UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES J. CAREY, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 11- 259-RMC FEDERAL ELECTION COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Christopher Hughey
Acting General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

Greg Mueller (D.C. Bar No. 462840)
Erin Chlopak (D.C. Bar No. 496370)
Attorneys

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

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INTRODUCTION

Contrary to plaintiffs' portrayal, the dispute between the parties is not about prohibiting plaintiffs' First Amendment activity. National Defense PAC and two individuals allege that the Federal Election Commission ("Commission") has prevented them from taking advantage of recent court decisions that allow certain organizations to accept unlimited funds to make independent expenditures to support or oppose federal candidates. As we explain below, however, plaintiffs can both accept such funds and make direct contributions to federal candidates as long as they establish two separate political committees and comply with the applicable recordkeeping and reporting requirements. This case, therefore, is not about banning plaintiffs' speech or fundraising, but about reasonable requirements that help prevent corruption and inform the public.

Plaintiffs satisfy none of the requirements for a preliminary injunction. They cannot meet their burden of demonstrating a substantial likelihood of success on the merits because they can collect and spend the money they seek as long as the unlimited contributions they receive are accepted by a political committee that makes only independent expenditures and gives no direct contributions to federal candidates. Plaintiffs also cannot demonstrate any irreparable harm that would arise in the absence of an injunction because they have alleged a potential loss of only $1,300 in revenue during the pendency of this case, and because they face no imminent risk of enforcement proceedings against them. Finally, the government and the public have important interests in continued enforcement of the provisions challenged here, to minimize corruption or the appearance of corruption of the federal political system.

BACKGROUND

I. THE FEDERAL ELECTION COMMISSION

The Commission is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("Act" or "FECA"), 2 U.S.C. §§ 431-57, and other statutes. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. §§ 437d(a)(8), 438(a)(8),(d); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. §§ 437d(a)(7), 437f.

II. STATUTORY AND REGULATORY BACKGROUND

A. Contributions and Expenditures

The Act defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). "Expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

B. Independent Expenditures

The Act defines "independent expenditure" as an expenditure by a person "expressly advocating the election or defeat of a clearly identified candidate; and . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's

authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17).

C. Political Committees

A "political committee" includes "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year," 2 U.S.C. § 431(4)(A), and is "under the control of a candidate" or has as its "major purpose" "the nomination or election of a candidate," *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). A "nonconnected committee" is a political committee that is not a political party committee, an authorized committee of a candidate, or a separate segregated fund ("SSF") established by a corporation or labor organization. *See* 11 C.F.R. §§ 100.5(a), 106.6(a). Corporations and labor organizations may underwrite the administrative and fundraising costs of their connected SSFs, but may solicit contributions only from a "restricted class" of individuals associated with the company or union. 2 U.S.C. § 441b(b)(2)(C), (b)(4)(A); 11 C.F.R. §§ 114.1(c), 114.5(g)(1). Nonconnected political committees, on the other hand, have no such restriction, and may solicit contributions from the general public. A "multicandidate political committee" is a political committee that has been registered for at least 6 months, has more than 50 contributors and has made contributions to at least 5 candidates for federal office. 2 U.S.C. § 441a(a)(4).

D. Organizational and Reporting Requirements

Any organization that qualifies as a political committee must observe certain organizational and reporting requirements. Every political committee is required to have a treasurer who, in turn, is required to keep an account and preserve the records, *inter alia*, of the committee's receipts and disbursements. 2 U.S.C. § 432(a)-(d). Political committees are also

required to file a statement of organization with the Commission within 10 days of either their designation (authorized campaign committees), establishment (separate segregated funds), or becoming a political committee within the meaning of section 431(4) (all other political committees). 2 U.S.C. § 433. Political committees must file periodic reports for disclosure to the public of all receipts from and disbursements to a person in excess of $200 in a calendar year (and in some instances, of any amount), as well as total operating expenses and cash on hand. 2 U.S.C. § 434.

E. Contribution Limits

The Act and Commission regulations prohibit any individual from making contributions that in the aggregate exceed $5,000 per year to a political committee that is not an authorized committee of a candidate or a political party committee. 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. § 110.1(d). The Act and Commission regulations also prohibit any individual from making contributions to political committees (that are not national party committees) that in the aggregate exceed $46,200 for the 2011-2012 biennial period. 2 U.S.C. § 441a(a)(3)(B); 11 C.F.R. § 110.5.[1] The Act correspondingly prohibits political committees from knowingly accepting contributions in excess of these limitations. 2 U.S.C. § 441a(f). In addition, the Act and Commission regulations prohibit corporations and labor organizations from making contributions to candidates. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1).

The Supreme Court has upheld the limits on contributions to multicandidate political committees that make contributions to candidates as a legitimate means to prevent corruption or its appearance. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981) ("*CalMed*") ("Congress enacted § 441a(a)(1)(C) in part to prevent circumvention of the very limitations on contributions

[1] *See* Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 Fed. Reg. 8368 (FEC Notice, Feb. 14, 2011).

that this Court upheld in *Buckley*."); *see id.* at 203 (Blackmun, J., concurring) ("[C]ontributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his or her authorized campaign committee upheld in *Buckley*.").

Following the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010), in which the Court held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," the D.C. Circuit struck down the contribution limits at 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) as applied to political committees that make only independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686, 689, 694 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"). At the same time, the D.C. Circuit upheld the reporting requirements for political committees in 2 U.S.C. §§ 432, 433, and 434(a), as well as the organizational requirements of 2 U.S.C. §§ 431(4) and 431(8). *Id.* at 696-98. To "be clear," the D.C. Circuit noted, it decided questions of constitutionality only "as applied to contributions to SpeechNow, an independent expenditure-only group. [The] holding does not affect, for example, § 441a(a)(3)'s limits on direct contributions to candidates." *Id.* at 696.

In two recent advisory opinions, the Commission interpreted *Citizens United* and *SpeechNow* and concluded that political committees that each sought to make only independent expenditures (and not any monetary or in-kind contributions or coordinated communications) may accept unlimited contributions from individuals, other political committees, corporations, labor organizations, and "the general public" to fund such independent expenditures. *See* FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269, at *1-*2 (July 22, 2010) ("Commensense Ten AO"); FEC Advisory Op. 2010-09 (Club for Growth), 2010 WL 3184267,

at *2 (July 22, 2010) ("Club for Growth AO"). Consistent with both *Citizens United* and *SpeechNow*, the Commission explained that these independent expenditure-only political committees must comply with the Act's registration and reporting requirements. Commonsense Ten AO, at *1, *2; Club for Growth AO, at *2, *4. *See Citizens United*, 130 S. Ct. at 909; *SpeechNow*, 599 F.3d at 696. The Commission approved Club for Growth's plan to establish a new independent expenditure-only political committee even though the Club also administers a separate segregated fund, Club for Growth PAC, that makes contributions to candidates. The Club's new independent expenditure-only committee, however, will not accept any contributions from Club for Growth PAC, nor will it transfer any funds to the PAC. Club for Growth AO, at *2.

III. PLAINTIFFS

Plaintiff Rear Admiral James J. Carey is retired from the United States Navy and resides in Alexandria, Virginia. (Ver. Compl. ¶ 8.) Carey is the founder and chairman of the National Defense Committee ("NDC"), a non-profit organization of war veterans headquartered in Northern Virginia. He formed NDC with several colleagues during the late 1990s with the stated goals of addressing certain military, defense, and veterans issues, including military voting, reemployment following service, and campus access for military recruiters. *See* NDC, *Who We Are* (Feb. 25, 2011) (FEC Exh. 1); The Pers. Website of Rear Adm. (Ret.) James J. Carey, *Links* (Feb. 27, 2011) (FEC Exh. 2).

In 2000, Carey registered plaintiff National Defense PAC ("NDPAC") with the Commission as a nonconnected political committee, and he has served as its treasurer ever since. NDPAC, Stmt. of Org. (July 17, 2000) (FEC Exh. 3). Carey formed NDPAC to support the candidacy of military veterans who hold certain positions concerning the size of government and

national defense and military issues. NDPAC, (Feb. 25, 2011) (FEC Exh. 4 at 2-3); FEC Exh. 2 at 2-3; *see also* Ver. Compl. ¶¶ 10, 12. NDPAC is "headquartered in Northern Virginia." Carey Website, *Links* (Feb. 27, 2011) (FEC Exh. 2 at 2). (*See also* Ver. Compl. (caption listing NDPAC's Virginia address).) And it is incorporated in Virginia. (Ver. Compl. Exh. A, at ECF p. 7 (email from Dan Backer, NDPAC, to William Powers, FEC, Aug. 16, 2010) (confirming NDPAC is incorporated in Virginia).) It has continuously filed reports with the Commission since 2000 and obtained multicandidate political committee status in 2004. FEC, Reports Image Index for National Defense PAC (FEC Exh. 5 at 1-3). Carey filed NDPAC's reports until 2009, when NDPAC's Assistant Treasurer began filing its reports. *See id.*; NDPAC, Stmt. of Org., Dec. 29, 2009 (FEC Exh. 6 at 3).

In 2002, Carey registered another political committee, "National Defense Committee PAC," listing NDC as a "connected" organization. NDC PAC, Stmt. of Organization, Nov. 18, 2002 (FEC Exh. 7 at 2). Carey continuously filed reports for National Defense Committee PAC from 2002 until 2009, when the Assistant Treasurer began to file its reports. FEC, Reports Image Index for National Defense PAC (FEC Exh. 8 at 1-2); National Defense Committee PAC, Stmt. of Organization, Dec. 29, 2009 (FEC Exh. 9). National Defense Committee PAC's amended registration in 2009 no longer listed NDC as a connected organization. (FEC Exh. 9 at 2) NDPAC and National Defense Committee PAC indicated for the first time that they were affiliated with each other in their amended 2009 registrations. NDPAC, Stmt. of Organization, Dec. 29, 2009 (FEC Exh. 6 at 3); National Defense Committee PAC, Stmt. of Organization, Dec. 29, 2009 (FEC Exh. 9 at 3).

Plaintiff Kelly Eustis resides in Sacramento, California. (Ver. Compl. ¶ 9.) Eustis is the founder, president, and CEO of Eusatrix Corporation, which describes itself as "a strategic

public relations and political consulting firm specializing in campaigns and issue advocacy, public affairs, and online strategy." Eusatrix Corp., *About Eusatrix* (Feb. 25, 2011) (FEC Exh. 10). "Eusatrix serves conservative political, non-profit, and corporate clients across the United States." (*Id.*) Eustis has never been reported to have made a contribution to a federal candidate of $200 or more. FEC, Transaction Query By Individual, (Feb. 25, 2011) (query "Kelly Eustis") (FEC Exh. 11).

NDPAC alleges that it would like to pay to run an advertisement on the *Newsmax* website expressly advocating against the election of a candidate for New York's ninth congressional district in the months leading up to the 2012 election. (Ver. Compl. ¶ 24.) Such an advertisement would cost $6,300 and Eustis would like to contribute that amount to NDPAC. (*Id.*)

IV. ADVISORY OPINION REQUEST

On August 11, 2010, NDPAC submitted a letter to the Commission requesting an advisory opinion from the Commission. (Ver. Compl. Exh. A (FEC, AO Request 2010-20, Letter from Dan Backer, NDPAC, to Thomasenia Duncan ("AO Request"), Aug. 11, 2011).) NDPAC, a political committee that makes both contributions and independent expenditures, outlined its intention to accept unlimited contributions from individuals, other political committees, corporations, and labor organizations to fund independent expenditures from a separate bank account. (*Id.*) The Commission considered two draft responses to NDPAC's AO Request on September 23, 2010. (Ver. Compl. Exh. D (FEC Certification, Sept. 23, 2010).)

Draft A concluded that a committee such as NDPAC could not accept unlimited contributions if it makes both contributions to candidates and independent expenditures. (Ver. Compl. Exh. B (FEC, Draft AO 2010-20 – Revised Draft A, Agenda Doc. 10-60-B ("Draft A"),

Sept. 23, 2010).) That draft concluded that the Act and Commission regulations prohibit such a political committee from accepting the types of contributions contemplated by NDPAC's request, even if it uses a separate bank account. (*Id.* at 6-7 (citing 2 U.S.C. § 441a(a)(l)(C), (f) and 2 U.S.C. § 441b(a)).) Draft A relied on Supreme Court decisions upholding these amount limitations and source prohibitions as a valid means of preventing corruption as applied to political committees that make both contributions and expenditures. (*Id.* at 3, 7 n.3 (citing *CalMed*, 453 U.S. at 197-98, and *FEC v. Beaumont*, 539 U.S. 146, 154 (2003)).) The draft distinguished *SpeechNow* as well as the Commonsense Ten and Club for Growth Advisory Opinions by noting that each of the entities in those matters made only independent expenditures. (*Id.* at 4.)

Draft B concluded that NDPAC may accept unlimited contributions to its separate bank account to fund independent expenditures. (Ver. Compl. Exh. C (FEC, Draft AO 2010-20 – Draft B, Agenda Doc. 10-60-A ("Draft B"), Sept. 21, 2010).) The draft relied on the holdings in *Citizens United*, *SpeechNow*, and *EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009), that independent expenditures do not corrupt or create the appearance of corruption. (Draft B, at 5-7.) The draft cited *EMILY's List* for the proposition that NDPAC merely had to set up separate accounts to accept unlimited contributions, and concluded that NDPAC's making of contributions did not meaningfully distinguish it from SpeechNow, Commonsense Ten, or the Club for Growth. (*Id.* at 5-6.) Draft B also noted, in the alternative, that the "persons who created and operate NDPAC may establish a separate political committee to make independent expenditures." (*Id.* at 7 n.4.)[2]

[2] NDPAC also sought in its AO Request to allocate its administrative and operating expenses between its accounts however it wished. (Ver. Compl. Exh. A, at 5.) Draft A did not permit such allocation because, *inter alia*, the draft did not permit creation of the separate

Two commissioners supported issuance of Draft A, three supported issuance of Draft B, and one did not vote. (Ver. Compl. Exh. D.) Because the affirmative vote of four members of the Commission is required for the Commission to render an advisory opinion, 2 U.S.C. §§ 437c(c), 437d(a)(7); 11 C.F.R. § 112.4(a), the Commission was thus unable to render an opinion in this matter. As a result, the defense in this case is consistent with the position of the "controlling group" of Commissioners that declined to vote for Draft B, which would have provided NDPAC the relief it seeks in this lawsuit. *Cf. FEC v. National Republican Senatorial Comm.*, 966 F.3d 1471, 1476 (D.C. Cir. 1992) (explaining that when the Commission deadlocks and a case is then brought under 2 U.S.C. § 437g(a)(8), the decision of the controlling group of Commissioners becomes the subject of judicial review).

ARGUMENT

I. A PRELIMINARY INJUNCTION IS AN EXTRAORDINARY REMEDY THAT REQUIRES PLAINTIFFS TO MEET A HEAVY BURDEN

In seeking a preliminary injunction, plaintiffs bear a heavy burden. "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.* 129 S. Ct. 365, 374 (2008). "A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)); s*ee also Winter*, 129 S. Ct.

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accounts at all. (Ver. Compl. Exh. B, at 7.) Draft B indicated that NDPAC must allocate its administrative and operating expenses between its accounts in a manner that corresponds to the proportion of its activities funded by each account. (Ver. Compl. Exh. C, at 7-8.) Plaintiffs do not seek in this litigation the right to allocate administrative and operating costs in any manner they see fit. (*See* Ver. Compl. Prayer for Relief ¶¶ 1-4.)

375-76 (plaintiff must make "clear showing" that extraordinary remedy is necessary; "only a [] possibility of irreparable harm" is not sufficient) (internal quotation marks and citation omitted).

Plaintiffs shoulder a particularly heavy burden here because the requested relief "would alter, not preserve, the *status quo*." *Veitch v. Danzig*, 135 F. Supp. 2d 32, 35 (D.D.C. 2001). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Plaintiffs, however, seek to *alter* the relative position of the parties while their request for permanent relief is pending by preventing the Commission from enforcing provisions of FECA that have been in effect for over thirty years. *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement of congressional Act, despite First Amendment claim: "By seeking an injunction, applicants request that I issue an order *altering* the legal status quo.") (emphasis in original). There is a "presumption of constitutionality which attaches to every Act of Congress." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Plaintiffs fail to meet their burden of showing clearly that the longtime status quo should be altered and a federal statute preliminarily enjoined.

II. PLAINTIFFS CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs do not contest the facial constitutionality of the $5,000 limit on contributions to political committees. Nor is it disputable that *CalMed* upheld that contribution limit as applied to political committees — like NDPAC — that make both contributions and independent expenditures with the money they receive. Plaintiffs nevertheless argue that under *Citizens United*, *SpeechNow*, and *EMILY's List*, they must be permitted to do what *CalMed* prohibits because NDPAC will segregate its funds in separate bank accounts. As explained below, the

cases plaintiffs rely upon do not go that far. However, to take full advantage of the recent decisions they cite, plaintiffs need only follow the model of Club for Growth, *see* Club for Growth AO; *supra* pp. 5-6, and establish a separate political committee to accept unlimited contributions to spend on independent expenditures.

A. The Supreme Court Has Repeatedly Held That the Act's Contribution Limits Are Valid Means of Preventing Corruption or Its Appearance

In *Buckley*, the Supreme Court upheld the Act's limits on the amount individuals and multicandidate political committees can contribute to federal candidates and their campaign committees. 424 U.S. at 23-38; *see also CalMed*, 453 U.S. at 194 (discussing *Buckley's* holdings). *Buckley* "drew a line between expenditures and contributions, treating expenditure restrictions as direct restraints on speech" while saying, "in effect, that limiting contributions left communications significantly unimpaired." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-87 (2000) (citing *Buckley*, 424 U.S. at 19-21). Contribution limits "permit[] the symbolic expression of support" without "in any way infring[ing] the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. These limits help prevent corruption and the appearance of corruption. "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. "Of almost equal concern . . . is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27; *see also Citizens United*, 130 S. Ct. at 901 ("The *Buckley* Court recognized a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption.'") (quoting *Buckley*, 424 U.S. at 25).

In *CalMed*, the Court explained that section 441a(a)(1)(C)'s limits on contributions to multicandidate political committees "further the governmental interest in preventing the actual or apparent corruption of the political process" by "prevent[ing] circumvention of the very limitations on contributions that th[e] Court upheld in *Buckley*." *CalMed*, 453 U.S. 197-98 (plurality opinion); *id.* at 203 (Blackmun, J., concurring). The Court recognized that such committees are "essentially conduits for contributions to candidates," and thus "pose a perceived threat of actual or potential corruption" that is not posed by "a committee that makes *only* independent expenditures." *Id.* at 203 (Blackmun, J., concurring) (emphasis added). Four justices adopted the conclusion in the House Conference Report regarding the amendments that became section 441a(a)(1)(C) that multicandidate political committees "'appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.'" *Id.* at 199 n.18 (plurality opinion) (quoting H.R. Conf. Rep. No. 94-1057, at 57-58 (1976)). Justice Blackmun did not disclaim the Conference Report's findings or the plurality's reliance on them, and concluded that "contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*." *Id.* at 203 (Blackmun, J., concurring) (citing *Buckley*, 424 U.S. at 38).

Plaintiffs mischaracterize *CalMed's* holding as merely the "plurality's" conclusion. (*E.g.*, Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction ("PI Br.") at 17 ("a *plurality of the Court upheld* the limit on the ground that it served the government's interest in preventing circumvention of the limits on contributions made directly to candidates"); *id.* ("Thus, *according to the plurality*, contributors seeking to avoid the . . . candidate contribution limits could make larger contributions to multi-candidate committees,

which could then be funneled to candidates.") (emphases added).) But as explained above, Justice Blackmun agreed with the plurality on the constitutionality of the contribution limits as applied to CALPAC, a political committee that made both contributions and expenditures. *CalMed*, 453 U.S. at 203 (Blackmun, J., concurring). Justice Blackmun's reservation concerned "contributions to a committee that makes only independent expenditures." *Id.*

CalMed also makes clear that the "*Buckley* standard of scrutiny" for contribution limits applies here, where NDPAC "plans to make contributions to candidates for federal office" (PI Br. at 1). *See CalMed*, 453 U.S. at 202 (Blackmun, J., concurring) (limits on contributions to multicandidate committees "can be upheld only 'if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms'") (quoting *Buckley*, 424 U.S. at 25). Although plaintiffs attempt to suggest that a different level scrutiny *may* apply here, they fail to offer any support for an alternative constitutional standard, or any basis for deviating from the Court's approach in *CalMed*. (*See* PI Br. at 12-13, 27.) The question here is thus whether sections 441a(a)(1)(C) and 441a(a)(3) serve a "sufficiently important interest" and are "closely drawn to avoid unnecessary abridgment of [plaintiffs'] associational freedoms." *CalMed*, 453 U.S. at 202-03 (Blackmun, J., concurring). As discussed below, the answer to both parts of that question is yes.

B. Sections 441a(a)(1)(C) and 441a(a)(3) Serve Important Governmental Interests as Applied to NDPAC

1. The Supreme Court Has Recognized that the Act's Limits on Contributions to Multicandidate Political Committees Prevent Corruption or Its Appearance

As explained *supra* pp. 12-13, the Supreme Court has upheld the Act's limits on contributions to multicandidate political committees to prevent circumvention of the Act's limits on direct contributions to candidates. *CalMed*, 453 U.S. 199 (plurality opinion); *id.* at 203

(Blackmun, J., concurring). The fact that a multicandidate political committee may also make independent expenditures does not eliminate or even reduce its function as "'a means for advancing a candidate's campaign.'" *CalMed*, 453 U.S. at 199 n.18 (plurality opinion) (quoting H.R. Conf. Rep. No. 94-1057, at 57-58 (1976)).

Moreover, the plurality's concern in *CalMed* — that donors who make unlimited contributions, even if ostensibly targeted to pay for administrative expenses, could "completely dominate the operations and contribution policies of independent political committees" — applies equally here. *Id.* at 199 n.19. Specifically, individuals and groups who seek to maximize their contributions to candidates for federal office could make large "independent expenditure" donations to NDPAC as a means to gain control over NDPAC's contribution decisions. And corporations and unions, from which NDPAC intends to accept unlimited contributions (*see* Ver. Compl. ¶ 15.a.; PI Br. at 3), could seek to evade the ban on their direct contributions to candidates by obtaining influence over NDPAC's contributions through large donations to NDPAC's independent expenditure account. NDPAC's contributors could leverage their unlimited contributions to control NDPAC's direct contributions to federal candidates "to an extent . . . far greater than the individual or group [or corporation or union] that finances the committee's [independent expenditures] would be able to do acting alone." *CalMed*, 453 U.S. at 199 n.19. Permitting NDPAC to accept unlimited contributions, even if intended to be used for independent expenditures, could thus result in corruption or the appearance of corruption by facilitating the "circumvention of the very limitations on contributions that th[e] Court upheld in *Buckley*." *CalMed*, 453 U.S. at 197-98.

To be sure, maintaining separate bank accounts may reduce the most blatant avenue for corruption: the *direct* circumvention of the contribution limits — *i.e.*, NDPAC's conversion of

unrestricted independent expenditure donations into candidate contributions. But the 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. Nor do separate bank accounts end "the appearance of improper influence [which] 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). While the public may be aware of the *activities* of political committees like NDPAC — *i.e.*, whether they make independent expenditures, contributions, or both — the public is less likely to be aware of committees' internal financial controls or the nature and number of their various bank accounts. Separate bank accounts may thus "[l]eave the perception of impropriety unanswered." *Shrink*, 528 U.S. at 390.

Requiring NDPAC to establish a separate, independent expenditure-only committee to solicit and accept unlimited contributions for its independent expenditures reduces the potential for both actual and apparent corruption created by individuals, corporations, and unions giving unrestricted contributions to a political committee that itself makes contributions directly to federal candidates. As discussed *infra* pp. 28-30, the burden imposed by such a requirement is not onerous, and it is closely drawn to meet this "sufficiently important" interest.

Plaintiffs incorrectly suggest (PI Br. at 16-18) that Justice Blackmun's caveat regarding "contributions to a committee that makes only independent expenditures" undermines the applicability of *CalMed's* analysis or holding here. *CalMed*, 453 U.S. at 203 (Blackmun, J., concurring). Although Justice Blackmun did observe that "contributions to a committee that makes *only independent expenditures* pose no such threat [of corruption]," *id.* (emphasis added),

NDPAC does not even purport to be such a committee. NDPAC instead seeks not only to solicit and accept donations for independent expenditures, but also to "[a]ccept[] contributions from individuals and other political committees . . . to expend as *campaign contributions to candidates*." (PI Br. at 3 (emphasis added).)[3] Finally, plaintiffs conspicuously omit Justice Blackmun's important qualification when quoting his admonition that "a different result would follow if § 441a(a)(1)(C) were applied to contributions to a political committee *established for the purpose of making independent expenditures, rather than contributions to candidates*." *Compare CalMed*, 453 U.S. at 203 (Blackmun, J., concurring) (emphases added), *with* PI Br. at 17 (quoting italicized portion of Blackmun concurrence but omitting underscored words). Since NDPAC was established for the purpose of making *both* independent expenditures *and* contributions to federal candidates, Justice Blackmun's caveat is inapposite here.

2. Plaintiffs' Reliance on *SpeechNow* and *EMILY's List* Is Misplaced

SpeechNow does not support plaintiffs' arguments because that case involved an organization that made only independent expenditures. The en banc D.C. Circuit could not have been more explicit when it stated, "We should be clear, however, that we only decide these questions as applied to contributions to SpeechNow, an independent expenditure-only group." 599 F.3d at 696. The court thus carved out from the scope of its decision organizations like NDPAC, which make direct contributions to federal candidates.

[3] Plaintiffs go even further by suggesting that "National Defense PAC's case is distinguishable from the fact pattern in *CalMed* — National Defense PAC asks to make independent expenditures, the California Medical Association did not — and falls squarely within the reason [sic] of Justice Blackmun's controlling concurrence." (PI Br. at 19.) However, 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).

To be clear, plaintiffs have the right, consistent with the Commission's recent Advisory Opinions, to establish a separate, independent expenditure-only political committee that, like the independent expenditure-only political committees created by SpeechNow, Club for Growth, and Commonsense Ten, could accept unlimited contributions for independent expenditures. *See* Commonsense Ten AO, at *1-*2; Club for Growth AO, at *2. In those opinions, the Commission concluded that a political committee that does "not make any monetary or in-kind contributions (including coordinated communications) to any other political committee or organization," and makes only independent expenditures may "solicit[] and accept[] unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures." Commonsense Ten AO, at *1-*2; Club for Growth AO, at *1. Plaintiffs thus remain free to follow the Club for Growth model approved in Advisory Opinion 2010-09 and establish two political committees, one for independent expenditures and one for contributions to federal candidates.[4] The independent expenditure-only committee, like the committees at issue in *SpeechNow* and in the Commission's recent Advisory Opinions, would be restricted to making independent expenditures and thus could not make any monetary or in-kind contributions to, or coordinate communications with, any candidate, other political committee or organization. (*Cf.* Draft A, at 4 (distinguishing NDPAC's request to make both contributions and independent expenditures from the holdings in *Citizens United*, 130 S. Ct. at 909, and *SpeechNow*, 599 F.3d at 689, and the Commission's conclusions in the Commonsense Ten and Club for Growth AOs).) But plaintiffs, like Club for Growth, would

[4] In addition to its new, independent expenditure-only political committee, Club for Growth, an incorporated non-profit organization, also has a separate segregated fund that receives funds subject to the Act's contribution limits and makes candidate contributions. *See* Club for Growth AO, at *2; Committees and Candidates Supported/Opposed for Club for Growth PAC, FEC Disclosure Database, (Feb. 25, 2011) (FEC Exh. 12).

remain free to make candidate contributions from NDPAC, as long as that separate committee observes the Act's source and amount limits and other applicable requirements.

The decision in *EMILY's List* does not require a different result. Contrary to plaintiffs' argument (PI Br. at 21), *EMILY's List* does not "squarely decide[]" the question here. (Plaintiffs' AO Request did not even mention the case. (*See* Ver. Compl. Exh. A (FEC AO Request 2010-20), at 1-2.).) 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 election activities could be spent, how certain "mixed" federal and nonfederal activity could be financed, and whether funds solicited in certain ways are federal contributions. *See, e.g.*, *EMILY's List*, 581 F.3d at 20 (rejecting FEC regulations that "federalize[d] the funding and reporting of a large portion of [EMILY's List's] *nonfederal* receipts and disbursements, which are not made for the purpose of influencing federal elections") (emphasis added); *id.* at 31 (Brown, J., concurring) (EMILY's List "challenge[d] the regulations as the 'functional equivalent of spending limits, prohibiting EMILY's List from supporting *state and local* candidates in certain ways when its federal funds are exhausted' and claim[ed] they [were] not properly tailored because they 'restrict[ed] vast amounts of *nonfederal activity*'") (quoting EMILY's List Br. at 17) (emphasis added by Brown, J.).

The Commission had originally promulgated the allocation regulations to address, *inter alia*, the fact that committees like EMILY's List are subject to both federal campaign finance laws and the distinct laws of each state in which they act. *See* Section 106.6: Allocation of Expenses Between Federal and Non-Federal Activities by Separate Segregated Funds and Nonconnected Committees, 55 Fed. Reg. 26,058, 26,066 (FEC Explanation and Justification, June 26, 1990) ("This section has been added to the rules to provide . . . detailed instructions as

to how [political committees] are to allocate their administrative expenses and costs for combined federal and non-federal activities."). The allocation regulations "appl[ied] *only* to those committees that make disbursements in connection with federal and non-federal elections." *Id.* (emphasis added). The regulations — including their revisions in 2007 — thus clarified when such committees could use "hard money" subject to federal campaign finance requirements, when they were permitted to use "soft money" that was not subject to such federal restrictions (but is subject to various state-law restrictions), and when they could use an allocated combination of both for certain mixed activity. *See* 11 C.F.R. §§ 100.57 (2009), 106.6(c), (f) (2009); *see also, e.g.*, Political Committee Status, 72 Fed. Reg. 5595, 5603 (FEC Supplemental Explanation and Justification, Feb. 7, 2007).

The *EMILY's List* decision ordered the district court to vacate the three challenged regulations, *EMILY's List*, 581 F.3d at 25, and the agency has implemented the courts' orders by deleting the regulations, *see* Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 Fed. Reg. 13,223, 13,223-24 (FEC Final Rule, Mar. 19, 2010); Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 74 Fed. Reg. 68,661, 68,661-62 (FEC Interim Final Rule, Dec. 29, 2009). But *EMILY's List* neither invalidated nor even considered the constitutionality of the contribution limits imposed by sections 441a(a)(1)(C) and 441a(a)(3), which were not challenged in that case and concern only contributions made to influence *federal* elections.[5] While the Commission may consider

[5] Indeed, at oral argument counsel for EMILY's list argued that *CalMed* "'didn't raise any of the issues in this case'" and that its analysis of limits on contributions "'made to [a] federal program'" has no "'bear[ing] at all on this invasion of our state and local programs through the promulgation of these excessive federal regulatory schemes.'" *EMILY's List*, 581 F.3d at 32 (Brown, J., concurring) (quoting Tr. of Oral Arg. at 32-33).

additional rulemaking to implement the decision, *see* Club for Growth AO, at *1 n.1, nothing in the opinion requires the Commission to stop enforcing sections 441a(a)(1)(C) and 441a(a)(3) or the regulations implementing those statutory provisions.

Although the majority opinion in *EMILY's List* grounded its decision on broad constitutional principles, it must be reconciled with both *CalMed* and *SpeechNow*. In particular, the panel majority reasoned that a "non-profit that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates." 581 F.3d at 12. Through advisory opinions, the Commission has honored that reasoning consistent with other precedent 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. *E.g.* Club for Growth AO, at *2.

Plaintiffs nevertheless argue that notwithstanding *CalMed*, *EMILY's List* establishes a First Amendment right for NDPAC to accept both source- and amount-limited donations for contributions to federal candidates and unlimited contributions for independent expenditures, as long as the respective contributions are deposited into separate bank accounts. (PI Br. at 21-22.) But *EMILY's List* was decided in a different context and does not resolve the distinct issue presented here. *See, e.g., Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 485 U.S. 360, 369 n.7 (1988) (distinguishing prior case "'decided in [a] significantly different context'") (quoting *Maher v. Roe*, 432 U.S. 464, 475 n.8 (1977)); *Troy Corp. v. Browner*, 120 F.3d 277, 284 (D.C. Cir. 1997) (holding that out-of-circuit decision "under a different statute . . . on a different factual record would not compel a similar result on our part even if that case were a binding precedential decision from our own circuit") (emphasis

added); *Haw. Gov't Emp. Ass'n v. Martoche*, 915 F.2d 718, 726 (D.C. Cir. 1990) ("We are satisfied that [the case relied upon by plaintiffs] is not controlling here. The facts of that case differ in critical respects."); *Otsuka v. Polo Ralph Lauren Corp.*, No. C 07-02780, slip op., 2010 WL 366653, at *5 n.2 (N.D. Cal. Jan 25, 2010) (declining to rely on case that "dealt with . . . an entirely different context from that presented" in pending case).

Moreover, accepting plaintiffs' view of *EMILY's List* would require the Court to ignore or decline to follow the Supreme Court's decision in *CalMed*, which addressed the precise statute and question presented here. And *SpeechNow*, the only precedent invalidating the contribution limits at issue here, expressly stated that it was addressing only political committees that make only independent expenditures. 599 F.3d at 696.

Alternatively, to the extent that *EMILY's List's* statements regarding "hard-money" and "soft-money" accounts can be interpreted to apply outside the context of mixed federal and non-federal spending to conduct like plaintiffs' proposed expenditures that are *entirely* federal, that limited portion of the majority opinion should be treated as dicta. The suggestion that separate accounts are the constitutionally required solution for addressing possible corruption in the context of a non-profit's *federal* independent expenditures was not necessary to the decision regarding whether to strike down Commission regulations for allocation of federal and non-federal spending. The distinct issue here regarding exclusively federal activity was simply not before the court in *EMILY's List*. *Cf. TRT Telecomms. Corp. v. FCC*, 876 F.2d 134, 149 (D.C. Cir. 1989) (where agency "has never been asked, nor purported to speak to the question" presented, agency's prior interpretations of statute, "were necessarily rendered in different contexts, and, accordingly, were dicta"). Indeed, because the independent spending NDPAC alleges it wants to make consists entirely of expenditures expressly advocating the election or

defeat of federal candidates (*see* Ver. Compl. ¶¶ 12, 24, 31, 35, 44-46), the account it seeks to create has as its "major purpose" the election of federal candidates and thus merits treatment as a political committee. *See Buckley*, 424 U.S. at 79.[6] *EMILY's List* did not address facts like these.[7]

CalMed, which the Supreme Court has "consistently cited . . . for the unqualified proposition that it is constitutional to limit contributions to multicandidate committees," thus remains the controlling authority here. *EMILY's List*, 581 F.3d at 37 (Brown, J., concurring) (citing *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441-42 (2001); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *Buckley*, 424 U.S. at 38). And none of the other cases on which plaintiff s rely (PI Br. at 23-28) undermine the Court's conclusion in *CalMed* upholding limits on contributions to political committees like NDPAC that make direct contributions to federal candidates. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (narrowing the constitutional application of limits on corporate independent spending on electioneering communications, but not addressing limits on contributions to political committees or other groups); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986)

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[6] *See also* 11 C.F.R. § 102.5(a)(i) (explaining when political committee's federal account "shall be treated as a *separate Federal political committee* that must comply with the requirements of the Act including the registration and reporting requirements of 11 CFR parts 102 and 104") (emphasis added).

[7] Plaintiffs contend that the Commission "fail[ed] to follow *EMILY's List*" when it did not issue their requested advisory opinion. (PI Br. at 11.) But at the time the Commission was considering the AO Request, it appeared that any potential enforcement action against NDPAC would be brought outside this Circuit, in the Northern District of Virginia, where NDPAC resides and is incorporated. *See supra* pp. 6-7; 2 U.S.C. § 437g(a)(6)(A) (providing for venue of Commission enforcement actions "in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business"). Thus, *EMILY's List* would have persuasive, but not binding, authority for such a hypothetical enforcement action, because the federal government is not bound to treat a decision of one circuit court of appeals as binding law in the other circuits. *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

(exempting limited class of ideological non-profit corporations from FECA's then-existing prohibition on corporate expenditures); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (striking down limit on political committee's independent spending but distinguishing contribution limit upheld in *CalMed*); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) (striking down limits on contributions to committees that spent funds to influence ballot referenda, not to make contributions to candidates); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) ("risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue"); *NAACP v. Ala.*, 357 U.S. 449, 460 (1958) (recognizing First Amendment protects political association); *N.C. Right to Life, Inc. v. Leake*, 482 F. Supp. 2d 686, 698-99 (W.D.N.C. 2007) (state contribution limit unconstitutional as applied to independent expenditure-only committees), *aff'd in part, rev'd in part*, 525 F.3d 274 (4th Cir. 2008). Although some of these cases may support the undisputed proposition that individuals may pool funds to finance unlimited independent expenditures, none of them support plaintiffs' claim that NDPAC may accept unlimited contributions while simultaneously making direct contributions to federal candidates.

3. Plaintiffs' Analogy to Corporations and Their Separate Segregated Funds Supports the Commission's Interpretation of Sections 441a(a)(1)(C) and 441a(a)(3)

Plaintiffs invoke the analogy of corporations — which may use their general treasuries to make unlimited independent expenditures but not direct contributions to federal candidates, and their separate segregated funds ("SSFs"), which are permitted to make direct candidate contributions — to support their argument that separate bank accounts for unlimited independent expenditures and limited candidate contributions serve an adequate "prophylactic effect" to address the government's anti-corruption interests here. (*See* PI Br. at 14-16.) But this analogy

actually weakens, not strengthens, plaintiffs' position. As plaintiffs concede, SSFs are legally separate entities from the corporations or unions to which they are connected. (*Id.* at 19 ("The FEC . . . may point out that a corporation or labor union ('connected organization') and its separate segregated fund are legally separate entities." (citations omitted).) As the Supreme Court stated in *Citizens United*, "[a] PAC is a separate association from the corporation" subject to its own administrative and regulatory obligations. 130 S. Ct. at 897. An SSF "is considered a 'political committee' under the Act." *Mass. Citizens for Life*, 479 U.S. at 253 (citing 2 U.S.C. § 431(4)(B)). The corporation-PAC scenario is thus more analogous to the separate political committee approach upheld in *SpeechNow* and approved by the Commission in Advisory Opinions 2010-11 and 2010-09, not to plaintiffs' proposal to allow a single legal entity to separate its activities only by creating two separate bank accounts.

4. The Hard/Soft Money Account System for Committees that Engage in Both Federal and Nonfederal Activity Is Insufficient to Address Corruption and the Appearance of Corruption Here

Plaintiffs further suggest that even though corporations and their SSFs are necessarily separate legal entities, the "prophylactic" of separate "hard-money" and "soft-money" accounts, which Commission regulations require for political committees engaged in both federal and nonfederal election activity, must be an adequate solution to address the distinct corruption concerns raised here. (PI Br. at 19-20.) Not so.

First, as discussed *supra* pp. 19-22, it is incorrect to conflate the "hard money"/"soft money" dichotomy, which relates to federal and nonfederal political activity, with *Buckley's* expenditure/contribution dichotomy concerning exclusively federal activity. The "soft money" that political committees like EMILY's List may solicit and accept for their nonfederal activities is not analogous to the unlimited funds that independent expenditure-only committees like

SpeechNow may accept for their federal independent expenditures. Because the individual states have their own campaign finance regimes with which political committees that engage in nonfederal political activity must comply, "soft money" is not synonymous with "unlimited" funds; instead, it describes money that, while not subject to *federal* campaign finance restrictions, remains subject to those restrictions imposed by the individual states. *See* Political Committee Status, 72 Fed. Reg. 5595, 5603 (FEC Supplemental Explanation and Justification, Feb. 7, 2007) (noting that Commission regulations permit registered political committees that participate in both federal and nonfederal elections to maintain both federal and nonfederal accounts containing funds that comply, respectively, with federal and state restrictions.).

Second, as explained *supra* pp. 14-16, separate bank accounts do not adequately respond to the actual and apparent corruption concerns presented here. As long as NDPAC solicits and accepts donations for making direct contributions to federal candidates, regardless of which bank account such donations are deposited in, it functions as "'a means for advancing a candidate's campaign.'" *CalMed*, 453 U.S. at 199 n.18 (plurality opinion) (quoting H.R. Conf. Rep. No. 94-1057, at 57-58 (1976)). And it thus remains available to individuals, groups, corporations, and unions as a mechanism for circumventing the Act's limits (or outright prohibition) on direct contributions to candidates, creating the potential for actual and apparent corruption of the political process. *See, e.g.*, *Shrink*, 528 U.S. at 390; *CalMed*, 453 U.S. at 197-99 nn.18-19 & 203; *Buckley*, 424 U.S. at 27.

The formality of separate political committees, on the other hand, addresses both actual and apparent corruption. By removing unlimited independent expenditure contributions completely from a committee engaged in contributing money directly to federal candidates, opportunities for actual circumvention of the contribution limits, and the appearance of such

circumvention, are substantially diminished. As the D.C. Circuit has explained in the context of corporate formalities, "the formalities are themselves an excellent litmus of the extent to which the individuals involved actually view the corporation as a separate being." *Labadie Coal Co. v. Black*, 672 F.2d 92, 96-97 (D.C. Cir. 1982). Here, too, where plaintiffs seek collectively to engage in two distinct forms of federal political activity, which are subject to different federal restrictions, adherence to the formality of separate political committees for plaintiffs' unlimited independent expenditures and their limited contributions to federal candidates would further the separation of such activities, thus reducing actual and apparent corruption. *Cf.* Carolyn B. Lamm, *Assertion of Jurisdiction Over Non-U.S. Defendants*, 785 Prac. L. Inst./Com. 85, 116-17 (Feb. 1999) ("The observation of formalities is particularly important where the business affairs of two corporations are intertwined, or where the subsidiary and parent operate parts of a single line of business . . . . [A]dherence to corporate formalities helps to ensure that third parties are not misled into believing that they are dealing with the parent.").

Third, 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. The Act's disclosure requirements remain valid and enforceable as applied to independent campaign spending. *See, e.g.*, *Citizens United*, 130 S. Ct. at 913-14 (upholding disclaimer and reporting requirements for electioneering communications as applied to Citizens United, citing government's interest in provide electorate with information). And the D.C. Circuit has confirmed that the Act's disclosure and organizational requirements for political committees are valid as applied to groups that make only independent expenditures. *SpeechNow*, 599 F.3d at 698 (citing public's "interest in knowing who is speaking about a candidate and who is funding that speech" as well as "expos[ure of] violations of other

campaign finance restrictions, such as those barring contributions from foreign corporations or individuals").

Disclosing plaintiffs' independent expenditure activity by a separate legal entity will increase transparency to the public. If separate political committee reports are submitted to the Commission, voters will more easily be able to understand which of NDPAC's contributors have given money to support its independent advocacy and which are supporting its direct contributions to candidates. Even if a contributor donates money "towards administrative expenses" to support NDPAC's independent expenditures, the "public has an interest in knowing" who is helping to fund that speech. *SpeechNow*, 599 F.3d at 698. Similarly, if NDPAC's independent expenditures are paid for by a separate political committee, that specific committee will be directly identified in the disclaimers that must appear in the communications themselves, *see* 2 U.S.C. § 441d, thus making it easier for the public or press to research the Commission's databases and determine who is funding the political committee that sponsored the public communications. And because solicitations by political committees must also identify who has paid for the solicitation, *id.*, persons who receive NDPAC's solicitations will be more clearly informed of the exact recipient and use of their funds if they are told which political committee under the National Defense umbrella is seeking their money.

In sum, replicating a system established for differentiating federal and nonfederal campaign activity is not constitutionally required here, given the dissimilar context of a political committee seeking to make direct contributions to federal candidates while simultaneously engaging in the solicitation and acceptance of unlimited — by federal or state law — contributions for independent expenditures. The differing schemes established to regulate these distinct contexts reflect the consideration that "these entities have differing structures and

purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *CalMed*, 453 U.S. at 201.

C. Sections 441a(a)(1)(C) and 441a(a)(3) as Applied Are Closely Drawn to Avoid Unnecessary Abridgement of Plaintiffs' Associational Freedoms

As applied to plaintiffs, sections 441a(a)(1)(C) and 441a(a)(3) are closely drawn to avoid unnecessary abridgement of associational freedoms. *See CalMed*, 453 U.S. at 202-03 (Blackmun, J., concurring). Indeed, plaintiffs are not "prevent[ed] . . . from joining together to exercise their First Amendment rights to speech and association" (PI Br. at 1). On the contrary, as indicated *supra* pp. 17-18, plaintiffs remain free to join together both to solicit unlimited amounts for the exclusive purpose of making independent expenditures and to accept source- and amount-limited contributions to make contributions to candidates. Plaintiffs simply must establish a separate, independent expenditure-only committee to solicit and accept unlimited contributions for independent expenditures.

The Supreme Court has explained that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking,'" *Citizens United*, 130 S. Ct. at 914 (quoting Buckley, 424 U.S. at 64; *McConnell v. FEC*, 540 U.S. 93, 201 (2003)) (internal quotation marks and brackets omitted). And the D.C. Circuit has specifically held that the organizational and disclosure burdens of an independent expenditure-only political committee are "minimal."

> Because SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal. . . . Nor do the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, impose much of an additional burden upon SpeechNow. . . .

SpeechNow, 599 F.3d at 697. Indeed, it would require "a specious interpretation of the facts" before the Court, *id.*, for a finding that establishing and maintaining a separate, independent

expenditure-only political committee is unduly burdensome. Carey has been operating *two* political committees under the National Defense umbrella of entities for over *eight* years: plaintiff National Defense PAC and non-party National Defense Committee PAC. *See supra* pp. 6-7.[8] By establishing those two committees and continuously reporting their receipts and disbursements for almost a decade, Carey has shown himself quite capable of operating two separate political committees. Plaintiffs have thus already accepted the expense of administration and regulatory compliance, they have appointed a treasurer, and they already are filing the requisite disclosures. *See Citizens United*, 130 S. Ct. at 897 (detailing burdens associated with forming PAC in the first instance). Moreover, in accordance with the Commission's decision in the Club for Growth AO, the same person who serves as NDPAC's treasurer could also serve as treasurer for an ND independent expenditure-only PAC, provided that the independent expenditure-only PAC does not engage in coordinated activity and complies with the requirements of the Commission's conduct standards related to coordination in 11 C.F.R. § 109.21(d).[9] Club for Growth AO, at *3 & n.7.

Finally, while NDPAC claimed in its AO Request the desire to "expand the scope of its activities" "[i]n response to the rulings in *Citizens United v. FEC* and *SpeechNow v. FEC*, as well as AO 2010-09 and AO 2010-11" (AO Request, at 2), plaintiffs have never offered any indication of why they are unable to conduct such activities as the Club for Growth intends to do

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[8] From 2002 through 2009, National Defense Committee PAC was registered with the Commission as a "connected organization" of the National Defense Committee. *See supra* p. 7; FEC Exhs. 7-9. In 2009, National Defense Committee PAC indicated that Carey had incorrectly identified itself as having a "connected organization." *See supra* p. 7; FEC Exh. 9. The two political committee entities, NDPAC and National Defense Committee PAC, have identified themselves as affiliated since 2009. *See supra* p. 7; FEC Exhs. 6, 9.

[9] Plaintiffs have asserted that NDPAC "does not coordinate any of its activities with candidates or national, state, district or local political party committees or their agents as defined in 2 U.S.C. § 441a(a)(7)(B) and (C) and 11 C.F.R. § 109," and that it "does not and will not coordinate its activities with other political committees." (PI Br. at 8-9; Ver. Compl. ¶ 30.)

in accordance with the advisory opinion the Commission issued at its request. *See* Club for Growth AO, at *2.

III. PLAINTIFFS HAVE FAILED TO SHOW IRREPARABLE HARM

Plaintiffs also fail to meet their burden of demonstrating that they will suffer irreparable harm without the requested temporary relief, another showing plaintiffs must make clearly. Plaintiffs must "articulate a tangible injury that is either 'certain and great' or irreparable." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 298 (D.C. Cir. 2006). To obtain a preliminary injunction, "[a] litigant must do more than merely *allege* the violation of First Amendment rights" because "the finding of irreparable injury cannot meaningfully be rested on a mere contention of a litigant." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (citation and internal quotation marks omitted); *see also NTEU v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991).

Instead, where a plaintiff alleges injury from a provision that may only potentially affect speech, "the plaintiff must establish a causal link between the injunction sought and the alleged injury," *i.e.*, "that the injunction will prevent the feared deprivation of free speech rights." *Chaplaincy*, 454 F.3d at 301; (quoting *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir. 2003)). This requirement sets a "high standard for irreparable injury." *Id.* at 297. The "injury must be both certain and great," and "actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Plaintiffs must also "show that [t]he injury complained of [is] of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (citation and internal quotation marks omitted). Further, the prospective injury must be "beyond remediation." *Chaplaincy*, 454 F.3d at 297.

A. Plaintiffs' Alleged Injuries Are Neither Actual Nor Certain

Plaintiffs fail to establish that they will be irreparably injured if they comply with the requirement that independent expenditures and contributions be conducted by different legal entities while this case is pending. Indeed, plaintiffs have several options for financing the advertisement they wish to run without violating the Act's contribution limits.

Plaintiffs conclusorily allege that "[w]ithout the ability to solicit unlimited contributions to fund [independent expenditures], [NDPAC] will not be able to speak during the 2012 electoral season." (Ver. Compl. ¶ 25; *see* PI Br. at 5-6.) However, plaintiffs could fully accomplish their plans while this case proceeds without accepting unlimited contributions into the NDPAC multicandidate political committee. Plaintiffs could fund the planned $6,300 expenditure in at least four obvious ways:

- NDPAC could accept a $5,000 contribution from Eustis and combine it with $1,300 from the PAC's existing funds. In so doing, the committee would not violate the contribution limit in 2 U.S.C. § 441a(1)(C).

- NDPAC could accept $5,000 from Eustis and combine it with $1,300 from another single donor or combination of donors. *See Buckley*, 424 U.S. at 21-22 (The "overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons . . . .").

- Consistent with *SpeechNow* and the Club for Growth and Commonsense Ten advisory opinions, NDPAC could set up a separate entity that accepts contributions of unlimited amounts, including $6,300 from Eustis. *See SpeechNow*, 599 F.3d at 696; Commonsense Ten AO, at *1-*2; Club for Growth AO, at *2.

- Eustis could spend the $6,300 "on direct political expression" rather than "contribut[ing] amounts greater than the statutory limits." *Buckley*, 424 U.S. at 22. That is to say, Eustis could simply pay *Newsmax* to run the ad himself.

Receiving only about 5/6th of Eustis's intended contribution does not irreparably harm NDPAC given these other available avenues. Nor does it irreparably harm Eustis, for he is still able to make the "undifferentiated, symbolic act of contributing," *Buckley*, 424 U.S. at 21, or pay for the

ad himself. And plaintiffs could avoid any diminution in funds from Eustis by creating an independent expenditure-only committee, similar to the two National Defense political committees that Carey has demonstrably been able to oversee.

Plaintiffs make virtually no demonstration that they will be irreparably harmed without an injunction. (*See* PI Br. at 29.) Instead, they simply cite *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality), but that case does not support their position. *Elrod* held that employee dismissal based on political party affiliation was an unconstitutional infringement on employees' First Amendment rights. *Id.* at 372. But that holding rested on the specific finding that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were threatened or in fact being impaired at the time relief was sought" — *i.e.*, an actual or imminent harm. *Id.* at 373. Here, however, plaintiffs have alleged no governmental action against them whatsoever. In fact, the only governmental action has been the Commission's vote failing to issue the advisory opinion that plaintiffs had sought. (*See* Ver. Compl. Exh. D.) But this Commission inaction bears no resemblance to the kind of actual or certain threats that were present in *Elrod*.

Plaintiffs' claimed need for preliminary relief is also belied by their past conduct. They have raised only a handful of contributions that were up to the contribution limits, and NDPAC has never before in its 11-year history run independent expenditure advertising that in the aggregate exceeded $200 in a calendar year. FEC, Disclosure Reports (FEC Exhs. 13 at 1-4, 14 at 1-6). *See* 2 U.S.C. § 434(b)(4)(H)(iii), (6)(B)(iii) (requiring disclosure of such independent expenditures). NDPAC has received a $5,000 contribution only a few times, and it has received none in the past five years. Likewise, plaintiff Kelly Eustis has never made a contribution in

excess of $200 to a federal candidate or committee. FEC, Disclosure Database (FEC Exh. 11). Given NDPAC's long history without many contributions up to the limit and its complete lack of experience making independent expenditures, plaintiffs cannot demonstrate the certain, actual harm needed for the extraordinary relief they seek.

The D.C. Circuit and other courts have clearly explained that *Elrod* did not eliminate a First Amendment plaintiff's burden to show that its interests are actually threatened or in fact being impaired. *NTEU*, 927 F.2d at 1254-55; *Wagner*, 836 F.2d at 576-77 n.76; *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-150 (D.C. Cir. 1990) (rejecting preliminary injunction sought by Ku Klux Klan to require local government to issue parade permit for planned march longer than one for which it had received permit, finding *Elrod* not controlling on irreparable harm because shorter parade allowed in permit was not total denial of First Amendment rights); *Wis. Right to Life, Inc. v. FEC*, Civ. No. 04-1260, 2004 WL 3622736, at *4 (D.D.C. Aug. 17, 2004) (rejecting WRTL's reliance on *Elrod*); *Smith v. Frye*, 488 F.3d 263, 271 (4th Cir. 2007) (allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod*"); *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989) ("[A]ssertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits.").

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted). Because plaintiffs have made "no showing of irreparable injury, 'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)); *see also*

Wis. Gas, 758 F.2d at 674 ("[A]nalysis of [irreparable harm] disposes of these motions . . . ."). Since plaintiffs are unable to establish any such constitutional burden that is actual and certain, they clearly fall short of meeting the "high standard" necessary for a preliminary injunction.

B. Plaintiffs Face No Imminent Injury

Plaintiffs also fail to establish that "[t]he injury complained of [is] of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas*, 758 F.2d at 674 (internal citation and quotation marks omitted). As explained *supra* p. 32, plaintiffs have numerous ways to avoid harm to their intended campaign activity, and any potential harm from governmental action is far off and speculative. NDPAC has plans to raise funds above the contribution limits and then run an independent expenditure advertisement "in the months leading up to the November 2012 elections" and perhaps others "in the months leading up to the 2012 primary and general elections." (PI Br. at 6-7.) Neither this activity, nor any potential injury from a Commission enforcement proceeding, is imminent. There is thus no "clear and present need for equitable relief." *Wis. Gas*, 758 F.2d at 674 (citation and internal quotation marks omitted).

Plaintiffs argue that they are "chilled due to fear of prosecution by the Federal Election Commission" (PI Br. at 33), but they make no showing that any action against them by the Commission is imminent.[10] Congress carefully designed the Act's enforcement procedures "to

[10] The vote by three of the six sitting Commissioners to grant NDPAC's advisory opinion request suggests that it is highly unlikely that the current Commission would reach a majority vote (of at least four Commissioners) to bring an enforcement action against plaintiffs in the event that an administrative complaint were filed against them in the future. *See generally* 2 U.S.C. §§ 437c(c), 437g(a)(6). The D.C. Circuit found that a party confronting such a split vote is "not faced with any present danger of an enforcement proceeding" but nevertheless possesses standing to challenge a Commission rule. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995). To be sure, a new Commissioner or a change of mind by a current Commissioner could lead to an enforcement action against NDPAC, and the Commission

ensure fairness . . . to respondents." *See Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). As Congress presumably was aware, under the Act's elaborate enforcement procedures — which include multiple opportunities for a respondent to file briefs and permit only a court to impose a remedy on a respondent unwilling to agree to one — "complaints filed shortly before elections . . . might not be investigated and prosecuted until after the event." *Id.* at 559 (recounting statutory enforcement procedures). Accordingly, the likelihood that plaintiffs would suffer anything beyond an investigative proceeding during the life of a preliminary injunction is remote. *Wis. Right to Life, Inc. v. FEC*, No. 04-1260, 2006 WL 2666017, at *5 (D.D.C. Sept. 14, 2006) ("[A]n FEC administrative investigation . . . carries little threat of imminent or certain sanction."). Even if an administrative proceeding during that time then concluded with the institution of an enforcement suit against plaintiffs, they would then have a full opportunity to present their constitutional arguments *de novo* to a federal court before they could be subject to any penalties for their conduct. *See generally* 2 U.S.C. § 437g(a)(4)-(6). That distant eventuality is manifestly not imminent. *Wis. Right to Life*, 2006 WL 2666017, at *5 ("It is clear that even if an administrative investigation is opened, the investigation likely would not conclude until long after the . . . ad has been broadcast.").

C. None of Plaintiffs' Alleged Harms Are Beyond Remediation

Finally, plaintiffs must demonstrate that their alleged injury is "beyond remediation," *Chaplaincy*, 454 F.3d at 297, or "*irreparable*," *Wis. Gas*, 758 F.2d at 674. As the D.C. Circuit has explained, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate

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therefore does not challenge plaintiffs' standing to bring this action. *Id.* To obtain a preliminary injunction, however, a "present danger of an enforcement proceeding" is precisely the showing of imminent danger that plaintiffs must make, but cannot.

compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Chaplaincy*, 454 F.3d at 297-98.

None of plaintiffs' claimed harms are irreparable. For example, the incremental additional administrative burden of setting up a new political committee and complying with the requirements of the FECA would constitute "[m]ere injuries" of "money, time and energy." *Id.* at 297. And having to respond to an administrative enforcement proceeding would not create irreparable harm. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") (internal quotation marks and citation omitted); *see also Sears Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972). Thus, any burden associated with responding to a possible future FEC enforcement proceeding cannot constitute irreparable harm warranting preliminary injunctive relief.

IV. THE RELIEF REQUESTED BY PLAINTIFFS WOULD HARM THE GOVERNMENT AND UNDERCUT THE PUBLIC INTEREST

Permitting plaintiffs to fund independent expenditures through an existing political committee that also makes contributions to candidates would undermine the anti-corruption purpose and disclosure requirements in the Act. This would hinder the public interest and substantially injure the government. To prevail on their application for a preliminary injunction, plaintiffs must establish precisely the opposite. *CityFed. Fin. Corp.*, 58 F.3d at 746. Because of the strong public and Commission interest in enforcement of the federal campaign finance laws, plaintiffs' proposed injunction would substantially injure other parties.

The statutory provisions challenged by plaintiffs have been on the books for more than thirty years. Indeed, the requirements for registration and reporting by political committees in 2 U.S.C. §§ 432, 433 and 434, and the definition of political committee in 2 U.S.C. § 431(4)

were enacted by Congress in 1971.[11] The individual contribution limits in 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3)(B) were enacted in 1974 and 1976.[12] The Act's contribution limits and registration and reporting provisions were generally upheld by the Supreme Court in *Buckley* in 1976.

"The public has a strong interest in the enforcement of laws passed by Congress and signed by the President." *Wis. Right to Life*, 2006 WL 2666017, at *5. There is a "presumption of constitutionality which attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of . . . [the government] in balancing hardships." *Walters*, 468 U.S. at 1324. As Chief Justice Rehnquist stated in the similar context of a requested injunction pending appeal, "barring the enforcement of an Act of Congress would be an extraordinary remedy." *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1305 (2004) (Rehnquist, C.J., in chambers) (citation omitted).

The limits on contributions to political committees and the registration and reporting requirements for political committees relate to the public interest in preventing corruption and its appearance. *See supra* pp. 14-17, 25-27. In addition, permitting NDPAC to fund both its contributions and independent expenditures through a single political committee would reduce transparency to the public of NDPAC's financing and activities. *See supra* pp. 27-28. Thus, the relief sought by plaintiffs would interfere with the achievement of Congress's goals of "'shed[ding] the light of publicity' on campaign financing," *McConnell*, 540 U.S. at 231 (quoting *Buckley*, 424 U.S. at 81), and protecting the "'First Amendment interests of individual

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[11] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 301-306, 86 Stat. 3, 11-16 (Feb. 7, 1972).

[12] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263 (Oct. 15, 1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, Title I, § 112(2), 90 Stat. 475 (May 11, 1976).

citizens seeking to make informed choices in the political marketplace,'" *id.* at 197 (quoting *McConnell*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

Granting plaintiffs' motion for preliminary injunction would also "substantially injure" the government and the public. *CityFed Fin.*, 58 F.3d at 746. As Justice Rehnquist explained, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The government and the public are similarly harmed when a court proscribes enforcement of a federal statute. "[E]njoining the FEC from performing its statutory duty constitutes a substantial injury to the FEC." *Wis. Right to Life*, 2006 WL 2666017, at *5; *see also Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006).

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

Christopher Hughey
Acting General Counsel
chughey@fec.gov

David Kolker (D.C. Bar No. 394558)
Associate General Counsel
dkolker@fec.gov

Kevin Deeley
Assistant General Counsel
kdeeley@fec.gov

Greg Mueller (D.C. Bar No. 462840)
Attorney
gmueller@fec.gov

/s/ Erin Chlopak
Erin Chlopak (D.C. Bar No. 496370)
Attorney
echlopak@fec.gov

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

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