IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH,

Plaintiff,

VS.

FEDERAL ELECTION COMMISSION,

Defendant.

CASE NO. 12-CV-127-SWS

SEPTEMBER 12, 2012
3:19 P.M. - 4:54 P.M.

CASPER WYOMING

TRANSCRIPT OF HEARING
ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE SCOTT W. SKAVDAHL
UNITED STATES DISTRICT JUDGE

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(The proceedings commence at 3:19 p.m.)

THE CLERK: All rise.

THE COURT: Thank you. Please be seated.

Court is in session in the matter of Free Speech versus Federal Election Commission, Civil Action 12-CV-127. I note the presence of the plaintiff -- or plaintiffs in this matter, Mr. Barr.

MR. BARR: Yes, sir.

THE COURT: And Mr. Klein?

MR. KLEIN: Yes, Your Honor.

THE COURT: I apologize for the pause. There's another Steve Klein, isn't there, out of Cheyenne?

MR. KLEIN: Yes, Your Honor. He works in the office kitty-corner to me, but we're no relation.

THE COURT: Okay. Well, I had to look twice because I was wondering where's the Steve Klein that I had previously known. And on behalf of the defendant, I note the presence of Ms. Chlopak (CHO-pack) --

MS. CHLOPAK: Chlopak (KLO-pack).

THE COURT: -- Chlopak, Mr. Kolker and Mr. Vassallo.

The Court has allotted two hours in this matter, one hour per side, and I would hear first from the movant.

MR. BARR: Good afternoon, Your Honor. Thank you for having us before the Court.

THE COURT: Good afternoon.

MR. BARR: Before this commission -- before this Court is a commission that shrugs. It shrugs when the plaintiff asked whether its speech was regulated or not; it shrugs when it was asked whether it's a political committee under the Federal Election Campaign Act or not; it shrugged when it was asked basic questions of the Federal Election Campaign Act.

This is a commission that interprets and enforces federal election law across the United States, laws that carry civil and criminal penalties for noncompliance, and the First Amendment will not permit such a shrugging.

I'd like to take a moment to work through some of the constitutional principles that surround regulable categories of speech that are at issue in this case. The FEC's reply brief responding to our motion for preliminary injunctive relief looks at electioneering communications that was at issue in *Wisconsin Right to Life*, in *McConnell* and in *Citizens United* and applies those standards to what we call "independent expenditures." These are the incorrect standards to be applied.

Electioneering communications under the Federal Election Campaign Act deal with a very specific set of statutorily defined communications that occur within 30 to 60 days of an election, that clearly mention a candidate -- so if you've named them, you know that you're within the trigger period -- that go to a relevant electorate -- the FEC provides

information about what that populous threshold is -- and only occurs in certain types of media such as television or radio. Absent those specific factors, regulation does not occur.

So in *McConnell versus FEC*, the first time the Supreme Court interpreted the constitutionality of regulating electioneering communications, it examined what it called the "'functional equivalent of express advocacy' test"; and whether a communication had express words to advocate for the election or defeat of a federal candidate, it still allowed regulation because the electioneering communication statute provided bright-line guidance to speakers to know whether they were regulated or not; but nothing could be further from the truth when you look to the Supreme Court's distinction in issue advocacy and express advocacy. So I need to move back for a moment before I move forward.

Buckley versus Valeo was a seminal election law case before the Supreme Court that dealt with the primary interpretation and construction of the Federal Election Campaign Act. There, the Court interpreted expenditures which were communications designed to influence a federal election to be read more narrowly, and the reason why they had to be read more narrowly was to save the statutory provisions from invalidation under vagueness and the overbreadth doctrines. That's because in determining what's an independent expenditure, you have no bright-light statutory guidance. You

don't have a specific time frame as you do with electioneering communications. You don't have it limited to specific type of media formats or to a relevant number of the electorate. It's a wide-open test. So we had to create a very narrow definition in order to protect that.

Outside of independent expenditures or express advocacy is issue advocacy, and that's a whole range of communications that may discuss issues that connect to a candidate running for federal office, talking about environmental policy, talking about ranching in connection with President Obama but do not, in express words, call for the election or defeat of that candidate; and the Supreme Court, time and time again, has held that any regulation of that sort of speech is impermissible and outside of the bounds of the First Amendment. Why? Because it's impossible, as a matter of law, to trust government commissions to decide when "issue" speech is reaching too far into an electoral sphere to influence an election or to try to get a candidate elected or defeated for federal office.

Now, the FEC goes to great lengths to explain that a recently decided federal Court of Appeals decision, Real Truth About Abortion, formerly known as "*Real Truth About Obama*" might be controlling or persuasive here. I would note, for purposes of this Court's information, that Footnote 5 in *RTAA* indicates that the appellants there did not provide an

evidentiary or administrative record upon which the Fourth Circuit would be able to make a determination about elements such as the political committee status of the organization or about the major purpose of the organization. Nor did the appellants in *Real Truth About Abortion* go through and seek the administrative assistance of the FEC.

In our instance, we availed ourselves of the advisory opinion process. We provided a copy of the bylaws of the organization to the FEC. We provided detailed scripts of each communication that we wish to have communicated. We provided four donation scripts. We provided budgets about this.

What -- what Free Speech then encountered was this dizzying array of two hearings before the FEC, three contradictory draft advisory opinions to -- some indicating we're regulated, some not, you know, across different areas of law and, ultimately, two conflicting statement of reasons from three Democratic commissioners and three Republican commissioners, both standing in direct contradiction of one another. The FEC -- the Free Speech has now sat since February, being unable to speak out about these issues as a result of the regulations that have been challenged.

I'd like to move on to a second point of law; and, that is, beyond the category of speech that's regulated -- and here we're distinguishing between issue advocacy, express advocacy and electioneering communications -- that once we've

determined where those lines are, we also have to be cognizant of the fact that there are different sorts of disclosure regimes under the FEC's provisions. The FEC goes to great length in its reply brief to suggest that this is about mere disclosure, like, "This was upheld in *Citizens United*. What -- what's the complaint here?"

And the problem is, is that for purposes of independent expenditures, individuals who are not taxed, File Form 5 -- it's a fairly simple form that you submit to the FEC. It's about two pages. One you aggregate beyond $250 on an independent expenditure, you indicate who that money is for, in support of or defense or -- in terms of their candidacy, what type of communication and then who's paying for it.

That matches with the governmental interest that's been identified in *Buckley*, it's been identified in *Massachusetts Citizens for Life*, *Citizens United*, providing the electorate with relevant information about who's speaking and who's funding that speaking; but there's a completely different nightmare reporting regime, and that's called "political committee status," and that is the main thrust of the challenge here; and the FEC's reply brief, of course, conflates these two reporting regimes as if they were one.

In *Massachusetts Citizens for Life*, the Supreme Court looked at the spending and operations of a small nonprofit group that put out a mailer about their pro-life positions, and

it analyzed in-depth the political committee requirements that were going to be imposed on Massachusetts Citizens for Life; and it said, as a matter of law, that filing these one-time, simplified forms satisfied any governmental interest in providing information to the electorate about who's speaking; but once you go beyond that, once you go into the nightmare world of being a political action committee, that these were too tangential; they were too far from that interest, and they imposed too great of a burden to be able to be sustainable.

Now, as you move through *McConnell* and you move into *Wisconsin Right to Life* and *Citizens United*, *Citizens United*, although the FEC advocated it, rejected the PAC option. There you can see Justice Kennedy writing the majority opinion, indicating that PACs are very burdensome alternatives. They are -- have especially onerous demands on small groups, grassroots organizations who would speak out.

Now, the FEC has stated in its reply brief, "Well, you're -- Mr. Barr, you're speaking about burdens that existed before *Citizens United*, before *Citizens United* corporations were banned from speaking." There were criminal penalties and they couldn't solicit funds from their own membership. That's true but that's not what *MCFL*, Massachusetts Citizens for Life, or *Citizens United* was contemplating entirely.

Once you're a political committee, you have to appoint a treasurer. That treasurer has criminal liabilities under the

law. You have to file a statement of organization, any changes to that within ten days; disbursements in 12 different categories; receipts in ten different categories; any interest, dividends, rebates, loans that have been provided.

THE COURT: Sounds like a tax return.

MR. BARR: Not quite, I mean, because this is a monthly or -- or quarterly reporting. We were already regulated as a 527 for purposes of IRS tax compliance, and that's a very simple reporting regime. Here, we've got cash on hand, what type of affiliations have you had with other political committees, candidate committees, any cash in, cash out that is related there and in perpetual existence as a political committee until the FEC deems that you're not one.

This is why, you know, beyond the "corporate ban" issue and beyond the issue of whether you can solicit from your own members, there's a whole host of other organizational requirements that attach as a PAC that are far too burdensome for a grassroots organization to be able to sustain so that they can properly exercise their First Amendment rights.

In addition, once you're a PAC, you have to guard against any "foreign national" contributions. So any "foreign national" contributions that come in are potentially illegal. We know those are high-enforcement matters for the FEC and DOJ. We have to watch out also for any coordination. PACs cannot coordinate their communications with candidates.

So the distinction, in terms of providing a safe harbor and a protected area for groups that are not PACs, is important just as it's important to distinguish between "issue advocacy" and "express advocacy." These were the issues presented before the Court in *MCFL* and later in *CU* and have been upheld time and time again.

One week ago today, the Eighth Circuit, in an *en banc* review of Minnesota's similar system of political action committee requirements, noted that for purposes of preliminary injunctive relief that it is most likely that the Minnesota state system that mirrors what the FEC does was unconstitutional precisely because you can have disclosure and you can meet the governmental interest -- whether we -- whether we characterize that as being a "compelling interest" or a "sufficiently important interest," we can meet that in a least restrictive manner. What's the least restrictive manner for purposes of the FEC? It's Form 5. It's two pages. It's very simplified reporting for a small group.

We're not here to challenge disclosure in its entirety. We understand very well that -- through *Citizens United*, through *Buckley* and through a string of election law cases brought in the federal courts, that disclosure is proper when it is attendant to the correct type of speech, when you have effective boundaries that police that and when it is for the correct type of organization.

THE COURT: Your claim is that issue advocacy does not or is not or should not be subject to the regulations under the FEC?

MR. BARR: That is correct.

THE COURT: All right.

MR. BARR: And, you know, that's -- the Eighth Circuit brought up its example of two farmers. You know, if you have two farmers that want to go out and put an ad out and -- and to do so, it's fine to require the simple type of informational interests, easy form, fill out who you're spending for or against, how you're doing it and who's paying for it and get it in. Don't impose treasurer requirements. Don't impose monthly or quarterly reporting requirements, 12 different types of disbursements, ten categories of receipts and the like. These are -- these are far unrelated to any interest that the electorate has in information about this, and so we -- the courts have always struggled to protect those -- those boundaries, and that's why -- why we're here.

It -- it's amazing to me because, you know, we sought review by the FEC, and we have -- we have lawyers here defending half of the commission's position today. They are in defense of Draft B. I don't know that we have any lawyers in defense of Draft C. There isn't one standard. We have commissioners that see the sky black and blue, and all that we're asking and all that we think that the First Amendment

compels is that the FEC must be able to articulate a singular, uniform standard in each of these areas of laws that have been implicated so that average Americans are able to go out and speak. We believe the First Amendment demands nothing less.

Now, the last part of this component: You decide -- there's a dividing line between issue advocacy and express advocacy as well as electioneering communications; there's a dividing line between groups that are regulable under federal election law and not; and then, lastly, there's a question of solicitations.

In addition to the scripts that we put forward in terms of communications that we wanted to air, we also asked whether four "donation request" scripts were regulable as solicitations under the law. Why is that relevant? It's relevant because solicitations have to include specific disclaimers, and money that's raised as a solicitation can turn into a contribution which has to be treated differently under federal law.

Two of those the commission went in directly opposite manners on. We were able to receive no direct advice about it. And I just want to back up for a moment and -- and just work through two of the advertisements that we had proposed to air and apply what we frequently used in the past in terms of speech standards to -- to explain why there's a problem here. One of the ads -- and this was listed as "Script B" in our

Advisory Opinion Request, Environmental Policy, read: "President Obama opposes the Government Litigation Savings Act. This is a tragedy for Wyoming ranchers and a boon to Obama's environmentalist cronies. Obama cannot be counted on to represent Wyoming values and voices as President, in Italics, *this November*, end Italics. Call your neighbors. Call your friends. Talk about ranching."

Now, if you break the communication down, the first line discusses the Government Litigation Savings Act and the fact that President Obama opposed it. The second line is a reference that this would have helped Wyoming ranchers and would have helped -- would have been -- I'm sorry -- that this was harmful to Wyoming ranchers and would have helped Obama's environmentalist cronies.

The next line that -- states that Obama can't be counted on to represent Wyoming values and voices as President. It's an attack on his -- on his character. Then "*this November*, call your neighbors, call your friends." These are verbs, call to action. "Call your neighbors. Call your friends. Talk about ranching."

Now, during the hearing, one of the commissioners suggested that we not even run this ad; that her students had listened to it and had laughed about it and thought it was very funny, and -- and that "talk about ranching" couldn't mean "talk about ranching." It was an obvious non sequitur. Nobody

would be interested in that. We know what you really mean. You really mean that you want to vote against Obama.

But then you had another three commissioners who said, "Well, we don't have a clear plea for action here. What's going on? The plea that we see here, the verbs, are "call your neighbors, call your friends, talk about ranching."

And so if you look at the applicable regulation that we're using here -- it's 100.22(b) -- it asks that speech, when taken as a whole, with limited reference to external events such as proximity to election, could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidates because, one, the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and, two, reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action.

Now, we don't know, on the face of the regulation, exactly what these external events might be that could cause regulation nor were they articulated by the three commissioners who believed this was a regulable communication. We don't know what an "electoral portion" is nor were they -- nor was that articulated by the three commissioners who were in support of regulation here; but what we're told is that "there's a feel, you know. If you just look at it, we really know what you're

doing here." Now, the FEC will tell you this is based on what the Ninth Circuit ruled on in *Furgatch versus FEC*. *Furgatch* concerned an anti-Carter newsletter; and at the end of it, after discussing some issues that -- and, you know, it discusses the election. It talks about the choice of candidates, and it says, "Don't let him do it." And *Furgatch* has most of 1OO.22(b), but it has another element as well. It says that must include a clear plea for action. So they said, "You know, the only way to" -- "don't let him do it" means that you have to vote against him.

But where -- where you have speech that can be reasonably read to interpret another reading, we know that you can't have that to be regulable; and in the unfortunate trend of the FEC, as we pointed out in the verified complaint, as we pointed out in the PI memo, both as applied to us and as applied to previous speakers nationwide, is that it continues to grow and evolve the standard. The Patriot Majority enforcement matter says that they distill the meaning of what an expenditure is. It evolves in its meaning.

There is no way to pin down the FEC in an understanding of where the line between regulated and non-regulated speech might be. We think the First Amendment compels nothing less.

Another ad that we wanted to run was the gun control ad. It read: "Guns save lives" -- this is listed as

"Script A" in the advisory opinion. "Guns save lives. That's why all Americans should seriously doubt the qualifications of Obama, an ardent supporter of gun control. This fall get enraged, get engaged and get educated and support Wyoming state candidates who will protect your gun rights."

Now, to fall under the ambit of 100.22(b), we have to look supposedly at the communication as a whole, limited reference to external events like the proximity to an election and to decide whether this is the -- contains advocacy for the election or defeat of a candidate. Clearly, the last line of this advertisement, "support Wyoming state candidates who will protect your gun rights" -- three commissioners believed that no reasonable audience, no reasonable person could read that and believe that you were spending money on a communication dedicated to Wyoming state candidates who supported gun rights. Three believed that indeed the opposite was true; that you might just mean what you're saying.

Now, it's -- it's a curious thing because the FEC, of course, argued in the Fourth Circuit in defense of 100.22(b) and the similar provisions. There, Adav Noti said two things that are interesting and I think bear weight on this case as well, the most important of them being that the FEC said that 100.22(b) was essentially the same test as what you saw in *Wisconsin Right to Life*; and *Wisconsin Right to Life*, of course, includes a famous Footnote 7 where Chief Justice

Roberts says -- he is responding to Justice Scalia's concurrence, and he says, "You know, Justice Scalia thinks our test is impermissibly vague, but we have factors here that convene and control to make sure that it's not, and the last of those factors is that whenever there is a tie between 'regulation' and 'speech,' whenever we look at a communication and it could go one way or the other, that we must give the benefit of the doubt to the speaker, to the First Amendment, to freedom, not to the censor."

Now, before the FEC were several ads that went three to three; and if my math is correct, that's a perfect tie. If the FEC argued in the Fourth Circuit that Wisconsin Right to Life standards are the same as 100.22(b), then we should see the tie being awarded to Free Speech, not to the commission; but we don't and that's made clear through the administrative record that we pointed out here; that time and time again the FEC continues to go after groups in a "gotcha" fashion without any clear ability of giving notice and guidance to individuals, and you're -- so you're stuck at the mercy -- at the mercy of the FEC, and this is important because in *Citizens United*, you remember the Court said, "Look, when you develop a complicated system of federal election law where only the professionals can understand it, when you have to wade through 1,268 pages of regulations, some -- more than 500 pages of explanations and justifications for those and more than 1,700 advisory opinions

interpreting those, it's the functional equivalent of a prior restraint.

THE COURT: But that was with regards to the formation of a PAC.

MR. BARR: That was with regards to electioneering communications, yes; but they're speaking to the entirety of everything the FEC does which doesn't operate in isolation. So while we have electioneering communications, part of what the FEC was arguing there was indeed that we could set up a PAC. "You could do this; you could do that." And what the -- what the Supreme Court was saying was, of course, one, PACs are very burdensome alternatives, but that's not an adequate remedy; but, two, you've made it so complicated and so difficult that people, instead of trying to seek advisory opinions or go through this long process or to try to save up enough money to hire a boutique election law expert or high-end CPAs, they're going to stay home quiet, and we don't allow that in the United States; and so it properly struck the electioneering communication provisions there, but we shouldn't view that in isolation. I mean, the same First Amendment frailties that plagued the electioneering communication provisions extend over here in 1OO.22(b), in political committee status, in defining the "major purpose" test and what's a solicitation.

Now, admittedly, there's inter-circuit dispute over how this is going. I would suggest that the Fourth Circuit's

record, especially if you look to Footnote 5 in that opinion, indicates that the challenges there did not bring an "as applied" challenge discussing the "major purpose" test and "political committee" and couldn't show how this would hurt them.

If we look to *SpeechNow* which the FEC also cites, there that organization said that it would -- the entirety of its communications would be independent expenditures. So that's -- that doesn't present the same question under the law. If all of your communications are express advocacy, of course you have as your major purpose the election or nomination or defeat of a clearly identified candidate, and you don't have that issue before you.

When they're asked, "Will PAC burdens -- are they really burdensome," the answer is, well, no, not -- it wouldn't really be that burdensome for us. So you -- you have two -- two sets of records, both from the DC Circuit and the Fourth Circuit, that point to weak -- weak evidentiary records before the Court and no exhaustion -- well, at least in the case of *Real Truth About Abortion*, no exhaustion of administrative remedies.

We have most recently in the Eighth Circuit a very strong finding against imposing PAC burdens; and we know, of course, that the First Circuit in the Southern District of New York had looked at 100.22(b) and the attendant regulations

and said, not on constitutional grounds but under purely APA and statutory grounds, that the regulation 100.22(b) goes well beyond the statute as it has been construed and limited by *Buckley*.

And we're left with this mess today. We're here more than seven months past the time that we asked to get our speech out. During that time, of course, the Department of Labor issued draft regulations that would have prohibited children from doing common farm chores and ranching chores. We're unable to run our environmental policy ad that we would have liked to during that time. We have provided an amended verified claim, indicating our new course of action that we would like to do.

We believe that we're on solid, legal ground here to be able to speak freely without reporting and registering with the federal government under onerous PAC registration requirements; and we believe we're entitled to a simple answer, a simple answer about "is our speech regulated or not; are we a PAC or not; what's the 'major purpose' test and how do you apply it; and what's a solicitation."

Now, I would note, in the context of a preliminary injunction, ordinarily the burden would be on us, the movants, to advance this forward; but as *Ashcroft versus ACLU* and other cases from the Supreme Court have indicated, that where regimes implicate First Amendment interest, it is on -- the burden is

upon the government or the sponsor of that legislation to be able to illustrate why there is a sufficient or important government interest that upholds it and that it's carried out in the least restrictive means. I would submit that the FEC cannot do that.

I also believe that the remainder of the factors that go towards a finding of a preliminary injunction also weigh in our favor. We know, for example, from *Elrod versus Burns* that, you know, any time that free speech and First Amendment interests are shut down or trampled upon, that that undoubtedly constitutes irreparable injury, the second factor.

We also know, in terms of hardships and the balance of the hardships between the parties, that, of course, we want to preserve the status quo, but the status quo cannot be insanity and chaos. We have two dueling drafts: One that takes constitutional considerations very seriously and the other that leaves us open to hundreds of pages of enforcement actions, no definitions and no steady guidance; and I would suggest that Draft C and the Statement of Reasons from the Republican commissioners offers that bright-line guidance that we -- we and other speakers deserve.

Lastly, it's always in the public interest for people to be able to speak and to vindicate their First Amendment interests; and for those reasons, I would submit that injunctive relief is appropriate here. I would reserve the

remainder of my time for rebuttal unless Your Honor has any questions.

THE COURT: At this time I don't. Thank you, Mr. Barr.

MR. BARR: Thank you.

MS. CHLOPAK: May it please the Court.

THE COURT: Counsel.

MS. CHLOPAK: Your Honor, in *Citizens United*, an eight-justice majority of the Supreme Court held, in the clearest of terms, that the government has an important and constitutionally sufficient interest in mandating disclosures regarding the sources and financing of campaign advocacy.

Citing its earlier decisions in *Buckley* and *McConnell*, the Court observed that reporting requirements impose no ceiling on campaign-related activities and do not prevent anyone from speaking; and because *Citizens United* also eliminated restrictions on independent expenditures, Section 100.22(b) of the commission's regulations now only defines a category of "unambiguous campaign advocacy," the sources and financing of which must be disclosed to the public.

Similarly, for groups like Free Speech, the commission's methods for determining whether a group must register and report as a political committee and whether a request for donations amounts to a solicitation for contributions under the Act only facilitate disclosure

requirements. To be clear, plaintiff is free to run each of its proposed ads and more and to solicit and spend unlimited sums of money to pay for them. The only consequences that today flow from a group like Free Speech financing express advocacy are disclosure obligations that, in the words of the Supreme Court, "ensure that voters are fully informed about the person or group who is speaking and enable the public to evaluate the arguments to which they are being subjected."

The Supreme Court thus upheld disclosure requirements similar to those implicated here, notably even as applied to a ten-second commercial advertisement that merely mentioned the name of a candidate. So for "express advocacy" communications at issue under Section 100.22(b), the government's interest in ensuring public availability of information regarding the sources and financing of such advocacy is even stronger here than the interests that eight justices in *Citizens United* found to be constitutionally sufficient; and that is why the Fourth Circuit recently rejected the very arguments that plaintiff is making in this case and upheld the constitutionality both of Section 100.22(b) and the commission's policy for determining whether a group must register and report as a political committee.

Now, I would like to just take a moment to clarify a couple of statements that plaintiff made that were not accurate. I believe at one point plaintiff was highlighting

the recent Eighth Circuit decision by the -- the decision by the Eighth Circuit in *Minnesota Citizens Concerned for Life versus Swanson* and suggested that that decision is applicable here because the system at issue in that case, the PAC disclosure requirements, mirrored the federal requirements.

That's simply not true. In fact, the Eighth Circuit, in its decision, explicitly distinguished the federal requirements from the state requirements at issue in the Minnesota case. In two separate footnotes, the Eighth Circuit made this point. First, in Footnote 10, the Eighth Circuit cited the DC Circuit case in *SpeechNow* and noted that the law upheld in *SpeechNow* applies to far fewer associations in Minnesota's law. The Court also noted that the Minnesota law had a lower trigger of $100 for expenditures and that, most importantly, the Minnesota law, unlike federal law, imposes requirements on all associations.

To further hammer home the point, the Eighth Circuit, in a subsequent footnote, Footnote 11, noted that its holding regarding the requirement that any group that spent $100 on an expenditure formed what Minnesota law calls a "political" -- I think it was a "political fund" -- that the holding -- the Eighth Circuit's holding in that case did not affect Minnesota's regulation of political committees. So the holdings in that case have no bearing on the issues before the Court here.

In challenging the commission's major -- the -- excuse me. In challenging Section 100.22(b), plaintiff relies on some cases decided in the 1990s that were brought to challenge the constitutionality of that regulation. Those cases interpreted the *Buckley* standard as imposing a constitutional requirement that so-called "magic words" be used for express advocacy and that any communication lacking those words was unconstitutional.

What plaintiff ignores is that those decisions preceded the Supreme Court's subsequent decisions, first in *McConnell* and then in *Wisconsin Right to Life* and ultimately in *Citizens United*. In *McConnell*, the Supreme -- the Supreme Court explicitly rejected the notion that the Congress -- that Congress -- excuse me -- that the Constitution requires Congress to treat issue advocacy differently from express advocacy; and the Court upheld the regulation of -- of -- excuse me -- electioneering communications not only in terms of disclosure requirements, but as of *McConnell*, the Court upheld a prohibition by corporations and unions engaging in these -- making these electioneering communications.

Now, opposing counsel tries to draw this distinction between "electioneering communications" and "independent expenditures," and the commission doesn't dispute that they are different; but substantively, electioneering communications are a much broader category of communications than express

advocacy. Electioneering communications, within certain restrictions of time and media, are any communication that mentions the name of a candidate; and the Supreme Court, initially in *McConnell* and then in *Wisconsin Right to Life*, upheld not only regulation generally of these communications but prohibitions on corporations and unions making these types of communications.

In *Wisconsin Right to Life*, the Supreme Court made clear that regulation of the functional equivalent of express advocacy may -- may occur and that corporations and unions may be prohibited from financing communications that meet the "functional equivalent" test which the controlling opinion in *Wisconsin Right to Life* described as an ad susceptible of no reasonable interpretation other than an appeal to vote for or against a candidate; and, in fact, in *Wisconsin Right to Life*, the Supreme Court explicitly noted that in making a determination about whether an advertisement meets this test, one need not ignore basic background information that might be necessary to put an advertisement in context.

Finally, we come to *Citizens United* in which the Supreme Court made a final decision about the -- these prohibitions on -- these prohibitions on -- excuse me -- both independent expenditures and electioneering communications by corporations and unions and how that they were unconstitutional. The effect of that decision is that

Section 100.22(b) no longer implements any sort of ban on speech, and plaintiff's reliance on a couple cases preceding *Citizens United* that talk about the constitutionality of regulating such a ban have no place in what we're talking about today which is a regulation that facilitates disclosure.

The eight-justice opinion in Citi- -- the portion of *Citizens United* in which eight justices upheld the constitutionality of disclosure requirements specifically rejected a request by plaintiff *Citizens United* to limit that holding to add there the functional equivalent of express advocacy. What that means is that in *Citizens United*, the Supreme Court held that disclosure may be required not only for electioneering communications that meet the "functional equivalent of express advocacy" test; but even an ad, a ten-second ad that says -- a ten-second advertisement in the case of *Citizens United* for a movie that said, and I quote, "if you think you know everything about Hillary Clinton, wait until you see the movie" -- that ad could be subject to disclosure requirements based on public informational interest.

The Supreme Court observed the disclaimers and disclosure provide the electorate with information and ensure voters are fully informed about a person or group who are speaking. It recognized that transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. For this reason, the

Fourth Circuit, in the *Real Truth About Abortion* case, concluded that the "express advocacy" standard which facilitates disclosure was constitutional under -- under *Citizens United*'s upholding of regulation on such a broad range of communications for purposes of disclosure.

Now, of course it is true that the Wisconsin Right to Life test -- or the *Wisconsin Right to Life* case dealt with the context of electioneering communications; but what the controlling opinion said was that the test articulated in the controlling opinion was not vague; that it gave enough clarity to allow someone to determine what met that standard; and so when the Fourth Circuit compared the -- the test at 100.22(b) and the test articulated in *Wisconsin Right to Life* and noted the similarity of those ads, that constitutional holding in *Wisconsin Right to Life* is relevant to the determination --

THE COURT: There was one word different, "significant" and "substantial." That's the only difference.

MS. CHLOPAK: Well, actually, Your Honor, an additional difference that the Fourth Circuit noted was that to the extent there -- there was a more substantive difference, it was that the test at 100.22(b) is actually narrower than the *Wisconsin Right to Life* test because it requires an ad to contain an unmistakable and unambiguous electoral portion.

Plaintiff makes much about the fact that the commis- -- there was disagreement among the commissioners in

reaching conclusions about the particular advertisements and solic- -- and donation requests that were proposed in the underlying Advisory Opinion Request; but as the commission points out in its briefing, the Supreme Court has -- has held that close cases can be imagined under any standards-based test, and that problem is not addressed by the doctrine of vagueness. Those are the *Williams* and *Wurzbach* cases.

And I won't get into responding to the mischaracterizations of the analysis by the commissioners -- we've addressed that in our brief -- but I will clarify that opposing counsel mis-describes the analysis, the nature of the question that the commissioners undertake when making a determination about whether an ad constitutes express advocacy under 100.22(b).

The commissioners do not substitute themselves as the "reasonable person" referenced in the standard. Rather, they make a determination about whether the ad meets the test at 100.22(b). So whereas the commissioners or certain commissioners concluded that an ad did not meet the test at 100.22(b) does not necessarily manifest a determination by those commissioners that the ad does not contain express advocacy or that it could not be construed to contain express advocacy but, rather, it reflects their determination that a reasonable person might be able to conclude that the ad constitutes something other than express advocacy; and,

similarly, the commissioners determining that it does meet the test at 100.22(b) are not determining that in their view the ad is express advocacy but, rather, making a determination about what a reasonable person would conclude.

The Fourth Circuit itself, in the Real Truth About Abortion case, addressed the scenario where there may be disagreements among people -- among fact-finders regarding whether a -- whether a proposed communication meets the test because in that case there had been a disagreement between the commission and the district court about one of the ads proposed, and the Fourth Circuit itself cited the *Williams* and *Wurzbach* cases in recognizing that that disagreement did not demonstrate that the standard being applied was a vague one.

And I would further note that although there was disagreement among the commissioners as to some of the ads, there also was agreement among some of the proposed ads. So it's not the case that the commission was unable to agree on anything. There -- there was some agreement that some of the proposed ads -- there was a unanimous agreement as to some of the proposed ads that they were not express advocacy.

Congress created the makeup of the commission and made a conscious choice to appoint three commissioners of one party and -- or to set up a system where there can be no more than three commissioners of a particular party and requiring four votes to make any substantive decision, and this simply

reflects the seriousness of the issues that the commission regulates and frequently results in narrow decisions because it requires four votes for the commission to take any sort of action in enforcing the law.

I also -- I'm sorry. Moving back to the Wisconsin Right to Life case, the plaintiff cited the language in that decision about the tie going to the speaker, and that language is taken out of context when used by opposing counsel in this case. *Wisconsin Right to Life* just like *Citizens United* and *McConnell* and *Buckley* and cases that plaintiff -- the lower-court cases that plaintiff relies on all involved a situation in which a group was being prohibited from engaging in speech that it wanted to engage in; and although plaintiff repeatedly characterizes the consequences of this particular case as being "censorship" or "prohibition," it's simply inaccurate. Plaintiff, from the time that it created the advertisements it wants to run, has been free to run those advertisements. It simply must observe the disclosure requirements associated with them.

When Justice Roberts indicated that when there's a -- if there's a question about a -- excuse me -- when there's a question about a test that would result in prohibiting a group's speech the tie must go to the speaker, he was not talking about whether a disclosure requirement might apply.

THE COURT: Your position is that this only requires

them to disclose whether or not the decision or the tie -- in that situation, they were referring to a prohibition on speech itself, not just mere disclosure --

MS. CHLOPAK: Correct.

THE COURT: -- before you speak.

MS. CHLOPAK: That's correct and that's why the language that that statement compared the speaker versus the censor -- there is no censor in this case because plaintiffs are free to speak, and I think something --

THE COURT: But aren't they also exposing themselves to potential civil or criminal sanctions if they speak and don't -- and are found to have violated the election code?

MS. CHLOPAK: If they -- so -- let me take one step back. First of all, the commission does not have criminal jurisdiction over plaintiffs. So while it's true that there are criminal penalties for knowing and willful violations of the Act, the commission has no authority, no -- no criminal authority, and I'm not aware of any criminal cases brought for violations of the disclosure requirements; but it is true that plaintiff has an obligation -- to the extent that it's -- that it would be distributing express advocacy or that it's a political committee, it certainly would have disclosure obligations; and if it failed to meet those disclosure obligations, then, yes, it could be subject to civil penalties although I think the reality in this case is that, as I

mentioned, in order to bring an enforcement -- excuse me -- in order to bring an enforcement action, four commissioners need to agree to bring it. There's a multi-step process which we detailed in our brief that follows when the -- when there is a complaint brought against a party, and I'd be happy to briefly go over that.

THE COURT: Well, I just -- essentially what a three-three tie is, is you've got a green light because the enforcement mechanism or -- you have to have a four-three vote in order to sustain a violation --

MS. CHLOPAK: That's correct and we --

THE COURT: -- on an application.

MS. CHLOPAK: And certainly we can't make any guarantees that plaintiffs could never -- that the commission couldn't reach a different conclusion in the context of enforcement. The reality is that's probably very unlikely in this situation, at least with the current makeup of the commission.

THE COURT: But it's not a grant of immunity.

MS. CHLOPAK: It is not a grant of immunity. That's correct.

But I wanted to take a step back and just clarify that this standard that applies when we're talking about disclosure, which is what each of the challenged requirements results in in this case -- the standard for those types of laws is

"intermediate scrutiny," not "strict scrutiny," and that simply required that under -- under intermediate scrutiny, the law must be upheld if it is substantially related to a sufficiently important governmental interest. There is no "narrow tailoring" requirement. This is not strict scrutiny.

THE COURT: It's referred to as "exacting scrutiny."

MS. CHLOPAK: That's correct. It's an -- it's an intermediate level of scrutiny, but "exacting scrutiny" is how it is generally referred to in the decision.

As Your Honor, I think, pointed out, the language in *Citizens United* talking about a -- you know, a functional equivalent of a prior restraint indeed involved the prohibition on speech. The whole issue and not part of the opinion was that the PAC requirement -- both in *Citizens United* and in *MCFL* which plaintiff talks about -- in those cases it was not a requirement that that particular group comply with certain registration and reporting requirements. It was that the particular group could not speak unless they set up a separate -- a corporate PAC, and that was the only organization through which they could speak.

Those corporate PACs were, in turn, subject to a variety of requirements that do not apply to plaintiff or other groups in plaintiff's situation. Before *Citizens United*, corporations that could only speak through PACs -- those PACs were subject to various restrictions on sources that they could

solicit for contributions and the amounts that they could solicit from those sources. So they were substantially limited. It was an actual limitation on the amounts that the PACs could -- could raise for their speech, and it was an absolute prohibition on direct corporate speech.

What the Court in *Citizens United* said was that that PAC -- that those PACs were not an adequate substitute for direct corporate speech. Plaintiffs are not being required to substitute an alternative -- to provide a different organization through which to speak.

Okay. Following the Supreme Court's decision in *Citizens United*, several points are -- are clear and have been reinforced and made clear by a number of different lower-court decisions. As I mentioned, disclosure requirements are subject to intermediate, not strict scrutiny which requires a substantial relationship between the disclosure requirements and a sufficiently important interest.

The Supreme Court not only affirmed that principle in *Citizens United*, it reaffirmed it shortly after in a case called "*Doe versus Reed*," and it's been recognized by various lower courts in decisions since the Supreme Court's decision, including, I might point out, a Tenth Circuit decision called "*New Mexico Youth Organized versus Herrera*."

Courts have also recognized that PAC registration and reporting requirements are disclosure requirements that are

subject to that "exacting scrutiny" test. In *SpeechNow*, the Supreme Court specifically addressed a group similar to Free Speech that engaged only in independent expenditures. From what plaintiff has alleged, they don't intend to make direct contributions to candidates. All of the activities that they have outlined concern either making communications, a number of which some of the commissioners determined were express advocacy, and then raising money to finance similar communications in the future.

Again, the Tenth Circuit recognized that PAC registration or reporting requirements are disclosure requirements; and a number of courts, including *Citizens United*, have similarly recognized that the government has a substantial interest in providing the public with information about who is speaking about a candidate and who is funding such speech.

Now, plaintiff hasn't said very much about the "major purpose" test although it focused on it significantly in its brief; but I would just point out that the commission does employ a "major purpose" test as required by the Supreme Court; and the Supreme Court, in announcing that a group is only a political committee if, in addition to making either $1,000 in expenditures or receiving $1,000 in contributions, it has the major purpose of nominating or electing a candidate -- in announcing such a requirement about "major purpose," the

Supreme Court mandated an inherently comparative test. Plaintiff itself has acknowledged that determining political committee status -- determining a group's major purpose is often -- often requires a fact-intensive inquiry; and the commission's approach to determining "major purpose" has been upheld both under the Administrative Procedure Act and under the -- under the Constitution, and that approach is consistent with Tenth Circuit law which requires -- which requires that a political committee have a major purpose of nominating or electing a federal candidate and noted that that purpose may be determined by examining the organization's central organizational purpose.

In concluding that plaintiff was a political committee and would need to register, the draft that plaintiffs are challenging found that 72 percent of plaintiff's budget would be spent on express advocacy.

Now, in talking -- I'm going to move on to solicitations. When plaintiff was talking about solicita- -- when opposing counsel was talking about the solicitation standard, I believe he said something about their contributions are treated differently if they're deemed -- if their donation requests are deemed solicitations.

I'm not quite sure what he was talking about because since Free Speech is not making contributions to candidates, they are free to raise -- to solicit unlimited funds to pay for

expenditures in unlimited amounts of money. So those -- the contributions received for -- as a result of solicitations remain subject -- not subject to any sort of limits.

And the Surviv- -- it's also not entirely clear what the dispute between the parties is regarding solicitation because both the commission and plaintiff appear to rely on the same standard, the test articulated by the Second Circuit in the *Survival Education Fund* case, which, when concluding that the request at issue in that case did solicit contributions, noted the important interests served by disclosure in the context of solicitations. The Second Circuit said, and I quote, "Potential contributors are entitled to know that they are supporting an independent critic of a candidate and not a group that may be in league with that candidate's opponent."

Finally, I would like to briefly address the other aspects of plaintiff's requests for preliminary injunctive relief. Plaintiff has failed -- has utterly failed to meet the requirement for showing irreparable harm. What they seek to avoid in this case are the costs and time -- the costs of time and money to comply with the registration and disclosure requirements. They have not alleged any loss of -- actual loss of First Amendment freedoms. They simply characterize the disclosure requirements as "First Amendment burdens" which they have no support -- no -- no legal support for that argument; and in terms of the balance of harms, the notion that

plaintiff's harms of above -- having to comply with disclosure requirements versus the harms of the public in being deprived of information regarding the sources and financing of the people who are advocating that they vote for or against a candidate is somewhat shocking.

In *McConnell*, the Court noted that the plaintiffs in that case were ignoring the First Amendment interests of the citizens seeking to make informed choices in the political marketplace. In the Ninth Circuit, in another case following *Citizens United*, the Court observed that for the same reasons plaintiffs have a heightened interest in speaking out about candidates now, in the run-up to the November 2012 election, voters have a heightened interest in knowing who is trying to sway their views on candidates and how much they are willing to spend to achieve that goal.

And to the extent that plaintiff asks this Court to issue a nationwide injunction not only to them- -- not only as to themselves but as to every party in every court throughout this county, such a request is utterly unfounded and asks this Court to abuse its discretion.

The very case that -- that plaintiffs rely on, the Fourth Circuit decision in *Virginia Society for Human Life*, which on the merits was overruled by the Fourth Circuit decision -- the recent decision in *Real Truth About Obama*, found that the district court had abused its discretion in

issuing a nationwide injunction as to the constitutionality and enforceability of Section 100.22(b). It's well settled by the Supreme Court that injunctive relief should be no broader than necessary to provide complete relief to plaintiff, and they simply make out -- they fail to make out any basis for demonstrating that they require such over- -- such broad relief.

Nationwide relief would also violate fundamental principles of judicial comity and *stare decisis*. Particularly in this case where another circuit has decided precisely the issue that -- the issues presented here for itself, the notion that plaintiff wants this Court to make the law for other circuits is not supportable.

And lastly, the request that -- the request that the commission be precluded from litigating this case in other circuits which have the right to decide these matters for itself would preclude the Supreme Court from having the benefit of various decisions from all of the different circuits.

For all of those reasons, the commission submits that the challenged provision should be upheld.

THE COURT: All right. Thank you, counsel.

THE CLERK: Mr. Barr, you have 30 minutes remaining.

MR. BARR: Thank you.

No grant of immunity indeed. It takes four votes for an enforcement action, of course, to occur. Five of the six

commissioners are holdover commissioners whose terms have long expired. Commissioners come and go. We know in -- we don't know in advance who's going to be replaced when, what method of interpretation they might attach to, of the many seeds that exist, the many varieties that exist within the FEC's record. That is why we are a nation of rules, not of men, and that is why we seek the protection here.

Now, sometimes the FEC forgets that it's lost all of its cases. You know, the challenge to *McConnell* was a broad facial challenge when it was first brought before the Supreme Court; and while the *McConnell* court created the "functional equivalent of express advocacy" test, the case came back in the form of *Wisconsin Right to Life* where the Supreme Court said, "Okay, yeah. You know what? You've actually demonstrated real harm here in an 'as applied' manner. We're going to give the FEC another chance. We'll give it an opportunity to redefine the standards that apply to what's a regulated electioneering communication and what isn't; and be on notice, FEC. No long, complicated tests; no searching for intents and effect. None of this is permissible."

What happens? The FEC issues rule-making that creates a two-prong, 11-factor speech code that asks such questions as: Is the speech in question looking at the character, qualifications and fitness of office for the candidate; and, if so, how do we sniff out and decide whether that's regulated or

prohibited or not? And it continued down its trend of examining the intent of speakers, what reasonable audiences might think of the speech and the like; and, finally, in *Citizens United*, the Supreme Court said enough was enough, and they struck it down facially.

Now, it's curious because in *Citizens United*, the FEC argued, "There's no ban." I don't think the FEC has ever seen a ban. In most of their litigation, they are very keen to -- to explain, "There's no ban here." Since *CU*, the argument was, "Well, corporations can make PACs; and so long you have PACs, you can go through the PAC organization, and you're sufficiently able to speak."

Now, it shocks me to hear in this courtroom today that I -- that my organization, the Free Speech that we're representing, can go out and speak freely. Well, but not really. You have to be a PAC. Of course, the Supreme Court said it was a ban in *Citizens United* when you had to create a PAC to speak, and we're told we can speak today but only if we're a PAC; and Justice Kennedy noted in *Citizens United* that PACs have to preexist before they can speak; and indeed the reporting obligations of PACs indicate that you'd better have your record-keeping in place as a PAC before the FEC finds out that you are one in order to preserve your legal protection.

So let me get back to this important distinction between "electioneering communications" and "independent

expenditures." The reason why we have a "functional equivalent of express advocacy" test that was applied in *McConnell* is because you have a wholly different statute that's at bay. I indicated in our verified amended complaint and in the PI memo all of the constitutional concerns that the Congress undertook when it was considering the electioneering communications provisions, and they are very careful not to link it as an expenditure. We know that -- as a matter of law, that you're either an electioneering communication or that you are an independent expenditure. We know that they have very different reporting regimes; and this curious problem happens, and it was brought up both in the two hearings on this matter; it was brought up in the hearing for another organization, National Defense Committee.

Well, if the test -- if the "speech trigger" test that you have to rely on to know what kind of speech you have is identical for an electioneering communication and independent expenditure, how do I know which reports to file? How I do know how to comply with the law? There is no sensible way. You -- they are mutually exclusive. You are one or the other.

Now, moreover, in *McConnell*, when the courts interpreted the electioneering communications provision, it noted a few things: One, PACs don't file electioneering communication reports. These are simplified, streamlined reports. Number one, you only file these when you hit an

aggregate amount of $10,000. It's not the 1,000-dollar expenditure limit that you have with independent expenditures. So you're at $10,000.

Speakers know up front if you name a candidate you're within that category. They know the media that they have to communicate through: Television, radio and the like; and they can look to the FEC for clear guidance because it indicates the number of electorate that that advertisement has to reach.

These are all careful, statutory and constitutional considerations that Congress undertook in fashioning electioneering communications. So the Supreme Court said, "Because it's so rigorously defined, we can have a broader standard defining what's in there because we have all these safeguards."

But now let's -- let's go over to 100.22(b) and express advocacy. There is no clear "day" specification whereas in ECs we have a 30- or 60-day trigger. All we know is that proximity to an election might trigger regulation. Now, in this case during the oral hearings before the FEC, one commissioner suggested that that might be 30 days. The vice chair suggested that might go out as far as six months or eight months. We have no guidance.

We know that we have to ask what a reasonable person would see that speech to be and how they would interpret that. We have to look for an electoral portion; and when Draft B,

issued by the Democrat commissioners, goes through this test, it simply recites: "Because there is an electoral portion, we find that the regulation" -- it's -- it's a tautology. We don't know what that -- we don't know what that means. Reasonable minds couldn't differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates; and it misses the constitutional safeguard that was found in *Furgatch*. It has to have a clear plea for action; and -- and if reasonable minds can disagree about it, then it has to escape the regulation.

There must be some class of speech that is beyond the FEC's reach. If I love Jello and I want to run ads about Jello around the United States, presumably it's not covered under the FEC's regulations. Mention a candidate or start to throw other elements in, we don't know; and we've got a clear split on at least three of our -- the advertisements that they were -- that were crucial for issues that they wanted to get out and talk about, and -- and we don't know: Are we express advocacy? Are we electioneering communication? That matters greatly because that -- there are entirely different reporting regimes, and we have very real civil penalties if we get that wrong. The FEC should be able to articulate that.

There should also be some category of speech that isn't regulated. That's issue advocacy. Now, this isn't -- this isn't anarchy. This isn't lawlessness. This is what's

happened in every area of First Amendment jurisprudence. So if you look at, for example, film licensing provisions, if you look at obscenity licensing provisions, Bantam Books, *Intercircuit State (sic - Interstate Circuit) versus Dallas*, these are -- there were systems that didn't ban speech, if we accept that as true from the FEC, but merely classified it. Even there you have to have strict procedural safeguards and objective boundaries.

Defamation is the same. All these areas have carefully narrowed the boundaries of where regulable or prohibited speech is at so that innocent speakers don't get caught up in government bureaucrats, as the *Citizens United* court said, pouring over every bit of the communication to decide, "Gosh, does -- does 'support Wyoming state candidates who will protect your gun rights' really mean 'support Wyoming state candidates who will project your gun rights?'" This is absurd.

Burden? It's not my characterization that this is an onerous burden; this is M*assachusetts Citizens for Life* which, as far as I am aware of, has not been overturned through *Citizens United*; and while one justice who dissented in *Citizens United* would state that *Buckley* and other provisions have been overturned, his opinion is not controlling; it's a dissent. *Massachusetts Citizens for Life*, both the majority and O'Connor joining in the majority, indicate that it's not

just the fact that a corporation can't speak or solicit from its members. It's all of these other host of regulatory burdens that get piled onto grassroots groups and that encourage them not to speak; that effectively shut down speech.

Sure there's an interest in disclosure. I've already identified that as being Form 5 by the FEC, two pages, very simple. It is in perfect parity with the government interest of disclosure. It provides information: How much are you spending in any aggregate over $250, for what candidate, in what race and in what manner? Seems to me that's sufficient for explaining to the electorate who's speaking, who's funding the speaking. You have to provide information on the contribution side: Who gave money to the group to do that?

We are not here to fight that. That's -- that is -- that's been upheld and we're in agreement; but once you move over into "Form 3" land which is "nightmare political committee status" land, you're subject to a whole wide regime that *MCFL*, *Mass. Citizens for Life*, recognized and that Justice Kennedy recognized in Citizen- -- there in the majority opinion. So what these -- these organizational requirements fall most heavily on nonprofit, grassroots groups, and they severely discourage them from going out to speak.

Let me just note that once you're in "PAC" land again, once you're in a "political committee status nightmare" situation, the FEC has issued, for example, guidance on "best

efforts" on how to comply with election law. This directs people towards professional actors. So if you're using someone that -- you know, a part-time-mom CPA to help you keep your books and records, that's not going to meet necessarily the FEC's "best efforts" requirements. You have to go to the professionals. You have to dole out serious money.

This is what *MCFL*/what *CU* was talking about. Sure we're happy to provide that information, sure we're happy to comply with Form 5; but there is in no way a justification to impose the staggering amount of paperwork, organizational requirements and going to the political professionals to meet that standard. In other words, there are manners that are less restrictive that carry out the same government interest whether you qualify that as "sufficiently important" or "compelling."

THE COURT: Aren't what you are advocating seeking to expand *Citizens United* to also prohibit the requirements upon your clients, the Form 3, and claim that the Form 3 essentially acts like the PAC that was discussed in *Citizens United*?

MR. BARR: It's not expanding *Citizens United* because *Citizens United* spoke to the issue of "electioneering communications." This is taking what the Supreme Court said in *Buckley* and in *MCFL* and is following that. As far as I know, we're the first organization that has brought a record before the Court that indicates we've gone through the advisory opinion process. We've shown how discriminatory and arbitrary

that is, applied to us and as applied in other enforcement matters before us. So I don't see it as an expansion there.

I also see that we're safeguarding the governmental interest in disclosure because we're not objecting to Form 5 that provides -- that has been the longstanding manner in which we meet the government interests for disclosure.

THE COURT: But when you talk about the mom-and-pop organization, the grassroots organization doesn't have the resources to be able to fill out the Form 3, isn't that analogous to the argument that was made with regards to the PAC or the comments --

MR. BARR: Yes.

THE COURT: -- by Justice Kennedy?

MR. BARR: Yes, it is. And -- and what I would suggest is that the constraining First Amendment principles, just as we find them in defamation, just as we find them in licensing systems, just as we find them in an electioneering communications case, aren't entirely limited to that specific regime. What didn't work in *Citizens United* doesn't work here as well.

Now, counsel for the FEC spoke to *MCCL*, *Minnesota Concerned Citizens for Life*, in an attempt to distinguish it there. It is true that there is a difference of a -- 100-dollar threshold difference. There, you're looking at a state's reporting regime. Here, we have a nationwide reporting

regime with, you know, many organizations spending hundreds of thousands of dollars that have an effective media campaign. Setting $1,OOO for a national reporting regime versus 1OO for a state is a distinction without a difference for purposes of this.

What was important and crucial to the Eighth Circuit was to go through -- and it took several pages in providing analogies between exactly how similar their provisions were in *Minnesota* with the FEC's and that it was entirely fine to require you to fill out one-time forms like you might do with Form 5 but that there was no -- that these extensive PAC requirements went beyond that interest and were, at best, tangentially related.

That's the same thing here. We're -- we're not objecting to an easy, objective form to fill out and file with the FEC. We're objecting to the mountain of paperwork and organizational requirements and pushing everything to -- to political professionals on the other end.

Now, I'd note that counsel also spoke to Tenth Circuit precedent. So we have both *Colorado Pro-life Council* (sic - *Colorado Right to Life Cmte. v. Coffman*), and we have the *New Mexico Youth Organize*. In both of those instances, the Tenth Circuit found that there was no need to impose political committee status. It recognized the burdens that attached with that to those organizations even when they use strong language.

If the FEC is bound by its representations in the Fourth Circuit, that -- Adav Noti also indicated that the Tenth Circuit has the strictest "major purpose" test in the nation. I would agree with that assessment.

A moment on solicitations. The solicitations defining clearly what are solicitations and what are not is important because, at least for some commissioners, a solicitation may turn funds that are raised under it into contributions; and we know that those -- once you hit $1,000 in contributions, you become a PAC. So we want to -- we want to have guidance to know where's the standard for what we can say in terms of raising money that's outside of it and what's within that boundary.

We know that once then we hit that "PAC" status, that we can't accept money from foreign nationals, for example, and that we have to be careful for other legal provisions; but it is relevant here because one -- one standard implicates a whole host of others, and we just want to know: Are we in; are we out?

Lastly, speaking to nationwide relief, the fear here is -- is this simple: First Amendment jurisprudence is very different from a whole host of other areas of administrative law and other constitutional concerns. The Supreme Court has commonly referenced the fact of the tale of the Sword of Damocles. The *Sword of Damocles* is -- is the metaphor for

vague and uncertain laws hanging above speakers throughout the nation, and the value in that sword is not that it drops and cuts off heads or creates imminent injuries but that it can do so and that it creates disincentives for people to speak because they don't understand the law, they have a commission that's wildly erratic and chaotic in applying it and cannot articulate a single standard by which the plaintiff is expected to comply; and so because of that, what the Supreme Court has traditionally recognized is that we need breathing room around the First Amendment, not just for Free Speech but for other similarly situated organizations nationwide. This is *jus tertii*, third-party standing, and it's implicated both in vagueness concerns and in overbreadth concerns.

In *Citizens United*, the Supreme Court, Justice Kennedy writing the majority opinion, you know, indicated that where a proper "as applied" challenge has been brought, it's entirely permissible if there is absence of legal foundation for that provision and implicates First Amendment interest to have a facial remedy, and -- and this *Broadrick versus Oklahoma* and traditional First Amendment areas.

In order to secure breathing room, a nationwide injunctive relief provides that remedy. It shouldn't be incumbent upon my other clients in Virginia or a veterans group who went before the FEC, asking for guidance in that matter, who again got a three-three split, to bring a lawsuit that's

expensive and takes their time and may not even be able to do so or for a Christian pro-life group on the west coast to do a similar thing and to shut that all down.

Now, there's no -- there's no -- there's no disrespect for judicial comity in doing so. I mean, that's why we pointed out, in our brief, cases that involve, for example, national terrorism provisions and the Communications Decency Act. The fact of the matter is, is that where regulation runs so far afoul of the Constitution or is beyond the statutory grant of authority to the agency in question, it should be invalidated as a matter of fact in its entirety.

The Fourth Circuit -- it's important, as I noted, that in the Fourth Circuit, if you address Footnote 5, the appellant there did not seek the administrative remedies of the Court, but they say, "You know, you can't make a showing that the commission would apply this in discriminatory or different ways. You haven't done -- we don't have that here. It's not before us. You haven't shown how it's been done to other organizations."

So in that sense, fine. The Fourth Circuit had a bare record, and it didn't have that administrative provision of history that we bring before this Court. So there's no contradiction between those two. So --

THE COURT: But doesn't the absence of a record in that situation simply go to the facial challenge -- or the "as

applied" challenge as opposed to a facial challenge?

MR. BARR: It does, mm-hmm.

THE COURT: So the absence of a record as to what they sought would limit the Fourth Circuit -- or distinguish the Fourth Circuit from deciding whether "as applied" in this case would have application.

MR. BARR: Well, let me -- let me just add a caveat to -- to my prior answer; and that is to say, by failing -- by *Real Truth About Abortion* failing to provide an example of other organizations who have tried to survive the enforcement process, there's little basis for the Fourth Circuit then to be able to say, "Well, look, wow, this is going in contradictory manners." So that would -- that would supply the correct record for the Fourth Circuit to be able to make a finding of the facial invalidity. It would certainly strengthen that -- that matter; but it also spoke more strongly to the "as applied" nature of the challenge, correct, Your Honor.

Okay. So where we're left: You know, we're left with the whim of the FEC deciding what speech is appropriate for public consumption and -- and what is not. It's exactly what was invalidated in *Citizens United*. We're told that we can speak today just so long as we're willing to disclose; but we've already indicated, in terms of independent expenditure, we're willing to do Form 5. If we have an electioneering communication, once we hit the 10,000-dollar aggregate limit,

we're willing to file that as well; but the FEC cannot tell this Court, because it's only representing one of -- one block of the commissioners' views, not the other, what that standard is. It just says, "Just -- just comply. There's no problem here." But *Massachusetts Citizens for Life*, not my characterization, *Massachusetts Citizens for Life* Court's characterization -- these are onerous and severe burdens placed on grassroots groups, and they shut them down, and we need them nationwide. We need a firm line of demarcation between express advocacy, issue advocacy and electioneering communications. I believe that Draft C has provided that to this Court along with what we provided in our preliminary injunctive memo. We need a line that provides objective guidance as to political committee status. That, too, is met in Draft C.

We also need a line defining the "major purpose" test, which is strict in the Tenth Circuit, and solicitations; and for these reasons, I believe that nationwide injunctive relief should be applied not just to Free Speech's operations but of similarly situated groups; and if there are no further questions, Your Honor, I'll conclude.

THE COURT: All right. Thank you, Mr. Barr.

MR. BARR: Thank you.

MS. CHLOPAK: Your Honor, would it be possible for me to respond to a few of opposing counsel's points? I'd be happy to let him have the last word. I'm not sure if we've used up

all our time.

THE COURT: How much time does she have?

THE CLERK: She has 30 minutes remaining.

THE COURT: All right. I will allow you to briefly respond, and then I will -- and I'll give equal time to Mr. Barr because he has the last word.

MS. CHLOPAK: Thank you, Your Honor.

Opposing counsel has suggested that his client is not clear on whether it's supposed to be filing electioneering communications report- -- reports for electioneering communications or independent expenditures, and I would just like to clarify that there have been no -- in the advisory opinion process, there were no questions raised about whether any of the communications were electioneering communications; and, more importantly, none of the proposed communications would appear to meet the Tenth -- the test for commun- -- for electioneering communications. Plaintiff has not alleged that it intends to spend $10,000 on any of its communications. So the question of whether its proposed ads fall -- would be independent expenditures or electioneering communications is not an issue in this case because, among other reasons, they couldn't be electioneering communications.

Again, the Eighth Circuit decision, as I mentioned in my initial response to opposing counsel's argument -- Footnote 11 of that case points out that "associations whose

major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question" -- which is the standard in Minnesota for political committees -- "would still comply with the same essential requirements because they are political committees. Our holding does not affect Minnesota's regulation of political committees."

So the notion that Minnesota -- that the Eighth Circuit decision protects groups from having to comply with the various requirements -- the registration and reporting requirements for political committees is not accurate. What that case decided was that -- a separate requirement that required -- a separate provision that required groups that did not have -- that did not meet any sort of "major purpose" requirement, that simply spent $100 with no other demonstration of their purpose, had to register as a political -- political fund, and the Court found that that -- did not uphold that requirement; but where a "major purpose" test existed, that requirement was upheld, and that is a provision that's more analogous to the federal -- the federal law.

The DC Circuit, sitting *en banc* in *SpeechNow*, specifically upheld the requirements that plaintiff is seeking to avoid for political committees. The Court held, and I quote: "We cannot hold that organizational and reporting requirements are unconstitutional. If *SpeechNow* were not a political committee, it would still have to report

contributions made -- it would not have to report contributions made exclusively for administrative expenses, but the public has an interest in knowing who is speaking about a candidate and who is funding that speech no matter whether the contributions were made towards administrative expenses or independent expenditures."

The Court recognized that money is fungible; and where a group has a major purpose of engaging -- of nominating or electing federal candidates, that disclosure and the reporting requirements are constitutional.

And lastly, the focus on the Fourth Circuit as not relying on a record really ignores a fundamental holding in that case regarding what plaintiff is challenging here which is the commission's approach to applying the "major purpose" test. The Fourth Circuit stated, "Although *Buckley* did create the 'major purpose' test, it did not mandate a particular methodology for determining an organization's major purpose. The commission was free to administer the Federal Election Campaign Act political committee regulations through individualized adjudications," and what the Court concluded was that the commission had good and legal reasons for taking the approach it did. So it did -- that decision includes a specific and clear holding regarding the constitutionality of the commission's approach to determining "major purpose."

Thank you.

THE COURT: Thank you, counsel.

Mr. Barr.

MR. BARR: I'll be brief, Your Honor; and with your indulgence, I would simply like to read one portion from the hearing. I ordinarily strive not to do that.

THE COURT: Go ahead.

MR. BARR: During the April 12th open meeting of the Federal Election Commission, Commissioner Magan asked: "Here's the question I have for you though. The Supreme Court treated *Hillary: The Movie* as a prohibited electioneering communication because it came within the test. It came within the 'appeal to vote' test, thus was the functional equivalent; and the issue is whether or not they could prohibit that, an electioneering communication. If 'appeal to vote' and 100.22(b) are the same thing, then the movie also comes within (b). If it comes within (b), then it makes it an expenditure, but the Act says it can't be both an expenditure and an electioneering communication.

"So which reporting regime are you subject to? And assume for the sake of argument that the draft is correct that both those ads come within the 'appeal to vote' test as articulated by the U.S. Supreme Court and are the functional equivalent of express advocacy. Is it an electioneering communication per the Supreme Court or an independent expenditure per Draft B?"

There are real issues here being real-world compliance issues of understanding "how do we comply with the law." We're not seeking to be renegades. We're not seeking to be anarchists. We would like a clear standard from the FEC by which to be able to plan our actions. We believe there are boundaries to its authority and jurisdictions, and so that was raised in the -- in the hearing, and it was an issue in play.

Second -- but it's -- certainly it's true that the Eighth Circuit had political funds and political committees, and we'll leave it to Your Honor to review that case in its entirety; but when the Eighth Circuit was analyzing the provisions, they -- the wide-ranging, "encompassed all organizations' political status" that was at issue there was deemed to be similar to the FEC's provisions.

Now, *SpeechNow*, which, is entirely true, upheld the PAC requirements, is not, in any way, an apposite to this case. Counsel, in oral argument before the DC Circuit, said -- agreed all of their speech were independent expenditures. By definition, if all of your speech expressly advocates the election or defeat of a clearly identified candidate, then you have, as your major purpose, that, and you may properly be subject to the PAC requirements. We're not -- we're not challenging that.

They also said that -- for their organization that they didn't think there was any particular PAC burden. So

records are important. They're -- they're dramatically important, and that goes to my last point in distinguishing the Fourth Circuit about "the record doesn't matter/is it -- is it relevant." Sure, sure it is. It's absolutely imperative.

McConnell versus FEC, a broad-brush attack is brought against McCain-Feingold in electioneering communication provisions; 100,000-page record is developed and goes through. The Supreme Court says, "Not enough facts, not enough proof here, come back, show us something more compelling."

We get to *Wisconsin Right to Life*, and there we see the Supreme Court say, "Well, okay. We got a new record here; and based on the facts that you've presented, we do believe it's appropriate for an 'as applied' challenge, and we're going to give the FEC another shot. Don't do all these horrible things, create long and complicated speech codes and entrap citizens within these murky tests."

Well, then we come back to *Citizens United* with yet a further record illustrating why the whole system has to go. So -- so records and how you exhaust your administrative remedies and what you present before the Court are absolutely relevant and do enable this Court to be able to distinguish its ruling from both the Fourth Circuit and *SpeechNow*.

So unless there are any questions, I will conclude my session.

THE COURT: All right. Thank you, Mr. Barr.

MR. BARR: Thank you, Your Honor.

THE COURT: Well, counsel, you are obviously much more familiar with this area of the law. I have to confess this is my first FEC challenge, and there is certainly good advocacy on both sides of the issue, and I appreciate the briefing.

The Eighth Circuit decision -- you filed a notice of supplemental authority on that, but I have been in trial this week and haven't had an opportunity to go through that and peruse it as well as some additional matters that you've raised in your oral arguments. So I will take the matter under advisement.

I am cognizant of the fact that this is a matter that deserves quick attention, given the timing and given the issues presented. So I will do my utmost to render a timely decision. We'll stand in recess at this time. Thank you.

THE CLERK: All rise. Court will stand in recess.

(The proceedings conclude at 4:54 p.m.)

REPORTER CERTIFICATE

I, JAMIE L. HENDRICH, Official Federal Court Reporter in the United States District Court for the District of Wyoming, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

___09.16.12____ _____/S/_____
Date **JAMIE L. HENDRICH, CSR-RPR-CRR**
Official Federal Court Reporter

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