyzing differences between political organizations under tax law and PACs under FECA).

The Commission's case-by-case approach has been upheld by the courts. 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; *see also Shays*, 511 F. Supp. 2d at 29-31; *see generally SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (holding that agencies have discretion to implement statutes through rulemaking or case-by-case adjudication). And "[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." *RTAA*, 681 F.3d at 557 (collecting cases); *see also Koerber v. FEC*, 583 F. Supp. 2d 740, 748 (E.D.N.C. 2008) (denying preliminary relief 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 contributors, as well as its election spending); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("[An] 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.").

Contrary to Free Speech's contention (Mot. 16-19), the Commission's approach is entirely consistent with the law of this Court. Free Speech cites *Colorado Right to Life Comm. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), *Herrera*, and *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), none of which supports its position. *Coffman* and *Herrera* struck down state statutes that, unlike the federal statute here, defined groups as PACs based solely on their meeting an expenditure threshold, without *any* consideration of the groups' major purpose. *Coffman*, 498 F.3d at 1153; *Herrera*, 611 F.3d at 673. In describing the major purpose requirement that these state provisions lacked, *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 *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986)); *Herrera*, 611 F.3d at 677-78 (citing *Coffman*). Because the Commission applies the major purpose test by determining each "organization's central organizational purpose" on a case-by-case basis, this approach is entirely consistent not just with *Buckley*, but also with this Court's precedent.

Free Speech's discussion of *Sampson* is completely off-point. That decision addressed disclosure laws in the context of *ballot initiatives*, which the Court 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*.

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). The Supreme Court has similarly distinguished between candidate elections and ballot initiatives for First Amendment purposes. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.") (internal citation omitted).[7] Thus *Sampson*, by its own terms and as a matter of constitutional law, has no application here.

2. The Consequences of PAC Status Are Constitutional Organizational and Disclosure Obligations

FECA's disclosure and organizational obligations for PACs "are minimal" and do not "impose much of an additional burden" beyond the disclosure requirements for independent expenditures. *SpeechNow*, 599 F.3d at 697-98. Accordingly, relying upon *Citizens United*'s upholding of disclosure for candidate-related communications, the D.C. Circuit upheld those organizational and reporting requirements even for "super PACs," which are constitutionally exempt from most financing restrictions. *See id.*; *see also RTAA*, 681 F.3d 558 (describing PAC status as entailing "'minimal' reporting and organizational obligations") (citing *SpeechNow*).

While it is true that *Citizens United* and *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253 (1986) ("*MCFL*"), described *speaking* through a corporate PAC as a burdensome alternative to *speaking* directly, that context is "significantly different from the one facing" Free

[7] The Supreme Court has nonetheless upheld most disclosure requirements in the ballot-initiative context. *E.g.*, *Bellotti*, 435 U.S. at 792 n.32; *Doe v. Reed*, 130 S. Ct. 2811 (2010).

Speech. *RTAA*, 681 F.3d at 549; *see Iowa Right to Life Comm., Inc. v. Tooker*, 795 F. Supp. 2d 852, 863 (S.D. Iowa 2011) (distinguishing "statutes that prohibited corporations and unions from . . . mak[ing] certain independent expenditures" in *Citizens United* and *MCFL* from "provisions [that] do not ban any independent expenditures"). As the Fourth Circuit explained:

> The regulation invalidated in *Citizens United* required corporations to set up a separate PAC with segregated funds before making any direct political speech. . . . 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 (internal citations omitted). In light of this distinction, "[m]any 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.'" *Yamada v. Weaver*, Civ. No. 10-497, 2012 WL 983559, at *20 (D. Haw. Mar. 21, 2012) (collecting cases). Among those decisions is *Herrera*, where this Court observed that regulations classifying groups as PACs "require disclosure, thus distinguishing them from regulations that limit the amount of speech a group may undertake." 611 F.3d at 675-76.

The court below was accordingly correct to reject 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." Ruling Tr. at 19 (emphasis added).

III. FREE SPEECH FAILS TO DEMONSTRATE IRREPARABLE HARM

As demonstrated above, the provisions challenged here do not limit appellant's speech. The only *actual* harms alleged here are those associated with registration and disclosure. 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. And appellant has failed to identify any irreparable harm that would result from compliance with FECA's disclosure, reporting, and registration requirements. (*See, e.g.*, Mot. Exh. 1 ¶¶ 6, 43 (complaining of burden of "having to expend time and money complying with FEC registration, reporting and disclaimer requirements").) Indeed, although Free Speech complains about various generalized burdens, it 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 explain how challenged disclosure requirements "'impinge[ ] upon its associational freedoms'") (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 who are disclosed. *See McConnell*, 540 U.S. at 197-99; *Citizens United*, 130 S. Ct. at 914. 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. *See Buckley*, 424 U.S. at 69 (noting that NAACP members faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility") (citation omitted). Because Free Speech has alleged no such harm, its challenge to FECA's disclosure requirements is "foreclose[d]." *McConnell*, 540 U.S. at 197. Free Speech's failure on this element alone warrants denial of an injunction pending appeal.

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 v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

The harm to the public if the Commission is enjoined from enforcing compliance with the relevant disclosure requirements in the days leading up to a nationwide election far outweighs appellant's interest in avoiding the administrative burdens resulting from such compliance. Indeed, for the same reasons that Free Speech wants to air its ads now, the public has "a heightened interest in knowing who [is] trying to sway [its] views on the [candidates] and how much they were willing to spend to achieve that goal."[8] *Brumsickle*, 624 F.3d at 1019. The injunction appellant seeks could cause confusion among political actors and undermine 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," and "[a]s 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 impose preliminary injunction that would "radically change Iowa's campaign finance rules mid-stream during an election").

Free Speech fails to make any showing, much less a strong one, that the balance of harms tips in its favor. *See Awad*, 670 F.3d at 1125. For this reason, too, its motion should be denied.

CONCLUSION

Free Speech has failed to meet its heavy burden to obtain an extraordinary injunction that would alter the status quo in the days before a presidential election and limit disclosure of campaign finance information to the public. The Court should deny appellant's motion.

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[8] Free Speech characterizes the upcoming election as its "last meaningful chance to speak." (Appellant's Local Rule 8.2 and 27.3(C) Certificates; *see also* Mot. at 4.) This acknowledgment that the proposed advertisements will not be "meaningful" after the election appears to undermine the fundamental premise of Free Speech's claims — *i.e.*, that its communications are not candidate advocacy.

Respectfully submitted,

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October 29, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, the foregoing Federal Election Commission's Opposition to Appellant's Motion for Emergency Injunction on Appeal was filed electronically with the Clerk of Court through the Court's ECF system, and served by electronic filing on the following recipients:

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