

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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KUHN FOR CONGRESS)	Civil No. 2:13-CV-03337-PMD
)	WWD
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM
)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
)	

**PLANTIFF KUHN FOR CONGRESS'S MEMORADUM TO
DENY DEFENDANT'S MOTION TO DISMISS**

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SUMMARY OF THE FACTS

John Kuhn (“Kuhn”) ran in a special election (“Election”) to fill a vacated Congressional seat for South Carolina First Congressional District because the Congressional seat was vacated due to appointment of the S.C. First Congressional District Representative to the United States Senate. All candidates were required to announce their intent to run in the election immediately upon the Congressional office’s vacation. At that time, each candidate had to build up a campaign committee (“Kuhn for Congress”), a campaign staff, and a whole Congressional campaign in time for the Election within sixty days. This also included finding a Campaign Treasurer, and Kuhn for Congress used Amanda Perry, who was six months pregnant. At the same time, Kuhn for Congress hired Lisa Lisker, an accountant that specialized in filing Federal Election Commission (“FEC”) reports.

Most importantly, during the election, Kuhn for Congress Campaign filed all of its Federal Election Commission (“FEC”) reports on time. All of the election reports due to the FEC before the election were filed on time.

Just before the end of the election, Amanda Perry, the Treasurer, delivered her baby twelve days early, creating an eight day window for Kuhn for Congress to find another Treasurer before the “after election report” was due into the FEC. Kuhn for Congress eventually found Sarah Miller to fill the role of Campaign Treasurer to assist with filing financial reports after the Election. This report included a list of donors and expenditures (“Report”) and this “after the election” report was filed late.

Kuhn for Congress relied on the experience of Ms. Lisker to file the Election Reports. Ms. Lisker did not file the “after the election” April 15, 2013 report. John Kuhn, of Kuhn for

Congress, found out three months later that the final Report had not been filed and he immediately called Ms. Lisker to determine why. She replied that filing a report without a zero balance would result in a FEC fine. Therefore, she did not file the report on time. John Kuhn of Kuhn for Congress also contacted the FEC at this point and he explained the situation as to why the final “after the election” report was not yet filed. He was told by FEC agent, Sari Pickerall that Kuhn for Congress’s extenuating circumstances would not matter to the FEC. The FEC would move forward with a fine in the amount of \$8,800. At that time, Mr. Kuhn explained in detail the extenuating circumstances of his Campaign Treasurer having an early pregnancy delivery and who then went on maternity leave for two months, as well as that the FEC consultant, Lisa Lisker, hired by Kuhn for Congress to file the FEC reports, refused to file the final report because it did not have a zero balance. Ms. Pickerall informed Mr. Kuhn he could file for relief in Federal District court and skip the internal FEC appeals process since she said that the Kuhn for Congress situation did not fit under the internal extenuating circumstances which would give rise to a successful internal appeal with the FEC. Ms. Pickerall also informed Mr. Kuhn that the FEC can ruin his credit if the \$8,800 fine was not paid immediately.

The FEC issued a letter in November, 2013 (after Kuhn for Congress had already filed the “after election report” on August 20, 2013, approximately four months late), with the FEC’s final decision that Kuhn for Congress would be fined \$8,800 for not filing the “after the election” Report. This November, 2013, letter was received after Kuhn for Congress had already filed the late report. In other words, the FEC still made a determination the Report was “Not Filed” instead of “Filed Late” based on 2 U.S.C. § 437a and 11 C.F.R. § 111.35. After receiving the November, 2013, letter, Kuhn for Congress filed in Federal District Court of South Carolina, Charleston Division, seeking judicial review of the FEC fine.

SUMMARY OF THE ARGUMENT

John Kuhn's Constitutional rights are violated because the FEC's statutes and procedures are unconstitutional as applied to the First, Fifth, and Eighth Amendments. Kuhn for Congress has judicial review based on the Administrative Procedures Act ("APA") and 2 U.S.C. §437g(a)(4)(C)(iii).

The FEC's procedures of issuing a fine for filing a late Report violate Kuhn for Congress's First and Fifth Amendment due process rights. Under Fifth Amendment due process, several factors must be met to prove that FEC procedures are not adequate, 11 C.F.R. § 111.35. The first factor is a privacy interest, and John Kuhn's privacy interest is the opportunity to be heard. Second, the FEC's procedures for issuing a fine are inadequate. Third, there is no cost for the FEC to change its procedure. The FEC procedures also infringe upon John Kuhn's First Amendment rights because the procedures penalized protected expression and the process to appeal an administrative fine is unknown.

The FEC's \$8,800 fine violates the Eighth Amendment because it is extremely excessive. Kuhn for Congress can meet the following Eighth Amendment review factors: (1) nature and extent of the activity (2) other illegal activity (3) extent of harm (4) maximum penalty to be imposed. Furthermore, the Report is from a losing Campaign, and the donor and expenditures provided in the final report were mostly already reported to the FEC in previous reports.

Federal Election Campaign Act statute, 2 U.S.C. § 437d, and regulation 11 C.F.R. § 111.35, are facially unconstitutional as applied to Kuhn for Congress because the statutory four day turnaround did not give Kuhn for Congress any opportunity be heard or even know about the violation. 2 U.S.C. § 437d and regulation 11 C.F.R. § 111.43 are overbroad and gives the FEC too much power because the FEC can issue civil penalties without adequate due process.

STANDARD OF REVIEW

This action arises under the Federal Election Campaign Act (“the Act”), 2 U.S.C. § 431, et seq., the Declaratory Judgment Act, 28 U.S.C. §2201, and the Administrative Procedure Act, 5 U.S.C. 701-706. This Court has jurisdiction under 2 U.S.C. §437g(a)(4)(C)(iii) and 28 U.S.C. §1331. The petition and complaint have been filed with this Court within 30 days of plaintiffs’ receipt of the notice of adverse determination as required by 2 U.S.C. §437g(a)(4)(C)(iii). This district has venue under 2 U.S.C. §437g(a)(4)(C)(iii) and 28 U.S.C. §1391(b) and (e).

ARGUMENT

I. Kuhn for Congress Campaign Committee has Judicial Review

Kuhn for Congress Campaign Committee, representing John Kuhn, has judicial review of the Federal Election Commission’s action based on the Act. 2 USC § 437g(a)(4)(C)(iii). The statute states “Any person against whom an adverse determination is made . . . may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, . . .” 2 USC § 437g(a)(4)(C)(iii).

The Act verifies a Federal Court imposes the appropriate remedy on the plaintiff instead of the Federal Election Commission. *Stockman v. Federal Election Com’n*, 138 F.3d 144 (5th Cir. 1998). The FEC does not share the grand jury’s traditional role as an instrument of justice and is required to make public its enforcement decisions and enforcement reasoning. *Costello v. United States*, 350 U.S. 359, 362 (1956); 11 C.F. R. § 111.20 (finding judicial authority to adjudicate alleged violations does not come into play until after the FEC has had an opportunity

to act. *Friends of Phil Gramm v. Americans for Phil Gram in '84*, 587 F. Supp. 769 (ED Va.1984)).

Kuhn for Congress is not precluded from judicial review because the Act contains a judicial review section. 2 USC § 437g(a)(4)(C)(iii). The Administrative Procedures Act (“APA”) states “a person suffering legal wrong because of agency action, or adversely affected . . . is entitled to judicial review thereof.” 5 U.S.C. § 704. Even if the Act did not contain a judicial review section, there is a presumption that agency action is reviewable. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). FEC’s final agency action is reviewable. 5 U.S.C. § 702; *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *D’Imperio v United States*, 575 F. Supp. 248 (1983 DC NJ).

Kuhn for Congress should receive judicial review because the FEC fine is the final agency decision regarding the issue of filing a late Report. Kuhn for Congress has been adversely affected because Kuhn for Congress has received a fine of more than eight thousand dollars after losing the Election. The FEC’s agency action is final based on final decision letter issued to Kuhn for Congress in November, 2013. This final agency action is reviewable based on the APA and the Act itself.

II. The FEC’s procedures have violated Kuhn for Congress’s First and Fifth Amendment Due Process rights.

The FEC implemented the Administrative fine program to circumvent a four-stage enforcement framework. 2 U.S.C. § 437(g). This program is extremely broad and does not allow the respondent an opportunity to be heard before the commissioners. Due process is flexible and calls for procedural protections as the situation demands. *Morrissey v. Brewer*, 408

U.S. 471, 481 (1972). Three factors are considered to determine the adequacy and sufficiency of the administrative procedure. *Matthews v. Elridge*, 424 U.S. 319, 332-335 (1976). The first factor is the privacy interest that will be affected by the official action. *Id.* The second factor is the deprivation of this interest through the administrative procedure, and finally, the third factor is weighing the cost to the government that the Plaintiff's recommended change would create.

Id.

Simply by not allowing the respondent, Kuhn for Congress, to present an oral argument before the committee, reveals the inadequacy of the current FEC's administrative fine program.

A. The FEC's procedures have violated Kuhn for Congress's Fifth Amendment Due Process Rights

i. Kuhn for Congress's privacy interest is the opportunity to be heard.

The first factor is to prove how an administrative procedure adversely affects a privacy interest. 424 U.S. at 333.

Once the FEC found that Kuhn for Congress (and John Kuhn) should pay an \$8,800 fine (which was almost immediate), Kuhn for Congress then had extremely limited options to internally oppose the FEC's ruling. The basis for internal appeal to the FEC are limited under 11 C.F.R. § 111.35, to "(1) . . . factual error . . . (2) [improper] calculation of civil penalty; or (3) respondent used best efforts to file in a timely manner." 11 C.F.R. § 111.35(b)(1-3). For the FEC to fine a candidate for a late filed Report, the FEC first must issue an opinion and address the respondent's concerns. *Lovely v. FEC*, 307 F. Supp. 2d 294 (D. Mass. 2004). This was not done in this case.

If we further review FEC Regulation 11 C.F.R. § 111.35(c), it falls woefully short in protecting the candidate because it only allows for FEC extraordinary circumstances (e.g. FEC computers are down the day of the filing) creating the late filing; it does not allow for candidate

extraordinary circumstances (e.g. early delivery of Treasurer's baby, incredibly short timetable on an unusual special election, failure of hired expert to file the report because of miscommunication between candidate and hired FEC expert). The District Court of Northern Illinois has held that extraordinary circumstances are the ones that are beyond the Candidate's control. *Cox for United States Senate Comm., Inc. v. FEC*, 2004 U.S. Dist. LEXIS 6939 (N.D. Ill, Jan. 21, 2004).

We are also arguing that the FEC merely allowing for a written response to a proposed civil action is not truly an opportunity for Kuhn for Congress to be heard either. The FEC immediately made a finding of probable cause and issued a civil penalty before allowing Kuhn for Congress the opportunity to explain why the Report was late.

Interpreting the regulation broadly would actually allow Kuhn for Congress to make a showing for "reasonably unforeseen circumstances", something the FEC does not allow at all under their regulation. Here are the details of Kuhn for Congress' extraordinary circumstances: Kuhn for Congress was involved in special Election, which only lasted sixty days. Kuhn for Congress lost the Election. Kuhn for Congress filed all the FEC reports before the election on time. However, as soon as the election was over, the unforeseen circumstances started occurring. Eight days before the election, Kuhn for Congress's treasurer went into premature labor. Due to unforeseen circumstances of premature delivery and the Campaign Treasurer on sixty-day maturity leave, Kuhn for Congress failed to file the final "after the election" report. Kuhn for Congress did file the Report four months late; however, even after two FEC administrative hearings, the commissioners determined Kuhn for Congress did not file. The FEC commissioners determined the status of "did not file" based on evidence received from the FEC, and they did not solicit any evidence from Kuhn for Congress, nor the Candidate. John Kuhn

was denied an opportunity to present his case, in person, to explain the unforeseen circumstances which occurred. Kuhn for Congress was also informed by FEC agent, Sara Pickerall, that Kuhn for Congress did not meet the extenuating circumstances and might as well skip the internal FEC appeal process and file directly in Federal District Court. The FEC agent also informed John Kuhn that his credit could be ruined if the fine was not paid within thirty days. If Mr. Kuhn had been allowed to present his case before the FEC, Kuhn for Congress's opportunity to be heard would be satisfied and a different outcome might have resulted. Because Kuhn for Congress was denied its opportunity to be heard, the FEC imposed a status of "not filed" which resulted in a huge \$8,800 civil penalty. And, as a result, Kuhn for Congress filed an appeal in this Honorable Court.

ii. The FEC's administrative procedures are inadequate.

A fair hearing is required to satisfy due process. *Goldberg v. Kelly*, 397 U.S. 254 (1970). "If the Commission [FEC] determines, by an affirmative vote of at least four of its members, that it has reason to believe that respondent has violated the [reporting requirements], then the respondent will be notified . . ." 11 C.F.R. 111.32. To challenge a reporting requirement violation that results in a proposed civil penalty, ". . . the respondent must submit a written response to the Commission [FEC] . . . within 40 days . . ." 11 C.F.R. 111.35(a). There are only two options with regard to a civil monetary penalty. Option one, the FEC can modify the penalty only if the respondent is able to demonstrate that the proposed civil penalty amount was calculated incorrectly. *Friends for Houghton v. FEC*, 2002 U.S. Dist. LEXIS 23678 (WD NY July 23, 2002). Option two, is to waive the monetary penalty because the respondent has convincingly demonstrated the existence of extraordinary circumstances that were beyond the respondent's control and the circumstance only lasted forty-eight hours in duration. *Id.*, 11

C.F.R. § 111.37. Each option is first determined by a four-person committee, with no evidence or explanation from the respondent. 11 C.F.R. § 111.37 (a).

The FEC's administrative procedures are inadequate because an adverse decision, here a fine, was issued without any opportunity to be heard. The procedures are inadequate for the candidate, not for the FEC. The regulations benefit only the FEC, not the candidate. Here, the FEC issued a violation before Kuhn for Congress had a fair hearing. Kuhn for Congress should have the same opportunity as the FEC to present its case before the four-person committee the first time the committee meets. Similar to *Goldberg*, a fair hearing should be provided before a violation has been issued. The first time the committee meets is to determine if an Act violation has occurred. This determination, regardless of the committee's decision, at the first meeting results in an adversarial result for the candidate. The procedure should allow the respondent, Kuhn for Congress, the opportunity to be heard at each stage of the process, and this includes the first time the four-person committee meets to determine a reporting violation. Because the FEC procedures are inadequate (by not allowing Kuhn for Congress to present his case the first time the committee meets), Kuhn for Congress's due process rights have been violated.

iii. FEC has no cost in changing procedure.

The final factor to determine an insufficient administrative process is to look at the government cost for making a procedural change. Here, the FEC has no cost to change its procedure. A government interest is conserving scarce fiscal and administrative resources. 424 U.S. at 348. At some point the benefit of an additional safeguard to the individual affected and to society that the action is justified, may be outweighed by the cost. *Parratt v. Taylor*, 451 U.S. 527 (1981) (citing *Mathews v. Eldridge*, 424 U.S. 319 at 348).

If the FEC allowed the respondent to present its case at the first four-person committee meeting, then there would be no need for additional hearings. Ironically, the current process is more costly for the FEC because there is second hearing and additional staff time. To allow the respondent to present their case at the first meeting eliminates the cost for the second four-person meeting. Also, once the second meeting is eliminated, there is no additional staff time for preparation. The FEC would have no cost in changing its administrative to procedure by allowing the respondent to present their case the first time the four-person committee meets.

B. The FEC procedures have violated Kuhn for Congress's First Amendment Due Process Rights

The FEC procedures are constitutionally defective. The First Amendment requires procedural safeguards when the government is regulating or burdening protected expression. *Blount v. Rizzi*, 400 U.S. 410, 416-18 (1971); *Carroll v. President & Comm'rs of Princess Anee*, 393 U.S. 175, 181-83 (1968). Freedom of expression has higher protection than traditional Fifth Amendment due process rights. *Smith v. California*, 361 U.S. 147, 150-53 (1959).

Because the FEC is regulating campaign expenditures and contributions, an indispensable part of political communication, the FEC is regulating an area "most fundamental to First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The Supreme Court has stated clearly that there "[is] a constitutional guarantee to the conduct of political office campaigns." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

There are two criteria where the First Amendment invalidates unduly burdensome procedures that deter freedom of expression. One, the procedure cannot create the likelihood that protected expression will be penalized. *Speiser v. Randall*, 357 U.S. 513 (1958). Two, the procedure

cannot impose heavy costs upon the defense of First Amendment rights. *Freedman v. Maryland*, 380 U.S. 51 (1964).

i. The FEC procedures penalize protected expression

The FEC's administrative fine program penalizes freedom of expression. The government has the burden of proof when arduous procedures violate protected freedom of expression. *See Freedman*, 380 U.S. at 48; *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Any final restraints on freedom of expression are imposed at adversarial proceedings. *Carrol*, 393 U.S. at 183.

The FEC has violated Kuhn for Congress's freedom of expression due process rights because the FEC has failed to show how the FEC Administrative Fine Program is not arduous. As soon as the FEC imposed a fine during the first commissioner hearing, the proceeding became adversarial. The current process is arduous to Kuhn for Congress because there is no way to appeal the fine until after the fine has been issued. Worst yet, the FEC Administrative fine breakdown does not take into account losing campaigns. *See* 11 C.F.R. § 111.43-111.44. The fine is imposed on any campaign, including losers of primaries.¹ The FEC has failed to

¹ *See, e.g.*, Miles for Senate (candidate raised approximately \$63,000 before dropping out of Senate race before primary. The candidate's treasurer personally mailed the Quarterly Report by first class mail on the due date. Under the regulations, reports must be received by the due date unless sent by certified mail. *See* 11 C.F.R. § 104.5. Campaign was fined \$2700). Even well-financed primary losers are often left without money to pay fines for late filed reports due after the primary, with the result that the burden of fines often falls heavily on the candidate or treasurer, as in Hochberg for Congress, in which the campaign was fined \$9500. Given that these post-primary reports are not relevant to the public, such fine levels are probably high. Bradley A. Smith, Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 Election L.J. 145 (2002).

show how its administrative fine program does not infringe on Kuhn for Congress's First Amendment rights.

ii. The process to appeal an FEC administrative fine is unknown, creating costly litigation for First Amendment rights defense.

The financial cost of appealing an adverse decision based on the FEC administrative fine program is unknown because the regulation does not allow an appeal. 11 C.R.F. 111.43. Because there is no appeals process in place, the Candidate has no way of knowing how to appeal and even the cost of the potential appeal. Therefore, just the prospect of costly defense would chill protected speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 n. 21 (1978) (holding that the burden and expense of litigating the issue that is established in a complex relationship would impinge on a constitutional right.); *Rosenbloom v. Metromedia*, 403 U.S. 29, 52-53 (1971) (holding that the possibility of expense litigation is a sufficient threat to inhibit protected discussion). The court has determined that the only way to protect freedom of expression sensitivity is through a judicial determination in an adversary proceeding. *Freedman*, 380 U.S. at 58.

The FEC claims in their brief that the Plaintiff's Appeal to this Court should be dismissed. Therefore, taking the FEC at face-value, the FEC does not have a procedure to appeal a decision, since the opportunity to appeal internally was denied by the FEC and this court is the last resort for the Candidate to be heard. If this court does not accept this case, then due process is manifestly denied in this case.

Moreover, an unknown FEC appeal process creates undue burden on an American's freedom of expression. Potential Candidates for office in this country will not run for office when they realize that they may have to pay a huge fine for filing Candidate reports late with the

FEC. The FEC is supposed to be an institution designed to promote the freedom of information, not hinder folks from running for office in the first place. Additionally, when potential candidates realize that they have virtually no appeals process when they file late reports, then they surely will not run for office.

Once the Plaintiff shows that there is a chilling effect on potential candidates running for office, then the burden shifts to the FEC to prove that their procedure has no alternative to reach their interests. The government now has the burden to show a procedure has no less restrictive alternatives to achieve a legitimate government interest. *US v. O'Brien*, 391 U.S. 367, 377 (1968). A sufficient government interest does not include administrative efficiency, convenience, and cost savings. 357 U.S. at 529 (1958).

The FEC's procedural goal is to quickly determine a violation to eliminate campaign corruption. 2 U.S.C. § 437d. However, the FEC's administrative fine program creates a chilling effect on potential candidates' freedom of expression rights because the FEC administrative fine program does not have any less restrictive alternatives available.

III. The FEC's fine violates the Eight Amendment

The FEC's fine is excessive and deprives Kuhn for Congress of due process. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Walters-Pierce Oil Co. v Texas*, the Supreme Court held that excessive fines are those which "so gross [in] excess as to amount to a deprivation of property without due process of the law." 212 U.S. 86, 112 (1909). Judicial authority can interfere with legislative action if the fines are so grossly excessive that results in deprivation of property. *Id.*

The burden is on the respondent to prove the FEC's fine is excessive. The standard to apply is gross disproportionality of the forfeiture compared to the defendant's offense. *US v.*

Bajakajian, 524 U.S. 321, 337 (1998). In applying this standard, the district courts “must compare the amount of the forfeiture to the gravity of the defendant's offense.” *Id.* at 337-38. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional. *Id.* The FEC’s \$8,800 fine is exceedingly excessive because Kuhn for Congress actually filed the information-only Report, albeit late, which resulted in no loss of information to the government or the public. The fact that the report was late was virtually irrelevant because all prior reports during the election were filed on time and this report was due after the Candidate lost the election. Furthermore, Eight-Thousand, Eight Hundred Dollars has no correlation whatsoever to the offense. It is patently arbitrary.

In *US v. Bajakajian*, the court developed the following factors to help determine the proportionality: (1) nature and extent of the activity (2) other illegal activity (3) extent of harm (4) maximum penalty to be imposed. 524 U.S. 321, 336 (1998); *United States v. Ahmad*, 213 F.3d 805, 816 (4th Cir. 2000).

Here, Kuhn for Congress can demonstrate that each *Bajakajian* factor shows the FEC’s fine is excessive. The first factor, the nature and extent of the activity, is the late filing of the Report. Filing a late report usually results in a fine of about \$300 in the real world. The second factor, other illegal activity, shows Kuhn for Congress previously filed all prior FEC Reports on time. Therefore, the Kuhn for Congress Committee was not only trying to do the right thing, until this moment in time, the Committee actually fully-succeeded in doing the right thing. The third factor, extent of harm, shows the government was not deprived of any information because the Report was, indeed, filed. Therefore, there is no harm. Also, the Report did not deprive the voters of information because Kuhn for Congress was the losing party in the Election. The final factor is the maximum penalty to be imposed, and here, Kuhn for Congress was fined \$8,800

based on campaign contributions and the number of days late. The FEC cannot possibly have a more arbitrary fine calculation procedure than it has. The FEC bases its late fees on the amount of donations and contributions that the Campaign took in that particular Fiscal Quarter. In other words, the FEC fine is a percentage of whatever amount happens to come in the bank that Quarter. You cannot possibly get a more arbitrary fining process for a late filing than that. If we are not mistaken, this is not a fine for a late payment of taxes to the IRS; this is a fine for late filing of an information-only report to the Federal Election Commission. The fine should only include the amount for the number of days the Report was late, not including the total amount of campaign contributions because the government did not lose any information. As the court stated in *Bajakajian*, the gravity of the offense, filing a late Report, is not proportional to the FEC's whopping fine of \$8,800.

IV. Federal Election Campaign Act violates Kuhn for Congress's First Amendment rights because the statute as applied to Kuhn for Congress is unconstitutional and overbroad.

A. FEC's powers of commission statute as applied to Kuhn for Congress is unconstitutional.

The FEC's powers of commission statute, 2 U.S.C. § 437d, allows the FEC to create a civil penalty. Regulation 11 C.F.R. § 111.43 provides a breakdown of civil penalty, while regulation 11 C.F.R. § 111.35 creates an FEC process to maintain the civil penalty.

The FEC has failed to prove a compelling government interest for 2 U.S.C. § 437g(a)(12)(B)(b) and 11 C.F.R. § 111.35. Congressional intent for implementing the Act was to expedite judicial review without creating a chilling effect on First Amendment rights. The government must prove that it has a legitimate government interest and those interests should be of the "highest order" to be placed in opposition to First Amendment freedoms. *Brown v.*

Hartlage, 456 U.S. 45 (1982) (finding First Amendment infringement requires government restriction be supported by a compelling interest, not merely a legitimate interest). Laws that restrict political speech require the government to prove the restriction meets a compelling government interest with the least restrictive means. *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876 (2010). It is up to judges to determine the substantiality of the government interest asserted. *City of Newport, KY v. Lacobucci*, 479 U.S. 92 (1986).

The FEC's enforcement statute, 2 U.S.C. § 437g(a)(12)(B)(b), and regulation, 11 C.F.R. § 111.35, are unconstitutional as applied to Kuhn for Congress because the Report was filed. Candidates can bring election law challenges as applied to the plaintiff based on a particular situation. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1193-95 (2008). The plaintiff has to prove how the law will impose a higher burden on a certain group of voters. *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1621 (2008). The Court in *Crawford* leaned on the factors set forth in *Anderson v. Celebrezze* to determine Constitutional challenges to election laws. 103 S. Ct. 1564 (1983). A court should use an "analytical process" by first considering the plaintiff's character and magnitude of the asserted injury to the rights protected by the First Amendment. *Id.* at 789. Second, the Court evaluates the government's interest for the burden imposed by the rule, and lastly, the Court should consider the extent to which those interests burden the plaintiff's rights. *Id.*

The FEC has failed to prove a compelling government interest for its unduly short statutory four-day response when it determines that the Candidate has an alleged reporting violation. The FEC has also failed to prove a compelling government interest to limiting a Candidate's areas of allowed response. For example, why would the FEC limit hearing Candidate's extenuating circumstances in the first place? 2 U.S.C. § 437g(a)(12)(B)(b); 11

C.F.R. § 111.35 (c)(1-3). Here, an Election was held within 60 days, where Kuhn for Congress lost the election. After the election, John Kuhn, the Candidate, was not notified directly of the missing Report to the FEC until August. Once the violation was brought to the attention of the Candidate, he worked hard and quickly to file the missing Report. Yet, he still received an \$8,800 fine. Mr. Kuhn's FEC penalty is injurious to other potential American Citizens whom might wish to run for office because it has a definite chilling effect on normal citizens desiring to place themselves up for elected office. This is what the First Amendment is designed to protect: The potential folks who may wish to run for elected office in the United States. Mr. Kuhn's First Amendment right is the ability to run for an elected office without fear of government retribution. Here, the excessive fine was the government's retribution for filing a late Report. This fine creates a chilling effect on voters who might run for office in the future because these potential candidates see how the government burdens other candidates' First Amendment rights, such as those of Mr. Kuhn.

The FEC's burden is to prove a compelling government interest with the least restrictive means. Here, the FEC can claim an interest is to prevent anti-corruption; however, the Report is from a losing candidate where the number of donors and expenditures had not changed in a matter of days after the election. The information in the Report did not affect potential votes for John Kuhn; however, the excessive fine issued by the FEC will affect potential candidates who would like to run for elected office because the excessive fine creates a chilling effect on potential voter's freedom of expression. The limitation on the voter's "freedom of expression" is quite literally that the voter cannot now vote for one potential candidate because that candidate will now not run for office because of the chilling effect created by the FEC. The FEC has failed to show any compelling interest for issuing an excessive fine and the FEC has failed to

show how issuing an exorbitant fine is the least restrictive means possible that does not infringe on candidate's and voters' First Amendment freedom of expression rights.

B. The FEC's power of commission statute is overbroad.

The FEC's power of commission and civil penalty schedule are overbroad because they give the FEC exclusive civil remedy for enforcement. 2 U.S.C. §437d; 11 C.F.R. 111.43.

Overbreadth occurs when government limitation on federal constitutional rights has not been carefully drawn and narrowly tailored to reach a specific violation. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The government regulation has violated the Due Process Clause of the Fifth Amendment. *Bigelow v. Virginia*, 421 U.S. 809 (1965). When a federal court is reviewing a federal statute that is being challenged as overbroad, it should construe the statute to avoid constitutional problems. *New York v. Ferber*, 458 U.S. 747, (1982). The overbreadth doctrine permits individuals to raise third-party Constitutional concerns who may not ordinarily appear before the Court due to fear of prosecution for their freedom of expression activity. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

The FEC's power of commission statute is too broad because it gives the FEC exclusive civil remedy without regard to First Amendment protected rights. The statute allows for constitutionally protected conduct, such as running for elected office, to be penalized. The FEC cannot have exclusive civil remedy without adequate due process. Here, the FEC's procedure immediately inflicts a civil penalty without taking into account constitutionally protected rights. Here, Kuhn for Congress was immediately issued a fine for not filling the Report; however, once John Kuhn, the Candidate himself, learned of the missing Report, it was immediately filed. At this point, the FEC's power of commission statute violated Kuhn for Congress's First

Amendment rights because the FEC has the exclusive civil remedy to determine a civil penalty without adequate due process.

The FEC's civil penalty schedule is overbroad because the statute does not take into account losing campaigns. 11 C.F.R. 111.43(a). Here, Kuhn for Congress lost the Election and filed a late Report. However, based on the overbroad penalty schedule, Kuhn for Congress's fine was calculated as other candidates who filed late would be calculated. The fine schedule does not account for winning or losing campaigns.² The difference is Kuhn for Congress filed the Report, the Report did not contain election sensitive information and John Kuhn lost the election. The fine for a candidate who lost the election is excessive, and this excessive fine creates a chilling effect on potential voters' First Amendment right of political expression for fear of receiving an excessive fine. The FEC's statutes create a chilling effect on potential candidates for elected office because if a candidate does not precisely follow the FEC regulations the candidate is immediately imposed an egregious fine. The First Amendment is designed to protect all rights of political expression, Here, the FEC has trampled on the First Amendment with facially unconstitutional statutes and overbroad regulations.

CONCLUSION

For the reasons stated above, Kuhn for Congress respectfully requests that the Court deny the Defendant's motion to dismiss and allow Kuhn for Congress adequate due process based on an adverse agency decision.

Kuhn for Congress also prays that this Court reduce the fine to \$300 for late filing of an information-only report. Likewise, Kuhn for Congress prays that this Court order the Federal Election Commission to change its statutes to become Constitutional in nature and reduce its

² See note 1.

penalties to reasonable amounts to ensure that potential candidates for office in the United States are not freighted to run for office.

Respectfully submitted,

Date: July 29, 2014

A handwritten signature in black ink, appearing to read "John R. Kuhn", written over a horizontal line.

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