IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREE SPEECH,	)	
Plaintiff-Appellant,	)	
v.	)	Case No. 12-8078
FEDERAL ELECTION COMMISSION,	)	
Defendant-Appellee.	)	

APPELLANT'S MOTION FOR
EMERGENCY INJUNCTION ON APPEAL

Introduction

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 8(a)(2), Appellant respectfully requests that this Court enjoin the enforcement of 11 C.F.R. 100.22(b) and related political committee practices and policies maintained by the Federal Election Commission ("FEC"). Because Free Speech wishes to speak about issues and candidates for public office before the November 6th election, immediate relief is requested.

This request seeks to secure Appellant's First Amendment rights denied by the FEC and court below. This case boils down to two fundamental questions of law. First, is it permissible for the FEC to maintain regulations and policies that it cannot articulate? Second, may a free people be denied the right of political expression due to administrative complexities enforced by criminal and civil penalties? Because the answer to each is resoundingly in the negative, Appellant asks for emergency injunctive relief.

Statement of Facts and the Record Below

Free Speech is a group of three Wyoming men formed to speak publicly about issues and candidates for office. These gentlemen formed the group as an unincorporated association and registered as a political group under Section 527 of the Internal Revenue Code. While it wished to speak, Free Speech could not determine how to comply with federal election law in three ways. First, it could not determine if it would be required to register as a political committee ("PAC") under the Federal Election Campaign Act ("FECA"). Second, it could not determine where the boundary lines between regulated and free speech existed. Third, if it was regulated, it could not determine which reporting regime would apply to its conduct. To clarify these issues, Free Speech filed an advisory opinion request with the FEC that the Commission could not answer.

Free Speech feared the FEC would apply onerous PAC regulations to it in a manner outside of its jurisdictional and constitutional authority. Throughout this process, the regulation, policies, and practices in controversy—as well as the Commission's Explanations and Justifications, enforcement process, and advisory opinions—could not provide answers to basic questions of federal election law. This has left Free Speech muted due to the vagueness and overbreadth of these regulations, policies, and practices.

When the FEC was asked to explain how the challenged regulatory programs operated as applied to Free Speech and generally, the FEC deadlocked on key questions of law and compliance and could not offer advice. EXHIBIT 1 (First Am'd Ver. Compl.) Exh. A–F. The FEC offered only a "partial response" advisory opinion where six

commissioners agreed about limited questions, but not about the underlying legal reasoning. *Id.* at Exh. G.

Following this inconclusive advisory opinion, Free Speech filed suit in June. Among the challenged provisions, Free Speech focuses its suit on 11 C.F.R. 100.22(b), which purports to regulate some speech as express advocacy if:

> 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.

Free Speech also challenged the FEC's policies and practices defining and regulating "solicitations," and the determination of "political committee status" including the major purpose test. First Am'd Ver. Compl. at ¶¶ 47–49, 97–106. Free Speech also alleged that these programs operate as the functional equivalent of a prior restraint when taken in their entirety. *Id.* at ¶¶ 80–85. Lastly, Free Speech explained that, beyond its constitutional arguments, the challenged programs exceeded the statutory authority enjoyed by the FEC and were invalid under the Administrative Procedure Act ("APA"). *Id.* at ¶ 78.

At the district court, the FEC's only response to its own confusion was to defend the positions of half the Commissioners by maintaining that the regulatory logjam created no burden. After conducting a hearing on Free Speech's request for preliminary injunctive relief, the court denied the motion. *See* EXHIBITS 4–5. In doing so, the court below committed several errors of law. These errors demand relief by this Court.

Standards for Securing an Injunction on Appeal

The standards for granting an injunction pending appeal are the same as for granting a preliminary injunction. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This involves a determination of whether: (1) the applicant has made a strong showing that he is likely to succeed on the merits; (2) the applicant will be irreparably injured absent an injunction; (3) issuance of the injunction will substantially injure other parties; and (4) the injunction serves the public interest. *Id.* Under Local Rule 8.1, the Tenth Circuit also requires a showing of the basis for the district and appellate courts' jurisdiction. Here, the district court had jurisdiction under 28 U.S.C. § 1331 as a challenge arising under the First Amendment to the Constitution of the United States, FECA, and the Declaratory Judgment Act, 28 U.S.C. § 2201–02. In addition, this Court enjoys jurisdiction under FRAP 8(a)(1) to review whether the grant of injunctive relief is appropriate on appeal.

On October 19, Appellant filed its notice of appeal and request for injunctive relief on appeal with the district court. It is "well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence." *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010). Free Speech's last meaningful opportunity for relief is here and now.

Argument

1. Free Speech is Likely to Succeed on the Merits

Whenever government regulates political speech—"an essential mechanism of democracy"—strict protection must follow. *Citizens United*, 130 S. Ct. at 898. Even when government dresses its programs up as mere disclosure, the duty of a reviewing

court is to look through form to function and determine whether the underlying burdens may be constitutionally upheld. *Bantam Books v. Sullivan*, 372 U.S. 58, 67 (1963). In this instance, the FEC maintains several programs injurious to First Amendment rights.

The court below applied the wrong standards in assessing whether to grant injunctive relief. While in other cases it is true that movants bear the burden of establishing relief, special rules operate in First Amendment challenges. These were adequately pled in the court below. First Am'd Ver. Compl. at ¶¶ 70–106. When analyzing regulations affecting speech, the "Government bears the burden of proof on the ultimate question" and movants must be "deemed likely to prevail unless the Government has shown that the [movants'] proposed less restrictive alternatives are less effective than [the regulations in controversy]." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). Burdens at the preliminary injunction stage track burdens at trial, where government must prove the constitutionality of the challenged provisions. *Gonzales v. O Centro Espirita Ben. Uniao do Vegetal*, 546 U.S. 418, 429 (2006). This burden shifting remains true whether strict or intermediate scrutiny is applied. *See, e.g.*, *Ashcroft*, 542 U.S. at 666; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). Recent Supreme Court cases concerning election law illustrate that where speech implicating political issues is under review, all doubts must be resolved in the favor of the speaker. *See, e.g., FEC v. Wisconsin Right to Life, Inc.* (*WRTL*), 551 U.S. 449 (2007). This burden shifting is especially appropriate for regulatory schemes capable of sweeping and improper application. *NAACP v. Button*, 371 U.S. 415, 432–33 (1963).

The district court also erred by applying traditional standards for injunctive relief that are inappropriate for the First Amendment. EXHIBIT 5 (*Free Speech v. FEC* Telephonic Oral Ruling) at 15–16. Instead, it based its ruling on erroneous conclusions of the law thus committing an abuse of its discretion. *See Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). It did not presume that Free Speech was likely to prevail. It did not inquire whether the FEC could show that Free Speech's less restrictive alternatives would not effectively carry out the FEC's interest in disclosure. Instead, the court determined that Free Speech was subject to heightened burdens applied against usual movants for preliminary injunctive relief, which is wrong as a matter of law, necessitating review by this Court and the entry of injunctive relief.[1] *See, e.g.*, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117 (9th Cir. 2011). In each area challenged, this Court must ask whether Free Speech's "proposed less restrictive alternatives are less effective" than the regulation, policy, or practice in controversy. *Ashcroft*, 542 U.S. at 666; *cf. FEC v. Massachusetts Citizens for Life* (*MCFL*), 479 U.S. 238, 262–63 (1986) (legal inquiry is whether any interest in disclosure could be met "in a manner less restrictive"). If the

[1] The lower court also applied incorrect injunctive relief standards because it viewed the request as altering the status quo. *See* EXHIBIT 5 at 15–16. This approach contradicts the rule espoused in *Gonzales*, where the Supreme Court held that the government bears the burden of proof to support challenged provisions affecting First Amendment rights. 546 U.S. at 429. Additionally, only three Commissioners agreed with the legal position advocated by the FEC's attorneys, and those Commissioners lack the legal authority to issue a binding, status quo, position of the FEC. A binding advisory opinion requires the votes of four Commissioners. *See generally* 2 U.S.C. §§ 437g(a)(2), (a)(4)(C), and (a)(6)(A). The First Amendment presumes that the freedom to speak, not free-floating regulatory licensing, constitutes the status quo. *See Freedman v. Maryland*, 380 U.S. 51, 59 (1965) ("Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution").

answer is no, then relief must be afforded to Appellant. In each area of law, Appellant has demonstrated less restrictive alternatives that adequately address the FEC's interest in disclosure. Because of this, injunctive relief is appropriate.

a. The Lower Court did not Apply the Correct Standards to Determine Express Advocacy or the Burdens of Political Committee Status

The FEC employs certain regulatory triggers to invoke significant burdens against speakers. These are not, as the FEC contends, simple disclosure programs upheld by the Supreme Court in *Citizens United*. They are rather much more burdensome and onerous regulations that impair First Amendment rights—a point of law already recognized by the Supreme Court and the Tenth Circuit. *See MCFL*, 479 U.S. at 252–53.

In *Buckley v. Valeo*, the Court construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. 1, 80 (1976). It also limited the application of the FECA 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." *Id.* at 79. These limits were necessary to preserve a sphere of protection for protected expression—speech about political issues and candidates for public office deemed "an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United,* 130 S. Ct. at 898. The *Buckley* Court deemed these safeguards important because they offered a reliable means to distinguish between regulated and non-regulated speech, allowing ease of compliance in an area affecting core First Amendment interests. In

addition, *Buckley*'s construction has been relied upon as a statutory limit on the FEC's authority. *See* EXHIBIT 2 (Mem. in Support of Preliminary Inj. Motion) at 43.

The limiting principles of *Buckley* remain significant for several reasons. First, speakers potentially affected by the reach of any law need clear notice about their scope. *Buckley*, 424 U.S. at 77–79. Second, insisting on clarity prevents against arbitrary and discriminatory enforcement by the FEC in an area of highly protected speech. *See Button*, 371 U.S. at 433. Third, some speakers cannot bear the regulatory PAC burdens applied by the FEC, necessitating a clear line of demarcation between regulated and unregulated conduct. *See MCFL*, 479 U.S. at 253–54. The sum of these protections act as a cure against any chill the system would cast against speakers facing complicated and confusing elements of federal election law. Half of the Commissioners agreed with Appellant's position, but another half did not, leaving Free Speech in legal limbo subject to criminal and civil penalties for non-compliance.

The line distinguishing regulable from non-regulable speech remains constitutionally and statutorily mandated. The First Amendment requires some articulable boundary defining regulation. *See, e.g.*, *Bantam Books*, 372 U.S. at 66; *Interstate Circuit v. Dallas*, 390 U.S. 676, 685 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964); *Federal Communications Comm'n v. Fox Television Stations, Inc*., 132 S. Ct. 2307 (2012). Even where regulatory constraints are minimal or government lacks any enforcement authority, these distinctions still prove necessary when First Amendment interests are implicated. *Interstate Circuit*, 390 U.S. at 688. This is particularly true when it comes to political speech. *See, e.g.*, *Right to Life of Duchess*

Co., Inc. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *Maine Right to Life Cmte. v. FEC*, 914 F. Supp. 8, 13 (D. Maine 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997).

The lower court confused the definition of express advocacy and PAC disclosure burdens with a different category of political speech. In analyzing a different statute involving a different, well-defined form of speech, *electioneering communications*, the Supreme Court endorsed the functional equivalent of express advocacy test. In footnote seven of *WRTL*, the Chief Justice explained that any test for deciding regulable electioneering communications must "meet[] the brightline requirements of BCRA 203 in the first place." *WRTL*, 551 U.S. at 474 n.7. These requirements were that electioneering communications only regulate speech that: (a) occurs within 30 or 60 days of an election, (b) is targeted to 50,000 people or more, (c) is carried by specific types of media, and (d) which mention a clearly identified candidate. *See* 2 U.S.C. § 434(f)(3)(A)(i). Faced with this narrow statutory enactment, the Supreme Court deemed the functional equivalent test constitutionally appropriate as to electioneering communications.

Expenditures are not electioneering communications. The FECA recognizes this. 2 U.S.C. § 434(f)(3)(B)(2)(i). Expenditures are much broader than electioneering communications, and the *Buckley* Court narrowed the former to prevent the capturing of too much speech or indiscriminate application. 424 U.S. at 44. When faced with an open-ended statutory definition for expenditure, the Supreme Court required greater rigor in construing it—the real deal, the express advocacy construction. But when faced with a narrower statutory definition for electioneering communications, the Supreme Court

required less rigor in construing it and accepted a lesser test, the functional equivalent of express advocacy standard. Never should the two tests be confused as the same. When they are confused, speakers cannot determine the difference between an expenditure and an electioneering communication, making compliance with the law impossible. Appellant raised this issue at the administrative and district court levels as well. *See* First Am'd Ver. Compl. Exh. K at 5–10.

Undoubtedly, government has an interest in providing disclosure about "'where political campaign money comes from and how it is spent' . . . in order to aid voters in evaluating those who seek federal office." *Buckley* 424 U.S. at 66–67. Thus, the disclosure interest at hand must relate to a specific category of speech—express advocacy—that in express terms calls for the election or defeat of clearly identified candidates. *Id.* at 44–45. It is not impossible to distinguish these classes of speech. Indeed, it is imperative to do so.

Providing disclosure of genuine express advocacy ensures the government interest in offering the electorate information about "where political campaign money comes from" is met but goes no further than that. This less restrictive method of ensuring disclosure protects against shifting and indeterminate regulatory boundaries, cures attendant problems with the chilling effect against speakers, and prevents arbitrary and discriminatory enforcement by the FEC. At the same time, it offers relevant information to the electorate about a category of speech approved by the Supreme Court without trampling constitutional liberties. This form of disclosure is also what the Supreme Court had in mind in *MCFL* and *Citizens United*. 130 S. Ct. at 897–98. The FEC's proposed

alternative—one embraced by half the FEC's Commissioners—permits an evolving and fuzzy interpretation of Section 100.22(b). This approach provides disclosure for the electorate but in a much more burdensome and constitutionally inappropriate manner.

A glimpse into the boundless operation of 100.22(b) can be found in the administrative record leading up to this case. Appellant provided ample administrative evidence of the FEC applying Section 100.22(b) in inconsistent and incomprehensible ways due to its underlying invalidity. *See* First Am'd Ver. Compl. at ¶¶ 76–77. In deciding whether to regulate speech under Section 100.22(b), the Commission never makes public what factors it will consider, what weights will be applied to these factors, or how the actual weights will be determined, and cannot do so because these considerations change from case to case. This administrative history belies any attempt to cast Appellant's deadlocked advisory opinion request as a one-time incident.

The FEC's approach to determining express advocacy contrasts sharply with the D.C. District Court's overview of the *Christian Coalition* matter. There, the district court applied the limiting construction of *Buckley* to make sense of the FEC's express advocacy standard. *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D. D.C. 1999). A strong message indicating that "[Victory] will be ours here" and "We're going to see Pat Williams sent bags packing back to Montana in November of this year" were considered "prophecy rather than advocacy." *Id.* at 63. Another communication consisted of a letter which referred to the "1994 elections for Congress" and "Christian voters . . . are going to make our voices heard in the elections this November . . . we must stand together, we must get organized, and we must stand now." This communication included a scorecard

for candidates as well. While the court understood that it would be "likely that the reader is to make his voice be heard by voting," the proper judicial focus on the entire communication indicated that it could be reasonably read to indicate the "importance of raising the profile of issues important to 'Christian voters.'" *Id.* at 63–64. Where reasonable interpretations of speech could be made, the D.C. District Court understood that any doubt must be resolved in favor of a finding of non-regulation.

On its face, Section 100.22(b) lacks the precision and simplicity necessary for regulations abutting political speech. Section 100.22(b) asks the Commission to conduct inquiries with "limited reference" to "external events," like the "proximity to the election," but other events could trigger regulation. Just no one knows what they may be. The regulation also asks the FEC to fish for an undefined "electoral portion" that might trigger regulatory requirements. The FEC's own administrative history points to the conclusion that the meaning of 100.22(b) is found through perpetual evolution, making its meaning impossible to discern except in the midst of an enforcement action when it is too late. And the FEC's record in interpreting this request illustrates that the boundaries to protect Section 100.22(b) from invalid application are nowhere to be found. *See* First Am'd Ver. Compl. at ¶¶ 15–17, 33–38.

What must be asked is whether the government's interest in disclosure can be met through a narrow construction of express advocacy or whether the FEC's expansive and evolving formulation is required to carry out disclosure. Nothing points to the conclusion that shifting and indeterminable speech standards are required to implement disclosure. The concerns highlighted in this request and briefed below illustrate that a narrow

interpretation of express advocacy safeguards constitutional interests while implementing the government's interest in disclosure. For these reasons, injunctive relief must issue in favor of Free Speech.

Once triggers for regulated conduct are understood, the nature of the burden applied to them must also be examined. There exists a notable difference between simple disclosure, found in FEC form 5 requirements, and the full panoply of PAC requirements, found in FEC form 3 requirements. *Cf.* "Form 5" for persons, http://www.fec.gov/pdf/forms/fecfrm5.pdf with "FEC Form 3" for committees, http://www.fec.gov/pdf/forms/fecfrm3.pdf. While the FEC trumpets *Citizens United* for upholding disclosure, even the *Citizens United* Court agreed with Appellant's distinction that disclosure is a "less restrictive alternative to more comprehensive regulations of speech." 130 S. Ct. at 915, *citing MCFL* , 479 U. S. at 262. While simple disclosure was appropriate, imposing comprehensive PAC regulations constituted a disincentive to speak. It explained, "[f]aced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *MCFL*, 479 U.S. at 255. Justice O'Connor, joining the plurality, explained that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." *Id.* at 266. Thus, *MCFL* shows that some regulatory requirements are so burdensome the Supreme Court took great steps to protect against them. These protections still matter.

Free Speech specifically argued that less restrictive alternative modes of regulation would meet the government interest at hand. This is the legal inquiry commanded in First Amendment challenges. *Ashcroft*, 542 U.S. at 666. *Buckley*, *MCFL*, and *Citizens United* already answer this question: the "state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *MCFL*, 479 U.S. at 262. Appellant argued this point below to no avail. Mem. in Support of Prelim. Inj. at 31. What matches the interest in disclosure with perfect parity is simplified reporting requirements offering the electorate information about who is speaking and who is funding such speech. Any burdens piled on top of this interest go beyond the interest in disclosure for issue advocacy organizations as a matter of law and are consequently invalid.

Because the legal standard is whether Appellant's proposed less restrictive alternative is effective at meeting the government interest in disclosure, the lower court erred when it failed to undertake this consideration. Because this issue has been settled as a matter of law, Free Speech, and others not before this Court, are entitled to injunctive relief before the upcoming election to protect their First Amendment interests.

b. The Lower Court Applied Non-Binding Fourth Circuit Precedent over Controlling Tenth Circuit Precedent

The district court uniformly applied the recent ruling in *Real Truth About Abortion v. FEC* (*RTAA*) to Free Speech. *See generally* 681 F.3d 544 (4th Cir. 2012). *See* EXHIBIT 5 at 11, 17–18, 21–22. The court neglected to consider that *RTAA* contradicts the Tenth Circuit, specifically the application of the "major purpose" test and the burdens

of applying political committee status to issue advocacy organizations. This Court should direct a preliminary injunction on these issues due to this error below.

RTAA is a case fundamentally different from the one before this Court. By means of example, without a record demonstrating how broad and vague Section 100.22(b) actually is, the Fourth Circuit held that "100.22(b) is likely narrower than the one articulated in [*WRTL*], since it requires a communication to have an 'electoral portion' that is 'unmistakable' and 'unambiguous.'" *RTAA*, 681 F.3d at 552. Lacking an administrative record, the Fourth Circuit was unable to discern the constitutional frailties present in the challenged system. In the 100.22(b) example, it did not have a record showing commissioners arguing over the "true meaning" of the phrase "talk about ranching." *See* Mem. in Support of Prelim. Inj. at 25–26. It did not have a record illustrating that half the commissioners believed Section 100.22(b) had objective, narrow boundaries, similar to those found in *Furgatch v. FEC*, 807 F.2d 857 (9th Cir. 1987), and three that believed it remained an open book of evolving standards and progressive meaning. *See* Mem. in Support of Prelim. Inj. at 23–26.

Unlike in *RTAA*, Appellant here included allegations about improper application of political committee status and the major purpose test to itself and third parties. *See id. at* 27–37. The Fourth Circuit specifically *limited* its ruling based on the fact that "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. Real Truth also does not specifically identify any instances in which . . . the Commission incorrectly categorized an organization as a PAC." *RTAA*, 681 F.3d at 558 n.5. In this case, Free

Speech cited many institutional and past examples of the FEC indiscriminately applying PAC status. *See* First Am'd Ver. Compl. at ¶¶ 28–30, 34, 58, 76–77, 100.

While the Fourth Circuit declined *RTAA's* record-light challenge to similar provisions of federal election law, a different case is before this Court. Because of the record provided here, this case illustrates how the challenged programs really work—this Court requires no hypothetical application of the programs in controversy as found in *RTAA*. It requires no deference to the FEC's posture, since a deadlock among Commissioners occurred here. *See Hispanic Leadership Fund, Inc. v. FEC*, ___ F.Supp.2d ___ 2012 WL 4759238 (E.D. Va. 2012). This case illustrates the good faith efforts of Appellant to clarify the reach of the law through the advisory opinion process. Finally, this case shows how grassroots groups remained silenced by the FEC, with their only option of silence or onerous compliance if they wish to speak.

Since it was first implemented as a limiting principle to assuage vagueness and overbreadth in the FECA in *Buckley*, the major purpose test has remained an integral step in determining political committee status. 424 U.S. at 79. Before considering the structure of the test itself, it is important to emphasize that the test is meant to protect associations that do not primarily engage in express advocacy. The Tenth Circuit has, on two separate occasions, found state campaign finance laws that forced issue advocacy groups to register and report as political committees unconstitutional as-applied. *See Colorado Right to Life Cmte. v. Coffman* (*CRTL*), 498 F.3d 1137 (10th Cir. 2007); *New Mexico Youth Organized v. Herrera* (*NMYO*), 611 F3d 669 (10th Cir. 2010). In both instances, this Court affirmed that there is a major purpose to "major purpose." In *CRTL*,

this Court affirmed "the district court's thorough and well-reasoned order . . . afford[ing] injunctive relief . . . ." 498 F.3d at 1156. In that order, the District of Colorado rejected the idea that "the government necessarily has a legitimate interest in regulating issue advocacy." *Colorado Right to Life Cmte. v. Davidson*, 395 F. Supp. 2d 1001, 1020 (D. Colo. 2005). Later, in *NMYO*, this Court re-affirmed this reasoning and "the Supreme Court's repeated admonition that *only* organizations that have 'the major purpose' of electing or defeating a candidate may be forced to register as political organizations." 611 F.3d at 679 (emphasis added). This Court is now faced with a necessary corollary: the trappings of PAC status are so burdensome that issue advocacy organizations must be able to avoid them with clear and narrowly tailored laws and policies.

As the record reflects for Free Speech's facial and as-applied challenge, the FEC has turned the major purpose test's limiting principle into a trap. First Am'd Ver. Compl. Exh. C at 22–26. This Court has upheld the prongs of determining major purpose by examining an organization's "central organizational purpose" or "comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *NMYO*, 611 F.3d at 678, *citing CRTL*, 498 F.3d at 1152. The latter prong is not at issue here, but the FEC claims it maintains the ability to determine an organization's central organizational purpose on a case-by-case basis using any factor it pleases. *See* First Am'd Ver. Compl. at ¶100. Aside from the record, which shows a multitude of hazy factors used by the FEC to determine central organizational purpose (many of which are beyond an organization's control), Free Speech itself faced three commissioners who believe its

issue advocacy that criticizes candidates—speech that is *not* express advocacy—helps establish a major purpose of candidate advocacy and impose PAC burdens. First Am'd Ver. Compl. Exh. C at 24; *see also* Mem. in Support of Prelim. Inj. at 34. This Court has affirmed the purpose of the major purpose test as one to prevent regulation of issue advocacy organizations. In this case, it must affirm that it is not a vague and overbroad tool for kindly inquisitions that chill political speech as onerously as PAC status itself.

Aside from the purpose and structure of the "major purpose" test, this Court has also acknowledged the Supreme Court's consistent rulings that themselves give the lie to *RTAA*. That ruling, and the court below, accepted the FEC's argument that since there are no outright bans on political speech, disclosure requirements are not actually "onerous." *RTAA*, 681 F.3d at 549. This argument directly contradicts this Court's decision in *Sampson v. Buescher*, where this Court analyzed Colorado's issue committee obligations on a small organization and considered the burdens:

> The burdens are substantial. The average citizen cannot be expected to master . . . the many campaign financial-disclosure requirements set forth in [Colorado law.] . . . Even if those rules that apply to issue committees may be few, one would have to sift through them all to determine which apply. . . . One would expect . . . that an attorney's fee would be comparable to, if not exceed, the [amount] that had been contributed . . . .

625 F.3d 1247, 1259–60 (10th Cir. 2010). Free Speech's situation is little different from the *Sampson* case, but instead it faces even tougher compliance requirements with political committee status than Colorado issue committees. Furthermore, in *Sampson* the burdens of issue committee status were challenged, but it seemed organizations could at least determine their status. Under the regulations at issue here, Free Speech cannot even

determine what type of organization it is. It cannot determine how to avoid the $1,000 express advocacy threshold due to the vague and overbroad reach of § 100.22(b), which donation requests trigger regulated "solicitations" under the law, and even then cannot escape the major purpose crapshoot related to political committee status. Further, the FEC has made compliance impossible by comingling electioneering communications standards with expenditure standards. *See* First Am'd Ver. Compl. Exh. K at 5–10.

There is a reason for the major purpose test. It acts to protect against the imposition of burdensome PAC requirements where less burdensome alternatives could provide for the government's interest in disclosure. *MCFL*, 479 U.S. at 262. The lower court abused its discretion by ignoring this controlling point of law—a point of law recognized by this Court. Without the major purpose test, government is free to apply the onerous requirements of PAC status to any group before it—a result that cannot be upheld under *Buckley*, *MCFL*, *Citizens United*, *CRTL*, or *NMYO*. The relevant inquiry here remains whether the "proposed less restrictive alternatives are less effective" than those proffered by the government. Appellant's less restrictive alternative is not only as effective, it is constitutionally mandated to protect First Amendment rights. The FEC must not be permitted to softly censor a free people who are fearful of criminal and civil penalties for violating standards even the Commission itself cannot articulate.

c. The Nature of Relief Requested

Appellant asked that the lower court embrace the "Draft C" Advisory Opinion issued by half the FEC's Commissioners to fully restore its First Amendment freedoms. This relief protects the status quo while preserving constitutional rights. The draft

opinion narrowed the reach of the challenged regulations and practices in accord with the statutory limits of the FECA and controlling constitutional precedent. This same relief is requested here. *See* First Am'd Ver. Compl. Exh. D.

2. Remaining Injunction Standards

Once the likelihood of success in established, in the First Amendment context the remaining elements of injunctive relief largely fall into place. The Appellant will suffer irreparable injury if injunctive relief is not awarded, since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373–74. The FEC will not be substantially injured if relief is awarded: if anything, clear and objective regulations will aid the FEC in its enforcement process. *See* Mem. in Support of Prelim. Inj. at 47–48. Finally, protecting First Amendment rights is in the public interest. *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005).

Conclusion

For the foregoing reasons, this Court should grant Appellant's motion for emergency injunctive relief.

Respectfully submitted,

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**Tenth Circuit Bar admission pending*

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2012 a copy of the foregoing motion for emergency injunction pending appeal was served through electronic mail pursuant to Fed. R. App. P. Rule 25(c)(1)(D) on the following:

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CERTIFICATE OF REDACTIONS AND DIGITAL SUBMISSIONS

I hereby certify that pursuant to the Tenth Circuit's General Order 95-01 dated August 10, 2007, all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk. Further, the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Trend Micro Titanium 2012, updated on October 24, 2012, which is the latest version of this software). According to the program, the digital submission is free from viruses.

/s/ Stephen Klein

LOCAL RULE 8.2 AND 27.3(C) CERTIFICATES

This motion for emergency relief arises from the underlying order issued by the district court on October 3, 2012. Appellant's Notice of Appeal and Request for Injunctive Relief Pending Appeal was filed with the district court on October 19, 2012. Due to the complexity of the issues presented, availability of counsel due to pressing election law matters for other clients, and necessary time to competently draft the underlying requests for emergency relief, this emergency request was prepared as promptly as possible. Moreover, FEC's counsel were notified of Appellant's plan to file its request for injunctive relief at the district court and at the Tenth Circuit on October, 19, 2012. This timing ensures that the correct constitutional and legal arguments are made before this Court to protect Free Speech's First Amendment rights before their last meaningful chance to speak – the November 6, 2012 elections – passes.

Lastly, in accord with Rule 27.3(C), Appellee FEC opposes this motion.

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