UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REAR ADM. JAMES J. CAREY [Ret.],

KELLY S. EUSTIS,

NATIONAL DEFENSE PAC,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Case No. 11-259-RMC

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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ARGUMENT

Introduction

Plaintiffs are before this court seeking protection of their First Amendment rights to assemble together and speak out about political issues important to them. The Federal Election Commission (FEC) has responded to that request by listing, in exhaustive detail, a myriad of burdensome alternative ways Plaintiffs, or acquaintances of Plaintiffs might speak — even going so far as to suggest that National Defense PAC should clone itself to do so. While the Commission would demand that Plaintiffs suffer repeat injuries or undergo radical organizational changes—just to speak—the First Amendment does not countenance such demands. "The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation." *Citizens United v. FEC*, 130 S.Ct. 876, 889 (2010). Here, this court faces a familiar trend in the FEC's regulatory zeal—to deny the fundamental constitutional liberties of speakers while pointing to legions of burdensome alternatives to demonstrate why regulation, and not free speech, should reign supreme. In the wake of *Citizens United* and *EMILY's List*, these arguments are unavailing.

The crux of the Commission's arguments boil down to two main points: (1) Plaintiffs are not injured because they should speak first and defend against criminal or civil enforcement second, and (2) a plentitude of FEC-approved ways to speak and associate adequately protect First Amendment interests here. The FEC's tried and not so true arguments fail to account for controlling precedent from the Supreme Court's campaign finance and First Amendment jurisprudence that favor Plaintiffs' request for injunctive relief in this matter.

I. The FEC Elides the Fact That *EMILY's List* was a Challenge to Federal Contribution Limits

Plaintiffs rely on *EMILY's List* to demonstrate that the Constitution compels the relief they request. But the FEC frames *EMILY's List* as a controversy about allocation regulations and not about the constitutional reach of speech-limiting contribution statutes. Specifically, the FEC claims that, unlike this case, "*EMILY's List* involved a challenge to Commission regulations—not to any statutory provisions of FECA—governing how funds contributed for nonfederal activity could be spent [and] how certain 'mixed' federal and nonfederal activity could be financed." Opp'n Memo. at 17, 20. Plaintiffs will demonstrate, however, that EMILY's List's challenge to the allocation regulations of 11 CFR 106.6 was necessarily a challenge to the contribution limits (and source restrictions) of the Federal Election Campaign Act (FECA), and that the holding in *EMILY's List* is not *dicta*. *EMILY's List* prevents the FEC from enforcing contribution limits against a non-connected committee that uses separate accounts to speak independently about federal candidates. 581 F.3d 1, 12 (D.C. Cir. 2009). The Supreme Court's opinion in *Citizens United*, 130 S. Ct. 876 (2010), prevents the FEC from enforcing the corporate source prohibition of 2 U.S.C. § 441b against non-connected committees for the same communications. *See EMILY's List,* 581 F.3d at 12 n.11 ("If *Austin* were overruled, then non-profits would be able to make unlimited express-advocacy expenditures from their soft-money accounts even if they accepted donations from for-profit corporations or unions to those accounts.").

It is important for this Court to understand, despite the FEC's repeated suggestion, that the term "non-federal funds" does not merely mean "state funds," though non-federal

funds happen to finance state elections in many instances. Rather, the term "non-federal funds," like its synonym "soft money," is shorthand for a precise definition. It defines funds the FEC has *no* authority to restrict, whether or not a state has authority to restrict them, either because the FECA does not restrict those funds or because those funds further speech that the FEC cannot restrict under the *First Amendment* to the U.S. Constitution.[1] *See* Federal Election Commission, "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money," Final Rule, 67 Fed. Reg. 49064 at 49064-65 (July 29, 2002) (term "non-federal funds" is preferable to the term "soft money" but each denotes "unregulated funds" or funds regulated only "under state law").

The FEC concedes that in challenging the allocation regulations EMILY's List challenged the line between "federal" and "non-federal" funds. Opp'n Memo. at 19. However, by challenging the federal funds percentage as too high, EMILY's List was necessarily arguing that the FEC's regulations had in fact reached funds the FEC had no authority to restrict *at all*. After all, the FEC restricts the receipt of funds in two ways: It either 1) limits the contributions an organization receives pursuant to 2 U.S.C. § 441a, or it 2) prohibits the receipt of funds from certain sources altogether; pursuant to 2 U.S.C. § 441b.

In determining which funds FEC regulations could legitimately reach, the *EMILY's List* Court by necessity had to determine what activities the FEC had the power to reach at all. The Court correctly held that the FEC may restrict only those funds that the Supreme Court has ruled can corrupt candidates as a matter of law. 581 F.3d at 6.

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[1] Here is an example of where the funds are "non-federal" (a.k.a "soft money") but the activity furthered appears to be federal: An individual gives money to an organization above a contribution limit for independent expenditures in favor of a candidate to federal office. *See Citizens United v. FEC,* 130 S. Ct. 876 (2010); *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010).

With this as its standard, the D.C. Circuit held that those funds that EMILY's List accepts for contributions to candidates may be restricted as to source and amount. 581 F.3d at 12. Funds accepted to administer contributions to candidates may also be restricted. *Id.* But all other funds may not be so restricted (even though they must be reported under 2 U.S.C. 434(a)). *Id.* This led the D.C. Circuit Court of Appeals to hold that "a non-profit that makes expenditures *and* makes contributions to candidates" is "entitled to make their expenditures … out of a[n] account that is not subject to source and *amount limitations*." *EMILY's List,* 581 F.3d at 12 (emphasis added). The reference to "amount limitations" is a reference to the contribution limits of 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). It is these contribution-limit statutes that provide the FEC's authority for its (flawed) regulation at 11 CFR 106.6. Much as the FEC might wish this away, there is no other conclusion.

The FEC suggests that its advisory opinion process honors the holding in *EMILY's List* "by permitting groups to maintain one political committee to accept limited funds for contributions to federal candidates, and also establish a second political committee to accept unlimited contributions for independent expenditures." Opp'n Memo. at 21. *Citizens United* eclipses the Commission's reasoning because a "PAC is a separate association." 130 S. Ct. at 897. That a separate, distinct legal entity may speak does nothing to cure the constitutional injuries at hand. *Id.*

The FEC goes on to argue that while the *EMILY's List* opinion did decide where federal activity ends and non-federal activity begins, the opinion can have no bearing on a committee like NDPAC that engages in federal activity (contributions) and still other federal activity (independent expenditures). Opp'n. Memo. at 20. In deciding which

activities were "non-federal," the *EMILY's List* Court had to determine the outer reach of federal campaign funding restrictions. It freed the organization of restrictions on funds that would be used to make independent expenditures. The definition of "independent expenditure" includes federal candidates. *See* 2 U.S.C. 431(17) ("independent expenditure" means expressly advocating the election or defeat of a *federal* candidate). Independent expenditures clearly are, as the FEC would have it, federal activity. Yet, there is no doubt that the *EMILY's List* Court permitted those expenditures to be made with 100% "non-federal funds"—that is, with "soft money"; that is, with *unrestricted* funds. The essence of the FEC's argument is that the *EMILY's List* opinion might help a non-connected committee determine what funds it can raise to communicate in, say, gubernatorial races, but it offers *no* relief to non-connected committees that want to make independent expenditures about federal candidates. Opp'n. Memo. at 22. Not only does the FEC's argument deny the very logic of the *EMILY's List* opinion, it denies its very words. *EMILY's List,* 581 F.3d at 12.

The error can be exposed fully by Plaintiffs speaking the FEC's language. The FEC claims that the *EMILY's List* case merely challenged the allocation regulations for non-connected committees at 11 CFR 106.6 but *not* FECA's contribution limits. Opp'n. Memo. at 17. While on the books, section 106.6 required that "(1) The following shall be paid 100 percent from the Federal account of the nonconnected committee: (i) Public communications that refer to one or more clearly identified federal candidates." *See* 11 CFR 106.6(f)(1)(i) (invalidated as unconstitutional in *EMILY's List,* 581 F.3d at 25). Invalidating section 106.6, the *EMILY's* Court held that independent public communications that refer to one or more clearly identified federal candidates can be paid

100 percent from the *non-federal* account. The court held it unconstitutional for the FEC to require that those communications be paid from the federal account. 581 F.3d at 12.

But what is the "federal account"? It is an account made up of funds received under the contribution limits of 2 U.S.C. § 441a and the source restrictions of 2 U.S.C. § 441b. *See* 11 CFR 300.30(b)(3)(i) ("Only contributions that are permissible pursuant to the limitations and prohibitions of the [Federal Election Campaign] Act may be deposited into any Federal account."); *see also* 11 CFR 300.2(g) ("*Federal funds* mean funds that comply with the limitations, prohibitions, and reporting requirements of the Act"). Because the section 106.6 allocation rested on the limits and restrictions of 2 U.S.C. §§ 441a and 441b, the *EMILY's List* case was effectively an as-applied challenge to the scope of FECA's contribution limits and source prohibitions.

No matter how the FEC seeks to recast the issue, it is true that *EMILY's List* protects the right of non-connected committees to accept unrestricted funds into a separate account to make independent expenditures about federal candidates. 581 F.3d at 12. The *EMILY's List* holding is not *dicta.* Because NDPAC is a non-connected committee like EMILY's List, the opinion is binding on the case at hand.

II. The D.C. Circuit Examined *CalMed* at Length in *EMILY's List* and Rejected the Same Arguments Made by the FEC Here

The FEC submits "accepting plaintiffs' view of *EMILY's List* would require the Court to ignore or decline to follow the Supreme Court's decision in *CalMed*." Opp'n Memo at 22. The argument is remarkable when one considers the depth to which *EMILY's List* considers and integrates the *CalMed* opinion. *See EMILY's List*, 581 F.3d at 12 ("[n]on-profits may be compelled to use their hard-money accounts to pay an

appropriately tailored share of administrative expenses associated with their contributions") (quoting *California Medical Ass'n v. FEC*, 453 U.S. 182, 198-99 n.19 (1981) (opinion of Marshall, J.)).

The FEC goes out of its way to argue that *CalMed* already decided the constitutionality of applying contribution limits to a political committee that makes both contributions to candidates and independent expenditures. The FEC makes this argument despite *EMILY's List's* holding that a non-connected committee "that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to … candidates." 581 F.3d at 12. It makes this argument despite *CalMed*'s footnote 17, in which the plurality noted an *amicus* brief that claimed the contribution limit "would violate the First Amendment if construed to limit the amount individuals could jointly expend to express their political views." 453 U.S. at 197 n.17. And, the FEC makes the argument despite the plurality's explanation that, "[c]ontributions to such committees are therefore distinguishable from expenditures made jointly by groups of individuals in order to express common political views." *Id.*

The FEC believes that if it can just find independent expenditures in the record of the *CalMed* case then nothing stated in *EMILY's List* or *Citizens United* can vindicate Plaintiffs' claim. The FEC argues that "contrary to plaintiffs' suggestion, 'CALPAC ma[de] contributions to and expenditures *on behalf of* candidates in state and federal elections.' *FEC v. Cal. Med. Ass'n*, 502 F. Supp. 196, 198 (N.D. Cal. 1980) (emphasis added)." Opp'n Memo. at 17 n.3. The FEC's memorandum equates "expenditures on behalf of" candidates with independent expenditures. But that is inconsistent with the *CalMed* opinion and the FEC's position in AO 2010-09 (Club for Growth).

Plaintiffs can find nothing in the record to support the assertion that California Medical Association actually made independent expenditures calling for the election or defeat of a federal candidate or that the funding of independent expenditures was the issue in the case.[2] What's more, the FEC has elsewhere maintained that expenditures "on behalf of" does not mean "independent expenditures," it means "coordinated expenditures," which are treated as in-kind contributions. In AO 2010-09, the FEC made the following statement:

> The Commission's current regulation at 11 CFR 110.1(h) limits a person that has already contributed to a specific candidate from also contributing to an unauthorized political committee if the contributor "give[s] with the knowledge that a substantial portion will be contributed to, or *expended on behalf of*, that candidate for the same election." Section 110.1(h) "governs the circumstances under which contributions to a candidate and his or her authorized campaign committee(s) must be aggregated with contributions to other political committees for the purposes of the contribution limits of section 110.1." Explanation and Justification, Contribution and Expenditure Limitations and Prohibitions, 52 FR 760, 765 (Jan. 9, 1987). In other words, the Commission's earmarking regulation is designed to prevent the circumvention of contribution limits.
>
> However, the Club has represented that the Committee will not, itself, make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by the Act, *nor will the Committee make any coordinated communications or coordinate any expenditures* with any candidate, authorized committee, political party committee, or agent of such persons. Thus, because there is no possibility of circumvention of any contribution limit, section 110.1(h) and its rationale do not apply to the Committee's solicitations or any contributions it receives that are earmarked for specific independent expenditures.

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[2] Plaintiffs are aware of no evidence of independent expenditures made by the California Medical Association in the record. *See generally FEC v. California Medical Assn.*, 502 F. Supp. 196 (1980). Rather, the record shows the association making in-kind contributions to CALPAC in excess of $5000 per year to cover the expense of CALPAC employees. *Id.* One would think that CALPAC was the separate segregated fund of California Medical Association, which would permit the association to pay CALPAC's administrative expenses. *See* 11 CFR Part 114. It appears, however, that CALPAC was established as a non-connected committee able to accept contributions from the general public. This made the association's payment for CALPAC's administrative expenses impermissible in-kind contributions. But plaintiffs can find no evidence that the Association made independent expenditures or that the *CalMed* Court ruled it is permissible to restrict funds that would finance them. *See California Medical Ass'n v. FEC*, 453 U.S. 182 (1981).

AO 2010-09 at 5 (emphasis added). From this it is clear that an expenditure "on behalf of" a candidate is an in-kind contribution, not an independent expenditure. *See also Buckley v. Valeo,* 424 U.S. 1, 24 n.25 (1976) ("Expenditures by persons or associations that are 'authorized or requested' by the candidate … are treated as contributions under the Act."). This seems supported by the numerous occurrences of "on behalf of" in the federal regulations. *See, e.g.,* 11 CFR §§ 100.5(e)(2) and (f)(2), 100.16(b), 100.87(c). Thus, the Club for Growth's Independent Expenditure-PAC was free to accept earmarked contributions to be used for independent expenditures because they were *not* expenditures "on behalf of" the candidate. Absent further evidence, it seems fair to assume that the quote the FEC cites (Opp'n. Memo. at 17 n.3) indicates that the California Medical Association was making in-kind contributions by paying bills on behalf of CALPAC, not making independent expenditures. The FECs reliance on *CalMed* is wholly misplaced.

III. If Separate Bank Accounts Cure the Threat of Corruption in Mixed Purpose Non-Connected Committees, They must also Cure the Threat for Non-Connected Committees Like NDPAC

If separate bank accounts are adequate to prevent the corruption of federal candidates for mixed purpose non-connected committees, they are adequate to prevent corruption here. The FEC does not explain how a mixed purpose non-connected committee may swell with soft money in one account and not corrupt candidates, but that a non-connected committee that would accept unrestricted funds into a separate account for independent expenditures suddenly poses a threat of corruption. The FEC's argument is nonsensical.

The FEC also argues that "[t]he creation of separate bank accounts does not eliminate the potential for individuals, groups, corporations, or unions to try to leverage

unlimited donations as a means to pressure an organization to direct contributions to particular federal candidates." Opp'n. Memo. at 16. Actually, it does. The reason is simple. The same individuals, groups, corporations, or unions could try to leverage unlimited donations to the state side of the non-connected committee and achieve the same result the FEC fears with independent expenditures. Yet, this prospect does not trouble the FEC, as it cannot: Mixed purpose non-connected committees have a right to speak without restriction where they pose no the threat of corruption. *See generally Buckley v. Valeo,* 424 U.S 1 (1976). Is it the FEC's position that a corporation could give unlimited amounts to a non-connected committee for gubernatorial races and not sway the committee's decision makers on candidate contributions, but that the moment the same corporation gave generously for independent expenditures the committee's decision makers would lose their integrity?

There is another aspect of the argument this Court should consider: The FEC's remedy here is to stifle NDPAC's independent expenditures. The FEC argues that Plaintiffs' robust exercise of their rights to independent speech from one account will sway the decision of which candidates will receive contributions from another account. Therefore, argues the FEC, NDPAC and its supporters must renounce their right to robust independent speech by subjecting themselves to contribution limits and source prohibitions to ensure that NDPAC's contributions to federal candidates—made from another account, subject to limits, to source restrictions, and to thorough reporting requirements—are truly the decision of Admiral James Carey. This is hardly a compelling interest. *See FEC v. Nat'l. Conservative PAC*, 470 U.S. 480 ("[a] restriction on the amount of money a … group can spend on political communications …

necessarily reduces the quantity of expression.") It surely can be met by the less burdensome requirement that NDPAC report its every receipt and disbursement as required under 2 U.S.C. § 434(a).

Earmarking contributions is already illegal. 2 U.S.C. § 441f. The biennial aggregate limit on contributions to all political committee accounts that, in turn, go to candidates ensures that no one donor will assert too much influence. *See Buckley,* 424 U.S. at 264. The FEC's position—that NDPAC forfeits its rights to independent speech when it makes contributions to candidates—is contrary to the holding in *EMILY's List* and untenable.

IV. Plaintiffs Need Not Clone Itself to Make Independent Expenditures

The FEC argues that "requiring NDPAC to create a separate political committee to accept unlimited contributions to make independent expenditures will increase full and clear disclosure of NDPAC's federal campaign activity." Opp'n. Memo. at 27. Requiring Plaintiffs to establish and administer two political committees is unnecessarily burdensome. *See Citizens United v. FEC,* 130 S. Ct. 876 (2010). And it ignores the fact that plaintiff NDPAC is already a political committee under 2 U.S.C. 431(4). NDPAC not only reports every (federal) "contribution" it accepts, *see* 2 U.S.C. 431(8), and every (federal) "expenditure" it makes, *see* 2 U.S.C. § 431(9), it also reports every (non-federal) receipt and disbursement. *See* 2 U.S.C. 434(a). The FEC cannot argue that funds will go unreported if NDPAC does not clone itself and Adm. Carey is not forced to administer two committees. Every receipt and disbursement will be reported. Nonetheless, the FEC argues that people may better understand the reports if one political committee would

handle the independent expenditures and another the contributions. With due respect to the FEC, the argument is nonsense: non-connected committees may currently make independent expenditures, which are quickly reported and readily understood. And, whatever its merit, the FEC's argument does not justify restricting funds for NDPAC's independent expenditures, essentially saying that NDPAC may speak as loudly as it wants so long as it only speaks as loudly as the FEC permits. Assuming, *arguendo*, there is some benefit in requiring all political committees to create sister committees to handle their independent expenditures, such is the prerogative of Congress.

Furthermore, any public communication by NDPAC that contains express advocacy will contain a disclaimer. *See* 2 U.S.C. 441d(a). The definition of "independent expenditure" subsumes express advocacy, s*ee* 2 U.S.C. § 431(17), and is the kind of communications NDPAC would make if it prevails.

The FEC says Adm. Carey is qualified to operate two political committees. Opp'n Memo. at 27. Plaintiffs note that seasoned political operative, David Bossie, of Citizens United, is no less qualified. But that fact hardly constitutes a legitimate, let alone compelling, governmental interest. *See Citizens United,* 130 S. Ct. at 897 (establishing a PAC is burdensome); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 263 (1986) ("While the burden on MCFL's speech [establishing a political committee] is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification").

As the FEC clings to its regulatory requirements, it misses important constitutional developments in First Amendment jurisprudence necessary for the

disposition of this matter. Taking these considerations into view helps better illustrate why Plaintiffs' request for injunctive relief should be granted.

V. Recognizing Cognizable Injuries in First Amendment Jurisprudence

The Commission maintains that Plaintiffs have not suffered enough injuries to warrant injunctive relief by this court. This position ignores the careful instruction given to the FEC in its recent trilogy of First Amendment losses before the Supreme Court.

A. Setting Speech Protective Standards

In response to Plaintiffs' request for preliminary injunctive relief, the FEC is silent concerning salient First Amendment benchmarks applicable to this case. Following the FEC's losses in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.* ("WRTL"), 540 U.S. 93 (2007), *Davis v. FEC*, 554 U.S. 724 (2008), and *Citizens United*, several rules that give proper preference to the operation of the First Amendment must be integrated into this challenge.

First Amendment case law recognizes that pre-enforcement challenges are entirely permissible, if not welcome. Where a challenged law targets speech by the class belonged to by plaintiffs, a credible threat of enforcement and corresponding injury exists. *See Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (FEC's inability to affirmatively vote on an advisory opinion request confers standing because nothing "prevents the Commission from enforcing its rule at any time"); *but see* Opp'n Memo. at 35-36 n.10 (where the FEC suggests there is no harm because the Commission will probably not enforce this rule). A related rule holds that a party most assuredly may challenge a statute in the pre-enforcement context if "First Amendment

rights are arguably chilled, so long as there is a credible threat of prosecution." *Chamber of Commerce,* at 603-04. Because speakers might have to undergo costly compliance or risk prosecution, pre-enforcement challenges in the context of the First Amendment are appropriate. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 391 (1988); *but see* Opp'n Memo. at 36 (where the FEC explains that Plaintiffs should risk investigations and litigation to speak).

It should be recounted that a fundamental maxim of the Supreme Court's First Amendment jurisprudence is that while speakers could employ other methods to disseminate their message, such a fact "does not take their speech . . . outside the bounds of First Amendment protection." *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)). This then means that speakers not only possess the right to determine their message, but also to "select what they believe to be the most effective means for so doing." *Id*; *But see* Opp'n Memo. at 32 (detailing the many ways the FEC suggests Plaintiffs should associate and speak). This principle was confirmed most recently in *WRTL*, where the Court noted that instructing individuals that they may speak, but only in a manner the government approves, is "akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says 'I disagree with the draft.'" 551 U.S. at 477 n.9 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

The principles of *Meyer* and *Hurley* take especially strong force in the context of political speech – communication at the very core of the First Amendment. *Buckley,* 424 U.S. at 39. It is when citizens unite that effective advocacy is had, as the Supreme Court has routinely protected the "close nexus" between freedoms of speech and assembly.

NAACP v. Alabama, 357 U.S. 449, 460 (1958). The right to speak effectively proves crucial in the context of association, because it would be "diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (quoting *Buckley*, 424 U.S. at 65-66).

These principles find their realization in *Wisconsin Right to Life* and *Citizens United*. In *WRTL*, the Supreme Court was careful to explain that while the FEC might expound about the many ways an organization could speak, such burdensome options did nothing to cure the constitutional maladies. *WRTL*, 551 U.S. at 477 n.9. While the FEC argued that a "PAC option" was sufficient to protect First Amendment speech, the Court explained that PACs "well-documented and onerous burdens, particularly on small nonprofits" did not cure the constitutional injuries at hand. *Id.* Similarly, while the speakers in *WRTL* might have availed themselves of other communication outlets, such alternatives might not be as effective. *Id.* As a result, they were no remedy to the real constitutional injuries suffered by the *WRTL* speakers. *WRTL* returned the Supreme Court's jurisprudence to one favoring speech, not regulation. *Id.* at 482 ("we give the benefit of the doubt to speech, not censorship").

After the FEC lost *WRTL*, it went on to lose *Citizens United* by revamping its regulations to include a two-prong, eleven factor speech code – designed as a response to the *WRTL* Court's admonition that speech tests must not rely on an "open-ended rough-and-tumble of factors." *Id*. at 451 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)). The Court then offered another rule of hand: "The First Amendment does not permit laws that force speakers to retain a

campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 130 S.Ct. at 889. Thus, a guiding principle emerges from *Citizens United* – the continued maintenance of complicated regulatory structures that inhibit First Amendment rights must fall if average speakers are to have their rights protected.

In the wake of the Supreme Court's speech-friendly precedent, most recently recognized in *Wisconsin Right to Life* and *Citizens United*, any review of First Amendment burdens must incorporate, not ignore, these principles. To wit, citizens facing overbroad provisions that smother and inhibit speech must have a remedy to protect their constitutional rights. This remedy is not found in piling burdensome alternatives on already-strained grassroots organizations like National Defense PAC. Nor is an adequate remedy found by demanding that citizens risk enforcement actions when they associate together about issues they care about and speak out to the public. Instead, it is the proper function of this court to ensure that Plaintiffs' speech is not chilled and that their ongoing injuries to their First Amendment rights receive an appropriate remedy – injunctive relief.

B. Applying the Correct First Amendment Standards to the FEC's Arguments

The FEC submits that Plaintiffs have failed to meet the threshold standards to satisfy preliminary injunctive relief. Most specifically, it claims that Plaintiffs cannot demonstrate any cognizable irreparable injury. To make this claim, the FEC relies on cases resting outside of the special protection enjoyed by speakers under the First Amendment. For example, the FEC asserts that any "additional administrative burden of setting up a new political committee" is only "[m]ere injuries of money, time, and

energy." Opp'n Memo. at 37 (internal quotations and citations omitted). Or having to "respond to an administrative enforcement proceeding would not create irreparable harm." *Id*. How quickly the FEC forgets the lessons of *Citizens United.*[3]

The D.C. Circuit has held that when it comes to the First Amendment and preliminary injunctions, speakers must "establish they are or will be engaging in constitutionally protected behavior to demonstrate that the allegedly impermissible government action would chill allowable individual conduct." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006). Where plaintiffs have demonstrated that First Amendment rights are "either threatened or in fact being impaired at the time relief is sought," irreparable harm will be demonstrated. *National Treasury Employees Union v. U.S.*, 927 F.2d 1253, 1254-55 (D.C.Cir. 1991) (quoting *Wagner v. Taylor*, 836 F.2d 566, 577 n.76 (D.C.Cir. 1987)). More recently, while the *Speechnow* district court denied preliminary injunctive relief based on a similar argument, the D.C. Circuit Court of Appeals reversed that ruling. 599 F.3d 686.

The D.C. Circuit has likewise recognized the inherent difficulty in alleging irreparable harm in the context of the First Amendment, leading it to note what the Third Circuit has stated, that the "assertion of First Amendment rights does not automatically require a finding of irreparable injury . . . rather the plaintiffs must show 'a chilling effect on free expression.'" *Chaplaincy of Full Gospel Churches*, 454 F.3d at 301 (internal citations omitted). Thus, where this chilling effect appears true, such allegations "clearly

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[3] The FEC bends over backwards to rely on non-speech oriented cases to substantiate its claim that no irreparable injury exists here. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980), cited in the Opposition Memo on page 37, is a case that has nothing to do with constitutionally protected liberties. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006), involved the Establishment Clause of the First Amendment, and did not concern itself with the special speech-protective rules applicable to political speech.

show irreparable injury." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). It is fair to state in the context of political speech being threatened by unconstitutional regulation and enforcement that a finding of irreparable injury is more easily met. *See, e.g., Connection Distributing Co. v. Holder*, 557 F.3d 321 (6th Cir. 2009); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995) (First Amendment pre-enforcement challenges employ relaxed standards due to the "fear of irretrievable loss"); *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995) (explaining that joining "organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection" so that "the duration of a trial is an 'intolerably long' period during which to permit the continuing impairment of First Amendment rights"). In sum, courts are more apt to grant this form of extraordinary relief due to the high value of political speech under the Constitution.

In *Citizens United*, even the Supreme Court explained that "When the FEC issues advisory opinions that prohibit speech, '[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." 130 S. Ct. at 896. In this challenge, the FEC could not muster four votes to issue an advisory opinion indicating that Plaintiffs would be safe associating and speaking in the manner contemplated, even though the holding of *EMILY's List* demands so. Fearful of being investigated, fined, or imprisoned, Plaintiffs had no other remedy than to seek injunctive relief before this court.

Oddly enough, the FEC submits that Plaintiffs have nothing to complain about – speakers can take their odds with a not-so-friendly-sounding "investigative proceeding" or enjoy the "institution of an enforcement suit" where they would have a "full opportunity to present their constitutional arguments." Opp'n Memo. at 36. Under this unconstitutional game of First Amendment Russian Roulette, Plaintiffs could face criminal or civil penalties just for following this very advice. Chilling. Of course, the Commission's position runs headlong into the Supreme Court's instruction in *Citizens United*, where it explained that a "speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on." *Citizens United*, 130 S. Ct. at 895. Déjà vu *Citizens United*.

Without reference to the aforementioned principles, the FEC argues that if Plaintiffs are not willing to dance with the Enforcement Division, they "could fully accomplish their plans while this case proceeds" in at least four ways. Opp'n Memo. at 32. First, the FEC contends that Plaintiff Eustis could donate *less* money to fund National Defense PAC's independent expenditures because his funds could be comingled with those of NDPAC. *Id.* Second, NDPAC could accept the lower-amount contribution from Eustis and spend time fundraising to find additional money to perhaps, one day, enable it to produce its independent expenditures. *Id.* Third, NDPAC could "set up a separate entity that accepts contributions of unlimited amounts" – alleging that NDPAC's First Amendment rights might be fungible and otherwise transferred to a separate organization. *Id.* Fourth, the FEC submits that NDPAC need not speak at all and that

Eustis should be forced to pay for the advertisement himself. *Id.* Each of these arguments suffers from one fundamental flaw – they ignore the recognition of Plaintiffs' full First Amendment rights.

To argue, as the FEC does, that forcing individuals to speak less, spend less, or associate less adequately protects First Amendment interests puts an entirely new spin on "less is more." It remains a basic principle that speakers are free to "select what they believe to be the most effective means for [communicating]." *Meyer,* 486 U.S. at 424. To demand that speakers do less, or that government possesses the authority to instruct free people how to communicate otherwise turns this principle on its head. In this matter, Plaintiffs have done exactly this – forming together as NDPAC and wishing to exercise their rights to speak out about Anthony Weiner and other candidates for federal office. The Supreme Court has affirmed just this right in *Citizens United*, itself explaining that the government "may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation." 130 S.Ct. at 889. In attempting to fashion four regulatory exemptions to explain how some members of NDPAC might speak runs against the Supreme Court's holding in *Citizens United*. Plaintiffs' full First Amendment rights must be recognized, not through an FEC regulatory exemption, but in realization that acts of speech and association are not inherently corrupt, but are, instead, inherently protected under the First Amendment.[4] *See WRTL*, 551 U.S. at 457 (the "First Amendment requires us to err on the side of protecting political speech rather than suppressing it").

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[4] Indeed, the Supreme Court noted that because the FEC's "business is to censor, there inheres the danger that [it] may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression." *Citizens United*, 130 S. Ct. at 896.

In this instance, it is members of National Defense PAC who would like to engage in independent expenditure campaigns while also making contributions from a separate account. To argue that one contributor to NDPAC may speak instead of the organization fully misses the constitutional argument at hand. To suggest that members might donate *less* money or that NDPAC should be forced to fundraise more in hopes of bringing in enough funding for its speech is likewise unavailing. National Defense PAC wishes to speak, unabridged in the manner it has selected, and cannot due to the challenged laws and the FEC's interpretation of them.

The FEC next focuses on an especially narrow construction of *Elrod v. Burns*, 427 U.S. 347 (1976), in discussing the injuries at hand. The Commission seems to allege that because there are no specific threats of enforcement here and no "governmental action," that no irreparable injury could be had. Opp'n Memo. at 33. But a narrow focus on the factual holding of *Elrod* is misplaced. The D.C. Circuit has held that when plaintiffs have demonstrated their First Amendment rights are "either threatened or in fact being impaired" irreparable harm will be demonstrated. *National Treasury Employees Union,* 927 F.2d at 1254-55. When a chilling effect has been demonstrated, these allegations "clearly show irreparable injury." *Dombrowski,* 380 U.S. at 486.

The Commission submits that its inability to issue an advisory opinion clearing Plaintiffs for the independent expenditure campaign they hoped to run does not work a cognizable injury in this case. Opp'n Memo at 33. Plaintiffs are not required to illustrate that they have been specifically threatened or are currently facing government investigation or enforcement to obtain injunctive relief. As *Dombrowski* holds, when "statutes also have an overbroad sweep . . . the hazard of loss or substantial impairment

of those precious rights may be critical." 380 U.S. at 486. To force Plaintiffs to step out on their own and risk enforcement actions by the FEC is not tolerated under controlling First Amendment case law. *Citizens United*, 130 S. Ct. at 896.

In this challenge, Plaintiffs have established concrete, well-articulated plans to engage in a focused independent expenditure campaign as soon as they are legally permitted to do so. In fact, ¶ 24 of the Verified Complaint indicates that "*as soon as possible*" NDPAC would like to engage in an independent expenditure campaign directed against Anthony Weiner in New York's Ninth Congressional District. VC at ¶ 24 (emphasis added). Plaintiffs specifically included EXHIBIT F, which includes the proposed advertisement to be run on Newsmax. *Id.* Going further, National Defense PAC articulated its plans for additional independent expenditure campaigns in the near future, having contacted donors willing to give more than $5,000.00 per calendar year to finance such campaigns. *Id.* at ¶ 25. Plaintiffs NDPAC and Eustis articulated clear and concrete plans to engage in speech protected at the very core of the First Amendment, as well as association with other likeminded individuals, both now and in the near future. *Id.* at ¶¶ 26-29.

Plaintiffs have satisfied well-established rules to demonstrate the need for injunctive relief in the context of the First Amendment. National Defense PAC, its members, and Plaintiff Eustis need not test the FEC's enforcement division by engaging in its independent expenditure campaign risking fines or criminal penalties. Just the same, Plaintiffs need not exhaust burdensome FEC alternatives to its own plans to reach the public with its political message. In this challenge, that means allowing Plaintiff Eustis to donate beyond the $5,000.00 annual federal limit to be able to permit NDPAC

to run advertisements about its views on Anthony Weiner. It also means that NDPAC should be permitted to keep two separate bank accounts for its independent expenditures and contributions, as detailed earlier.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) and applicable regulatory requirements as they apply to Plaintiffs.

Dated: March 28, 2011

Respectfully submitted,

_/s/ Dan Backer___________________

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2011, I caused to be served this Reply Memorandum by electronic mail, pursuant to the agreement of counsel, upon the following counsel:

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Respectfully submitted,

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