UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THE HISPANIC LEADERSHIP FUND, INC. P.O. Box 23162 Alexandria, VA 22304, Plaintiff, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	Civil Case No. **PLAINTIFF'S MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION** **EXPEDITED RELIEF REQUESTED** **ORAL ARGUMENT REQUESTED**

The Hispanic Leadership Fund, Inc. ("HLF") moves for a preliminary and permanent injunction against Defendants to enjoin them from enforcing (a) 11 C.F.R. § 100.17 ("clearly identified" candidate definition), (b) 2 U.S.C. § 431(18) ("clearly identified" candidate definition), (c) 11 C.F.R § 100.29 ("electioneering communications" definition), (d) 2 U.S.C. § 434(f) ("electioneering communications" definition) as applied to HLF and its intended activities, as set out in the Verified Complaint. This motion is made on the grounds specified in this motion, Plaintiff's brief in support thereof, the Verified Complaint, the Exhibits attached to the Verified Complaint, and such other and further evidence as may be presented to the Court at the time of the hearing.

Further, Plaintiff moves this court for an expedited and consolidated preliminary and permanent injunction hearing pursuant to Fed. R. Civ. P. 65(a)(2), and a waiver of the bond

requirements under Fed. R. Civ. P. 65(c). Plaintiff respectfully requests oral argument at the hearing because of the complexities and the important constitutional rights involved in this case.

Dated: July 30, 2012

Respectfully submitted,

By: /S/Matt Dummermuth

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**Motion for pro hac vice admission pending*

Counsel for The Hispanic Leadership Fund, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 30-31, 2012, copies of the foregoing Motion for Preliminary and Permanent Injunction were served by hand delivery and certified mail on the following parties:

VIA HAND DELIVERY
Federal Election Commission
999 E Street, NW
Washington, DC 20463

And

VIA CERTIFIED MAIL
Attorney General Eric H. Holder, Jr.
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And

VIA HAND DELIVERY
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MATT DUMMERMUTH

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THE HISPANIC LEADERSHIP FUND, INC. P.O. Box 23162 Alexandria, VA 22304, Plaintiff, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	Civil Case No. **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The Hispanic Leadership Fund, Inc. ("HLF") requests that this Court issue a preliminary injunction enjoining the Defendant from applying the electioneering communications disclosure and disclaimer requirements of the Federal Election Campaign Act of 1971, as amended ("FECA"), to HLF's proposed communications. HLF's proposed advertisements do not "refer[] to a clearly identified candidate for Federal office," and in the absence of such a reference, an advertisement cannot, by definition, be an "electioneering communication" subject to Federal Election Commission ("FEC") regulation.

This case is not ultimately about what might be the best or preferred scope of coverage for federal reporting and disclosure requirements, but rather, what the federal law currently does cover, and what it may properly be construed to cover under applicable First Amendment precedent. HLF does not, in this matter, challenge the constitutionality of the electioneering communications provisions. Rather, HLF seeks clarity on what constitutes a reference to a "clearly identified candidate," which is one of the four statutory elements of an "electioneering communication" under the law and a prerequisite to invoking its corresponding disclosure and reporting requirements.

In *Buckley v. Valeo* the United States Supreme Court emphasized that a reference to a "clearly identified" candidate must be explicit and unambiguous. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (holding that "[t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608(e)(2) requires that *an explicit and unambiguous reference* to the candidate appear as part of the communication") (emphasis added).

An organization called American Future Fund ("AFF") sought an advisory opinion from the FEC on whether certain proposed advertisements containing various terms and phrases constitute references to a clearly identified candidate for Federal office, including: "the government;" "the administration;" "the White House;" and unidentified audio clips of Barack Obama and the White House Press Secretary speaking. HLF wishes to air materially indistinguishable advertisements. HLF believes that none of its proposed communications "refers to a clearly identified candidate for Federal office," as that phrase is used in the statute at 2 U.S.C. § 434(f)(3)(A)(i)(I), as it has been interpreted by the Supreme Court, and as the FEC has previously represented the standard in litigation.

When AFF sought to confirm its understanding of the law, the FEC was unable to reach an affirmative conclusion by the required four votes with respect to the references and audio clips noted above. As a result, all similarly situated organizations, including HLF, now face the prospect of potential civil and criminal penalties if they proceed, like HLF with its proposed communications, without first seeking a pre-enforcement preliminary injunction.

STATEMENT OF FACTS

The Hispanic Leadership Fund, Inc., is a non-profit organization that operates pursuant to Section 501(c)(4) of the Internal Revenue Code of 1986, as amended. HLF was incorporated in Virginia in 2008.

The Federal Election Commission is the independent federal regulatory agency charged with civil enforcement of the Federal Election Campaign Act of 1971, as amended, and is located in Washington, D.C.

HLF was founded to advance free enterprise, limited government, and individual freedom. HLF has, for a number of years, engaged in making public communications on a wide variety of federal and state policy matters. HLF has previously made an "electioneering communication," as that term is used in FECA.

On March 30, 2012, the United States District Court for the District of Columbia issued an order invalidating the FEC's regulation that generally governed the scope of disclosure required of organizations that fund "electioneering communications" from their general treasuries. *Van Hollen v. FEC*, No. 11-0766 (D.D.C. Mar. 30, 2012). The effect of the court's decision – which is currently under appeal – was to significantly expand both the scope of required disclosure and the administrative burden of complying with the reporting requirements of FECA's "electioneering communication" provisions. The district court decision forces organizations making "electioneering communications" funded by their general treasuries to report to the FEC the names and addresses of all "donors who donated" $1,000 or more to the organization from January 1 of the prior year through the date of the electioneering communication. The additional reporting that is now required increases the burden of compliance by requiring more detailed recordkeeping and reporting by these organizations.[1]

Would-be speakers have taken notice of the greatly increased consequences of airing an "electioneering communication." Since the March 30, 2012, district court order went into effect, no single entity of any type has made an electioneering communication, despite the ongoing

[1] It is unclear what the penalty is for failure to disclose employer and occupation information under the electioneering communications statute should an organization not possess that information about its donors. Because organizations that make "electioneering communications" under the FECA are by definition not "political committees" under the FECA, it appears that organizations that file electioneering communications reports are not protected by the "best efforts" rules for employer and occupation information. 11 C.F.R. § 104.7(a).

Presidential and Congressional primary season.[2] *See* Federal Election Commission Electioneering Communications Reports, http:// www.fec.gov/finance/disclosure/ec_table.shtml (last visited July 26, 2012) (listing recently filed electioneering communications reports); Federal Election Commission 2012 Electioneering Communications Periods, http://www.fec.gov/ info/charts_ec_dates_2012.shtml (last visited July 26, 2012) (listing electioneering communications date ranges for 2012). Prior to this district court ruling, electioneering communications reports were filed approximately every one to three days for the ninety-day period ending March 31, 2012.

On April 18, 2012, American Future Fund submitted an advisory opinion request ("AOR"), attached as Exhibit 2 to HLF's Complaint, to the FEC pursuant to 2 U.S.C. § 437f. This request asked whether a series of eight proposed communications contained one or more references to a clearly identified candidate for Federal office, as that phrase is used in the definition of "electioneering communication."

The advisory opinion process allows a person to receive a written response from the FEC "concerning the application of this Act [FECA] . . . or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person." 2 U.S.C. § 437f(a)(1). Furthermore, "any person who relies upon any provision or finding of an advisory opinion . . . and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act . . . ." 2 U.S.C. § 437f(c)(2).

Pursuant to 11 C.F.R. § 112.1, the FEC accepted AFF's AOR for review, designated the request as AOR 2012-19, and posted it on the FEC's website for public comment on April 25,

[2] Pursuant to Rule 62 of the Federal Rules of Civil Procedure, the district court's March 30, 2012 order was automatically stayed for 14 days. Two reports were filed after this period. The reports filed on May 22 and June 30 appear to be misfilings due to the lack of any dollar values and the lack of any identified candidate.

2012. On May 31, 2012, the FEC's General Counsel issued two proposed draft responses to the AOR, Draft A and Draft B, attached as Exhibit 3 to HLF's Complaint and Exhibit 4 to HLF's Complaint, respectively (hereinafter "Draft A" and "Draft B"). Draft A concluded "that none of AFF's proposed advertisements would constitute an electioneering communication." Draft A at 1. Draft B concluded "that seven of AFF's eight proposed advertisements would constitute electioneering communications. One of AFF's proposed advertisements does not refer to a clearly identified candidate for Federal office and would therefore not be an electioneering communication." Draft B at 1.

On June 7, 2012, at an open meeting of the FEC, the Commissioners failed to approve a slightly revised version of Draft A by a vote of 2-4.[3] The Commissioners then failed to approve Draft B by a vote of 3-3.[4] By a vote of 4-2, the Commissioners then agreed that two proposed advertisements (AFF's Advertisements 7 and 8, containing references to "Obamacare" and "Romneycare") were electioneering communications. (This finding is not being challenged in this case because Plaintiff's proposed advertisements do not implicate this finding.) By a vote of 6-0, the Commissioners also unanimously agreed that one proposed communication (AFF's Advertisement 4, containing two references to "the government," and also references to "HHS" and "Secretary Sebelius") was not an electioneering communication. (This finding is not being challenged in this case because Plaintiff thinks it is correct.) By the same 6-0 vote, the Commissioners agreed that they could not reach a conclusion with respect to AFF's Advertisements 1, 2, 3, 5, and 6 by the required four votes. The FEC's Certification of these votes is attached as Exhibit 5 to HLF's Complaint (hereinafter "FEC Certification"). A

[3] Commissioners Hunter and McGahn voted for the motion, and Commissioners Bauerly, Petersen, Walther, and Weintraub voted against the motion.

[4] Commissioners Bauerly, Walther, and Weintraub voted for the motion, and Commissioners Hunter, McGahn, and Petersen voted against the motion.

transcript of the Commissioners' discussion and consideration of AFF's AOR is attached as Exhibit 6 to HLF's Complaint. The FEC provided a response to the requestor on June 13, 2012. Commissioners Bauerly and Weintraub issued a concurring statement on June 14, 2012. Commissioner McGahn issued a separate statement on June 29, 2012. The FEC's response and additional Commissioner Statements are attached as Exhibit 7 to HLF's Complaint.[5]

HLF planned to rely upon the Advisory Opinion rendered to AFF, pursuant to 2 U.S.C. § 437f(c)(1)(B), and air advertisements that are materially indistinguishable from those submitted by AFF in their AOR. These advertisements would call on the public to contact "the administration," "the government," or "the White House" to express their views on important public policy issues. They would also feature short audio clips of President Obama and other government officials speaking. HLF planned to air its advertisements in Iowa and other states. HLF's proposed advertisements are attached as Exhibit 1 to HLF's Complaint.

The FEC's failure to provide an affirmative four-vote, binding advisory opinion in response to the bulk of AFF's AOR is the legal equivalent of the FEC taking no action, which leaves Plaintiff HLF, and all similarly situated organizations, exposed to possible civil enforcement actions and/or criminal penalties pursuant to 2 U.S.C. § 437g if it publicly disseminates any of its proposed communications, which are materially indistinguishable from those on which the FEC was unable to agree. *See Carey v. FEC*, 791 F. Supp. 2d 121, 127 (D.D.C. 2011) (noting "the six-member Commission failed to issue a binding four-vote advisory opinion . . . . As a result, the Commission left [requestors] liable for possible enforcement actions

[5] AOR 2012-19 is the second electioneering communications-related advisory opinion request submitted since March 30, 2012, in which the FEC failed to reach a conclusion. In AOR 2012-20, the FEC was unable to issue an opinion regarding the application of the electioneering communication provisions to plumbing advertisements that featured the plumbing company's owner, who is also a candidate for Congress. The company's owner had been regularly featured in his company's advertisements for nearly a decade. *See* FEC Advisory Opinion Request 2012-20 (Mullin), *available at* http://saos.nictusa.com/saos/searchao?AONUMBER=2012-20 (last visited July 26, 2012).

against them" should requestors proceed with their proposed activity). The FEC's inability to issue a binding advisory opinion deprives HLF of its ability to rely on that opinion pursuant to 2 U.S.C. § 437f(c)(1)(B), (2).

The advisory opinion process in this matter is complete and deprives Plaintiff of a legal right – the right to engage in constitutionally protected speech and association with the prior knowledge that its communications will or will not require various disclaimers and public disclosures. *See Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) ("parties are commonly not required to violate an agency's legal position and risk an enforcement proceeding before they may seek judicial review").

STANDARD OF REVIEW

As noted by this court in *Iowa Right to Life Comm. v. Smithson*, 750 F. Supp. 2d 1020, 1028 (S.D. Iowa 2010), the authority to issue a preliminary injunction "is an awesome power vested in the district court, recognizing that it is an extraordinary form of relief and must be carefully considered." As the court held:

> The test for a preliminary injunction involves consideration of four factors: (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties and litigants; and (4) the public interest. [Plaintiff] has the burden of showing that a preliminary injunction should be granted. However, as to the merits, "the burdens at the preliminary injunction stage track the burdens at trial."

Id. at 1028-29 (internal citation omitted).

Plaintiff satisfies all of the elements required for a preliminary injunction, as outlined in the Complaint, the Motion for Preliminary Injunction, and this Brief.

ARGUMENT

The legal question presented in this matter is simple: do Plaintiff's proposed advertisements contain language that "refers to a clearly identified candidate for Federal office"? The phrase "refers to a clearly identified candidate for Federal office" is defined in the FEC's regulations. The Federal Election Campaign Act of 1971, as amended, defines the phrase "clearly identified," as do the FEC's regulations. The United States Supreme Court construed this standard in *Buckley v. Valeo*, 424 U.S. at 43, noting that the definition of "clearly identified" "requires that *an explicit and unambiguous reference* to the candidate appear as part of the communication" (emphasis added). Despite the very clear language of the statute, the regulations, and the Supreme Court in *Buckley* v. *Valeo*, three FEC Commissioners refused to faithfully apply that standard, thereby depriving the FEC of the four votes needed to provide a full response to American Future Fund and others similarly situated like HLF.

The inability of four members of the Federal Election Commission to agree on whether these proposed advertisements "refer[] to a clearly identified candidate for Federal office" convincingly demonstrates that the proposed advertisements do not contain the "explicit and unambiguous" references required under *Buckley v. Valeo*. By definition, the 3-3 split vote demonstrates that the references are, in fact, ambiguous.

When the FEC adopted its first "electioneering communications" regulations in 2002, the agency's *Explanation and Justification* stated that the "refers to a clearly identified candidate" standard "would not be based on the intent or purpose of the person making the communication." Explanation and Justification of Final Rule on Electioneering Communications, 67 Fed. Reg. 65,190, 65,192 (Oct. 23, 2002) (describing rule to be codified at 11 C.F.R. § 100.29(b)(2))

("Explanation and Justification"). This language is consistent with the FEC's litigation position in *McConnell* v. *FEC*, in which the agency assured the courts, "BCRA's definition of electioneering communication is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners, *Buckley*, 424 U.S. at 43 (quoting *Thomas*, 323 U.S. at 535)." Brief of Government Defendants at 156, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582) ("FEC Brief"); *see also Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. ___, No. 10-1121, slip op. at 13-14 n.3 (June 21, 2012) (quoting *Teachers v. Hudson* 475 U.S. 292, 303 n.11 (1986); *NAACP v. Button*, 371 U.S. 415, 438 (1963)) ("'Precision of regulation must be the touchstone' in the First Amendment context"). However, as the text of Draft B and the transcript of the FEC's public consideration of AFF's AOR makes clear, the three Commissioners who supported Draft B improperly invoked subjective considerations and criteria and refused to apply the legally required objective, unambiguous, bright-line test that the FEC previously assured the courts was the hallmark of the electioneering communication standard. In a concurring statement, two Commissioners who supported Draft B plainly acknowledge their application of a subjective standard: "We see nothing in American Future Fund's proposed ads to suggest that they were *intended* to be anything other than what they appear to be: references to the candidates and the policies associated with them" (emphasis added). See Exhibit 7 at 7-8 (Concurring Statement on Advisory Opinion 2012-19 (American Future Fund) of Commissioners Bauerly and Weintraub).

Three other Commissioners, however, recognized that they are bound by the U.S. Supreme Court's construction of the relevant statutory language in *Buckley* v. *Valeo*, the FEC's own regulations, and the assurances previously provided to the courts by the FEC. These three

Commissioners applied an objective, bright-line standard and correctly determined that inherently imprecise or ambiguous terms do not "refer[] to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I). However, the full FEC's failure to adhere to the plain language of the statute, the FEC's own regulations, binding Supreme Court precedent, and the agency's own prior representations to the courts leaves plaintiff without any legal assurances that it will not be subject to civil enforcement proceedings before the FEC if it airs its proposed advertisements.

As demonstrated below, HLF meets all of the required elements to obtain a preliminary injunction in this matter.

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

A. Statutory Background

i. The Electioneering Communication Provision Was Designed To Create An Objective, Bright Line Standard For Regulating Speech

The "electioneering communications" concept was conceived as an expansion of the so-called "magic words" standard of "express advocacy" set forth in *Buckley v. Valeo*, 424 U.S. at 43-44, that would allow Congress to broaden its scope of regulation to include "so-called issue ads [that] eschewed the use of magic words" but which were being "used to advocate the election or defeat of clearly identified federal candidates." *McConnell v. FEC*, 540 U.S. 93, 126 (2003).

As the United States Supreme Court explained in *McConnell*:

> The first section of Title II, § 201, comprehensively amends [Federal Election Campaign Act] § 304, which requires political committees to file detailed periodic financial reports with the FEC. The amendment coins a new term, "electioneering communication," to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*. As discussed further below, that construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or

> defeat of particular candidates. By contrast, the term "electioneering communication" is not so limited, but is defined to encompass any "broadcast, cable, or satellite communication" that
>
> > "(I) ***refers to a clearly identified candidate for Federal office***;
> > "(II) is made within--
> > > "(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> > > "(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> >
> > "(III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate." 2 USC § 434(f)(3)(A)(i) (Supp. 2003).
>
> New FECA § 304(f)(3)(C) further provides that a communication is "'targeted to the relevant electorate'" if it "can be received by 50,000 or more persons" in the district or State the candidate seeks to represent. 2 USC § 434(f)(3)(C).

Id. at 189-90 (emphasis added).

The plaintiffs in *McConnell* challenged the "electioneering communication" provision, arguing that the Court in *Buckley* "drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." *Id.* at 190. They argued that *Buckley* permitted regulation only of communications that contained express advocacy. The majority in *McConnell* rejected these arguments, and explained that the *Buckley* Court's adoption of the express advocacy standard was only a narrowing construction that saved otherwise "impermissibly vague" statutory language. *Id.* at 190-91. The Court explained:

> Thus, a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague or overbroad would be required to toe the same express advocacy line.

Id. at 191-92. The *McConnell* Court concluded that the new "electioneering communications" standard satisfied the *Buckley* Court's concerns:

> [W]e observe that new FECA § 304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in Buckley. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. *These components are both easily understood and objectively determinable*.

Id. at 194 (emphasis added); *see also* FEC Brief at 129 ("Congress designed BCRA's definition of 'electioneering communication[s]' to meet the Supreme Court's concerns about vagueness of certain language in FECA's regulation of independent expenditures. It draws a clear line in the right place . . . .").

After initially upholding the electioneering communications provisions against a facial challenge in *McConnell*, the Supreme Court subsequently issued a series of decisions that dismantled BCRA's electioneering communications funding restrictions. *See Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (*WRTL I*); *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007) (*WRTL II*); *Citizens United v. FEC*, 558 U.S. 50 (2010). BCRA's disclosure provisions that apply to electioneering communications have survived, however. Thus, while the "electioneering communications" concept previously served (primarily) as a ban on speech, it exists today as a trigger for disclaimer and disclosure requirements. Accordingly, would-be speakers, in order to satisfy various legal requirements, must still be cognizant of whether their constitutionally protected speech is an "electioneering communication." At this time, HLF does not challenge the constitutionality of the electioneering communications provision, or of the disclaimer and disclosure requirements that apply to communications that actually satisfy the established definition of "electioneering communication." This action is limited to seeking a declaratory judgment that advertisements containing the terms "the government," "the

Administration," and "the White House," or unidentified audio passages of federal officials or their spokesmen speaking, do not "refer[] to a clearly identified candidate for Federal office," as that phrase is used in FECA, and a preliminary injunction that prevents the FEC from applying the statute against HLF in a contrary manner.

In 2002, when Congress used a previously-defined term of art ("refers to a clearly identified candidate") as part of its definition of electioneering communication, it knowingly adopted that term of art's history and meaning and incorporated it into the new statute. *See, e.g.*, *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944) (noting "the general rule that adoption of the wording of a statute . . . carries with it the previous judicial interpretations of the wording"); *Kepner v. United States*, 195 U.S. 100, 124 (1904) ("It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."). As the FEC noted in its *Explanation and Justification*, the phrase "refers to a clearly identified candidate" "is already defined in the Commission's rules at 11 CFR 100.17," "[t]he final rule tracks the language of the current rule in 11 CFR 100.17," and "[t]his approach appears to be consistent with legislative intent." Explanation and Justification at 65,192. The FEC also noted "the well-established body of law construing this term," that is, "clearly identified," in rejecting the arguments of one commenter who suggested the regulatory definition was "vague and too broad." *Id.*

ii. Source of "Clearly Identified Candidate" Standard and Past Treatment

This litigation concerns one prong of the definition of electioneering communication: "refers to a clearly identified candidate for Federal office." As noted above, this phrase is not

new to BCRA; it dates back to FECA's adoption in the early 1970s and was construed and explained by the Supreme Court in *Buckley* in 1976.

In *Buckley*, the Court was confronted with statutory language in the Federal Election Campaign Act of 1971, as amended in 1974, referring to expenditures made "relative to a clearly identified candidate." *Buckley*, 424 U.S. at 39 (quoting section 608(e)(1)). The term "clearly identified" was (and remains) statutorily defined to mean "(i) the candidate's name appears; (ii) a photograph or drawing of the candidate appears; or (iii) the identity of the candidate is apparent by unambiguous reference." *Id.* at 193-94 (quoting section 608(e)(2)); *see also* 2 U.S.C. § 431(18). The Court explained that "the definition of 'clearly identified' in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication." *Buckley*, 424 U.S. at 44. To the extent that the third statutory definition above ("the identity of the candidate is apparent by unambiguous reference") is subject to a potentially broad reading, the Court very clearly imposed a limiting construction to ensure the constitutionality of the standard. *See id*. (requiring "*an explicit* and unambiguous reference to the candidate") (emphasis added). In a footnote, the Court further explained:

> Section 608(e)(2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (e.g., FDR), the candidate's nickname (e.g., Ike), his office (e.g., the President or the Governor of Iowa), or his status as a candidate (e.g., the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

Buckley, 424 U.S. at 43 n.51.

In light of the Court's striking clarity on the issue, this standard has been subject to very little subsequent judicial scrutiny. The "clearly identified candidate" standard arose occasionally in pre-BCRA cases that focused on whether certain communications constituted "express

advocacy," thereby making them subject to FEC regulation.[6] For example, in *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428, 433 (D.D.C. 1989), the district court reiterated that the "clearly identified candidate" standard requires that "an explicit and unambiguous reference to the candidate must be mentioned in the communication in order for express advocacy to be present."

The FEC has previously acknowledged that *Buckley*'s instructions provide the relevant construction for the phrase "refers to a clearly identified candidate for Federal office" that is used in BCRA's electioneering communication definition. *See* FEC Brief at 154 n.110 ("The Court found that this language was unambiguous when construing a nearly identical clause in *Buckley*, 424 U.S. at 43-44 n.51 (construing then § 608(e)(2), *id.* at 193-94, since recodified as 2 U.S.C. 431(18)).").

iii. Federal Election Commission Implementing Regulations

Current FEC regulations on "electioneering communications" establish that the phrase

> *refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

11 C.F.R. § 100.29(b)(2) (emphasis added). This is the exact same definition that appears at 11 C.F.R. § 100.17 as the FEC's regulatory definition of "clearly identified."[7]

iv. BCRA's Legislative History Demonstrates That Lead Sponsors Intended The Electioneering Communication Provision To Serve As A Clear, Objective, Bright-Line Standard

[6] The Supreme Court construed certain of FECA's requirements "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44.

[7] 11 C.F.R. § 100.17 dates to 1995, when the FEC consolidated its separate definitions of "clearly identified" and "clearly identified candidate" and "provide[d] some additional examples of when candidates are considered to be 'clearly identified.'" Final Rule on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,293-35,294 (July 6, 1995).

On the U.S. Senate floor, Senator Feingold, one of the main sponsors of the Bipartisan Campaign Reform Act (known colloquially as the McCain-Feingold Act), made absolutely clear that the "clearly identified candidate" standard used in the electioneering communication provision was the same standard that had long existed:

> In the bill, the phrase "refers to" precedes the phrase "clearly identified" candidate. That latter phrase is precisely defined in the Federal Campaign Election Act to mean a communication that includes the name of a federal candidate for office, a photograph or drawing of the candidate, or some other words or images that identify the candidate by "unambiguous reference." A communication that "refers to a clearly identified candidate" is one that mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing, or otherwise makes an "unambiguous reference" to the candidate's identity.

148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold); *see also* Statement of Commissioner McGahn on Advisory Opinion 2012-19 (American Future Fund), Exhibit 7 to HLF's Complaint, at 7-12 ("A review of the legislative history of the electioneering communication statute demonstrates that Congress intended 'clearly identified candidate for federal office' to remain unchanged, and continue to mean what it meant prior to the passage of McCain-Feingold.").

Senator Snowe, one of the sponsors of the electioneering communications provision (known as the Snowe-Jeffords provision), said of the provision:

> Already I have established how our provision is not even remotely vague. As the Brennan Center scholars' letter says that was signed by 70 scholars, "Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court's vagueness concerns. *Any sponsor will know, with absolute certainty, whether the ad depicts or names a candidate* and how many days before an election it is being broadcast. *There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard*.
>
> [***]
>
> They know their message is clear. And they know that using the name of Federal candidates in their ads near the election is an effective way of influencing the election.

> That's why Snowe-Jeffords keys in on the naming of candidates as one of the triggers of our disclosure regulations.

148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (emphasis added).

Thus, in the minds of those who proposed and supported passage of the electioneering communications provision, the provision utilized "a clear standard," "defined with great clarity," and "[a]ny sponsor will know, with absolute certainty, whether the ad depicts or names a candidate . . . ." *Id*; *see also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-15 ("supporters in Congress emphasized that the electioneering communication provisions were narrow, objective, and clear"). HLF now faces circumstances that the sponsors of this legislation virtually guaranteed could never arise.

B. Application Of "Refers To A Clearly Identified Candidate For Federal Office" Standard To Plaintiff's Proposed Advertisements

When the FEC defended BCRA's electioneering communications provisions shortly after the law's passage, the agency told the three-judge panel of the D.C. District Court that "the four criteria by which BCRA defines electioneering communications are perfectly clear, and suffer from none of the vagueness that concerned the [Supreme] Court in *Buckley*." FEC Brief at 131-32. Furthermore, the FEC, echoing Senator Snowe's statement quoted above, assured the court:

> These criteria are absolutely clear, individually and collectively, and no one wishing to avoid violations of BCRA need guess at where these four defining characteristics have drawn the line. Any individuals or organizations intending to broadcast electioneering communications, or wishing, on the other hand, to engage in genuine issue advocacy, can easily determine in advance whether their advertisements meet BCRA's definition of electioneering communications, and thus encounter no realm of legal uncertainty from which they must steer clear. "Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Yet "perfect clarity" and "precise guidance" are exactly what BCRA provides.

FEC Brief at 155. The FEC's response to AFF's advisory opinion request, however, demonstrates that three Commissioners now interpret the phrase "refers to a clearly identified candidate for Federal office" in a highly subjective, context-dependent manner that deprives the standard of its saving virtues: "perfect clarity" and "precise guidance."

In public comments made during the FEC's consideration of AFF's advisory opinion request, Commissioner Weintraub indicated that Draft B's deviation from the required objective, bright-line test analysis was justified because the only consequence of declaring the proposed advertisements to be "electioneering communications" is disclosure. Transcript of Open Meeting of the Federal Election Commission, Consideration of Draft Advisory Opinion 2012-19 (American Future Fund), Exhibit 6 to HLF's Complaint at 6-15 to 6-18 (June 7, 2012) (statement of Comm'r Weintraub) ("FEC Transcript") ("first of all, let's remember we're talking about disclosure . . . . The Court not only upheld these requirements as constitutional, they thought they were important . . . . You can't avoid disclosure by using a pronoun."); *see also* Concurring Statement on Advisory Opinion Request 2012-19 (American Future Fund) of Commissioners Bauerly and Weintraub, Exhibit 7 to HLF's Complaint at 7-9 ("we would have thought that all commissioners would be inclined to proceed with caution when presented with a new request to narrow our EC reporting and disclaimer requirements"). Administrative agencies, however, are not free to disregard clear statutory standards and direct, binding Supreme Court precedent because they believe that the ends (here, maximizing disclosure) justify the means (here, unlawfully broadening the scope of the electioneering communications provision by replacing an objective, bright-line standard with a subjective, totality of the circumstances standard). *See* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint at 7-40 ("While some of my colleagues have focused much of their attention on the disclosure aspects at issue in this

Advisory Opinion request, this rhetoric has nothing to do with applying the electioneering communication provisions."); *see also Knox*, No. 10-1121, slip op. at 22 (holding that where the law has "substantially impinged upon the First Amendment rights" of certain parties, general rules about First Amendment rights should prevail absent "justification for any further impingement").

In fact, when the Supreme Court heard oral argument in *McConnell* v. *FEC*, Justice Souter asked the Solicitor General, "[D]oesn't the primary definition today, in effect, give a corporation or a union that wants to run an issue ad *a safe harbor simply by virtue of not mentioning the name*? Say, let's hear it for nuclear power and don't let anybody else tell you otherwise. That's safe, isn't it?" The Solicitor General responded, "That's exactly right. That is safe . . . ." Transcript of Oral Argument at 164, *McConnell*, 540 U.S. 93 (No. 02-1674) (emphasis added). In other words, the Government has previously maintained that one may rather easily avoid application of the "electioneering communications" provisions "simply by virtue of not mentioning the name." *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint at 7-16 to 7-17 (reviewing FEC's assertions before U.S. Supreme Court).

In *Christian Civic League of Maine, Inc. v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006), counsel for the FEC appears to have conceded that a reference to "your Senator" is not a reference to a clearly identified candidate for Federal office. *See* Transcript of Motion Hearing at 27, *Christian Civic League*, 433 F. Supp. 2d 81 (No. 06-00614) ("I don't believe the Commission has taken a definitive position on 'Your Senators.' . . . I think -- I don't mean to split hairs, but if you said, 'Your Senator,' there's more ambiguity than the plural because we have more than one Senator[].").

In voting to support Advisory Opinion Response Draft B, three Commissioners voted for a response that: (i) is guided by a "totality of the circumstances" approach that otherwise contains no readily discernible analytic standard; (ii) includes no reference to the Supreme Court's footnote 51 in *Buckley* or the Court's requirement that "the definition of 'clearly identified' . . . requires than an explicit and unambiguous reference to the candidate appear as part of the communication"; and (iii) contains no acknowledgment that the standard to be applied is an objective test that was previously described by the FEC as "a classic bright-line test" that offers "perfect clarity" and "precise guidance." This approach is plainly in error.

i. "The Government" Is Not A Reference To A Clearly Identified Candidate For Federal Office

It is impossible to seriously maintain that the term "the government" is an explicit and unambiguous reference to President Obama, or even a more general reference to the President of the United States. A dictionary definition of "the government" includes: "the executive branch of the U. S. federal government"; "a small group of persons holding simultaneously the principal political executive offices of a nation or other political unit and being responsible for the direction and supervision of public affairs: . . . administration"; "the complex of political institutions, laws, and customs through which the function of governing is carried out"; and "the body of persons that constitutions the governing authority of a political unit or organization." *Merriam-Webster's Collegiate Dictionary* 541 (11th ed. 2011). Of course, the federal government consists of the three separate branches, of which this court may take judicial notice. The federal government currently has more than three million civilian employees. *See* U.S. Census Bureau, U.S. Department of Commerce, Federal Government Civilian Employment by Function: March 2010, http://www2.census.gov/govs/apes/10fedfun.pdf (last visited July 26, 2012).

Appropriately, the FEC concluded unanimously that two references to "the government" in proposed Advertisement 4 did not constitute references to any clearly identified candidate for Federal office. *See* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint at 7-24 ("All six Commissioners . . . agreed that 'the government' is not a reference to a candidate."). However, the FEC was not able to reach a conclusion with respect to references to "the government" in AFF's proposed Advertisements 2, 3, and 6. The three Commissioners who supported Draft B voted to treat "the government" as a reference to a clearly identified candidate in three proposed advertisements (AFF's Advertisements 2, 3, and 6), but *not* in a fourth proposed advertisement (AFF's Advertisement 4). This disparate treatment of the exact same term is glaringly inconsistent, inexplicable, and wholly at odds with the notion that the electioneering communications standard provides an objective, bright-line standard that affords speakers "perfect clarity" and "precise guidance."

During floor debate on the Bipartisan Campaign Reform Act, Senator Snowe very clearly stated that an advertisement that referred to "our own government" would not be subject to the electioneering communication provisions. Senator Snowe provided the following example of an "issue ad that wouldn't be covered at all by Snowe-Jeffords in any way, shape or form":

> (Woman): "We can't pay these bills, John."
>
> (Man): "Prices are as low as when my dad started farming."
>
> (Woman): "It's bad, alright."
>
> (Man): "Farmers are suffering because foreign markets have been closed to us and ***our own government*** won't even help."
>
> (Woman): "I hear the Thompsons are going to have to quit farming after four generations."
>
> (Man): "I can't even bear to think about it."

(Announcer): Tell Congress we need a sound, strong trade policy. Call 202-225-3121. 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (emphasis added).

Referring to this same advertisement, Senator Snowe explained, "there are graphics on the screen that show the phone number, that direct viewers to tell Congress that we need to pass initiatives like 'IMF Funding' and 'Sanctions Reform', and they give the number for the Capitol switchboard. *Again, this is a pure issue ad that we wouldn't touch*." *Id.* (emphasis added).

Nevertheless, three Commissioners have now taken the position that "the government" both is, and is not, a reference to a clearly identified candidate for Federal office. Draft B does not explain why the several references to "the government" in AFF's proposed communications are subject to different treatment, other than to assert, with respect to Advertisement 3 that "[i]f viewers were to follow this command by calling the White House to tell 'the government' about the need for a different energy policy, they would necessarily be seeking to convey that message to the President, the 'government' official who resides and maintains his office at the White House and the only person at the White House with executive authority to change the 'American energy plan.'" Draft B, Exhibit 4 to HLF's Complaint, at 4-8.

It is readily apparent that this explanation does not reflect the application of an objective, bright-line standard that disregards "the intent or purpose of the person making the communication," *Explanation and Justification*, 67 Fed. Reg. at 65,192, and "entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners," FEC Brief at 156. *See* Statement of Commissioner McGahn at 7-27 ("McCain-Feingold and the Commission's regulations require more than such inferential reference, tied to the subjective impression of viewers and listeners"). Objective, bright-line standards are not satisfied by "I know it when I see it" analyses, and under the required objective, bright-line test, which requires

an explicit and unambiguous reference, "the government" simply cannot be a reference to a clearly identified candidate in one advertisement but not in another.

ii. "The Administration" Is Not A Reference To A Clearly Identified Candidate For Federal Office

Three Commissioners concluded that "[t]he terms 'the Administration,' 'this Administration,' and 'the White House' are commonly understood as references to 'the President.'" Draft B, Exhibit 4 to HLF's Complaint, at 4-5. According to these three Commissioners, "[t]he references to 'the Administration' and 'this Administration' likewise unambiguously reference President Obama. Those terms are merely short-hand for the *Obama* Administration: 'this Administration' began with the inauguration of President Obama and it will conclude with his exit from office." *Id*. at 4-5 to 4-6.

In her comments during the FEC's consideration of AFF's advisory opinion request, Commissioner Weintraub offered the following analysis of the term "the administration": "When people talk about the Administration, they know who they're talking about, and the listeners all know who they're talking about." FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-19. The FEC itself previously explained that the electioneering communication standard was not "based on the intent or purpose of the person making the communication," *Explanation and Justification*, 67 Fed. Reg. at 65,192, and the FEC argued in court that the standard does not "plac[e] speakers 'wholly at the mercy of the varied understanding' of their listeners," FEC Brief at 156. Accordingly, this focus on the alleged intent of the speaker and the presumed understanding of the listener involve improper considerations.

In a 1995 decision, a federal district court rejected a very similar "codeword" theory advanced by the FEC. *See FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995). In that matter, the FEC "submitted a twenty-four page analysis of the advertisements prepared by

an expert in Political Science and federal campaign ads." Of this expert analysis, the court wrote:

> The court finds the expert's analysis unpersuasive for several reasons. First, the fact that an expert was needed to enlighten the court on the message conveyed by the communications strongly suggests that they did not directly exhort the public to vote. Second, the concepts used by the FEC's expert contradict his claim that a clear message was conveyed. For example, the term "codeword" cannot, by its very definition, be said to express a direct message. Lastly, nowhere in the expert's analysis does he state the *legal* standard or test on which he basis his opinion that the ads constituted "express advocacy."

Id. at 956 n.14.

While the context is somewhat different, both the "clearly identified candidate" and 1995-era "express advocacy" definitions require clear, explicit and unambiguous language, and in both that case and the present matter, the FEC advanced a "codeword" theory that is completely untethered from the law. Here, three FEC Commissioners plainly resorted to a "codeword" theory in their analysis of the term "the administration." *See* Draft B, Exhibit 4 to HLF's Complaint, at 4-5 (using phrases "commonly understood as references" and "merely short-hand"). The "codeword" theories advanced in Draft B should be rejected by this court as well.

"The Administration" refers to the Executive Branch, "a governmental agency or board," or "a group constituting the political executive in a presidential government." *Merriam-Webster's*, *supra*, at 16. On the White House's own website, "the Administration" is described as consisting of "[t]housands of people work[ing]" in a variety of departments. The White House, http://www.whitehouse.gov/administration (last visited July 26, 2012). At the time American Future Fund made their advisory opinion request, the White House website described the Administration as "consist[ing] of thousands of individuals in a variety of departments." The

website has since been redesigned, but both descriptions make clear that "administration" does not "explicitly and unambiguously" refer to President Obama. *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-24 ("After all, one cannot place 'the administration' or 'the White House' on the ballot – the laws of all fifty states require that a candidate be named, and not merely referenced by inference. Instead, both 'the administration' and 'the White House' refer to elements of the executive branch generally.").

iii. "The White House" Is Not A Reference To A Clearly Identified Candidate For Federal Office

The Commissioners who supported Draft B claimed that "*the only logical reading*" of a reference to "the White House" is "as a reference to the President, rather than as a personification of his residence." Draft B, Exhibit 4 to HLF's Complaint, at 4-10. As proof that this is "the only logical reading," Draft B includes the following explanatory footnote: "One of the preeminent authorities on English usage invokes the example of 'the White House' as a reference to the Presidency in its definition of 'metonymy,' which is 'a figure of speech which consists in substituting for the name of a thing the name of an attribute of it or of something closely related.' R.W. Burchfield, *The New Fowler's Modern English Usage* 492 (3d ed., 2000)." *Id.* at 4-5 n.1. In addition, Commissioner Weintraub added that "there are certain addresses that really do suffice."[8] FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-19. An "analysis" that "everyone knows" what a reference to a "certain address" means, or that "the only logical reading" of the term "the White House" is that it is a codeword for "the President," is not consistent with an objective, bright-line standard. *See Christian Action Network*, 894 F.

[8] *See also* Concurring Statement on Advisory Opinion 2012-19 (American Future Fund) of Commissioners Bauerly and Weintraub, Exhibit 7 to HLF's Complaint, at 7-8 ("And 'the White House' – like '10 Downing Street' or 'Buckingham Palace' – is a place inextricably linked to the official who lives and works there. Anyone else currently working in the White House works for President Obama, and acts solely on his behalf.").

Supp. at 956-57 (rejecting FEC's interpretation of "codewords" in an advertisement as constituting express advocacy).

"The White House," in addition to being the structure located at 1600 Pennsylvania Avenue, also means "the executive department of the U. S. government." *Merriam-Webster's*, *supra*, at 1428. In addition, there are numerous government officials who work at "the White House," including a number of government officials with specific statutory authorities provided in numerous different statutes, including the application of the Freedom of Information Act, such as the Director of the Office of National Drug Control Policy, the Director of the Office of Management and Budget, the Director of the Office of Science, Technology and Space Policy, and the United States Trade Representative. *See* Webster L. Hubbell, FOIA Memo on White House Records (Nov. 3, 1992), *available at* http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page4.htm. In that same memorandum, the Department of Justice explained:

> By its terms, the FOIA applies to "the Executive Office of the President," 5 U.S.C. § 552(f), but this term does not include either "the President's immediate personal staff" or any part of the Executive Office of the President "whose sole function is to advise and assist the President." *Meyer v. Bush*, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)); *see also, e.g.*, *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). This means, among other things, that the parts of the Executive Office of the President that are known as the "White House Office" are not subject to the FOIA; certain other parts of the Executive Office of the President are.

Id.

The U.S. Department of Justice recognizes that statutes treat different parts of the White House differently for the purposes of applications of other statutes, and this alone makes clear that the White House is not an unambiguous reference to President Obama. The "White House" is an inherently ambiguous term that could refer to the historic building at 1600

Pennsylvania Avenue, the President, the President's staff, agencies within the White House, or certain government officials. The term does not "explicitly and unambiguously" refer to President Obama. Even the FEC has previously acknowledged this. As Commissioner McGahn notes:

> [W]hile investigating [Matters Under Review] 4407 and 4544, the Commission issued a number of subpoenas. One went to the Executive Office of the President and certain named individuals to seek "White House materials." A separate subpoena was addressed specifically and personally to the President by name. Thus, in other contexts, the Commission has already determined that the White House generally is not the same as the President individually.

Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-25 (footnotes omitted).

iv. Unidentified Audio Clips Of A Federal Officeholder Do Not Refer To A Clearly Identified Candidate For Federal Office

Draft B's explanation for why the inclusion of an unidentified audio clip of President Obama speaking "refers to a clearly identified candidate for Federal office" is that "President Obama's voice is widely recognized." Draft B, Exhibit 4 to HLF's Complaint, at 4-7. Commissioner Weintraub also stated that "the voice of the President is . . . clearly recognizable to the citizens of this country . . . ." FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-20. Whether something is "widely recognized" or "clearly recognizable" is not the applicable legal standard, and, in fact, the FEC has previously stated that such considerations are irrelevant. *See* FEC Brief at 156 ("the definition of electioneering communications is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners").

Draft B does not even attempt to explain how an unidentified audio clip satisfies the standard set forth at 2 U.S.C. § 431(18), 11 C.F.R. § 100.29(b)(2), 11 C.F.R. § 100.17, or the construction rendered in *Buckley v. Valeo*. One Commissioner who supported Draft B indicated

that she was motivated to conclude that unidentified audio "refers to a clearly identified candidate," at least in part, because she found the request offensive:

> The notion that you could actually use somebody's own voice, their own voice, and claim that you're allowed to criticize them using their own voice, and you don't have to identify who you are, you want to hide behind some shield, some ambiguous name like American Future Fund, and not identify who you are when you're criticizing the White House, when you're criticizing the President using his own voice, that certainly is not demonstrating civic courage.

FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-20 (statement of Comm'r Weintraub); *see also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-42 n.98 (discussing Commissioner Weintraub's statement). A Commissioner's views on how a party *should* conduct itself, or what the law *should* be, is no substitute for what the law actually is.

The applicable law setting forth the various types of references that qualify as a reference to a clearly identified candidate for Federal office does not include audio recordings of a candidate's voice. The FEC's own regulation, which is based on the Supreme Court's footnote 51 in *Buckley v. Valeo*, includes names, nicknames, photographs, drawings, other "unambiguous references" such as "the President," "your Congressman," or "the incumbent," or an "unambiguous reference" to "the status of a candidate," such as "the Democratic presidential nominee." 11 C.F.R. § 100.17. All of these examples are either visual representations or means of actually naming the candidate. *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-13 ("Under the plain text of the regulation, a reference to a clearly identified candidate can be either visual or by name."). Audio recordings are not included, nor are they similar to any of the examples provided.

The applicable bright-line standard cannot turn on whether listeners do or do not recognize the voice speaking. As was noted during the FEC's consideration of this advisory

opinion request, while some or many may recognize the voice of the President, very few would recognize the unidentified voice of a Member of Congress. Any standard that turns entirely on the listener's reaction yields inconsistent results that are simply not consistent with an objective, bright-line standard. *See also* Statement of Commissioner McGahn, Exhibit 7 to HLF's Complaint, at 7-33 ("That audio of someone's voice was not included in the Act or the regulation makes sense when one realizes that a uniform rule needs to apply to all candidates, not just the more well-known ones. It makes little sense for a voice that is unrecognizable to the vast majority of listeners to be considered 'clearly identified' for statutory purposes. To claim that a voice can be sufficiently recognizable merely begs the pertinent questions: at what point is a voice sufficiently recognizable and on what principle do we draw the line?").

An unidentified audio recording, whether the speaker is recognized by the listener or not, cannot be a reference to a clearly identified candidate for federal office because the applicable statutes, regulations, and precedent do not include audio clips within the definition of a clearly identified candidate.

v. Unidentified Audio Clips Of An Unelected Federal Official Do Not Refer To A Clearly Identified Candidate For Federal Office

Proposed Advertisement 3 in the AOR included an unidentified audio clip of the White House Press Secretary speaking. Draft B concludes that Proposed Advertisement 3 contains references to a clearly identified candidate, but does not specifically address whether the use of unidentified audio of the White House Press Secretary is a reference to a clearly identified candidate. Draft A, in its original form, was responsive to the question posed in the AOR, and concluded, "The inclusion of an audio clip of the White House Press Secretary's voice in Advertisement 3 also is not a reference to a clearly identified candidate because the White House

Press Secretary is an employee of the federal government and is not himself a candidate." Draft A, Exhibit 3 to HLF's Complaint, at 3-8. However, the motion to approve Draft A included an amendment deleting the foregoing explanation from Draft A. *See* FEC Certification, Exhibit 5 to HLF's Complaint, at 5-1. Accordingly, neither Draft A nor Draft B actually addressed this issue.

As noted above, the applicable law setting forth the various types of references that qualify as a reference to a clearly identified candidate for Federal office does not include the use of a person's voice, but only includes either visual representations or means of actually naming a candidate. *See* 11 C.F.R. § 100.17. It is difficult to even conceive of an argument that would seriously maintain that the use of unidentified audio of an individual who is not even a federal candidate constitutes "an unambiguous reference" that makes "the identity of the candidate . . . otherwise apparent." *Id.* Even the faulty and subjective "voice recognition" analysis of Draft B with respect to the use of unidentified audio of the President's voice does not support the view that the use of unidentified audio of the White House Press Secretary's voice is an explicit and unambiguous "reference" to the President.

II. THREAT OF IRREPARABLE HARM

As in other campaign finance cases, *see, e.g.*, *Missouri Republican Party v. Lamb*, 87 F. Supp. 2d 912 (E.D. Mo. 2000), HLF faces a real and immediate threat of lengthy government investigations, civil penalties and potential criminal liability if fails to act in full compliance with applicable legal standards. Additionally, HLF is presented with a series of options, all of which carry the threat of irreparable harm.

First, if HLF proceeds with airing its proposed advertisements, it must decide whether to treat the advertisements as electioneering communications and file reports with the FEC. Three

Commissioners have instructed AFF that its proposed Advertisements 1, 2, 3, 5, and 6 *are not* electioneering communications, and three Commissioners have instructed AFF that these advertisements *are* electioneering communications. If HLF opts to air its materially indistinguishable advertisements under the theory that they *are not* electioneering communications, HLF will almost certainly be the subject of a complaint filed with the FEC. On the other hand, if HLF airs its proposed advertisements under the theory that they *are* electioneering communications, and complies with BCRA's disclosure requirements for electioneering communications, it will be required to disclose the identity of all persons who have given more than $1,000 to HLF since January 1, 2011. If this disclosure is made, it cannot be undone or retracted, even if this court subsequently determines that the advertisements in question *are not* "electioneering communications." In this scenario, HLF will have unnecessarily invaded the privacy of its supporters, subjected them to potential harassment,[9] and

[9] If disclosures are not required to be made in the first place, it is of no significance that the "harassment" may not rise to the level of requiring a constitutionally-mandated exemption, as in *NAACP v. Alabama*, 357 U.S. 449 (1958). *Any* harassment that results from disclosures that were not legally required, and which were made only because the FEC was unable to render guidance to Plaintiff, is unacceptable. *See Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010) ("as-applied challenges would be available if a group could show a reasonable probability that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials *or* private parties.") (internal quotation marks omitted) (emphasis added); *Brown v. Socialist Workers '74 Campaign Comm.* , 459 U.S. 87 (1982); FEC Advisory Opinion 2009-1 (Socialist Workers Party), *available at* http://saos.nictusa.com/saos/searchao?AONUMBER=2009-01 (extending FECA reporting exemption for Socialist Workers Party). At this time, though, HLF is not requesting any such exemption.

Donor harassment has recently become a favored political tool of some. For example:

- On April 20, 2012, President Obama's reelection campaign posted on its website details about seven of Mitt Romney's financial supporters. The supporters were dubbed "a group of wealthy individuals with less-than-reputable records." Senator McConnell referred to this as "a list of eight private citizens [the campaign] regards as enemies – an actual old-school enemies list . . . ." Senator Mitch McConnell, Growing Threats to Our First Amendment Rights (June 15, 2012), *available at* http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=10f84ce5-aba9-42e8-9119-fb88d2edb2e2.

- In a June 12, 2012, letter, the Congressional Progressive Caucus, using official U.S. House of Representatives letterhead, wrote to the National Federation of Independent Business and demanded that the organization, "Please report all donors to NFIB over the past three years. For each year please provide the donor name and amounts." Letter from Congressional Progressive Caucus to National Federation of Independent Business (June 12, 2012), *available at* http://grijalva.house.gov/uploads/CPC%20Co-

Chair%20Letter%20to%20NFIB%20June%2012.pdf. The source of the Congressional Progressive Caucus's interest in the NFIB's financial support is a lawsuit brought by the NFIB challenging portions of the Patient Protection and Affordable Care Act.

- On June 14, 2012, Citizens for Responsibility and Ethics in Washington (CREW) issued a press release and correspondence in which the organization attacks a donor to the U.S. Chamber of Commerce and American Action Network, both of whom produce and distribute advertisements that are reported to the FEC. CREW included the following accusations of corruption in its press release: [CREW President Melanie] "Sloan continued, "I wonder how much influence Aetna has on exactly which lawmakers AAN and the Chamber target? Just because Aetna isn't telling the public what it's up to, doesn't mean the company is hiding its political activities from everyone. I'm sure Aetna is expecting lawmakers to express their gratitude with legislative favors. Just like these grateful lawmakers, Americans should know what Aetna is really doing with their insurance premiums." Press Release, Citizens for Responsibility and Ethics in Washington, Aetna Hides $7 Million in Political Spending; CREW Calls for Greater Disclosure (June 14, 2012), *available at* http://www.citizensforethics.org/press/entry/aetna-political-spending-american-action-network-chamber-of-commerce.

- In early April 2012, the leftist Center for Media and Democracy "launched a protest campaign in tandem with Color of Change opposing what it said were [American Legislative Exchange Council]'s efforts to deny climate change, undermine public schools and encourage laws that would require voters to present various forms of identification before voting." Color of Change is led by Van Jones, who previously served as President Obama's "Special Advisor for Green Jobs, Enterprise and Innovation." In response to the boycott threats, "Coca-Cola Co. and Kraft Foods Inc. bowed to consumer pressure this week and cut ties with the American Legislative Exchange Council." Tiffany Hsu, *Coca-Cola, Kraft Leave Conservative ALEC After Boycott Launched, L.A. Times*, Apr. 6, 2012, *available at* http://articles.latimes.com/2012/apr/06/business/la-fi-mo-coca-cola-kraft-alec-20120406. PepsiCo also yielded to these secondary boycott tactics.

- Numerous troubling instances of political harassment facilitated by government-compelled disclosure are detailed by Justice Thomas in his separate opinion in *Citizens United v. FEC*. He succinctly summarizes the threats faced by would-be speakers as follows:

> "Some opponents of [California's] Proposition 8 compiled this [individual supporter] information and created Web sites with maps showing the locations of home or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result. . . . The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to pre-empt citizens' exercise of their First Amendment rights. . . . Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United*, 130 S.Ct. at 980-82 (Thomas, J., concurring and dissenting).

Senate Minority Leader Mitch McConnell of Kentucky gave a speech on June 15, 2012, about what he called "an effort by the government itself to expose its critics to harassment and intimidation, either by government authorities or through third-party allies." McConnell, Growing Threat. He noted that Charles and David Koch, "along with Koch employees, have had their lives threatened, received hundreds of obscenity-laced hate messages, and been harassed by left-wing groups." *Id.*

Each of these examples may very well be mere nuisances that must be tolerated as part of free political debate. *See generally Doe* v. *Reed*, 130 S.Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."). *But see* McConnell, Growing Threat ("the harassment and intimidation by private citizens of those who choose to participate in the political process – is deplorable"). What Plaintiff seeks is the ability to determine whether or not it will engage in

undermined HLF's own First Amendment rights to free speech and association. HLF will certainly comply with all clearly applicable disclosure requirements, but it cannot be asked to volunteer disclosure that may or may not be required.

Alternatively, HLF could determine that the consequences of proceeding are simply too unclear, potentially harmful and irreversible, and not air any of its proposed advertisements. At this point, the FEC's inability to render guidance will have chilled HLF's protected speech. Self-censorship "[i]s a harm that can be realized even without actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Iowa Right to Life Comm. v. Williams*, 187 F.3d. 963, 970 (8th Cir. 1999) ("*IRTL*") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.")

A deprivation of "constitutional rights" likewise "supports a finding of irreparable injury." *Planned Parenthood of Minn. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977). The Eighth Circuit has held that when constitutional rights are involved, and a strong showing has been made on the merits, Plaintiffs are "entitled to a presumption of irreparable harm." *Straights & Gays for Equality v. Osseo Area Sch. – Dist. No. 279*, 471 F.3d 908, 913 (8th Cir. 2006); *see also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

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activities that require the filing of disclosure reports, which in turn may subject its supporters to the types of treatment described above. Plaintiff cannot make an informed decision, however, without guidance from the FEC, which it requested and did not receive.

HLF wishes to engage the public on the issues of the day. HLF anticipates that public interest in these major public policy issues will be at their zenith in the time periods before the election. The opportunity to engage the public on major issues of policy when the public is most engaged will be gone if this court does not act soon. Because HLF is likely to succeed on the merits of its First Amendment claim, irreparable harm is presumed.

III. BALANCE OF HARMS

The Eighth Circuit has held that when First Amendment rights are involved, "the balance [is] clearly in favor of issuing the injunction" to prevent irreparable harm. *IRTL*, 187 F.3d at 970. The balancing required by this court "favors constitutionally-protected freedom of expression" over the government interest in maintaining an unconstitutional position. *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995). "In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008).

Finally, as the Supreme Court has made clear, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 469, 474. HLF prevails on this factor.

IV. PUBLIC INTEREST

"[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *United States v. Raines*, 362 U.S. 17, 27 (1960). This circuit has held "the public interest favors protecting core First Amendment freedoms." *IRTL*, 187 F.3d at 970. Furthermore, the circuit has held that the public interest "is served by free expression on issues

of public concern." *Kirkeby*, 52 F.3d at 775. "[T]he determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights." *Phelps-Roper*, 545 F.3d at 690.

The Supreme Court "has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 295 (1981). HLF wishes to speak on important issues of the day at the time when the citizenry is most tied in to what the federal government is doing.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ; *see also Knox*, No. 10-1121, slip op. at 22 ("The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals."). Thus "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Plaintiff wishes to participate in the process of self-government by urging the public to support the policies that it believes should be adopted. HLF prevails on this factor as well.

PLAINTIFF SATISFIES THE REQUIREMENTS OF STANDING

To demonstrate standing, three elements must be established: an injury in fact, a causal connection between the injury and the defendant's conduct, and a likelihood that the injury will be redressed by a decision favorable to the plaintiff. *See Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560-61 (1992). An injury in fact is satisfied when plaintiffs make a showing of an "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560. (internal quotation marks and citations omitted).

HLF has demonstrated an injury in fact capable of relief by this court. There is a causal connection between the FEC's failure to apply the law and issue an advisory opinion, and the harm now faced by HLF. This court can cure this injury through the issuance of the injunction sought by HLF.

In First Amendment cases, pre-enforcement challenges are subject to more flexible standing requirements. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965) (detailing expanded standing principles for pre-enforcement First Amendment challenges); *American Booksellers Ass'n*, 484 U.S. at 393 (self-censorship is a harm that can be alleged without actual prosecution); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution").

In this context, prospective speakers bringing pre-enforcement challenges must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," and make a showing that there exists a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). HLF meets all of the standing requirements to maintain this action.

WAIVER OF BOND REQUIREMENT UNDER RULE 65(c)

Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction shall issue without the giving of security by the application in an amount determined by the court. "[I]t is within the Court's discretion to waive Rule 65(c)'s security requirement where it finds such a waiver to be appropriate in the circumstances." *Cobell v. Norton*, 225 F.R.D. 41, 50 n.4 (D.D.C. 2004); *see also Doctor John's, Inc. v. City of Sioux City, Iowa*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) ("requiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon an ability to pay."); *Bukaka, Inc. v. County of Benton*, 852 F. Supp. 807, 813 (D. Minn. 1993). In non-commercial cases, such waivers are often granted. Accordingly, HLF respectfully requests that the court waive the bond requirement in the event the requested preliminary injunction is granted.

CONCLUSION

For the foregoing reasons, this Court should declare that, as a matter of law, references to "the government," "the administration," "the White House," and the use of unidentified audio of a person's voice do not "refer to a clearly identified candidate for Federal office," grant HLF's motion for a preliminary injunction, and enjoin defendants from enforcing:

1. 11 C.F.R. § 100.17 as applied to HLF's proposed communications;
2. 11 C.F.R. § 100.29 as applied to HLF's proposed communications; and
3. 2 U.S.C. §§ 431(18) and 434(f) as applied to HLF's proposed communications.

HLF also asks that that this court grant any other relief that may be appropriate, including attorney's fees and costs under applicable provisions of law.

Dated: July 30, 2012

Respectfully submitted,

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**Motion for pro hac vice admission pending*

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CERTIFICATE OF SERVICE

I hereby certify that on July 30-31, 2012, copies of the foregoing Brief in Support of Motion for Preliminary and Permanent Injunction were served by hand delivery and certified mail on the following parties:

VIA HAND DELIVERY
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And

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