**No. 13-8033**

# In The United States Court of Appeals for the Tenth Circuit

FREE SPEECH,

*Plaintiff-Appellant,*

v.

FEDERAL ELECTION COMMISSION,

*Defendant-Appellee.*

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

## PETITION FOR REHEARING EN BANC

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## FRAP 35(B)(1) STATEMENT

Appellant Free Speech seeks en banc rehearing and reversal of the Panel's decision in this case. Here, the Panel adopted the lower court's order of dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The Panel's decision conflicts with Supreme Court and Tenth Circuit precedent that protects grassroots groups against the indiscriminate application of burdensome political committee ("PAC") requirements as a prerequisite to speak. It also conflicts with Supreme Court and Tenth Circuit precedent that requires stringent review of First Amendment claims related to infringements of political free speech. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986); *New Mexico Youth Organized v. Herrera* ("*NMYO*"), 611 F.3d 669 (10th Cir. 2010).

## INTRODUCTION

This petition asks whether the holdings of *Buckley*, 424 U.S. 1, *MCFL*, 479 U.S. 238, and *NMYO*, 611 F.3d 669, continue to be good law, protecting individuals from burdensome government interference in their political lives. Free Speech asks for en banc review to: (1) reverse the lower court's grant of dismissal under Federal Rule of Civil Procedure 12(b)(6) and provide instruction for meaningful review of First Amendment claims; (2) require that *MCFL* and the

major purpose test be applied to the facts of this case; and (3) find that clear speech standards must exist to guide citizens between regulated and non-regulated conduct.

## ARGUMENT

### I. A PRIMER ON ELECTION LAW

This petition, while grounded in First Amendment principles, involves the operation of obscure components of federal election law. It is this machinery that inhibits the exercise of Free Speech's First Amendment rights, both because of how it is designed and applied.

Disclosure is not always beneficial or constitutional. *See NAACP v. Button*, 371 U.S. 415 (1963). In the context of election law, disclosure provides information to monitor a group's "independent spending activity and its receipt of contributions." *MCFL*, 479 U.S. at 262. Properly cabined, disclosure serves a defined government informational interest—to provide the electorate with information about "sources of election-related spending." *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *Buckley*, 424 U.S. at 66). Still, not every system that claims to effectuate disclosure is constitutional simply by invoking the term. *See generally MCFL*, 479 U.S. 238.

The Supreme Court has readily upheld simplified, one-time, event-driven disclosure. *Citizens United*, 558 U.S. at 366–71. This simplified type of

disclosure is what the *MCFL* Court referred to as a less restrictive way of providing for disclosure that did not impose the "full panoply of regulations that accompany status as a political committee under the Act." *MCFL*, 479 U.S. at 262.

Two forms of speech are subject to simplified disclosure under federal election law—electioneering communications and independent expenditures. *See* 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.22. Individuals or groups who spend more than $10,000 on an electioneering communication must provide a single filing with the FEC, simple in nature, offering basic information about who funded the speech. *See* 2 U.S.C. § 434(f)(2); *see also* FEC Form 9, http://www.fec.gov/pdf/forms/fecfrm9.pdf. Individuals or groups who spend more than $250 on independent expenditures must file single reports with the Commission providing basic information. *See* 2 U.S.C. § 434(c); *see also* FEC Form 5, http://www.fec.gov/pdf/forms/fecfrm5.pdf. These types of disclosure are not challenged here.

Unlike filling out simple disclosure forms, registering and reporting as a PAC is, as the Supreme Court described it, "onerous" and "burdensome" and the heart of the matter here. *Citizens United*, 558 U.S. at 336, 337. PAC-style regulations demand that citizens register with the government to speak, appoint a treasurer, impose specific accounting requirements, file disclosure reports even when silent, and seek government permission to dissolve. *Id.* at 337–38. *Buckley*

limited the reach of election law by requiring that only groups whose major purpose was the nomination or election of candidates could be forced to undergo PAC requirements. *Buckley*, 424 U.S. at 79. Faced with the option to speak with a host of expensive and burdensome regulations, many Americans simply elect to self-silence. *MCFL*, 479 U.S. at 254 (PAC regulations "create a disincentive for such organizations to engage in political speech"). The Tenth Circuit has routinely applied the protection of the major purpose test and *MCFL* to ensure the limited reach of PAC regulations. *See Colorado Right to Life Cmte. v. Coffmann*, 498 F.3d 1137, 1147–51 (10th Cir. 2007).

PAC status, then, is not mere disclosure, but something quite different and more difficult. It is an unwieldy legal barrier that prevents many Americans from being able to speak. Accepting PAC status as just another form of disclosure is mistaken and "risks transforming First Amendment jurisprudence into a legislative labeling exercise." *Minnesota Citizens Concerned for Life v. Swanson*, 2011 WL 1833236 at *14 (8th Cir. May 16, 2011) (Riley, C.J., dissenting in part). But this is just what the lower court and Panel did, accepting PAC requirements to be disclosure, applying a relaxed level of exacting scrutiny, and then dismissing this suit. This petition asks for en banc review to ensure that the important protections of *Buckley*, *MCFL* and *Citizens United* are applied here.

## II. THE DISTRICT COURT AND PANEL'S TREATMENT DID NOT ADEQUATELY PROTECT POLITICAL SPEECH

This case arose out of Free Speech's attempt to obtain an advisory opinion from the FEC about what specific regulations and policies meant, how they would be applied, or not, to Free Speech, and if it would be forced to register and report as a political committee under the FECA. *See* 2 App. 102–131. The FEC could not muster a sensible answer. *See* 2 App. 282–92. After two hearings and several contradictory draft advisory opinions, the Commission released a partial answer to Free Speech's request and otherwise failed to answer any of the substantive queries contained in it. Whether, when, and if Free Speech would have to comply with PAC regulations was left to the best guesses of the members of Free Speech.[1]

When Free Speech sought a preliminary injunction in the court below, it was denied relief. Likewise, the district court dismissed Free Speech's suit under Federal Rule of Civil Procedure 12(b)(6), which was affirmed by the Panel (itself adopting the lower court's order of dismissal as its own). *See* 4 App. 574. During

[1] It has been suggested that since four members of the FEC did not affirmatively vote that Free Speech had to register as a PAC that it is free to speak. This is not true. FEC staff may begin investigations that Free Speech would be forced to defend against well before any Commissioner ever votes on the matter. *See* 2 U.S.C. § 437g(a). Beyond this, Vice Chairman McGahn issued a memorandum on July 25, 2013 detailing the ad hoc enforcement patterns of Commission staff. *See* Background Information Regarding Proposed Enforcement Manual, FEC, *available at* http://www.fec.gov/members/mcgahn/statements/13-21-k.pdf.

prior judicial review, the careful administrative record built by Free Speech was not examined and important precedent, specifically *MCFL*, was entirely omitted.

Instead of analyzing the case at hand, the Panel and lower court borrowed the reasoning of the Fourth Circuit in *Real Truth About Abortion, Inc. v. FEC* ("*RTAA*"), 681 F.3d 544 (4th Cir. 2012) as its own. However, as pled earlier, Free Speech raised issues unique and separate from *RTAA* that deserved review here. These include whether the specific advertisements and scripts would trigger regulation and whether the major purpose test, as applied to Free Speech, would support the imposition of PAC status. *RTAA* involved a limited factual record, no administrative background, and the Fourth Circuit avoided the major purpose consideration. *See RTAA*, 681 F.3d at 557 n.5 ("Real Truth does not assert that the major purpose test is unconstitutional as applied to it. Nor could it, since the Commission has never claimed that Real Truth is a PAC").

Granting a motion to dismiss is a "harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001) (quoting *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999)). Still, the lower court ordered dismissal here all without reviewing the relevant facts in controversy and applying the major purpose doctrine or *MCFL*

analysis to them. This omission by the lower court and Panel supports en banc review.

## III. THIS CASE CONFLICTS WITH SUPREME COURT AND TENTH CIRCUIT PRECEDENT PROVIDING MEANINGFUL PROTECTION OF POLITICAL SPEECH

At issue in this petition is whether citizens may still rely on the doctrinal protection of political speech found in *Buckley*, *MCFL*, and *Citizens United*. The District Court and Panel failed to properly apply *Buckley's* major purpose test and other limiting principles to protect political free speech and association rights. 4 App. 559–73, 574. Without the continued recognition and application of these cases, no meaningful firewall exists to police against government intervention into the political lives of Americans. Absent the insistence of these standards, government agencies are free to harass, investigate, delay, fine, and criminalize citizens for the exercise of our most cherished liberty—the right to speak one's mind unapologetically.[2] These standards prove integral to preserve political speech, what the *Citizens United* Court deemed an "essential mechanism of democracy." 558 U.S. at 339.

[2] One need look little further than the still-ongoing Internal Revenue Service controversy to understand the evils of unfettered disclosure. *See IRS's Lerner Had History of Harassment, Inappropriate Religious Inquiries at FEC*, The Weekly Standard, http://www.weeklystandard.com/blogs/irss-lerner-had-history-harassment-inappropriate-religious-inquiries-fec_725004.html?page=1.

### A. Re-Branding Onerous PAC Burdens as Disclosure do not Make Them Constitutional

When facing laws that implement disclosure, one categorical distinction has long served as the guiding compass of constitutional concerns. The Supreme Court has upheld simple, event-driven disclosure, explaining that its application poses few burdens on the exercise of First Amendment rights. *Citizens United*, 558 U.S. at 366. However, where laws impose the complicated and onerous demands of PAC status their validity has been anything but certain. *Id*. at 337–39. Stated simply by the *Citizens United* Court, simple, event-driven disclosure represents a "less restrictive alternative to more comprehensive regulations of speech" found in PAC-style requirements. *Id.* at 369.

It is important to protect against indiscriminate application of PAC status due to its burdensome nature. PAC status "may create a disincentive for [] organizations to engage in political speech." *MCFL*, 479 U.S. at 254. Extensive and expensive administrative requirements, some 23 detailed by the *MCFL* Court, act as an effective barrier to political participation by average Americans. In a nation premised on the notion that everyone should be free to participate in our national public debate, public discussion should be "uninhibited, robust, and wide-open," and this intervention into the political lives of Americans cannot be countenanced. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Judicial treatment of these concerns must reflect these values.

The only way the protection of *Buckley*, *MCFL*, and *Citizens United* can be achieved is by insisting on firm principles that limit the application of more burdensome regulatory programs to political free speech and association. In election law parlance, these protections can be found in the formulations of the express advocacy test and the major purpose test.[3] Their purpose is to ensure that disclosure is achieved without burdening constitutional rights too heavily. But because the lower court and Panel failed to conduct these considerations or analyses, en banc review is supported here.

**B. PAC Burdens may not be Applied Indiscriminately**

If *MCFL* remains good law, something *Citizens United* affirms, then it must exist to ensure some constitutional value is achieved. Otherwise, the *Citizens United* Court would have been free to discard its continued validity, as it did *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990), and parts of *McConnell v. FEC*, 540 U.S. 93 (2003). *Citizens United*, 558 U.S. at 310.

Both *Buckley* and *MCFL* stand for the principle not just that government may not ban Audubon Society groups and Big Brother/Big Sister groups from speaking. They also hold that government efforts demanding that every coffee

[3] Appellant preserves its arguments concerning the express advocacy standards employed by the FEC as this supports en banc review as well. Comprehensible speech standards allow speakers the ability to comply with the law—a feature entirely lacking in the system at hand. The administrative record below is ripe with these examples. *See, e.g.*, 2 App. 199–201; 2 App. 249, 337–39.

klatch register and report as a political committee are constitutionally infirm, because just requiring a group to register and report as a PAC is, as a matter of law, constitutionally burdensome and onerous. *Id.* at 337. This point was lost on the court below and reviewing Panel. Government can ban speech just as effectively through prolix and difficult regulations as it can through a direct ban. *Id.* at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day"). *Buckley* and *MCFL* still exist to protect against this very subterfuge. They do so through the continued recognition of the major purpose test.

Were this Court to agree with the FEC, effective judicial protection against government efforts to suppress political speech would be lost. It cannot be that *MCFL* and other First Amendment doctrine protects only against the most blatant abridgements of speech—bans—but not against more subtle suppression. Courts have been careful in every area of the law touching upon sensitive First Amendment freedoms to construct and apply meaningful standards that give the exercise of free speech breathing room, not just against bans, but against any meaningful encroachment of those rights. *See, e.g.*, *Interstate Circuit v. Dallas,* 390 U.S. 676, 688 (1968) (even systems involving only "classification [of speech] rather than direct suppression" require strict judicial review); *Bantam Books v.*

*Sullivan*, 372 U.S. 58, 67 (1963) (it is the duty of the courts to "look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief"); *Citizens United*, 558 U.S. at 335 (complicated election law provisions "function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit"). This Court should do the same here.

What is asked in this en banc petition is for the protection of *Buckley* and *MCFL* to be re-affirmed and applied to this case. This requires the resurrection of a sensible major purpose test and objective speech standards to be applied to the case at hand, something never contemplated by the lower court or Panel. The lower court and Panel failed to apply binding Supreme Court and Tenth Circuit precedent upholding the constitutional necessity of the major purpose test.

The major purpose test imposes a simple requirement: that only groups whose major purpose is the nomination or defeat of candidates must be forced to register as a PAC. *MCFL*, 479 U.S. at 253 n.6. The Tenth Circuit has steadfastly applied this protection in its own election law considerations. *See, e.g.*, *Coffman*, 498 F.3d 1137. The Supreme Court's holdings in *Buckley*, *MCFL*, and *Citizens United* establish the dividing line between permissible and impermissible

regulation of groups engaged in political speech. *MCFL* acknowledged the importance of disclosure and found that regular, simple, event-driven reports adequately promoted the government's informational interest, while other regimes proved too burdensome. *MCFL*, 479 U.S. at 262. *Citizens United* affirmed this distinction. 558 U.S. at 337 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations"). Indeed, As Justice Kennedy explained, even "if a PAC could somehow allow a corporation to speak" then "the option to form PACs does not alleviate the First Amendment problems." *Id.* This is because imposing PAC status is far too burdensome when simple, event-driven disclosure adequately addresses the governmental interest here. But these points were never considered by the lower court or Panel and support review here.

## IV. THIS CASE CONFLICTS WITH SUPREME COURT AND TENTH CIRCUIT PRECEDENT DEMANDING HEIGHTENED STANDARDS OF REVIEW

First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society." *Button*, 317 U.S. at 433. These freedoms, whether at the administrative or judicial level, need careful safeguards. Dismissal of these concerns cannot be said to adequately protect these rights.

The lower court and Panel reviewed the claims presented by Free Speech and sanctioned summary dismissal even where substantial free speech rights were in jeopardy. *See, e.g.*, 1 App. 32, 87–89; 2 App. 199–201; 2 App. 321–24.

Binding precedent from the Supreme Court and Tenth Circuit that protect these very rights was not even considered or applied. The analysis provided by the lower court and adopted by the Panel did not apply correct precedential standards. For example, Judge Skavdahl reasoned that Free Speech "seeks to finance and distribute these communications without registering as a political committee or complying with the disclaimer and disclosure obligations." 3 App. 482. However, Free Speech routinely pled that it sought clarity as to PAC status and was not challenging disclaimer or basic disclosure requirements. *See* 1 App. 70–71. Additionally, Judge Skavdahl viewed Free Speech's claim as requesting an *extension* of the holding in *Citizens United* when Free Speech sought the *application* of *MCFL* and *Citizens United*. *See* 3 App. 488 ("The plaintiff appears to seek to expand the discussion in *Citizens United* as to the formation of a PAC and the burdens imposed upon going through that process, but this Court does not find that those same burdens are analogous in this case and thus do not act as a prior restraint or the equivalent of the same"). That the lower court did not apply settled law by applying the holding of *Buckley*, *MCFL*, and *Citizens United* to the case at hand supports review here.

Given the Tenth Circuit's usually strong presumption in favor of speech, the outcome of this case is unsupportable. *See Bertot v. School Dist. No. 1 Albany County, Wyo.*, 613 F.2d 245, 252 (10th Cir. 1979) (*citing* A. BICKEL, THE

MORALITY OF CONSENT 78 (1975)) (The Tenth Circuit would "prefer that governmental officials acting in sensitive First Amendment areas err, when they do err, on the side of protecting those interests"). The FEC ignored the need for clarity in assessing its political speech regulations while the lower court dismissed the suit with no mention of the controlling constitutional precedent at hand. Free Speech was left wholly unfree to speak given the constitutional deficiencies alleged in its complaint and pleadings. To correct this, en banc review is requested.

## CONCLUSION

Existing Supreme Court and Tenth Circuit precedent require that government programs imposing PAC burdens on groups engaged in political speech be evaluated with: (1) meaningful judicial standards and (2) held unconstitutional when they are vague and overbroad. That the lower court and Panel did not review or apply controlling election law precedent about these points supports en banc review to eliminate this conflict.

Dated: August 9, 2013.

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## CERTIFICATE OF VIRUS PROTECTION

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

____/s/_____
Stephen Klein
Dated: August 9, 2013

## CERTIFICATE OF COMPLIANCE

This petition complies with the page limitation of Fed. R. App. P. 35(b)(2).

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

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

____/s/_____
Stephen Klein
Dated: August 9, 2013

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

1. 10th Circuit Panel Judgment – June 25, 2013
2. 10th Circuit Panel Opinion – June 25, 2013

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**June 25, 2013**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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FREE SPEECH,

Plaintiff - Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant - Appellee.

No. 13-8033
(D.C. No. 2:12-CV-00127-SWS)

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**JUDGMENT**

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Before **BRISCOE**, Chief Judge, **BRORBY**, and **MURPHY**, Circuit Judges.

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This case originated in the District of Wyoming and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**June 25, 2013**

**Elisabeth A. Shumaker**
**Clerk of Court**

PUBLISH

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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| FREE SPEECH,<br><br>Plaintiff - Appellant,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant - Appellee. | No. 13-8033 |

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF WYOMING**
**(D.C. NO. 2:12-CV-00127-SWS)**

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Benjamin T. Barr, Rockville, Maryland (Stephen Klein, Wyoming Liberty Group, Cheyenne, Wyoming and Jack Speight, Cheyenne, Wyoming, with him on the briefs), for Plaintiff-Appellant..

Kevin Deeley, Acting Associate General Counsel (Anthony Herman, General Counsel, Lisa J. Stevenson, Deputy General Counsel-Law, Erin Chlopak, Acting Assistant General Counsel, David Kolker, Associate General Counsel and Adav Noti, Acting Assistant General Counsel, with him on the briefs), Federal Election Commission, Washington, D.C., for Defendant-Appellee.

Fred Wertheimer, Democracy 21, Washington, D.C.; Donald J. Simon, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, Washington, D.C.; J. Gerald Hebert, Tara Malloy and Paul S. Ryan, The Campaign Legal Center, Washington, D.C.; and Larry B. Jones, Simpson, Kepler & Edwards, LLC, The Cody, Wyoming Division of Burg Simpson Eldredge Hersh & Jardine, P.C., Cody, Wyoming, on the Briefs for Amici Curiae.

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Before **BRISCOE**, Chief Judge, **BRORBY**, and **MURPHY**, Circuit Judges.

**MURPHY**, Circuit Judge.

Plaintiff-Appellant, Free Speech, appeals the district court's dismissal of the complaint it filed in July 2012, alleging certain regulations and practices of Defendant-Appellee, the Federal Election Commission ("FEC"), violate its rights under the First Amendment. After careful review of the appellate filings, the district court's order, and the entire record, we **affirm** the dismissal for substantially the reasons stated by the district court.

The district court correctly concluded Free Speech's claims implicate only disclosure requirements which are subject to exacting scrutiny, requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010) (quotations omitted). Further, the district court comprehensively analyzed and correctly resolved Free Speech's constitutional challenges to the FEC's definition of express advocacy, codified at 11 C.F.R. § 100.22(b); the standard used by the FEC to determine whether a request for funds is a solicitation of contributions under 2 U.S.C. § 441d(a); and the FEC's policy of determining political committee status on a case-by-case basis.[1]

[1]The district court relied, *inter alia*, on the Fourth Circuit's decision in *Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544 (4th (continued...)

Accordingly, this court **adopts** the district court's analysis as the opinion of this court and **orders** the district court's memorandum decision and order granting the FEC's Motion to Dismiss to be published.

[1](...continued)
Cir. 2010). Free Speech argues that dismissal of its complaint for failure to state a claim was improper because the record in this matter is more fully developed than the record analyzed by the Fourth Circuit, thereby providing factual support for its assertions the FEC's regulations and policies are either onerous and burdensome, inconsistent and contradictory, or somehow different from the ones it publically adopts or articulates. We have reviewed the record and conclude nothing therein provides any factual support for these conclusory assertions.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

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| FREE SPEECH,<br><br>Plaintiff,<br><br>vs.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Case No. 12-CV-127-S |

**ORDER GRANTING FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS**

This matter comes before the Court on Defendant Federal Election Commission's ("FEC" or "the Commission") Motion to Dismiss [Doc. 33]. The Court, having reviewed the parties' written submissions, being familiar with the case file by virtue of having previously heard argument and having addressed the likelihood of success on the merits of Plaintiff's claims in conjunction with Plaintiff's Motion for Preliminary Injunction (Doc. 19) and this Court's oral ruling denying same (Docs. 41, 42 and 54), and considering itself otherwise fully advised in the premises of the motion, hereby FINDS and ORDERS as follows:

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Free Speech is an unincorporated nonprofit association formed on February 21, 2012 and is comprised of three Wyoming residents. Free Speech's stated mission is to promote and protect free speech, limited government, and constitutional accountability, and to advocate positions on various political issues including free speech, sensible environmental policy, gun rights, land rights, and control over personal health care. Its bylaws require that it operate independently of political candidates, committees, and political parties. (Am. Compl. ¶¶ 1 & 10; Am. Compl. Ex. A at Ex. 1.) On July 26, 2012, Plaintiff filed this lawsuit challenging certain FEC regulations that Plaintiff alleges abridge its First Amendment freedoms. Specifically, Plaintiff brings facial and as applied challenges against 11 C.F.R. § 100.22(b), alleging its definition of "express advocacy" is unconstitutionally vague and overbroad and triggers burdensome registration and reporting requirements which act as the functional equivalent of a prior restraint on political speech. Plaintiff further challenges the constitutionality of the FEC's interpretation and enforcement process regarding political committee status, solicitation tests, the "major purpose" test, and express advocacy determinations. (Am. Compl. ¶ 2.)

On July 13, 2012, Free Speech filed a Motion for Preliminary Injunction (Doc. 19) seeking to enjoin the FEC from enforcing any of the challenged regulations or policies. This matter was fully briefed by the parties and amicus curiae and the Court heard oral argument on the motion on September 12, 2012. On October 3, 2012, this Court issued an oral ruling denying Plaintiff's motion for preliminary injunction. (Docs. 41, 42, and 54.) Plaintiff timely appealed on October 19, 2012, and Plaintiff's interlocutory appeal is currently pending before the Tenth Circuit Court of Appeals.

Prior to the Court's oral ruling on Plaintiff's Motion for Preliminary Injunction, the FEC filed

a motion to dismiss Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). This motion has been fully briefed and is ripe for a decision on the merits.

"Ordinarily an interlocutory injunction appeal under 1292(a)(1) does not defeat the power of the trial court to proceed further with the case." 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3921.2 (hereinafter "Wright & Miller"). "Although the filing of a notice of appeal ordinarily divests the district court of jurisdiction, in an appeal from an order granting or denying a preliminary injunction, a district court may nevertheless proceed to determine the action on the merits." *U.S. v. Price*, 688 F.2d 204, 215 (3d Cir. 1982) (internal citation omitted). "The desirability of prompt trial-court action in injunction cases justifies trial-court consideration of issues that may be open in the court of appeals. A good illustration is provided by a motion to dismiss for failure to state a claim." Wright & Miller § 3921.2. Although a court of appeals may determine whether a claim has been stated as part of the interlocutory appeal, a district court nonetheless retains jurisdiction to dismiss for failure to state a claim pending appeal. *Id.* This power is desirable "both in the interest of expeditious disposition and in the face of uncertainty as to the extent to which the court of appeals will exercise its power." *Id.*

In addressing this matter now, this Court is mindful of the issues that have been presented on appeal as well as the current stage of the appellate litigation. This case presents purely legal questions that have been fully briefed and argued to this Court. Because this Court's substantive analysis of the constitutional issues addressed in the pending motion to dismiss is identical to that set forth in the Court's ruling denying Plaintiff's preliminary injunction motion, the Court deems it appropriate to address Plaintiff's claims on the merits. Therefore, for the reasons set forth on the

record during the Court's oral ruling, and for the reasons set forth more fully below, the Court will grant Defendant's motion to dismiss for failure to state a claim.

## STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556). "In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits, and documents incorporated into the complaint by reference ." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009).

## DISCUSSION

### *A. Standard of Review – Exacting Scrutiny*

At the outset, this Court addresses Plaintiff's contention that this Court should apply strict scrutiny to the regulations and policies at issue. Plaintiff challenges, on an as-applied and facial basis, the FEC's definition of "express advocating," *see* 101 C.F.R. § 100.22(b), the FEC's policy for determining political committee status, and the FEC's policy for determining when donations given in response to solicitations will be deemed "contributions." At their core, however, these challenged rules and policies implement only disclosure requirements. *See* 2 U.S.C. § 434(c) (reporting requirements for "independent expenditures"); 2 U.S.C. § 432, 433, 434(a)(4) (political reporting and organization requirements). The question before this Court, therefore, 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.

"Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 914 (2010) (internal citations and quotation marks omitted). Accordingly, the Supreme Court has subjected those requirements to "exacting scrutiny" which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.*; *see also Real Truth About Abortion (RTAA) v. FEC*, 681 F.3d 544, 549 (4th Cir. 2010) ("[A]n intermediate level of scrutiny known as 'exacting scrutiny' is the appropriate standard to apply in reviewing provisions that impose disclosure requirements, such as the regulation and policy."); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) ("The regulations at issue here require disclosure, thus distinguishing them from regulations that limit the amount of speech a group may undertake. . . . As such, the regulations must pass 'exacting scrutiny.'"). Accordingly, the Court applies exacting scruting to determine whether the regulations and policies at issue are constitutional.

***B. Express Advocacy – 11 C.F.R. § 100.22(b)***

Plaintiff's first challenge involves the FEC's definition of express advocacy codified at 11 C.F.R. § 100.22. This regulation is used to define what constitutes an "independent expenditure" under 2 U.S.C. § 431(17), which in turn, determines whether disclosures are required under 2 U.S.C. § 434(c).[1] *See RTAA*, 681 F.3d at 548.

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[1] An "independent expenditure" is defined as "an expenditure . . . ***expressly advocating*** the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party or committee. 2 U.S.C. § 431(17) (emphasis added). A person or

Regulation 100.22 sets forth a two-part definition of the term "expressly advocating." Subsection (a) of the regulation defines "expressly advocating" consistent with the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 44, 96 S.Ct. 612 (1976), and includes communications using words or phrases "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)". 11 C.F.R. § 100.22(a). In *Buckley*, the Supreme Court addressed the constitutionality of an expenditure limit which provided that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1000." *Buckley*, 424 U.S. at 39. Troubled by the vagueness of the phrase "relative to a clearly identified candidate," the Supreme Court construed the phrase "relative to" to "apply only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44 (emphasis added). The Court explained in a footnote that "[t]his construction would restrict the application of [the spending limit] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Consistent with this guidance, subsection (a) of the FEC's definition of "expressly advocating" later codified these types of "magic words" to signal express advocacy.[2]

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

[2] *See* 11 C.F.R. § 100.22(a) (defining "expressly advocating" to mean any communication that "[u]ses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the

Subsection (b) of the regulation, on the other hand, "defines 'expressly advocating' more contextually, without using the 'magic words.'" *RTAA*, 681 F.3d at 550. This subsection, which is the subject of Plaintiff's constitutional challenge, defines "expressly advocating" to include any 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
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

Plaintiff argues that part (b) of the FEC's definition of expressly advocating "goes beyond any proper construction of express advocacy and offers no clear guidelines for speakers to tailor their constitutionally protected conduct and speech," and "fail[s] to limit its application to expenditures for communications that in 'express terms' advocate the election or defeat of a clearly identified candidate for federal office." (Am. Compl. ¶¶ 74-75.) In this regard, Plaintiff appears to suggest that "express advocacy" cannot permissibly extend beyond the "magic words" acknowledged in *Buckley* and codified in subsection (a). However, this position is foreclosed by several recent Supreme Court

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Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in 94,' 'vote Pro–Life' or 'vote Pro–Choice' accompanied by a listing of clearly identified candidates described as Pro–Life or Pro–Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'").

decisions which have upheld the FEC's approach to defining express advocacy not only in terms of *Buckley*'s "magic words" as recognized in subsection (a), but also their "functional equivalent," as provided in subsection (b). *RTAA*, 681 F.3d at 550.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court considered a facial overbreadth challenge to Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA") which included a provision defining express advocacy for purposes of electioneering communications. In rejecting the facial challenge, the Supreme Court noted "that *Buckley's* narrow construction of the FECA to require express advocacy was a function of the vagueness of the statutory definition of "expenditure,' not an absolute First Amendment imperative." *RTAA*, 681 F.3d at 550 (citing *McConnell*, 540 U.S. at 191-92). Accordingly, the Supreme Court in *McConnell* held that "Congress could permissibly regulate not only communications containing the 'magic words' of *Buckley*, but also communications that were 'the functional equivalent' of express advocacy." *Id.* (citing *McConnell*, 540 U.S. at 193).

In *FEC v. Wisconsin Right to Life, Inc. (WRTL)*, 551 U.S. 449 (2007), the Supreme Court adopted a test for the "functional equivalent of express advocacy" which is consistent with the language set forth in section 110.22(b). *See WRTL*, 551 U.S. at 474 n.7; *RTAA*, 681 F.3d at 552. The controlling opinion in *WRTL* clarified that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is *susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate*." *WRTL*, 551 U.S. at 460-470 (emphasis added). This functional equivalent test closely correlates to the test set forth in subsection (b), which provides that a communication is express advocacy if it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified

candidate(s)." 11 C.F.R. § 100.22(b). Indeed, as the Fourth Circuit has noted, although the language of Section 110.22(b) does not exactly mirror *WRTL*'s functional equivalent test, the test set forth in Section 110.22(b) is "likely narrower . . . since it requires a communication to have an 'electoral portion' that is 'unmistakeable' and 'unambiguous.'" *RTAA*, 681 F.3d at 552.

Finally, the Supreme Court's recent decision in *Citizens United* reaffirmed the constitutionality of the *WRTL* test and provided further support for the FEC's use of the functional equivalent test to define express advocacy. In *Citizens United*, the Court applied the *WRTL* functional equivalent test to determine whether the communication at issue would be prohibited by the corporate funding restrictions set forth in Title II of the BCRA, ultimately concluding that "[u]nder the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy." *Citizens United*, 130 S.Ct. at 890. In that opinion, the Supreme Court upheld federal disclaimer and disclosure requirements applicable to *all* "electioneering communications." *Id.* at 914. In so holding, the Court "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 915. In other words, in addressing the permissible scope of disclosure requirements, the Supreme Court not only rejected the "magic words" standard urged by Plaintiff but also found that disclosure requirements could extend beyond speech that is the "functional equivalent of express advocacy" to address even ads that "only pertain to a commercial transaction." *Id.* at 916. Thus, "*Citizens United* . . . supports the [FEC's] use of a functional equivalent test in defining 'express advocacy.' . . . If mandatory disclosure requirements are permissible when applied to ads that merely *mention* a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible."

*RTAA*, 681 F.3d at 551-52 (emphasis original). As a result, *Citizens United* directly contradicts Plaintiff's argument that the definition of express advocacy set forth in subsection (b) is overly broad with respect to disclosure requirements.

In addition to its overbreadth argument, Plaintiff urges that section 100.22(b) is impermissibly vague based on the fact that the FEC did not "issue a conclusive opinion" as to whether some of Plaintiff's proposed ads constituted express advocacy in the advisory opinion process. However, as the Fourth Circuit has noted, "cases that fall close to the line will inevitably arise when applying § 100.22(b)." *RTAA*, 681 F.3d at 554. "This kind of difficulty is simply inherent in any kind of standards-based test." *Id.*; *see also National Organization for Marriage, Inc. v. Sec. of State of Fla.*, 753 F.Supp.2d 1217, 1221 (N.D. Fla. 2010) ("The fact that 'it may be difficult in some cases to determine whether these clear requirements have been met' does not mean that the statute is void for vagueness.") (quoting *United States v. Williams*, 553 U.S. 285, 306, 128 S.Ct. 1830 (2008)).

***C. The "Solicitation" Standard***

Plaintiff also challenges the constitutionality of the "solicitation" standard used by the FEC as vague and overbroad, arguing that it lacks clarity and guidance sufficient to enable interested persons to tailor their activities in compliance with the law. The FECA defines "contribution" to include "any gift, subscription, loan, advance, 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). It further requires "any person" who "solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising" to include a specified disclaimer in the solicitation. *Id.* § 441d(a); *see* 11

C.F.R. § 110.11(a)(3). Thus, the 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 a "solicitation."

The standard applied by the FEC for determining whether a request for funds "solicits" a "contribution" under the FECA was set forth by the Second Circuit in *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) ("*SEF*"). Under that standard, disclosure is required "if [a communication] contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id.* This solicitation standard does not interfere with Plaintiff's ability to raise funds to support its advocacy. Plaintiff is free to spend unlimited funds on its solicitations and to solicit unlimited funds for its express advocacy. Any "solicitations" of "contributions" simply trigger disclosure requirements, and those disclosure requirements are substantially related to the government's interest in requiring disclosure. As the Second Circuit recognized in *SEF*, disclosure requirements for solicitations "serve[] important First Amendment values." *Id.* at 296. "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." *Id.* The disclosure requirement is thus "a reasonable and minimally restrictive method of ensuring open electoral competition that does not unduly trench upon defendants' First Amendment rights." *Id.* (internal quotation marks and citation omitted). As the Supreme Court explained in *Citizens United*, disclosures serve important interests even in the context of electioneering communications that need not be targeted to the election or defeat of a federal candidate. Such disclaimers "insure that the voters are fully informed about the person or group who is speaking." *Citizens United*, 130 S.Ct. 915 (citations omitted). "At the very least, the

disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party." *Id.*

Plaintiff's vagueness argument appears to be premised upon the fact that the advisory opinion issued to Plaintiff by the FEC concluded that two of Plaintiff's donation requests would not be solicitations under the Act, while the Commission could not approve a response regarding the remaining two donation requests. (Am. Compl., Ex. G.) However, as noted above, "[t]he fact that 'it may be difficult in some cases to determine whether these clear requirements have been met' does not mean that the statute is void for vagueness." *National Organization for Marriage, Inc.*, 753 F.Supp.2d at 1221 (quoting *Williams*, 553 U.S. at 306); *see also RTAA*, 681 F.3d at 554.

Plaintiff fails to establish any constitutional deficiency in the FEC's approach to determining whether a communication is a "solicitation" for "contributions." Plaintiff's claim relating to the solicitation standard is insufficient as a matter of law and must be dismissed.

***C. Political Committee Status - The "Major Purpose" Test***

Finally, Plaintiff challenges the FEC's policy of determining political committee status on a case-by-case basis. Under the FEC's approach, "the Commission first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, and then it evaluates an organization's 'major purpose,' as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents." *RTAA*, 681 F.3d at 555 (internal citations omitted).

A "political committee" is defined by the FECA as any "committee, club, association or other group of persons" that makes more than $1,000 in political expenditures or receives more than $1,000 in contributions during a calendar year. 2 U.S.C. § 431(4)(A). "Expenditures" and

"contributions" are defined to encompass any spending or fundraising "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i). However, in *Buckley v. Valeo*, the Supreme Court concluded that defining political committees only in terms of expenditures and contributions "could be interpreted to reach groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. "Accordingly, the Court limited the applicability of FECA's PAC requirements to organizations controlled by a candidate or whose 'major purpose' is the nomination or election of candidates." *RTAA*, 681 F.3d at 555 (citing *Buckley*, 424 U.S. at 79). "Thus the major purpose test serves as an additional hurdle to establishing political committee status. Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity." *See* Political Committee Status, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007).

As the Fourth Circuit has observed, "[a]lthough *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose. And thus the Commission was free to administer FECA political committee regulations either through categorical rules or through individualized adjudications." *RTAA*, 681 F.3d at 556. The FEC opted for the latter approach, explaining that "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." 72 Fed. Reg. at 5601. "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." *See RTAA*, 681 F.3d at 556 (emphasis original).

"The necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *Id.* at 556-57. This Court agrees with the assessment of the Fourth Circuit in *RTAA*:

> [T]he Commission, in its policy, adopted a sensible approach to determining whether an organization qualifies for PAC status. And more importantly, the Commission's multi-factor major-purpose test is consistent with Supreme Court precedent and does not unlawfully deter protected speech.

*Id.* at 558. Plaintiff's constitutional challenge to that policy is therefore unavailing.

## CONCLUSION

The FEC disclaimer requirements at issue are necessary to provide the electorate with information and to insure that the voters are fully informed about the person or group who is speaking. *Citizens United*, 130 S. Ct. at 915. Moreover, the disclosure requirements provide the transparency that "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 917. The FEC's functional equivalent and major purpose tests are essential components to narrowly, but effectively identifying those entities, ads and solicitations that fall within the FEC's reporting, disclaimer, and disclosure requirements. These disclaimer and disclosure requirements become even more essential and necessary to enable informed choice in the political marketplace following Citizen United's change to the political campaign landscape with the removal of the limit on corporate expenditures. For all of the reasons set forth above, and as previously set forth in this Court's oral ruling denying Plaintiff's Motion for Preliminary Injunction, Plaintiff's Complaint fails to state a claim upon which relief may be granted. It is therefore **ORDERED** that Defendant Federal Election Commission's Motion to Dismiss [Doc.

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**
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**RE: 13-8033, Free Speech v. Federal Election Commission**
Dist/Ag docket: 2:12-CV-00127-SWS

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40, any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 18 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Erin Rebecca Chlopak
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy hereof was served by electronic filing this 9th day of August, 2013 to:

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