UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE TEA PARTY LEADERSHIP FUND, *et al.*,	)	
Plaintiffs,	)	Civ. No. 12-1707 (RWR)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION
Defendant.	)	

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

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On the eve of the quadrennial nationwide elections, plaintiffs seek to halt enforcement of campaign-finance provisions that the Supreme Court has expressly upheld as constitutional measures that limit corruption. Plaintiffs' inexcusably late-filed suit is meritless, and they cannot remotely demonstrate that any legal or equitable factors weigh in favor of enjoining the government from enforcing the longstanding provisions they challenge.

The Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), generally prohibits an individual or group from contributing more than $2,500 to a federal candidate. FECA provides, however, that certain political organizations may take advantage of a higher contribution ceiling of $5,000 per candidate, provided these organizations meet three specific statutory criteria to demonstrate that they are bona fide "multicandidate political committees" ("multicandidate PACs"). Those criteria are: (1) being registered with the Federal Election Commission for at least six months; (2) receiving contributions from more than fifty persons; and (3) making contributions to at least five federal candidates. 2 U.S.C. § 441a(a)(4). More than 35 years ago, the Supreme Court reviewed and upheld the constitutionality of these criteria for multicandidate-PAC status, recognizing that they serve the important governmental interest of limiting corruption by preventing circumvention of the limits on individual contributions to candidates.

Plaintiff Tea Party Leadership Fund ("TPLF") has contributed $2,500 each to various federal candidates, including plaintiffs John Raese and Sean Bielat, and it wants to contribute more to these candidates for the 2012 election. But TPLF currently meets only two of the three criteria for multicandidate PAC status. Because TPLF registered with the Commission on May 9, 2012, it will not fulfill the six-month registration requirement until November 9, 2012.

TPLF filed an "emergency" motion 19 days before the upcoming federal election, arguing that the Constitution excuses TPLF from the registration requirement. This claim is remarkable because the self-imposed "emergency" results solely from plaintiffs' delay in filing their lawsuit *more than five months* after TPLF registered with the Commission and triggered the registration period. And even more remarkable is plaintiffs' request that this Court overrule a Supreme Court holding directly applicable here. Plaintiffs' attempts to introduce doubt about whether the Supreme Court's holding remains good law in light of subsequent developments must fail; only the Supreme Court can overrule its own decisions. In any event, none of the developments on which plaintiffs rely casts any doubt on the continued constitutionality of the registration requirement for multicandidate PACs.

BACKGROUND

I. MULTICANDIDATE PACS

FECA requires a group to register with the FEC as a "political committee" ("PAC") once the group has engaged in a certain amount of federal election campaign activity. Specifically, an organization must register if (1) it has received more than $1,000 in "contributions" or made more than $1,000 in "expenditures" during a calendar year, 2 U.S.C. § 431(4)(A); *see also* 2 U.S.C. § 431(8)-(9) (defining "contribution" and "expenditure"), and (2) its major purpose is the nomination or election of federal candidates, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Though FECA requires a PAC to register once it meets these thresholds, an organization is also free to register voluntarily at any time beforehand. 11 C.F.R. § 104.1(b). Once a group becomes or registers as a PAC, it must disclose most of its receipts and disbursements in periodic public reports filed with the Commission. *See generally* 2 U.S.C. § 434.

FECA generally provides that no "person" may contribute more than $2,500 per election to a federal candidate.[1] 2 U.S.C. § 441a(a)(1)(A); FEC, *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8369 (Feb. 14, 2011) ("*Inflation Index*"). A "person" subject to this limit includes any "individual . . . [or] organization." 2 U.S.C. § 431(11). The only relevant exception is for multicandidate PACs: These organizations can contribute $5,000 per candidate per election. 2 U.S.C. § 441a(a)(2)(A).[2] But to qualify for this higher limit, an organization must demonstrate that it is a bona fide multicandidate PAC by (1) being registered with the Commission as a PAC for at least six months, (2) receiving contributions from more than fifty persons, and (3) making contributions to at least five federal candidates. 2 U.S.C. § 441a(a)(4).

In *Buckley*, the Supreme Court upheld the constitutionality of both the personal contribution limit (which was $1,000 per election at the time) and the qualification criteria for the higher multicandidate-PAC contribution limit. The Court first held that the personal contribution limit is a constitutionally valid method of preventing corruption and the appearance of corruption in federal elections. *Buckley*, 424 U.S. at 23-35. The Court explained that contribution limits help prevent corruption because "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. And *Buckley* held that contribution limits also help prevent the appearance of corruption "inherent" in large

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[1] In this context, primaries and general elections are separate "elections." *See* 11 C.F.R. 100.2. Thus, one person can contribute $2,500 to a candidate for a primary election and another $2,500 to the candidate for the general election, for a total contribution of $5,000 per election cycle.

[2] Political committees established by national political parties are also subject to different contribution limits. *See* 2 U.S.C. §§ 441a(a)(2)(B), 441a(d), 441a(h). But these limits are irrelevant here.

contributions — the avoidance of which is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 27 (internal quotation marks omitted).

The Court then held that the criteria for multicandidate PAC status, including the six-month registration period, "serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Buckley*, 424 U.S. at 35-36.[3] The Court rejected the argument that the requirements unconstitutionally discriminate against "ad hoc organizations." *Id.* at 35. "Rather than undermining freedom of association," the Court explained," the higher contribution limit "enhances the opportunity of bona fide groups to participate in the election process," with the qualification criteria limiting the potential for abuse of that opportunity. *Id.*

II. THE 1976 FECA AMENDMENTS

Congress amended FECA shortly after *Buckley*. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 ("1976 FECA Amendments"). These amendments were intended, *inter alia*, to limit additional methods of circumventing contribution limits — methods that the prior version of FECA had not addressed, such as the use of PACs that "appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 198 n.18 (1981) (quoting H.R. Rep. No. 94-1057, at 57-58 (1976) (Conf. Rep.)). To partially address this particular form of circumvention, the 1976 FECA Amendments provided that no person or multicandidate PAC can

[3] At the time of *Buckley*, FECA had yet to use the term "multicandidate" to describe PACs that qualify for the increased $5,000 contribution limit. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (then-codified as 18 U.S.C. § 608(B)(2)). That term was added to FECA in 1976. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475 (codified at 2 U.S.C. § 441a(a)(4)).

contribute more than $5,000 per year to any one PAC. *See* 1976 FECA Amendments, § 112(2) (codified at 2 U.S.C. § 441a(a)(1)(C), (2)(C)). And the amendments provided that all PACs (including multicandidate PACs) that are established, financed, maintained, or controlled by the same individual or group are considered to be a single PAC for purposes of the limits on the contributions they may make. *Id*. (codified at 2 U.S.C. § 441a(a)(5)).

III. THE PARTIES

The Commission is the independent agency of the United States government with statutory authority over the administration, interpretation, and civil enforcement of FECA and other federal campaign finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 437d(a)(8), 438(a)(8); to issue advisory opinions concerning the application of FECA or the Commission's regulations to proposed transactions or activities, *id.* §§ 437d(a)(7), 437f; and to civilly enforce FECA, *id.* § 437g.

Plaintiff TPLF is a PAC that registered with the Commission on May 9, 2012. (Compl. ¶ 2 (Docket No 1).) TPLF alleges that it has satisfied two of the three criteria for multicandidate PAC status by receiving contributions from more than fifty people and making contributions to at least five candidates. (*See id*.) As a result, TPLF will achieve multicandidate PAC status when it satisfies the six-month registration requirement on November 9, 2012. 2 U.S.C. § 441a(a)(4).

TPLF describes itself as a "[h]ybrid" PAC (Compl. ¶ 2), meaning that it maintains two accounts: A "contribution account" that accepts contributions only from individuals in increments of $5,000 or less and is used to finance contributions to candidates; and a separate "non-contribution account" that accepts unlimited individual or corporate contributions and is

used to finance independent expenditures or electioneering communications. *See* FEC, *Statement on* Carey v. FEC: *Reporting Guidance for Political Committees That Maintain a Non-Contribution Account* (Oct. 5, 2011), http://www.fec.gov/press/Press2011/20111006postcarey.shtml. According to its FEC filings, TPLF has raised a total of approximately $480,000 since its registration.[4] It has made contributions totaling $27,500 to eleven federal candidates ($2,500 per candidate), and it has spent approximately $73,500 on express advocacy communications for and against federal candidates.

Plaintiff John Raese is a candidate for the United States Senate in West Virginia. (Compl. ¶ 3.) He was nominated as the Republican candidate for that seat on May 8, 2012.[5] Plaintiff Sean Bielat is a candidate for the United States House of Representatives in Massachusetts. (Compl. ¶ 4.) He was nominated as the Republican candidate for that seat on September 6, 2012.[6]

TPLF's contributions include $2,500 to Raese and $2,500 to Bielat. (Compl. ¶ 5.) TPLF alleges that it would like to contribute an additional $2,500 each to Raese and Bielat, plus up to $5,000 to other candidates before the November 6 general election. (Compl. ¶¶ 5, 60.) Plaintiffs Raese and Bielat each allege a desire to accept an additional $2,500 in contributions from TPLF "[a]s soon as possible, and certainly before the 2012 primary and general elections." (Compl. ¶ 61.)

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[4] TPLF's FEC filings can be retrieved by entering the committee's name into the Commission's search function at http://www.fec.gov/finance/disclosure/candcmte_info.shtml. As of the date of this brief, those filings encompass TPLF's activity from its registration through October 17, 2012.

[5] *See* W.V. Sec'y of State, *Election Results Center* (May 8, 2012), http://apps.sos.wv.gov/elections/results/results.aspx?year=2012&eid=8&county=Statewide.

[6] *See* Sec'y of Commonwealth of Mass., *2012 State Primary Results* (Sept. 6, 2012), http://www.sec.state.ma.us/ele/elepdf/20120906_sp_results_rep.pdf.

IV. PLAINTIFFS' ADVISORY OPINION REQUEST

On September 17, 2012, plaintiffs requested that the Commission issue an advisory opinion declaring the six-month registration period unconstitutional. (Compl. Exh. A (Docket No. 1-4).) On October 10, after receiving public comments and hearing argument from plaintiffs, all six FEC Commissioners voted unanimously to deny the request. (Compl. Exh. C (Docket No. 1-6).) The Commission found that

> the requestors ask the Commission to determine that TPLF may make, and Mr. Bielat and Mr. Raese may accept, contributions in excess of [$2,500 per candidate] because they contend the congressionally prescribed definition of a multicandidate committee is unconstitutional. The Commission, however, lacks the power to make such a determination. . . . [N]o court has struck down the qualification requirements of the Act. The Supreme Court has ruled that this limitation does not offend the Constitution.

(Compl. Exh. B. at 4 (citing *Buckley*, 424 U.S. at 35-36) (internal citations omitted) (Docket No. 1-5).)

V. PROCEDURAL HISTORY

On October 18, 2012, eight days after the Commission issued its advisory opinion, plaintiffs filed their complaint and motion for a preliminary injunction. (Docket Nos. 1-2.) Plaintiffs assert before this Court the same constitutional challenge to the six-month registration period as they raised in their advisory opinion request. Specifically, Count 1 of the complaint claims that the registration period is unconstitutional on its face and as applied to plaintiffs. (Compl. ¶¶ 1, 66-70.) Count 2 alleges that "the contribution limit[ ] [of] $2,500 per candidate per election" is also unconstitutional on its face and as applied to plaintiffs, *i.e.*, that plaintiffs are constitutionally entitled to the $5,000 contribution limit for multicandidate PACs instead of the

$2,500 limit that applies to any other person.[7] (Compl. ¶ 72; *see also id.* ¶¶ 1, 71, 73-76.) Plaintiffs seek a declaratory judgment holding these provisions unconstitutional, and preliminary and permanent injunctions barring the Commission from enforcing them against plaintiffs and similarly situated political committees and candidates. (*Id.* ¶¶ 77-84.)

ARGUMENT

I. STANDARD OF REVIEW

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008); *see Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). To prevail on a motion for a preliminary injunction, a plaintiff "must establish": "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20; *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009).

Plaintiffs here shoulder a particularly heavy burden because their 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); *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011). But plaintiffs here seek to upend the

[7] Plaintiffs' complaint and motion repeatedly state that they challenge the constitutionality of the contribution limit of section 441a(a)(1)(C). (Compl. ¶¶ 1, 63-65, 72, 74, 76, 79-80, 82-84; Pls.' Mot. for Prelim. Inj. at 1-2 (Docket No. 2).) But that provision — which imposes a $5,000 limit on contributions *to PACs* — does not appear to be at issue here. Rather, it is clear that plaintiffs actually challenge the $2,500 limit on contributions *to candidates* from any person who is not a multicandidate PAC, 2 U.S.C. § 441a(a)(1)(A). (*See, e.g.*, Compl. ¶ 1 ("This challenge is brought . . . against the $2,500 contribution limit per candidate per election . . . .").)

status quo by preventing the Commission from enforcing statutory provisions that have been in place for almost 40 years. *Cf. Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement of federal statute in First Amendment challenge and noting that "[b]y seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis in original). This is particularly inappropriate in the pre-election context, where "considerations specific to election cases" weigh even further against the issuance of injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam) (vacating lower court's injunction against enforcement of election statute and noting potential for pre-election injunctions to cause confusion among voting public).

Thus, plaintiffs can prevail on their motion only by meeting their heavy burden to make a clear showing in their favor on all four of the preliminary injunction factors, *see Sherley*, 644 F.3d at 392-93 — a showing sufficient to halt enforcement of a longstanding federal election statute just days before the general election.

II. THE COMMISSION IS LIKELY TO PREVAIL ON THE MERITS BECAUSE THE SUPREME COURT HAS ALREADY DETERMINED THAT THE REGISTRATION REQUIREMENT FOR MULTICANDIDATE POLITICAL COMMITTEES IS CONSTITUTIONAL, AND NOTHING HAS UNDERMINED THAT HOLDING

A. *Buckley* Controls the Standard of Scrutiny and the Outcome of This Case

The Supreme Court in *Buckley* directly affirmed of the constitutionality of the registration requirement (and other qualifying conditions) for groups seeking to become multicandidate PACs to take advantage of the higher contribution ceilings available to such groups. *Buckley*, 424 U.S. at 35-36. The Court recognized that these criteria "serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling

themselves committees." *Id.* That holding remains valid today, and it controls this case in its entirety.

In reaching its holding, *Buckley* analyzed the First Amendment implications of contribution limits in general, noting that they restrict "one aspect of the contributor's freedom of political association" but do not prevent a contributor from speaking. 424 U.S. at 24, 28. Specifically, the Court held that the speech value of a contribution lies in its function as a "symbolic act" that provides "a general expression of support for the candidate and his views." *Id.* at 21. But because a contribution does not "communicate the underlying basis for the support[,] . . . *[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution*." *Id.* (emphasis added). Thus, contribution limits leave contributors free to engage in the "symbolic act of contributing," while in no way inhibiting their ability to conduct other political activity, such as "discuss[ing] candidates and issues" or "becom[ing] a member of any political association and . . . assist[ing] personally in the association's efforts on behalf of candidates." *Id.* at 21-22.

In light of this merely "marginal restriction" that contribution limits impose on contributors' First Amendment rights, *Buckley*, 424 U.S. at 20, the Court assessed the constitutionality of such limits under an intermediate level of scrutiny, *see id*. at 25. That standard is satisfied "if the [government] demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id*. This is a "'lesser demand'" than the "strict scrutiny" under which restrictions on independent political spending are reviewed. *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)), *rev'd in part on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

Applying intermediate scrutiny, *Buckley* concluded that FECA's personal contribution limits are constitutional. The Court recognized that the personal limits further two important governmental interests: reducing the opportunity for contributors "to secure a political quid pro quo from current and potential office holders" in exchange for large contributions, and reducing "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 26-27. "[A]voidance of the appearance of improper influence," the Court held, is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 27 (internal quotation marks and alterations omitted). *Buckley* concluded that "restricting the size of financial contributions to political candidates" serves these "weighty interests," which are therefore "sufficient to justify the limited effect upon First Amendment freedoms" imposed by the personal contribution limits. *Id*. at 29.

Having upheld the basic limits on contributions to candidates, the Court then also upheld a number of FECA provisions designed to prevent evasion or circumvention of those limits. *See Buckley*, 424 U.S. at 38 (holding that anti-circumvention is "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid"). Regarding the six-month registration requirement for multicandidate PAC status, the D.C. Circuit opinion that the Supreme Court reviewed in *Buckley* had noted that it "only incidentally impedes the freedom of association" since it does not "prevent individuals from drawing together to act as a political committee at any time." *Buckley v. Valeo*, 519 F.2d 821, 857-58 (D.C. Cir. 1975) (en banc), *aff'd in relevant part and rev'd in part*, 424 U.S. 1 (1976). This incidental burden is justified, the court of appeals had held, as

> a loophole-closing provision intended to prevent proliferation of dummy committees, each of a few persons, in support of federal candidacies.

> Otherwise, two or three persons could acquire the $5,000 committee contribution authority . . . merely by organizing themselves as a political committee. The challenged Act limits such bootstrapping by interposing a six-month protective shield.

Id. at 857-58. The Supreme Court affirmed the D.C. Circuit's upholding of this "loophole-closing provision." Rejecting the argument that the multicandidate PAC criteria "unconstitutionally discriminate against ad hoc organizations in favor of established interest groups and impermissibly burden free association," *Buckley* held that increasing the contribution limit for multicandidate PACs "*enhances* the opportunity of bona fide groups to participate in the election process." 424 U.S. at 35 (emphasis added). And consistent with the Court's focus on "bona fide groups" — and the D.C. Circuit's similar concern about individuals "bootstrapping" themselves to the higher contribution limit — the Court held that the criteria for multicandidate PAC status "serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id*. at 35-36; *cf. id*. at 38 (upholding then-$25,000 aggregate limit on individual's contributions during election cycle to prevent individuals from circumventing personal contribution limit by routing contributions through political committees).

The Supreme Court and D.C. Circuit opinions in *Buckley* thus established two fundamental principles that control the outcome of this case: (1) the government's interest in preventing corruption and the appearance of corruption is sufficient to justify contribution limits, including provisions that prevent circumvention of those limits; and (2) the qualifications for multicandidate PAC status further the government's anti-circumvention interest by inhibiting the ad hoc creation of "dummy" committees to serve as conduits for excessive individual contributions.

Plaintiffs acknowledge, as they must, that the Supreme Court reviewed and upheld the six-month registration requirement as a constitutional qualification for multicandidate PAC status. (Pls.' Mem. of Law in Supp. Of Mot. for Prelim. Inj. ("Pls.' Inj. Mem.") at 2, 11-12 (citing *Buckley*, 424 U.S. at 35-36).) Yet in asking this Court to excuse TPLF from that requirement, plaintiffs cannot identify a shred of authority that purports to supersede the Supreme Court's holding on this sole issue raised in this case. For this reason alone, plaintiffs' motion should be denied. As the Supreme Court has held, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also McCutcheon v. FEC*, --- F. Supp. 2d ---, 2012 WL 4466482, at *3 (D.D.C. Sept. 28, 2012) (three-judge court) (citing *Rodriguez de Quijas*); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010) (three-judge court) ("As a lower court . . . we do not believe we possess authority to clarify or refine [Supreme Court precedent] . . . or to otherwise get ahead of the Supreme Court."), *aff'd mem.*, 130 S. Ct. 3544 (2010). Thus, even if plaintiffs could support their assertion that the registration requirement they seek to avoid has become obsolete — and, for the reasons discussed below, they cannot — their motion would fail because this Court does not have the authority to overrule *Buckley*.

B. The Registration Requirement for Multicandidate PACs Remains Closely Related to the Government's Important Interests in Preventing Corruption and the Appearance of Corruption

Plaintiffs contend that *Buckley's* direct holding on the constitutionality of the registration requirement for multicandidate PACs is irrelevant because the requirement is a "now-obsolete" provision. (Pls.' Inj. Mem. at 8.) Plaintiffs are wrong. Even if this Court were to accept

plaintiffs' request to disregard *Buckley*, the registration requirement would still easily survive intermediate scrutiny because it remains closely drawn to further the government's important interest in preventing corruption and the appearance of corruption.

1. Preventing Circumvention of Contribution Limits Furthers the Government's Important Anti-Corruption Interest

There appears to be no dispute that the government's important interest in preventing actual and apparent corruption justifies laws that prevent circumvention of the limits on direct contributions to candidates. (*See, e.g.*, Pls.' Inj. Mem. at 10-11 (acknowledging that registration requirement "was a permissible means of preventing corruption in 1974" and arguing that subsequent amendments to FECA "effectively addressed potential circumvention issues").) Indeed, the Supreme Court has repeatedly upheld such anti-circumvention laws as a constitutional means of furthering the government's anti-corruption interest. Three Supreme Court decisions demonstrate precisely why plaintiffs' challenge to the registration requirement for multicandidate PACs cannot be sustained.

First, in *California Medical Association*, the Court rejected a challenge to the $5,000 ceiling on contributions to multicandidate PACs. The Court noted that Congress had enacted this limit shortly after *Buckley* to "restrict the opportunity to circumvent the . . . limits on contributions to a candidate," and to limit the "adverse impact" of PACs that profess to be independent "but are actually a means for advancing a candidate's campaign." 453 U.S. at 198 n.18 (quoting H.R. Rep. No. 94-1057, at 57-58 (1976) (Conf. Rep.)). The Court recognized that without the added provision contributors could "easily" evade the then-$1,000 limit on individual contributions to candidates by giving much larger amounts to multiple PACs, each of which could then make contributions of up to $5,000 to the donor's preferred candidates. *Id.* at 198. The limit on contributions to multicandidate PACs was therefore constitutional because

it "further[ed] 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 this Court upheld in *Buckley*." *Id.* at 197-98.

The Court next assessed — and again upheld — the constitutionality of an anti-circumvention provision in *FEC v. Colorado Republican Federal Campaign Committee*, where "all Members of the Court agree[d] that circumvention is a valid theory of corruption." 533 U.S. 431, 456 (2001). The particular provision at issue in *Colorado Republican* limited how much a political party could spend in coordination with its own candidates; such coordinated expenditures have long been deemed equivalent to contributions to candidates. *Id*. at 438 (citing 2 U.S.C. § 441a(a)(7)(B)(i)), 464 ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate . . . ."). Because political parties (like multicandidate PACs) can raise funds in larger increments than candidates, the Court found that parties' spending on such coordinated expenditures was "tailor-made to undermine contribution limits." *Id.* at 464 (noting that, without limits on coordinated expenditures, candidates would have incentive to encourage donors to give large amounts to parties to be spent on candidates' behalf, rather than to solicit smaller contributions to candidates' own campaigns). Accordingly, the Court upheld the constitutionality of FECA's limit on coordinated expenditures as furthering the government's anti-corruption interest by "minimiz[ing] circumvention of contribution limits." *Id*. at 465.

Third, in *McConnell v. FEC*, the Court assessed multiple provisions in the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), that Congress enacted to close loopholes in FECA's prior statutory regime. The Court recognized that "[t]he less rigorous standard of review we have applied to contribution limits . . . provides Congress

with sufficient room to *anticipate and respond to concerns about circumvention* of regulations designed to protect the integrity of the political process." 540 U.S. at 137 (emphasis added); *see also id*. at 144 (quoting *Colorado Republican*). Applying this "less rigorous" standard, the Court upheld a series of statutory provisions aimed at reducing the opportunity for circumvention of FECA's contribution limits. *See, e.g., id*. at 133-34, 184-85 (upholding limit on certain contributions to state and local entities as preventing circumvention of ban on equivalent contributions to national political parties), 165-66 (same), 171-72 ("Given the delicate and interconnected regulatory scheme at issue here, any associational burdens imposed by the [contribution] restrictions are far outweighed by the need to prevent circumvention of the entire scheme.").[8]

Each of the FECA provisions upheld by the Supreme Court in these decisions hindered contributors' ability to give money to their chosen entities in the amounts of their liking; each was nonetheless constitutional because it furthered the government's important anti-corruption interest by preventing circumvention of the limit on how much any one entity can give to any one candidate. "Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation," Congress has the power to "[p]revent[ ] corrupting activity from shifting" to take advantage of gaps in the statutory regime. *See McConnell*, 540 U.S. at 165-66. Stopping financial contributors from "eviscerating FECA clearly qualifies as an important governmental interest." *Id*.; *see McCutcheon*, 2012 WL 4466482, at *4-*6.

[8] *McConnell* struck down one anti-circumvention statute: a provision that prohibited minors from making any contributions, which the government had asserted was necessary to prevent parents from making contributions in the names of their children. 540 U.S. at 231-32. The flaw that the Court found in this provision was *not* a limit on Congress's power to prevent circumvention; rather, there simply was no evidence before the Court that the purportedly problematic activity had ever occurred, and the government had not explained why a complete *ban* was necessary to address such hypothetical circumvention. *See id*. at 232 & n.3.

Plaintiffs incorrectly suggest (Pls.' Inj. Mem. at 10) that the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), narrowed or eliminated the government's interest in preventing circumvention of limits on direct candidate contributions. But *Citizens United* concerned the separate question of whether the government has a legitimate interest in prohibiting certain *independent expenditures* on campaign advocacy. *Id.* at 898-99. The Court made clear that it was not addressing the constitutionality of, or the government interest served by, limits on *contributions* to candidates, which were not at issue in that case. *Id.* at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."). And all three circuit courts to have considered this issue — as well as a three-judge court in this District — have concluded that *Citizens United* "preserved" the government's anti-corruption and anti-circumvention interests in regulating contributions. *See United States v. Danielczyk*, 683 F.3d 611, 618 (4th Cir. 2012) (citing *Ognibene v. Parkes*, 671 F.3d 174, 195 n.21 (2d Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011)); *McCutcheon*, 2012 WL 4466482, at *4 & n.3.

2. The Registration Requirement for Multicandidate PACs Continues to Limit Circumvention of the Personal Contribution Limits

Requiring groups seeking the doubled contribution limit for multicandidate PACs to meet *each* of the statutory criteria in section 441a(a)(4) — including the requirement to be registered with the Commission for at least six months — ensures that such groups are legitimate advocacy entities rather than dummy organizations created during a campaign to facilitate circumvention of the personal limits. The subsequent developments on which plaintiffs rely do not undermine *Buckley*'s conclusion that this is a constitutionally valid anti-circumvention mechanism.

Specifically, plaintiffs argue that *Buckley*'s rationale was vitiated in 1976 when Congress enacted (1) a $5,000 limit on contributions to a PAC, and (2) "affiliation" rules that inhibit an individual or group from creating multiple PACs to serve as conduits for their own excessive contributions. (Pls.' Inj. Mem. at 2-3, 12-13.)[9] Plaintiffs claim that these amendments "alleviate[d] *any* potential for corruption or circumvention of the base contribution limits" (*id.* at 2 (emphasis added)), by making it "impossible" for a single contributor to create several PACs and route contributions through them to a candidate (*id.* at 13).[10]

Plaintiffs simply ignore the fact that there are many ways contributors might seek to channel large contributions, above the personal limits, through PACs to the candidates they wish to support. *See generally McConnell*, 540 U.S. at 165-66 (noting that "entire history of campaign finance regulation" has "taught the hard lesson of circumvention"). In focusing exclusively on the use of PACs under the contributor's control, plaintiffs fail to account for another, equally problematic type of circumvention: "a person who . . . contribute[s] massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees *likely* to contribute to that candidate."[11] *Buckley*, 424 U.S. at 38 (emphasis

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[9] Plaintiffs misstate in a number of ways the contribution limits that were in effect before these amendments. (Pls.' Inj. Mem. at 13.) Most relevant to the instant motion, the aggregate limit on one contributor's total contributions to all candidates, PACs, and political parties combined was $25,000 per two-year election cycle, not $25,000 per year. *See Buckley*, 424 U.S. at 38 (citing FECA Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263, 1273 (then-codified at 18 U.S.C. § 608(b)(3)) (providing that contribution made in non-election year was deemed to be made in next election year for purposes of aggregate limit).

[10] As explained *infra* pp. 20-21, plaintiffs' claim that a particular contribution limit (or anti-circumvention provision) eliminates, or is intended to eliminate, "*any* potential for corruption or circumvention" fundamentally misunderstands the purpose and function of such laws.

[11] As *Buckley* held and *McCutcheon* recently reaffirmed, it is irrelevant for constitutional purposes whether plaintiffs themselves intend to engage in such circumvention. *See McCutcheon*, 2012 WL 4466482, at *7 ("The *Buckley* Court rejected challenges that the contribution limits are overbroad because most contributors are not seeking a quo for their quid . . . . [W]e join the *Buckley* Court in rejecting [that claim] . . . .") (citing *Buckley*, 424 U.S. at 30).

added). This remains a significant concern, as the 1976 affiliation provisions did not address such circumvention. Indeed, the internet makes identifying multiple, unaffiliated PACs "likely to contribute" to a given candidate a substantially easier endeavor today than it was in 1974.[12] The registration requirement, in conjunction with the other criteria for multicandidate PAC status, thus serves the important function of preventing the creation of fly-by-night PACs that publicize the list of candidates they intend to support, receive contributions from individuals who have already given the maximum to each candidate directly, and channel $5,000 contributions to the candidates. Requiring a new PAC to wait six months for the increased $5,000 contribution limit restricts both the temporal opportunity for and the financial effect of such circumvention. *See Buckley*, 424 U.S. at 35-36; *Buckley* 519 F.2d at 857-58.[13]

Finally, the registration requirement also promotes the government's informational interest in publicly disclosing the sources of campaign funds by ensuring that groups seeking multicandidate PAC status file at least one disclosure report before becoming eligible to make candidate contributions up to double the personal limit. *See* 2 U.S.C. § 434(a)(4)(A) (requiring all independent PACs to file disclosure reports at least every six months); *Buckley*, 519 F.2d at 858 (upholding registration requirement and observing that "[d]uring the waiting period, such political committees would be subject to the reporting and disclosures provisions of 2 U.S.C.

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[12] Many PACs simply list the candidates on their websites. *E.g.*, *Club for Growth PAC Endorsed Candidates*, Club for Growth, http://www.clubforgrowth.org/endorsedcandidates/ (last visited Nov. 1, 2012); *Naral Pro-Choice America PAC Announces New Endorsements*, NARAL Pro-Choice America (Apr. 3, 2012), http://www.prochoiceamerica.org/elections/elections-press-releases/2012/pr04032012_ pac-endorsements.html (identifying 44 federal candidates receiving contributions from PAC).

[13] Plaintiffs' overbreadth argument (Pls.' Inj. Mem. at 14-16) is premised on the same faulty assumption refuted above — *i.e.*, that the registration requirement "[is] entirely useless in preventing corruption or circumvention of the base contribution limits." (*Id.* at 15.) This claim therefore fails for the same reasons.

§ 434"); *cf. Citizens United*, 130 S. Ct. 915-16 (affirming government's informational interest in disclosure of "who is speaking about a candidate shortly before an election").

3. The Court Should Defer to Congress's Judgment Regarding the Dollar Amounts of the Contribution Limits and the Length of the Registration Period for Multicandidate PACs

Plaintiffs repeatedly assert that the $2,500 contribution limit to which TPLF is currently subject is lower than it should be to prevent corruption. According to plaintiffs, Congress's enactment of a $5,000 limit for bona fide multicandidate PACs is equivalent to a congressional determination that $5,000 contributions are *per se* "non-corrupting." (*E.g.*, Pls.' Inj. Mem. at 1, 10, 17; *see also id*. at 15 (arguing that TPLF should "enjoy the same contribution limits . . . enjoyed by [multicandidate] political committees").) But neither Congress nor the courts have ever found that any contribution limit *eliminates* corruption — or even that it is intended to do so. Rather, the limits strike a balance between enabling individuals and groups to influence elections and *reducing* the opportunities for actual and apparent corruption. *See, e.g.*, *Buckley*, 424 U.S. at 26 ("[T]he Act's primary purpose [is] to *limit* the actuality and appearance of corruption . . . .") (emphasis added). Thus, the fact that Congress has chosen to set the contribution limit for multicandidate PACs at $5,000 does not mean that a $5,000 contribution is inherently noncorrupting.[14]

The $5,000 limit represents a dollar amount that Congress determined to present a sufficiently low risk of corruption in the specific context of contributions from bona fide multicandidate PACs. Congress has determined that other types contributions present greater or

[14] In claiming that TPLF is constitutionally entitled to "the same . . . levels of political participation[ ] enjoyed by other political committees," plaintiffs cite *Davis v. FEC*, 554 U.S. 724, 741 (2008). (Pls.' Inj. Mem. at 15-16.) But that case directly refutes plaintiffs' argument: *Davis* held that the government is *prohibited* from using contribution limits to "equaliz[e] . . . financial resources" in political campaigns. 554 U.S. at 738 (internal quotation marks omitted).

lesser risks of corruption and has established contribution limits accordingly. *See Inflation Index*, 76 Fed. Reg. at 8369 (noting current contribution limits ranging from $2,000 to $30,800). It is not the courts' role to parse legislative judgments about the exact level of each of these limits: "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (internal quotation marks omitted); *see also Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality); *Colo. Republican*, 533 U.S. at 446 ("[T]he dollar amount of the limit need not be 'fine tun[ed].'") (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000)); *McCutcheon*, 2012 WL 4466482, at *6. Because there is no question — and plaintiffs do not disagree — that placing a limit on contributions to candidates by persons other than multicandidate PACs is constitutional, there is no basis in the Supreme Court's First Amendment jurisprudence for challenging whether that optimal corruption-reducing amount of that limit is $2,500 or $5,000.[15]

To the extent plaintiffs challenge the *length* of the registration period (*e.g.*, Pls.' Inj. Mem. at 17-18), the Court should similarly defer to Congress's judgment — which both the Supreme Court and D.C. Circuit have affirmed — regarding how long a PAC must exist to demonstrate its multicandidate bona fides. Just as courts are ill-suited to parse legislative judgments about the appropriate dollar amounts for contribution limits, they are likewise not in a position to determine "with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such

[15] Plaintiffs' conclusory assertion that the registration requirement "prevents candidates from gathering the resources necessary to be heard during the election cycle" (Pls.' Inj. Mem. at 6) is flatly contrary to binding precedent. *See Buckley*, 424 U.S. at 22 ("[T]he Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy."). Plaintiffs also provide no factual evidence that remotely suggests that the registration period renders candidates unable "to be heard."

empirical judgments." *Randall*, 548 U.S. at 248. Because the registration period furthers the government's important anti-circumvention interest, the First Amendment does not require that period to be six months, or twelve months, or some shorter period that plaintiffs would prefer. *Cf. Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (upholding state law requiring voters to be registered as member of political party for at least 30 days to be eligible to vote in primary: Registration-duration requirement "did not prohibit the petitioners from voting . . . or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard.").

C. Plaintiffs Fail to Identify Any Authority That Supersedes *Buckley*'s Direct Holding on the Sole Issue in This Case

Lacking any legal basis for their claims, plaintiffs rely on unsupported assertions and out-of-context snippets from inapposite cases. First, plaintiffs repeatedly exaggerate and misrepresent the nature of the statutory provision at issue here, asserting that it "prevent[s] them from exercising their speech and association rights" and "depriv[es plaintiffs and their contributors of] their right to association and speech." (Pls.' Inj. Mem. at 2, 7.) But the multicandidate PAC provision is not an expenditure limit, *see supra* pp. 2-4, and it does not "undermin[e] freedom of association." *Buckley*, 424 U.S. at 35. Indeed, TPLF has *already* associated itself with plaintiffs Raese and Bielat (and at least nine other federal candidates) by engaging in the "symbolic act" of contributing to them. *See id*. at 21. Although TPLF now seeks to increase the size of those contributions beyond the applicable limit, the size of a contribution is largely irrelevant for constitutional purposes. *See id*.; *see also Cal. Med.*, 453 U.S. at 196 (referring to contributions as "speech by proxy"). Moreover, TPLF remains "free[ ] to discuss candidates and issues" and engage in independent "efforts on behalf of candidates," *Buckley*, 424 U.S. at 21-22, such as continuing to spend tens of thousands of dollars directly

advocating for the election and defeat of candidates in this year's election, *see supra* p. 6. There simply is no deprivation of speech here.

Second, plaintiffs argue that the registration requirement is a prohibited "'prophylaxis-upon-prophylaxis.'" (Pls.' Mem at 3, 14 (alteration omitted) (quoting *FEC v. Wis. Right to Life, Inc.* ("*WRTL*"), 551 U.S. 449, 479 (2007) (controlling op. of Roberts, C.J.)).) This quoted snippet misleadingly omits the rest of the Chief Justice's statement, which was that a "prophylaxis-on-prophylaxis approach *to regulating expression* is not consistent with *strict scrutiny*." *WRTL*, 551 U.S. at 479 (emphases added). As that full context indicates, *WRTL* addressed a ban on certain independent campaign speech, not a contribution limit or a qualification for a contribution limit. *See id*. (finding that communications at issue could not be "equate[d] . . . with contributions"). For that reason, the controlling opinion in *WRTL* applied strict scrutiny — something the Supreme Court has *never* done when considering a contribution limit — and specifically confined its mention of a prohibited "prophylaxis" to that standard.

Plaintiffs' characterization of the registration requirement as a "prophylaxis-upon-prophylaxis" also fails because it is premised on yet another untenable assertion: that the registration requirement is merely a prophylactic measure to prevent evasion of FECA's contribution limits and affiliation rules, which themselves "prevent[ ] wealthy contributors from funneling . . . candidate contributions above the base limits." (Pls.' Inj. Mem. at 14.) As discussed *supra* pp. 17-19, plaintiffs ignore the fact that individuals remain free to contribute to various *unaffiliated* PACs that may then make contributions to those individuals' chosen candidates. So the registration requirement is not a prophylactic rule intended to prevent circumvention of the affiliation provisions; the registration requirement is (with the rest of the multicandidate PAC criteria) a standalone anti-circumvention measure.

Finally, despite plaintiffs' repeated incantation of the phrase, the registration requirement for multicandidate PAC status does not remotely resemble a "prior restraint" on speech. (Pls.' Inj. Mem. at 3, 8, 16-18.) As plaintiffs correctly note, prior restraints are "laws requiring permits, licenses, waiting periods or other official *permission to speak*" and "barring or discouraging speech before its utterance." (Pls.' Inj. Mem. at 16 (emphasis added).) On its face, a qualification for a heightened limit on contributions to candidates *to whom TPLF has already contributed* (or to whom TPLF can contribute $2,500) is not a "bar" on speech. The cases plaintiffs cite in support of their novel argument make this distinction clear. For example, plaintiffs rely (Pls.' Inj. Mem. at 16) on *Thomas v. Collins*, which dealt with a provision that prohibited a labor-union organizer from making certain public statements without first obtaining a government license. 323 U.S. 516, 518-23 (1945); *see also id*. at 539 ("[A] requirement of registration *in order to make a public speech* would seem generally incompatible with an exercise of the rights of free speech and assembly.") (emphasis added). They also cite *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, which addressed a village ordinance criminalizing any door-to-door canvassing unless the canvasser first obtained a permit. *See* 536 U.S. 150, 153 (2002). In stark contrast to these provisions, neither the personal contribution limit nor the criteria that must be satisfied for multicandidate-PAC status bar anyone from the engaging in the symbolic speech-act of making a political contribution. Indeed, TPLF has already made contributions to many candidates, and it has spent tens of thousands of additional dollars financing speech to advocate on those candidates' behalf.[16] Whether TPLF is

[16] The Court in *Thomas* itself distinguished the facts of that case from a hypothetical case in which "the speaker goes further . . . and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the *collection of funds* or securing subscriptions." 323 U.S. at 540 (emphasis added). In the latter circumstances, the Court

subject to the default personal contribution limit or the heightened limit for multicandidate PACs, FECA imposes "little direct restraint on [the contributor's] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21.

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Plaintiffs' constitutional arguments cannot be sustained because they are foreclosed by binding Supreme Court and D.C. Circuit case law. Accordingly, plaintiffs cannot meet their heavy burden of demonstrating that they are likely to succeed on the merits of their claims.

III. PLAINTIFFS CANNOT DEMONSTRATE THAT THEY ARE LIKELY TO SUFFER IRREPARABLE HARM

In addition to showing probable success on the merits of their case, plaintiffs must also demonstrate a likelihood — not merely a possibility — that they will suffer irreparable harm without injunctive relief. *Winter*, 555 U.S. at 22. "[T]he injury must be . . . actual and not theoretical . . . [and] of such imminence that there is a clear and present need for equitable relief. . . ." *Wis. Gas. Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (internal citations and quotation marks omitted). To meet the imminent harm requirement, "[a] litigant must do more than merely *allege* the violation of First Amendment rights." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (emphasis in original) (discussing *Elrod v. Burns*, 427 U.S. 347 (1976)). Plaintiffs must demonstrate that their "First Amendment interests are either threatened or in fact being impaired at the time relief is sought." *NTEU v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991) (alterations omitted) (quoting *Wagner*, 836 F.2d at 576 n.76). If plaintiffs make "no showing of irreparable injury, 'that alone is sufficient' for a district court to

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explained, a speaker "enters a realm where a reasonable registration or identification requirement may be imposed." *Id.*

refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

Plaintiffs claim they face irreparable First Amendment harm from complying with the registration period, 2 U.S.C. § 441a(a)(4), because it prevents TPLF from contributing an additional $2,500 each to Raese and Bielat before the November 6, 2012 general election. (Pls.' Inj. Mem. at 6-7, 18-19.) But for four reasons, plaintiffs' allegations are insufficient.

First, plaintiffs' alleged irreparable harm was caused not by FECA or the Commission, but by TPLF's *choice* to register as a political committee fewer than six months before the 2012 general election. *See Rosario*, 410 U.S. at 758 (holding that voters could have registered early enough to participate in primary election "but chose not to. Hence, . . . their plight . . . was not caused by [the registration requirement], but by their own failure to take timely steps to effect their enrollment."). TPLF was free to register with the Commission early enough to achieve multicandidate PAC status prior to the election. *See* 11 C.F.R. § 104.1(b) (allowing committees to register voluntarily before reaching the $1,000 expenditure or contribution threshold). Nothing in the challenged provisions, or FECA generally, required TPLF to choose to register on May 9, 2012, a date that would cause the six-month period to expire three days after the general election. *See Buckley*, 519 F.2d at 857 ("Clearly, [the six-month period] . . . does not prevent individuals from drawing together to act as a political committee at any time."). In fact, TPLF's treasurer signed and dated TPLF's registration form on May 2, 2012.[17] TPLF could have immediately sent that form to the Commission by overnight delivery to ensure registration on May 3, which would have allowed TPLF to become a multicandidate PAC on November 3 —

[17] *See* TPLF, Statement of Organization at 1 (rec'd May 9, 2012), http://images.nictusa.com/pdf/458/12030804458/12030804458.pdf.

three days before the general election. Instead, TPLF waited until May 4 to send its form to the Commission by first-class mail, resulting in its May 9 registration date.[18] TPLF is therefore responsible for plaintiffs' alleged harm, and a "preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Barton v. District of Columbia*, 131 F. Supp. 2d 236, 247 (D.D.C. 2001) (internal quotation marks omitted).

Second, plaintiffs' claimed need for "emergency" relief is undermined by their significant delay in bringing this lawsuit. Once TPLF registered as a political committee on May 9, 2012, it allowed more than *five months* of the six-month period to elapse before requesting a preliminary injunction on October 18 — just 19 days before the general election.[19] Now plaintiffs claim they need an "immediate ruling from this court." (Pls.' Inj. Mem. at 7; *see also* Compl. ¶ 60.) But plaintiffs cannot use their own delay to manufacture urgency that would justify preliminary injunctive relief — especially just before a federal election. *See Tenacre Foundation v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding that seven-month delay before filing suit "undermines any assertions that [plaintiff] will suffer irreparable harm if the Court does not grant preliminary injunctive relief") (internal quotation marks omitted); *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010) (affirming district court's denial of preliminary injunction where "appellants, well aware of the requirements of the election laws, chose not to bring this suit until August 5, 2010, shortly before the November 2 elections"); *Hispanic Leadership Fund, Inc. v. Walsh*, No. 1:12-cv-1337, slip op. at 27 (N.D.N.Y. Oct. 23, 2012) ("[A]lthough denying an injunction now may deprive Plaintiffs a remedy for the upcoming November 6, 2012 election,

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[18] *See* TPLF, Statement of Organization at 6.

[19] Indeed, plaintiffs delayed so long in asking for a preliminary injunction that this Court's local rules would permit an *expedited* preliminary injunction hearing to take place two days *after* the general election. *See* LCvR 65.1(d) (allowing 21 days for preliminary injunction hearing to be held when need for expedition is demonstrated).

Plaintiffs' decision to wait until just two months before the election to challenge the provisions of the Election Law that have been in place for decades undermines the alleged seriousness of the harm that they purportedly stand to suffer."); *Worley v. Roberts*, 749 F. Supp. 2d 1321, 1323-24 (N.D. Fla. 2010) (denying a September 28, 2010, motion to preliminarily enjoin Florida's campaign finance statutes where "there have been no changes in the relevant facts or law that explain the last-minute filing of this lawsuit. This is, instead, an emergency entirely of the plaintiffs' own making.").

There is no justification for plaintiffs' delay. And they do not even attempt to provide one. Under plaintiffs' theory, the registration period has been unconstitutional *since 1976*, when Congress amended FECA with additional anti-circumvention provisions. (*See, e.g.*, Pls.' Inj. Mem. at 7-8, 11-14.) Thus, plaintiffs could have sought an injunction immediately after TPLF registered as a political committee on May 9, 2012. (Indeed, Raese alleges that he has desired to accept a $5,000 contribution from TPLF since before his primary election in May 2012. (Compl. ¶ 61.)) Instead, plaintiffs waited more than four months to file — not a lawsuit — but an unnecessary and futile advisory opinion request. That request asked the Commission to overrule *Buckley* and declare the six-month period unconstitutional — which the Commission clearly lacks the authority to do. *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (noting that adjudication of constitutionality is generally outside administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) ("It was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional."); *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) (noting the "well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional"). FECA empowers the Commission to respond to an advisory opinion "request

concerning the *application* of th[e] Act," 2 U.S.C. § 437f(a)(1) (emphasis added), but plaintiffs' request did not dispute that the six-month period and $2,500 contribution limit applied to TPLF (*see* Compl. Exh. A). The Commission therefore predictably and unanimously rejected plaintiffs' request by a 6-0 vote on October 10, 2012 (Compl. Exh. B). Plaintiffs filed this suit eight days later. Given the unwarranted detour plaintiffs took through the advisory-opinion process before suing, their claim to need "immediate ruling" from the Court is a purported problem of their own making.

Third, plaintiffs do not face any actual irreparable harm to their First Amendment rights. *Wagner*, 836 F.2d at 576 n.76 ("[A] litigant must do more than merely *allege* the violation of First Amendment rights."). Plaintiffs allege that the six-month period "will *prevent* Plaintiffs from exercising their rights to speech and association during the period when those rights are most urgently protected — the election season." (Pls.' Inj. Mem. at 8 (emphasis added); *see also, e.g.*, *id.* at 4 (claiming Raese and Bielat "are *prohibited* from associating" (emphasis added)); *id.* at 7 (claiming plaintiffs "will be *deprived* of their ability to freely associate" (emphasis added)).) But as discussed previously, no prohibition on speech or association is at issue in this case. *See supra* pp. 22-23. And *Buckley*'s observation that contribution limits do not inhibit a contributor from conducting other political activity, such as "discuss[ing] candidates and issues" or engaging in independent "efforts on behalf of candidates," 424 U.S. at 21-22, is particularly applicable to TPLF, which has made $73,500 in independent expenditures expressly advocating for or against federal candidates during this election cycle.

Fourth, even if TPLF did have a First Amendment right to make a $5,000 contribution as opposed to a $2,500 contribution, plaintiffs have still failed to show they are likely to suffer imminent harm. TPLF may be able to make its desired additional $2,500 contributions to both

Raese and Bielat for the November 6 general election when it becomes a multicandidate PAC on November 9. The Commission's regulations permit a federal candidate to accept *post*-election contributions to pay down net debt the candidate's campaign incurred during the election. *See* 11 C.F.R. § 110.2(b)(3). As a result, plaintiffs incorrectly assume that because "the six-month waiting period will run for TPLF mere days after the election," plaintiffs will be "*forever* depriv[ed] . . . [of] their rights to association and speech." (Pls.' Inj. Mem. at 17 (emphasis added).) This is not necessarily so, and the complaint contains no allegations stating that Raese and Bielat will be ineligible to accept post-election contributions from TPLF under 11 C.F.R. § 110.2(b)(3); *see also* Raese for Senate, FEC Form 3 (Oct. 25, 2012), http://images.nictusa.com/pdf/451/12021001451/12021001451.pdf (disclosing that Raese's campaign has approximately $125,000 cash-on-hand and owes over $2.2 million in debt).

In sum, plaintiffs have failed to demonstrate that they face any irreparable harm.

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST GRANTING A PRELIMINARY INJUNCTION

The November 6 general election is just five days away. The balance of equities and the public interest weigh heavily in favor of this Court preserving the status quo for this short timeframe and denying plaintiffs' request for extraordinary injunctive relief.

Entering a preliminary injunction here would undermine the ability of federal candidates, political committees, and the voting public to rely upon the uniform application of longstanding and important campaign-finance provisions on the eve of the election. For 38 years, political committees have been required to wait six months to take advantage of an increased contribution limit to prevent circumvention of the law. Political actors and the public reasonably expect that these provisions will continue to be uniformly enforced. And "given the imminent nature of the election, . . . it [is] important not to disturb long-established expectations that might have

unintended consequences," especially because, "once the election is over, it cannot be reversed, and any consequences flowing from the disruption in equilibrium in the campaign contribution laws would . . . be irreversible." *Lair v. Bullock*, --- F.3d ---, 2012 WL 4883247, at *13-*14 (9th Cir. Oct. 16, 2012) (staying district court's permanent injunction against Montana's contribution limits) (citation omitted);[20] *see also Hispanic Leadership Fund*, slip op. at 28 ("It is clear that the balance of equities favors denying the preliminary injunction because it would disrupt the justifiable expectations of the individuals and entities that have and continue to comply with the challenged provisions of the Election Law.").

In addition, plaintiffs are asking this Court to enjoin federal statutes that the Supreme Court has explicitly upheld as constitutional. Thus, interference with the public interest "is inherent in the injunction," since "the public interest is already established by the Court's holding and by Congress's enactment." *See Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) (internal quotation marks omitted); *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) ("The presumption of constitutionality which attaches to every Act of Congress" favors the government in the balance of the equities) (internal quotation marks omitted).

[20] Indeed, the Ninth Circuit's warning proved prophetic. Two days after the ruling, Democratic gubernatorial candidate Steve Bullock asked a Montana state court to order his opponent, Republican Rick Hill, to return a $500,000 contribution Hill received from the Republican Party during the six-day window in which the applicable $22,600 contribution limit was enjoined. *See* Charles S. Johnson, *Bullock Wants Court to Find That Hill Broke Donation Law*, Independent Record (Oct. 18 2012), http://helenair.com/news/local/56db04b8-1973-11e2-9cb6-001a4bcf887a.html. On October 24, just 13 days before the election, the Montana court ordered Hill to stop spending the $500,000 and to cancel any advertisements that had already been purchased with the donation while the court reviewed the legality of that contribution — which was made possible by the federal district court's injunction. *See Hill Ordered to Stop Spending $500,000*, Daily Inter Lake.com (Oct. 24, 2012), http://www.dailyinterlake.com/news/local_montana/article_6f698036-1e55-11e2-be3e-0019bb2963f4.html.

Finally, given plaintiffs' more than five-month delay in bringing this case, the balance of equities weighs against an injunction. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("[Plaintiffs'] delay is . . . quite relevant to balancing the parties' potential harms. Since an application for preliminary injunction is based upon an urgent need for the protection of a Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required.") (internal quotation marks and alteration omitted); *Hispanic Leadership Fund*, slip op. at 28 ("Plaintiffs waited until the eleventh hour . . . [and t]his delay, which essentially precludes meaningful appellate review, greatly supports Defendants[']' position that the balance of the equities and public interest favor denying Plaintiffs' motion for preliminary injunctive relief."). The public's interest in the uniform application of laws that the Supreme Court has upheld to limit corruption far outweigh any interest arising from plaintiffs' unexplained decision to bring this suit on the eve of the election.

CONCLUSION

For all the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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