ORAL ARGUMENT SCHEDULED: May 7, 2013

No. 13-8033

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)

SUPPLEMENTAL BRIEF FOR APPELLEE FEDERAL ELECTION COMMISSION

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April 11, 2013

The district court correctly dismissed Free Speech's constitutional challenge to the Federal Election Commission's regulation of federal election campaign activity and campaign-related public disclosures by groups like Free Speech. Although Free Speech has endlessly repeated that the challenged regulation and two policies "ban" or "suppress" its speech, the district court properly rejected these inaccurate and hyperbolic characterizations. As the district court held, the question presented by Free Speech's lawsuit "is not whether Plaintiff can make expenditures for the speech it proposes or raise money without limitation, but simply whether it must provide disclosure of its electoral advocacy." (App. 562-63.) And applying exacting scrutiny — as defined by the Supreme Court and this Court rather than as redefined by Free Speech — the district court concluded correctly that each of Free Speech's constitutional challenges fails to state a claim for relief. The district court's judgment in favor of the Commission should be affirmed.

Supplemental Factual and Procedural Background

Free Speech filed its original complaint and preliminary-injunction motion on June 14, 2012, and its amended complaint on July 26. (App. 3, 4, 63.) The lawsuit challenged the constitutionality of (1) the Commission's regulatory definition of the statutory term "expressly advocating"; (2) the Commission's method for determining whether an entity is a "political committee"; and (3) the Commission's policy for determining whether a request for donations solicits regulable "contributions." (App. 85-96.) Free Speech alleged that the challenged regulation and policies prevented it from distributing certain political advertisements anonymously, without registering as a political committee or

complying with federal campaign-finance disclosure requirements, and from soliciting donations to finance additional advertisements. (App. 67-68, 70-71, 78-79.)

All of Free Speech's proposed advertisements and donation requests concerned the November 2012 federal election; all but two of the proposed communications discussed the presidential election. (App. 103-05, 118-21, 359.) Free Speech has thus asserted that its communications "mattered most" in the period before that election, when it could still "persuade . . . voters," (Appellant's Reply Br. 6-7 (internal quotation marks omitted)), and that its proposed communications are no longer "'meaningful'" now, five months after that election (*see* Appellee's Br. 59 n.19 (quoting Appellant's Motion for Emergency Injunction on Appeal (Oct. 24, 2012)).[1] Free Speech also has alleged "plans to speak about related issues as they arise beyond November as well" and "inten[tions] to raise funds to run these additional advertisements in the future well beyond the 2012 election cycle." (App. 67-68.) Free Speech has not revealed any further details about any intended future communications.

On September 24, 2012, the Commission moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6), because none of Free Speech's constitutional challenges states a plausible claim for relief. On October 3, while the Commission's motion to dismiss was pending, the district court denied Free Speech's preliminary-

[1] In its advisory opinion issued to Free Speech on May 8, 2012, the Commission unanimously concluded that four of Free Speech's 11 proposed advertisements were *not* express advocacy and that two of its four proposed donation requests were *not* solicitations. (App. 282, 286-88, 290-91.) When Free Speech filed its complaint more than two months later, it did not include in the record whether it had ever distributed any of those six communications.

injunction motion, and Free Speech filed an interlocutory appeal of that decision. Before the argument on Free Speech's interlocutory appeal to this Court, however, the district court on March 19, 2013, granted the Commission's motion to dismiss Free Speech's complaint and, on March 21, rendered judgment in favor of the Commission. On March 25, Free Speech appealed that final judgment.

The district court's judgment in favor of the Commission rendered moot Free Speech's interlocutory appeal of the preliminary-injunction decision, which this Court accordingly terminated on April 1, 2013. Because the appeals of the district court's interlocutory and final decisions arise out of common facts and present the same constitutional questions, however, the parties jointly asked the Court to transfer to this appeal of the district court's dismissal order (Docket No. 13-8033) the parties' briefing filed in the now-terminated preliminary-injunction appeal (Docket No. 12-8078). On April 1, this Court granted that request and ordered the parties to submit simultaneous briefs addressing, *inter alia*, what issues remain for the Court's consideration. The Commission thus notes that its analyses in its appellate brief (Appellee's Br. Parts III-IV) of irreparable harm, the balance of harms resulting from an injunction, and whether a preliminary injunction would be adverse to the public interest are generally not relevant to the question on this appeal of the district court's order dismissing the case. The Commission's discussion of Free Speech's failure to allege that the challenged requirements are unduly burdensome (Appellee's Br. 57-58) is relevant, however, to the constitutional analysis of those requirements, *see infra* p. 9.

Questions Presented

This appeal asks whether the district court properly dismissed Free Speech's constitutional challenges to (1) a Commission regulation, 11 C.F.R. § 100.22(b), that defines the statutory term "expressly advocating," 2 U.S.C. § 431(17)(A); (2) the Commission's method for 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 policy for determining whether a request for donations is a regulable "solicitation" for "contributions" under 2 U.S.C. § 441d(a).

The Commission extensively briefed Free Speech's likelihood of success regarding these constitutional questions in connection with the preliminary-injunction appeal. (Docket No. 12-8078.) As the Commission's prior briefing shows, and this brief underscores, the district court properly dismissed the underlying case under Federal Rule of Civil Procedure 12(b)(6).

Standard of Review

A complaint should be dismissed under Rule 12(b)(6) if it fails to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). In considering whether a plaintiff's factual allegations "plausibly suggest entitlement to relief," this Court has recognized that "'mere conclusory statements[] do not suffice . . . [and] are not entitled to the assumption of truth.'" *Hall v. Witteman*, 584 F.3d 859, 863 (10th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679). This Court reviews the dismissal of a complaint under Rule 12(b)(6) *de novo*. *Hall*, 584 F.3d at 863.

Supplemental Arguments

The Commission's appellate brief explains why the district court correctly resolved each legal question in this case in favor of the Commission. The court properly defined and applied exacting scrutiny to each of Free Speech's constitutional challenges, while rejecting Free Speech's conclusory characterizations of law and fact. In addition to the arguments set forth in the Commission's appellate brief, the following points are relevant to this Court's review of the district court's dismissal of the case.

1. The district court correctly defined and applied exacting scrutiny "to determine whether the regulations and policies at issue are constitutional." (App. 563; *see* Appellant's Br. 8 (acknowledging that exacting scrutiny applies to "each area of substantive election law" that Free Speech challenges).) As the Supreme Court and this Court and many other federal courts of appeals have recognized, a law mandating campaign-finance disclosure survives exacting scrutiny if there is "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010); *see also New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (same); Appellee's Br. 22 (collecting cases from other circuits). This "exacting scrutiny" scrutiny standard applies to various campaign-finance disclosure requirements, including registration and reporting requirements for political committees. *Herrera*, 611 F.3d at 676; *see also, e.g.*, *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555, 558 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013) ("*RTAA*"); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 56-70 (1st Cir.

2011) , *cert. denied*, 132 S. Ct. 1635 (2012); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1003-19 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 696-98 (D.C. Cir. (en banc)), *cert. denied*, 131 S. Ct. 553 (2010).

Despite the weight of recent authority, including from the Supreme Court and this Court, Free Speech erroneously asks this Court not to "differentiat[e]" between strict and exacting scrutiny because decades ago, courts "considered strict and exacting scrutiny as synonymous." (Appellant's Reply Br. 9 (asserting incorrectly that exacting scrutiny of disclosure requirements demands consideration of whether a "compelling" government interest may be satisfied by "less restrictive means"); *see* Appellee's Br. 22-23 (distinguishing between strict and exacting scrutiny).)

This argument is plainly unavailing – and contrary to the law of this Circuit. In *Herrera*, this Court recognized that regulations imposing political committee status on certain groups "require disclosure, thus distinguishing them from regulations that limit the amount of speech a group may undertake." 611 F.3d at 676. And the Court explained that such regulations "must pass '*exacting scrutiny*,'" *id.* (emphasis added; citing *Buckley*, 424 U.S. 1, 64 (1976)), which "'requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" *Id.* (internal quotation marks omitted; quoting *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010)).

Free Speech's argument likewise defies *Citizens United*, in which the Supreme Court explicitly refused to import its strict-scrutiny analysis of a *prohibition* on independent expenditures into its exacting scrutiny of laws that require campaign-finance *disclosures*. 130 S.Ct. at 915.

2. Free Speech's conclusory characterizations of law and fact should not be credited in reviewing the district court's dismissal of Free Speech's complaint. Such "'conclusory statements[] do not suffice . . . [and] are not entitled to the assumption of truth.'" *Hall*, 584 F.3d at 863 (quoting *Iqbal*, 556 U.S. at 679). Free Speech's complaint, like its legal briefs, is larded with sweeping, inaccurate characterizations of both law and fact. These characterizations have included erroneous portrayals of various court decisions including the Supreme Court's decision in *Citizens United* and the Fourth Circuit's decision in *RTAA* (*see* App. 425-26 & n.11, 430 n.15, 431-32, 433 n.17; Appellee's Br. 48 n.18); repeated mischaracterizations of the draft advisory opinion with which Free Speech disagrees (*see* App. 434-36, 451-52; Appellee's Br. 30); the emphatic — but inaccurate — claim that Commissioners reached "'diametrically opposed conclusions regarding *most* of Free Speech's ads'" (*see* Appellee's Br. 29 n.8 (emphasis added; quoting Appellant's Br. 11)); misleading descriptions of the Commission's advisory-opinion process (*see* App. 423 n.7, 424 n.10); and inaccurate descriptions of the Commission's enforcement process and various administrative enforcement matters (*see* App. 441-43, 446 n.28; Appellee's Br. 37-38, 46 n.16).[2]

[2] More recently, Free Speech inaccurately described the Commission's vote on a request for an advisory opinion in another matter as "splintered . . . about whether the term 'Obamacare' constituted a reference to a candidate." (Appellant's Reply Br. 19 (purporting to describe FEC Advisory Opinion 2012-19).) In fact, a majority of the Commission *agreed* that under the Commission's regulations, it did. *See* FEC Advisory Opinion 2012-19 at 3-4 (American Future Fund) (concluding that advertisement repeatedly discussing "Obamacare" "includes multiple references to a clearly identified Federal candidate and, therefore, is an electioneering communication"), *available at* http://saos.nictusa.com/aodocs/AO%202012-19.pdf. Free Speech's Reply Brief also misleadingly cites *Shays v. FEC*, in which the district court *upheld* the Commission's

Most fundamentally, Free Speech hyperbolically and wrongly insists that the regulation and policies it challenges *prohibit*, *penalize*, *proscribe*, *censor*, *muzzle*, or otherwise *suppress* its speech. (*Compare*, *e.g.*, Appellant's Br. 14, 33; Appellant's Reply Br. 2, 3, 13, 19; App. 15, 20, 23, 25, 26, 34, 35, 54, *with* Appellee's Br. 55-56.) Free Speech's charges that the challenged rules are a "comprehensive system of speech censorship, intimidation, and vagary" (App. 20) that "completely muzzle[] a wide array of protected First Amendment activity as effectively as any speech ban" (App. 25), and that the Commission "act[s] as a national censor of political speech" (App. 15) and its "mission [is] to capture more speech" (Appellant's Reply Br. 19), are simply fatuous. (Appellant's Reply Br. 19). The district court correctly rejected these inaccurate and rhetorically charged labels in concluding that the challenged regulation and policies, as implicated in this case, "implement only disclosure requirements." (App. 562.) For the same reasons, Free Speech's latest effort to spin its censorship argument — through an extended discussion of a *different* agency's enforcement of rules that actually prohibited

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case-by-case approach to determining a group's major purpose. *Compare* Appellant's Reply Br. 26 (asserting that court in *Shays v. FEC* "warned of First Amendment problems" with case-by-case approach to major purpose test), *with Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007) (upholding case-by-case approach to major purpose test).

That brief is further misleading when it makes the sweeping assertion that "three gentlemen from Wyoming who dare spend more than $2,000 for a newspaper advertisement criticizing the government while discussing their views may be jailed if they elect not to register with the government beforehand" (Appellant's Reply Br. 12), and when it purports to respond to an argument the Commission has never made that "there is no need for the major purpose test and any and all groups that engage in any sort of political activity may be required to register and report" (*id.* at 25). These statements, like many of Free Speech's assertions, are just plain false.

certain speech (*see* Appellant's Reply Br. 15-18 (discussing Federal *Communications* Commission's enforcement of indecency rules)) — is, of course, completely off point.

3. Free Speech has failed to allege specific facts demonstrating that complying with political-committee registration and reporting requirements would be unduly burdensome. (*See* Appellee's Br. 57-58 (discussing, in context of irreparable harm analysis, Free Speech's failure to allege burdens of complying with political-committee registration and reporting requirements).) Its conclusory and unsupported claims that the burdens of compliance are "heavy" or "complicated" (Appellant's Reply Br. 24), are insufficient. *Hall*, 584 F.3d at 863.

Moreover, Free Speech's willingness to accept foreign contributions to finance its communications is entirely irrelevant. (*See* Appellant's Reply Br. 23 (arguing incorrectly that an interest in accepting foreign contributions "furthers Free Speech's argument that PAC status is burdensome").) As Free Speech recognizes, the Federal Election Campaign Act categorically prohibits foreign nationals from financing independent expenditures or electioneering communications (*id.* (citing 2 U.S.C. § 441e)); thus, Free Speech would face the same "risk" if it financed such communications with foreign contributions regardless of whether it is a political committee.

CONCLUSION

For these reasons and those detailed in the Commission's appellate brief, the district court's judgment dismissing this case should be affirmed.

Respectfully submitted,

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April 11, 2013

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 requirements set forth in the Court's Order issued in this case on April 1, 2013, because the brief is limited to 10 pages in length and uses the typeface Microsoft Word 13-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2013, I caused appellee Federal Election Commission's supplemental brief in *Free Speech v. FEC*, No. 13-8033, 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 UPS Next Day Air Delivery.

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