



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF COMMISSIONER DONALD F. MCGAHN ON ADVISORY OPINION
2012-19 (AMERICAN FUTURE FUND) AND *THE HISPANIC LEADERSHIP FUND,
INC. v. FEDERAL ELECTION COMMISSION***

This statement concerns Advisory Opinion (“AO”) 2012-19 (American Future Fund) the current litigation brought by the Hispanic Leadership Fund, Inc. (“Plaintiff”). Plaintiff seeks to prevent the Commission from enforcing 2 U.S.C. §§ 431(8) and 434(f) and 11 CFR §§ 100.17 and 100.29 (regarding statutorily-defined electioneering communications) in the event that they air certain television advertisements. The central gist of Plaintiff’s claim is that because of AO 2012-19, they fear that the Commission will, at some point in the future and subsequent to exercising their First Amendment rights, decide *via* a confidential enforcement process that their contemplated advertisements ought to have been reported as electioneering communications, thus subjecting Plaintiff to civil and/or criminal penalties.¹

The court in *Hispanic Leadership Fund, Inc. v. FEC* has ordered additional briefing regarding, *inter alia*, Plaintiff’s standing prior to holding a consolidated hearing on the matter. The Commission’s Office of General Counsel (“OGC”) has filed briefs in the case, but as this statement will explain:

- **First**, those briefs do not represent the views of the Commission as a whole, but instead only concern what OGC calls a “controlling group of Commissioners.”² The views of that so-called “controlling group” are merely those of three Commissioners, and have never found support

¹ *See, e.g.*, 2 U.S.C. § 437g(a)(6) (authorizing the Commission to institute a civil action seeking a civil penalty which does not exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved in such violation, or \$10,000 or an amount equal to 200 percent of any contribution or expenditure involved in a violation if the violation is determined to be knowing and willful); 2 U.S.C. § 437g(d)(1)(A) (providing for imprisonment of up to five years or a fine pursuant to Title 18 of the United States Code (Crimes and Criminal Procedure) for any individual who knowing and willfully commits a violation of the Act involving the making, receiving, or reporting of any contribution, donation or expenditure aggregating more than \$25,000 during calendar year).

² OGC acknowledged this limitation in its briefing. *See, e.g.*, Defendant Federal Election Commission’s Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 7 n.2, *Hispanic Leadership Fund, Inc. v. FEC*, Case No. 1:12-cv-00893-TSE-TRJ (E.D. Va. Submitted on Aug. 15, 2012) (“HLF”) (“The Commission defends in this lawsuit the position of the ‘controlling group’ of three Commissioners who declined to provide AFF with the response it sought to its request.”).

among a majority of the Commission. Given that the Act is replete with examples that show it takes the affirmative vote of four Commissioners to alter the status quo, the “controlling group” is not controlling here.

- **Second**, although OGC correctly concedes that Plaintiff has standing to bring their challenge, the proffered basis for that concession lacks the support of the Commission as a whole. Plaintiff is not challenging a duly enacted regulation on its face, and Plaintiff is not suing as an aggrieved advisory opinion requestor. Instead, due to the position taken by the so-called “controlling group,” Plaintiff faces a very real and very credible threat of prosecution under an innovative, extra-regulatory legal theory. This credible threat of prosecution has chilled their ability to otherwise speak, and Plaintiff has standing to enjoin the FEC from pursuing this innovative theory *via* its confidential enforcement process.

1. STANDING AND “CONTROLLING GROUP”

To answer questions regarding standing and whether OGC has properly defined the “controlling group,” the correct analysis begins with Plaintiff’s suit itself. Plaintiff seeks declaratory and injunctive relief against the Commission. Plaintiff makes much of the Commission’s 3-3 vote in AO 2012-19, where half the Commission claimed that certain advertisements clearly identified a Federal candidate. Although that AO was filed by a separate group, American Future Fund (“AFF”), the advertisements at issue in AO 2012-19 are virtually identical to the ones Plaintiff wishes to air. The Commission lacked the statutorily-required four affirmative votes to provide AFF an advisory opinion regarding several of its advertisements. Instead, the Commission split 3-3 over the issue of whether such advertisements “refe[r] to a clearly identified candidate for federal office,” a necessary requirement for an advertisement to be deemed an electioneering communication.³

Critically, since Plaintiff was not the requestor of AO 2012-19, Plaintiff is not the sort of aggrieved requestor that other courts have held to have standing.⁴ For

³ See AO 2012-19 (American Future Fund); see also Advisory Opinion 2012-19, Agenda Document 12-44 (Advisory Opinion Drafts A & B); Concurring Statement of Vice Chair Ellen L. Weintraub and Commissioner Cynthia L. Bauerly on Advisory Opinion Request 2012-19 (AFF); Statement of Commissioner Donald F. McGahn on Advisory Opinion 2012-19 (AFF).

⁴ The only instance where a court has conferred standing on a non-requestor to challenge an advisory opinion (or lack thereof) was in *National Conservative Political Action Committee v. FEC*, 626 F.2d 953 (D.C. Cir. 1980). There, a plaintiff challenged an advisory opinion on procedural grounds, and successfully claimed that the Commission failed to afford comment on the proposed opinion.

example, in *Unity 08 v. FEC*,⁵ the FEC (*i.e.*, at least four Commissioners voting affirmatively) determined in an advisory opinion that Unity 08 “must register” as a political committee.⁶ There, the court held that since “[Unity08] sought advice on the legal consequences of pursuing a detailed, concrete course of action, and its only other route for seeking judicial review of the unfavorable advice would be to disregard the Commission’s opinion and risk enforcement penalties,” it faced a sufficiently credible threat of prosecution to sustain standing.⁷ In *Chamber of Commerce v. FEC*,⁸ the Commission split 3-3 on two advisory opinion requests from the appellants seeking to have individuals and entities associated with them classified as “members” (*i.e.*, communications with them would not be subject to the general corporate ban).⁹ Thus, in the absence of an affirmative advisory opinion, “[t]he rule [that communications with non-members were subject to the corporate ban] constitute[d] the purported legal norm that binds the class regulated by statute.”¹⁰ Thus, there was standing to challenge the corporate ban in that case. The same principle applied in *Carey v. FEC*.¹¹ There, the Commission failed to approve an advisory opinion request brought by the plaintiff seeking a declaration that a statutory contribution limit did not apply to their organization. The plaintiff brought their action to challenge the purported legal norm that would otherwise bind the class regulated by the statute (*i.e.*, the preexisting contribution limit).¹² The court held that Plaintiff had standing to do so.

Nor is Plaintiff bringing a facial challenge to the statute or a duly-enacted regulation of the Commission. In fact, Plaintiff makes this clear in its pleadings.¹³ By

⁵ 596 F.3d 861 (D.C. Cir. 2010).

⁶ See Advisory Opinion 2006-20 (Unity 08).

⁷ *Unity 08*, 596 F.3d at 868.

⁸ 69 F.3d 600 (D.C. Cir. 1995).

⁹ *Chamber of Commerce*, 69 F.3d at 602-603.

¹⁰ *Id.* at 603.

¹¹ 791 F.Supp.2d 121 (D.D.C. 2011); see also *Carey v. FEC*, -- F.Supp.2d ---, 2012 WL 1853869 (D.D.C. 2012) (ruling that the FEC’s position in opposing the plaintiff’s suit was not substantially justified and awarding the plaintiffs costs and fees).

¹² *Id.*

¹³ Plaintiff’s Verified Complaint for Declaratory and Injunctive Relief at ¶ 2, *HLF*, Case No. 1:12-cv-00893-TSE-TRJ (E.D. Va. Submitted Aug. 10, 2012) (“This case challenges a law that, as interpreted and applied by the Federal Election Commission (“FEC”), abridges the freedom of speech and association guaranteed under the First Amendment to the Constitution. These challenges are brought as applied against 2 U.S.C. §§ 431(18) and 434(f) and their implementing regulations.”) (emphasis added).

contrast, *Virginia Society for Human Life v. FEC*¹⁴ concerned a challenge to a Commission regulation. Although resisted by the FEC, the Fourth Circuit held that the plaintiff had standing. VSHL also attempted to sue regarding its rulemaking petition, which had failed 3-3. It did not obtain the relief sought, which was to order the Commission to undertake a rulemaking.¹⁵ Thus, unlike Plaintiff, VSHL was challenging a rule.

Next, this matter is distinguishable from the times where three commissioners can constitute a controlling group if they decide not to pursue an enforcement matter, and are sued under 2 U.S.C. § 437g.¹⁶ In *Democratic Congressional Campaign Committee v. FEC*, the D.C. Circuit held that the three Commissioners who chose to not pursue the plaintiff's administrative complaint were the controlling group for purposes of judicial review. That they did not pursue enforcement rendered their rationale the basis for the agency to not proceed. As they did not issue any explanation, the court remanded. Applied to this matter, if an administrative complaint is filed with the Commission regarding Plaintiff, the Commission's vote splits as it did in AO 2012-19 (AFF), and the complainant sues the Commission, OGC would defend the three commissioners who would not pursue the matter.¹⁷ This is the opposite group that is currently being defended.

So what is Plaintiff challenging? Although Plaintiff makes much of AO 2012-19, that AO did not state that the ads at issue reference a Federal candidate. Simply because OGC declared those three Commissioners who thought the ads did reference a candidate to be a "controlling group" does not make it so. On the contrary, the Commission has never declared *via* four affirmative votes that the relevant language in those ads constitutes a reference to a federal candidate, or is otherwise within the Commission's jurisdiction.¹⁸ The Act is replete with examples

¹⁴ *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) ["VSHL"].

¹⁵ *VSHL*, 263 F.3d at 382 ("VSHL sought a declaration that the FEC's failure to act on VSHL's petition was contrary to law . . ."); *VSHL*, 83 F.Supp.2d 668, 671 (E.D. Va. 2000) ("The Complaint prays for a judgment . . . 'overturning the FEC's failure to act on VSHL's petition for rulemaking in which VSHL petitioned the FEC to repeal the regulation" (*quoting* Complaint at ¶ 2, *VSHL*, 83 F.Supp.2d 668 (E.D. Va. 2000))). Plaintiff did not obtain that relief, but was only afforded the opportunity to challenge the constitutionality of the existing regulation. *VSHL*, 263 F.3d at 382 (noting that the district court "declined to order the FEC to open a rulemaking to repeal the regulation" and instead declared it unconstitutional).

¹⁶ *See, e.g., Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987).

¹⁷ As the D.C. Circuit observed: "This statute is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce." *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995)(emphasis in original) (citations omitted).

¹⁸ In fact, advisory opinions are not *de facto* rulemakings, since a rule of law may initially be proposed by the Commission only as a rule or regulation pursuant to very elaborate procedures involving submission of the rule or regulation to Congress. *See* 2 U.S.C. § 438(d). Likewise, no

that establish that it takes at least four affirmative votes by commissioners to create a new legal norm; the Act does not empower OGC to serve as a tie-breaker.¹⁹

Thus, it is not the so-called “controlling group” that represents and wishes to maintain the status quo (let alone get *Chevron* deference²⁰); it is Plaintiff.²¹ OGC implicitly concedes this point by not focusing its analysis on whether Plaintiff’s contemplated speech comes within the reach of the Commission’s existing regulation, section 100.17 and 100.29. In fact, save for a fleeting reference,²² OGC fails to even cite the Commission’s regulation in its analysis of the contemplated advertisements. Thus, all appear to agree that the advertisements in question do not come within the current regulation.

opinion of an advisory nature interpreting such a rule or regulation may be issued by the Commission except in accordance with that requirement. See 2 U.S.C. § 437f(b). On the other hand, the Supreme Court has already held that effectively forcing a speaker to “ask a governmental agency for prior permission to speak” in the form of an Advisory Opinion “function[is] as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.” *Citizens United*, 130 S. Ct. at 895-896.

¹⁹ See, e.g. 2 U.S.C. § 437c(c) (“the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action” with respect to certain powers of the Commission, including but not limited to initiating, defending, or appealing any civil action in the name of the Commission to enforce the provisions of the Act, rendering advisory opinions, making, amending, and repealing rules, and conducting investigations and hearings). See also *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (“Where the First Amendment is implicated, the tie goes to the speaker”).

²⁰ See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Contr. Trades Council*, 485 U.S. 568, 575 (1988) (*Chevron* deference does not apply “where an otherwise acceptable construction of a statute would raise serious constitutional problems.”).

²¹ This is confirmed by past enforcement matters, advisory opinions, legislative history and representations made by the government to courts. See generally Statement of Commissioner Donald F. McGahn on Advisory Opinion 2012-19 (AFF).

²² In addition to a *pro forma* recitation the regulation in full at the beginning of its brief, OGC makes a fleeting reference to the regulation in connection with Advertisement #2, and makes the claim that the regulation does not exempt mere audio. But this is beside the point, as the regulation is proscriptive, and defines what comes within its reach. That it does not mention pure audio means that is beyond the reach of the regulation. Merely because the regulation uses the phrase “such as” does not create an open ended license to regulate. See Statement of Commissioner Donald F. McGahn on Advisory Opinion 2012-19 (AFF) at 23-24 (“As courts have explained: ‘The English phrase ‘such as’ in the regulation may without difficulty be read as having the same effect as the Latin phrase *ejusdem generis*’ where the latter ‘is the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” (quoting *Johnson v. Horizon Lines, LLC*, 520 F. Supp. 2d 524, 532 n.7 (S.D.N.Y. 2007))).

2. CREDIBLE THREAT OF PROSECUTION

What Plaintiff can challenge is a credible threat of prosecution, which in turn chills the exercise of First Amendment rights.²³ This is demonstrated here by Draft B of AO 2012-19, which was supported by three Commissioners and defended by OGC. Clearly, three Commissioners have already made clear that, despite the rather limited language of section 100.29(b)(2), they feel empowered to ignore the limits of that regulatory language and nonetheless find Plaintiff's contemplated speech to be within their power to regulate. But the FEC cannot ignore the limits of its own regulation; once the Commission promulgates a regulation, it becomes the operative norm.²⁴ And the Act "provides a defense to 'any person' who relies in 'good faith' on FEC rules."²⁵

Even though the other half of the Commission said such ads are not subject to bureaucratic whim, such statements provide Plaintiff with little comfort. Commissioners are subject to term limits, with five of the current six Commissioners serving expired terms, subject to replacement by the President. And it need not take the replacement of any current Commissioners to tip the voting balance, as examples of Commissioners changing their mind are legion.²⁶ Thus, Plaintiff has been placed in the sort of "heads I win, tails you lose" predicament already rejected

²³ See *Chamber of Commerce*, 69 F.3d at 603 ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment Rights are arguably chilled, so long as there is a credible threat of prosecution.") (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-393 (1988); *Meese v. Keene*, 481 U.S. 465, 472-473 (1987)) (emphasis in the original); see also *Unity 08*, 596 F.3d at 865 ("parties are commonly not required to violate an agency's legal position and risk an enforcement proceeding before they may seek judicial review" (citing *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 483 (2004)) (holding that a finality requirement in an environmental statute was satisfied in a pre-enforcement challenge where the "EPA has spoken its 'last word'" on a legal issue and a party "would risk civil and criminal penalties if it defied" the EPA's directive)); *Citizens United*, 130 S. Ct. at 895 ("As additional rules are created for regulating political speech, any speech arguably within their reach is chilled."); *id.* at 892 ("First Amendment freedoms need breathing space to survive" (quoting *WRTL*, 551 U.S. at 468-469; *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

²⁴ Where the Commission chooses to regulate *via* general rule, it is effectively foreclosing its ability to regulate through case-by-case adjudication. See generally *Shays v. FEC*, 424 F.Supp.2d 100 (D.D.C. 2006) ("*Shays II*") (evaluating the Commission's decision to forego rulemaking regarding political committees as a choice between case-by-case adjudication and regulation *via* a general rule).

²⁵ *Id.* at 115 (citing 2 U.S.C. § 438(e)).

²⁶ Compare MUR 5024 (Council for Responsible Government), Statement of Reasons of Chairman Bradley A. Smith and Commissioners David M. Mason and Michael E. Toner (explaining their opinion that the CRG's advertisements did not constitute express advocacy) with MUR 5024R (Council for Responsible Government a/k/a Kean Remand) (Commissioner Mason voting that CRG's communications did constitute express advocacy) with MUR 5874 (Gun Owners of America), Statement of Vice Chairman David M. Mason (noting the "questionable constitutional validity of 11 C.F.R. § 100.22(b)).

by the Supreme Court.²⁷ Plaintiff can either forego their right to speak, or speak and be left wholly at the mercy of the FEC's tedious and secretive enforcement process, a process that can take years and years to complete.²⁸

Through this lens, the merits of the position of the so-called "controlling group" of Commissioners becomes secondary to the real problem faced by Plaintiff: confidential enforcement of a supposed "rule" that was not a rule at the time Plaintiff spoke. In other words, Plaintiff rightly fears a bait and switch, where the Commission declares its speech to be subject to the Commission's authority and thus subject to civil and criminal penalties *via* its confidential enforcement process, whereas such speech was not subject to such a rule at the time Plaintiff spoke. This is true regardless of whether or not the so-called "controlling" view, if promulgated *via* regulation, would withstand judicial scrutiny. After all, when one drives 55 miles an hour in a zone marked as such, the government cannot change the speed limit to 45 after the motorist passes the speed limit sign and ticket the motorist for speeding. Although it is perfectly within the power of the government to impose a 45 mile per hour speed limit, it is entirely another matter to enforce it on a motorist after the fact.²⁹

Hence the problem: the fear that the government moves the proverbial goal post after Plaintiff kicks the ball. If that "controlling" group of Commissioners wishes to move the goal post for future speech, it certainly can try. If they receive sufficient Commission support (*i.e.*, at least four votes) to launch a rulemaking, Plaintiff will be afforded an opportunity to comment, and then if the Commission nonetheless enacts an unfavorable rule, Plaintiff can seek judicial review of that rule, and the Commission can then attempt to claim *Chevron* deference.³⁰ But none of

²⁷ *WRTL*, 551 U.S. at 471.

²⁸ Meanwhile, Plaintiff would have to endure the reputational stigma that would attach when a complaint is filed. See 2 U.S.C. § 437g(a)(12) (permitting the person receiving "[a]ny notification or investigation made under this section" to make that notification public); see generally *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) ("It would be naïve not to recognize that such 'posting' or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter." (quoting *Constantineau v. Grager*, 302 F. Supp. 861, 864 (E.D. Wis. 1969))). Even if the Commission ultimately declines to pursue a matter, the process can still remain a penalty in its own right, as the Supreme Court has recognized. See *Citizens United*, 130 S. Ct. at 896 (noting the "heavy costs of defending against FEC enforcement").

²⁹ See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) ("this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements" provided broadcasters are provided notice at the time it is broadcast that the material they sought to broadcast could be found actionable).

³⁰ For an explanation of why such an expansive approach remains beyond the Act, see Statement of Commissioner Donald F. McGahn on Advisory Opinion 2012-19 (AFF).

that has happened yet. Today, Plaintiff is free to run their ads without the need to alert the FEC. Unfortunately, Plaintiff's confusion has been wholly caused by the so-called "controlling" Commissioner's effort to improperly rewrite the applicable legal standard on the eve of an election, thus creating a credible threat of prosecution on a previously unheard of legal theory.

Ordinarily, one would think that in addition to both the Act's limitations on the Commission to create new norms outside of the rulemaking rubric and the Administrative Procedure Act, fundamental due process would protect Plaintiff. In fact, the Supreme Court recently confirmed this view in a case concerning the FCC.³¹ But such mandates of the Court have fallen on deaf ears at the FEC, and the Commission has never formally recognized that its ability to pursue political speakers in such circumstances is at all limited. Regulation *via* enforcement remains alive and well at the Commission, leaving Plaintiff wholly at its mercy, and without judicial review of that power for potentially years and years.³²

3. THE MERITS

A brief word on the merits and some of the arguments offered by OGC on behalf of the so-called "controlling group."³³ These arguments emphasize that the

³¹ See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.") (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, (1939) (alteration in original)))).

³² For example, a newspaper reported on another court case involving the FEC:

"When there's a 3-3 tie, you have a green light?" [U.S. District Court Judge Scott Skavdahl] asked about whether Free Speech could broadcast the ads.

"That's right," FEC attorney Erin Chlopak said.

However, the FEC could revisit the case later.

"It's not a guarantee of immunity (to run the ad?)" Skavdahl said.

"There's no guarantee," Chlopak said.

Laura Hancock, *Federal Court Case in Wyoming Examines Election Law and Free Speech*, Casper Star-Tribune, Sep. 13, 2012, available at http://trib.com/news/state-and-regional/federal-court-case-in-wyoming-examines-election-law-and-free/article_4bde11fa-b731-5607-8c0a-5bdc2ae901f5.html.

³³ This statement does not purport to document each and every instances where there is disagreement with OGC's brief, and failure to refute each point ought not to be construed to mean agreement.

underlying statute regarding disclosure of electioneering communications was upheld by the Supreme Court. Certainly, the Court upheld the statute, first in *McConnell*, and later turned back an as-applied challenge in *Citizens United*. But here, Plaintiff does not challenge the statute. Instead, Plaintiff asks what triggers its application, which was not at issue in *Citizens United*.³⁴ Although *Citizens United* is therefore not particularly relevant, in a number of other cases the Court has said time and time again that speech regulation must be subject to clear standards – even when that regulation concerns disclosure. After all, in *Buckley v. Valeo*,³⁵ the Court went on at length about the need for clear standards, and construed the Act to ensure that the standard for disclosing independent expenditures was sufficiently clear. Likewise, in *McConnell v. FEC*,³⁶ the Court reiterated the need for clear standards, and upheld the then-new electioneering communication obligations because it employed clear standards.

Now, however, the so-called “controlling” Commissioners wish to go beyond that which was upheld in *McConnell* (and later, *Citizens United*), and impose an entirely new trigger, one based not upon the language of a communication, but instead upon “context” beyond the content of the communication itself, which can include:

- “common sense”;³⁷
- personification;³⁸
- “shorthand”;³⁹
- the effect on a “reasonable person”;⁴⁰

³⁴ All agreed that the movie at issue in *Citizens United* repeatedly referenced candidate Hillary Clinton by name.

³⁵ 424 U.S. 1 (1976).

³⁶ 540 U.S. 93 (2003).

³⁷ Defendant Federal Election Commission’s Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 12, *HLF*, Case No. 1:12-cv-00893-TSE-TRJ (E.D. Va. Submitted on Aug. 15, 2012).

³⁸ *Id.* at 15.

³⁹ *Id.* at 16.

⁴⁰ *Id.* at 17.

- whether the candidate reference is “recognizable to someone already familiar with the reference”;⁴¹
- statements in news articles relied upon by Plaintiff in support of its message that are not quoted or otherwise present in the ad;⁴²
- “creative or symbolic expressions”;⁴³ and
- “understanding the speaker’s intent.”⁴⁴

All this is nothing more than the same sort of contextual multi-factor test lampooned by the Court in *Citizens United*, which was called “an unprecedented governmental intervention into the realm of speech.”⁴⁵ Oddly, despite the Court’s pronouncements in *Buckley* and its progeny and *McCannell* and its progeny about the need for clear standards even for disclosure, and the wholesale rejection of a contextual, factor based test in *Citizens United*, the “controlling” Commissioners seem to think that they can continue to use such a test to trigger disclosure.⁴⁶

Regardless, the language at issue (*i.e.*, clearly identified Federal candidate) is not “just disclosure” as suggested by OGC. Hardly a phrase that was first used in McCain-Feingold to define electioneering communication disclosure, “clearly identified” has been a staple of Act and Commission regulation for decades. It is used not only to trigger disclosure, but also serves to ban speech in certain instances, including electioneering communications.⁴⁷ Similarly, the phrase is used

⁴¹ *Id.* at 18.

⁴² *Id.* at 21.

⁴³ *Id.* at 23.

⁴⁴ *Id.* at 24, nt. 11.

⁴⁵ *Citizens United*, 130 S. Ct. at 896.

⁴⁶ Not all disclosure has been upheld. *See Davis v. FEC*, 554 U.S. 724, 744 (2008) (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” (quoting *Buckley*, 424 U.S. at 64)); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (“Under our constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above [concerning regulating labor organization activity, regulating lobbying activity, and taxing press activities] were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”).

⁴⁷ *See* 2 U.S.C. § 441e(a)(1)(C) (making it unlawful for a foreign national to directly or indirectly make “an expenditure, independent expenditure, or disbursement for an electioneering

to define independent expenditures, which often only require disclosure, but are still banned in some instances under the Act.⁴⁸ Likewise, the language is used in the Commission's coordination regulation, which can operate as a ban on electioneering communications by certain speakers.⁴⁹

In sum, Plaintiff has standing because they wish to speak, and their First Amendment rights are being chilled by the FEC. That chill is caused by a credible threat of prosecution, as evidenced by, *inter alia*, a so-called "controlling" group of Commissioners' refusal to sanction unregulated speech. Plaintiff now has the Sword of Damocles⁵⁰ hanging over its speech, and can either refrain from speaking, or risk the very real threat of after-the-fact persecution.

communication"); *see also* 11 C.F.R. 115.2 (prohibiting contributions and expenditures by Federal contractors; although this regulation is probably unenforceable in certain cases (*i.e.*, spending limits) after *Citizens United*, the Commission has yet to public issue any guidance to that effect).

⁴⁸ *Id.*

⁴⁹ "Any person who is otherwise prohibited from making contributions . . . is prohibited from paying for a coordinated communication." 11 C.F.R. § 109.22. Corporations, labor organizations, and government contractors are prohibited from making "contributions" to any Federal candidate, and thus are prohibited from financing coordinated communications. *See* 2 U.S.C. § 441b; 2 U.S.C. § 441c. Electioneering communications, communications that contain express advocacy, communications that are the functional equivalent of express advocacy, and public communications that clearly identify a House or Senate candidate in their jurisdiction 90 days or less before an election in which they are a candidate or a Presidential or Vice Presidential candidate 120 days or less before an election in which they are a candidate *ipso facto* satisfy the content prong of the Commission's coordinated communications test. 11 C.F.R. § 109.21(c). Accordingly, the Commission's coordination regulations serve as a ban on electioneering communications, among others, under certain circumstances.

⁵⁰ *See Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (the threat of enforcement "hangs over [a speaker's] head[] like a sword of Damocles That th[e] Court will ultimately vindicate [him] if his speech is constitutionally protected is of little consequence — for the value of a sword of Damocles is that it hangs — not that it drops.").