UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Tea Party Leadership Fund 209 Pennsylvania Ave SE, Suite 2109 Washington, DC 20003 Mr. John Raese The Raese for Senate Committee PO BOX 262 Morgantown, WV 26507 Mr. Sean Bielat Bielat for Congress 2012 PO BOX 1143 Brookline, MA 02446 Plaintiffs, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	)	Civil Case No. _____

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EMERGENCY PRELIMINARY INJUNCTION

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*Motions for *Pro Hac Vice* to be filed.

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INTRODUCTION

This case is a constitutional challenge to a law that, as enforced by the Federal Election Commission ("FEC" or "Commission"), abridges the freedom of speech and association guaranteed under the First Amendment. This challenge is brought, both facially and as-applied, against the six-month waiting period of 2 U.S.C. § 441a(a)(4) that requires political committees to wait half a year before they may make contributions to candidates of up to $5,000—a level Congress has determined poses no threat of corruption. *See* 2 U.S.C. § 441a(a)(2)(A) ($5,000 contributions to candidates are non-corrupting).

The Tea Party Leadership Fund ("TPLF") is a non-connected political action committee that easily fulfills the primary prerequisites to attaining multicandidate status; however, because six months have not yet elapsed since TPLF's initial registration, and will not elapse until three days after the November 6 election, TPLF cannot yet register as a multicandidate committee, a designation which allows political committees to contribute to candidates up to $5,000 per election. VC ¶ 4; 2 U.S.C. § 441a(a)(2)(A). Thus, TPLF is forced to adhere to the lower contribution amount of $2,500 per candidate per election permitted to committees without multicandidate status. *See* 2 U.S.C. § 441a(a)(1)(A).

TPLF has already contributed $2,500 each to Mr. John Raese and Mr. Sean Bielat, candidates to the U.S. Senate and Congress, respectively, and to nine other Senate and House candidates, and wishes to contribute an additional $2,500 each to Mr. Raese and Mr. Bielat and other candidates, as permitted to multicandidate committees. VC ¶ 27. Yet, due to the six-month waiting period requirement, TPLF cannot make these additional contributions, and Messrs. Raese and Bielat are barred from accepting them. *Id.* Accordingly, the six-month waiting period requirement directly, significantly and impermissibly infringes upon the First Amendment rights

of TPLF, its thousands of contributors, and Messrs. Raese and Bielat, preventing them from exercising their speech and association rights.

In 1974, Congress defined the term "'political committee' [to] mean[] an organization registered as a political committee under section 303 of the Federal Election Campaign Act of 1971 for a period of not less than 6 months, which has received contributions from more than 50 persons and [. . .] has made contributions to 5 or more candidates for Federal office." Federal Election Campaign Act Amendments of 1974, § 101(b)(2), Pub. L. 93-443, 88 Stat. 1263, 1275-76 (Oct. 15, 1974). At that time, no individual could make a contribution in excess of $1,000 to any candidate per election, and there was an aggregate contribution limit to any and all candidates and political committees of $25,000 per calendar year. *Id.* at 1276, § 101(b)(3). The 1974 Amendments also instituted a $5,000 contribution limit per candidate per election for PACs and party committees, with no aggregate limit on the amount PACs and party committees could contribute to all candidates. *Id.* at 1275; § 101 (b)(2).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court determined that the sixth-month waiting period served the purpose of *preventing individuals from circumventing base contribution limits* by creating a political committee through which they could funnel excess contributions to a single candidate. *Id.* at 35-36. In response to that opinion, however, and to alleviate any potential for corruption or circumvention of the base contribution limits, Congress enacted additional contribution limits as well as provisions directly aimed at preventing individuals from evading contribution limits. Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). Importantly, the Amendments enacted the so-called nonproliferation provisions, a prophylactic measure aimed at preventing circumvention of the base contribution limits under federal campaign law. *Id.* All PACs

sponsored by the same organization or individual would henceforth be treated as "affiliated" and held to a single contribution limit. *Id;* 2 U.S.C. § 441a(a)(5) (affiliated committees share a contribution limit). The 1976 Amendments had a profound effect by preventing wealthy contributors from funneling, short of illegal earmarking, candidate contributions above the base limits Congress had already determined pose no cognizable threat of corruption. *See generally* 2 U.S.C. §§ 441a(a)(1) and (2). As a result, the six-month waiting period enacted in 1974 had, by 1977, become a "prophyla[xis]-upon-prophylaxis," *see FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449, 478-79 (2007), making it entirely ineffective and irrelevant to preventing corruption. In short, the six-month waiting period has been rendered obsolete, and thus unconstitutional in its continued enforcement.

With no compelling, important (or even valid) reason to enforce the waiting period as an anti-corruption measure, the requirement currently serves only as a constitutionally intolerable prior restraint on speech. The Supreme Court has repeatedly and emphatically recognized that any system imposing a prior restraint on speech bears a heavy presumption of invalidity. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963). Further, the Supreme Court has taken an expansive view of prior restraints, voiding registration requirements and even purely ministerial restrictions as preconditions to speech incompatible with First Amendment freedoms. *See Thomas v. Collins,* 323 U.S. 516, 539 (1945); *see also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). Forcing a political committee to register with the Commission and then wait for six months to pass before contributing $5,000 per election to a candidate is a prior restraint, as the law imposes a precondition to speech—and is entirely ineffectual in satisfying its purported goals of preventing corruption and circumvention of the base contribution limits both on its face and as applied to TPLF.

In continuing to enforce the law, the Commission impermissibly infringes upon the plaintiffs' constitutional rights without any compelling interest justifying such impairment. Specifically, the law presently bars TPLF from freely contributing an additional $2,500 to Messrs. Raese and Bielat. Additionally, Mr. Raese and Mr. Bielat, two candidates who are currently ready and willing to accept the additional contributions, are prohibited from associating with like-minded contributors within amounts Congress has determined pose no threat of corruption.

By the time TPLF fulfills the mandatory sixth-month waiting period, the most urgent time for political speech—the general election—will have already passed. Plaintiffs are entitled to a preliminary injunction that prevents the FEC from enforcing this outdated and unconstitutional requirement.

STATEMENT OF FACTS

Under current law, multicandidate committees may make contributions to candidates of up to $5,000 per election, 2 U.S.C. § 441a(a)(2)(A), which is greater than the $2,500 per election permitted to committees who have not attained multicandidate committee status. *See* 2 U.S.C. § 441a(a)(1)(A). Section 441a(a)(4) defines "multicandidate committee" as a political committee which has been "registered…for a period of not less than six months, has received contributions from more than 50 persons [and has] made contributions to 5 or more candidates for Federal office."

Plaintiff the Tea Party Leadership Fund is a non-connected Hybrid PAC (FEC # C00520825) whose registration with the Federal Election Commission was filed on May 9, 2012, resulting in a six-month period that will run three days after November's elections. VC ¶ 4. TPLF has made contributions to 9 candidates and has received contributions from at least 6,000

persons to its contribution account and from more than 100 persons to its *Carey* account. *See Carey v. FEC,* 791 F. Supp. 2d 121 (D.D.C. 2011). VC ¶ 26.

Plaintiff Mr. John Raese is the 2012 Republican candidate for the United States Senate from West Virginia. VC ¶ 24. Plaintiff Mr. Sean Bielat is the 2012 Republican challenger for the House of Representatives from Massachusetts' Fourth congressional district. VC ¶ 25. Both candidates are interested in associating politically with like-minded contributors to the full extent of the law. *Id.*

TPLF has already contributed $2,500 each to Mr. Raese and Mr. Bielat, and to 7 other federal candidates, and wishes to contribute an additional $2,500 each to Mr. Raese and Mr. Bielat, as well as to other candidates in amounts approaching $5,000 per election. VC ¶ 27; *see also* 2 U.S.C. § 441a(a)(2)(A). Under the law, however, TPLF is required to wait six months before contributing to candidates the $5,000 permitted to multicandidate committees. *Id.* In this instance, the six-month waiting period will run for TPLF mere days after the election, forever depriving the requestors and the thousands of individuals who contribute to the Tea Party Leadership Fund their rights to association and speech.[1]

I. The Advisory Opinion Request

On September 17, 2012, Mr. John Raese, Mr. Sean Bielat, and the Tea Party Leadership Fund ("TPLF") submitted an advisory opinion request ("AOR") to the Commission pursuant to 2 U.S.C. § 437f(a)(2). The AOR asked:

a. May the Tea Party Leadership Fund make contributions to candidates of up to $5000 per election before the six-month waiting period of 2 U.S.C § 441a(a)(4) has run?

[1] If Plaintiffs rights are recognized, the Tea Party Leadership Fund will abide by the $15,000 limit on contributions to political party committees applicable to all other multicandidate committees. 2 U.S.C. § 441a(a)(2)(B).

and

b. May Messrs. Raese and Bielat accept contributions above $2500, but not exceeding $5000, per election from TPLF before the six-month waiting period has run?

The Commission accepted the AOR for review, pursuant to 11 C.F.R. § 112.1, assigned it AOR number 2012-32, and posted the AOR on the Commission's website for public commentary. On October 10, 2012, the Commission voted six to zero to deny the request. VC ¶ 55. Certification of Shaun Whitehead Werth.

II. Ensuing Harm to Plaintiffs

At the time of filing the advisory opinion request, the general election was less than 60 days away. TPLF filed its request as promptly as possible to ensure that its desired speech would not be curtailed by the Act.

During the 2012 election cycle, TPLF wishes to contribute to candidates in amounts approaching $5,000 per election. The waiting period restriction in 2 U.S.C. § 441a(a)(4) limits the ability of TPLF and its thousands of donors to speak freely, and prevents candidates from gathering the resources necessary to be heard during the election cycle. The six-month waiting period will elapse on November 9, three days after the November 6 elections. VC ¶ 4.

III. Ongoing Harm to Plaintiffs

As soon as possible, and certainly before the 2012 general election, TPLF would like to contribute up to $5,000 per election to candidates without being forced to first endure a sixth-month waiting period. Correspondingly, Messrs. Raese and Bielat wish to be permitted to each accept TPLF's additional contributions totaling up to $5,000.

Without an immediate ruling from this court, TPLF will be prevented from making these contributions before the general election, depriving the requestors and those who contribute to the TPLF of their right to association and speech at the time when speech is most necessary and protected. Likewise, Messrs. Raese and Bielat—and countless other candidates—will be deprived of their ability to freely associate with their own contributors during election season, when First Amendment rights are of paramount importance.

ARGUMENT

In our nation's tradition and jurisprudence, political speech has been elevated to a position of constitutional supremacy, and the Supreme Court has emphatically recognized that any speech and association relevant to campaigns for political office strike at the very heart of fundamental First Amendment guarantees. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *see also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In accordance with this acknowledged primacy of political speech, contributions to political candidates can be limited *only* if the government has a valid interest in preventing actual or potential corruption and the law must be no broader than necessary to achieve that interest. *California Medical Association v. FEC*, 452 U.S. 182, 203 (1981) (emphasis added).

Given the paramount importance of these clearly-established First Amendment rights—and the limited circumstances under which the government may proscribe such rights—the six-month waiting period requirement in 2 U.S.C. § 441a(a)(4) clearly fails to pass constitutional muster. As will be thoroughly explained below, Congress successfully amended federal campaign finance law in 1976 to effectively prevent would-be contributors from circumventing contribution limits, and there is no longer any compelling government anti-corruption interest in

forcing TPLF to wait six months before making its permitted contributions of up to $5,000. Given the reality that such liberalized contribution limits pose no risk of corruption, "it is hard to imagine how the denial of liberalized limits to [groups who have yet to wait six months] can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden." *Davis v. FEC*, 554 U.S. 724, 741 (2008). In short, with no valid anti-corruption interest to serve, the law now operates as a simple prior restraint, suppressing TPLF's political speech in a manner repugnant to our Constitution in preventing TPLF from speaking freely until the requisite six-month period has elapsed. *See generally Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).*

The Commission's continued enforcement of a now-obsolete waiting period requirement suppresses Plaintiffs' rights of free speech and association and leaves Plaintiffs with the unmistakable conclusion that they will be liable if they contribute the permitted $5,000 per candidate amount before satisfying the six-month waiting period.

Plaintiffs seek to preliminarily enjoin the six-month waiting period that, if enforced against the TPLF and Messrs. Raese and Bielat, will prevent Plaintiffs from exercising their rights to speech and association during the period when those rights are most urgently protected—the election season. To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). As demonstrated below, each of these factors weighs in Plaintiffs' favor.

I. Plaintiffs Are Substantially Likely Succeed on the Merits

The burden of proof at the preliminary injunction stage tracks the burden of proof at trial. Where First Amendment rights are at stake, the FEC must demonstrate the likelihood that the law will be upheld. *See Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418, 429 (2006); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). The FEC must demonstrate that the mandatory six-month waiting period furthers either a compelling or substantial governmental interest.

A. The FEC Cannot Demonstrate a Compelling, Substantial or Legitimate Interest in Requiring TPLF to Wait Six Months Before Making its Permitted Contributions to Candidates.

As the Supreme Court has repeatedly stated, a fundamental purpose of the First Amendment is to protect the discussion of governmental affairs, and, in particular, of candidates, in order to "ensure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley*, 424 U.S. at 14. The First Amendment also protects the right of individuals to associate with one another, because "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). By associating with others, "individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). These concepts rest at the very heart of what TPLF hopes to accomplish through donations to its candidates of choice.

Since political speech constitutes expression at the core of First Amendment freedoms, contributions to candidates have consistently been afforded the highest constitutional protection,

and limits on such contributions can be justified only by a government interest in preventing corruption. *Buckley v. Valeo,* 424 U.S. 1, 26-29 (1976). Indeed, the Supreme Court in *Citizens United* again identified the sole interest sufficiently compelling to limit contributions to political organizations: that of preventing the actual or apparent quid pro quo corruption of candidates. *Citizens United v. FEC*, 130 S. Ct. 876, 908-909 (2010). As the Court has stated, "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985). *See also Randall v. Sorrell*, 548 U.S. 230, 246-248 (2006); *Citizens Against Rent Control*, 434 U.S. at 437-38 ("*Buckley* identified only a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate.*") (emphasis in original). For years now, Congress has approved $5,000 contributions as non-corrupting. TPLF wants nothing more than to make contributions at the level made by every other PAC.

Here, there is no valid government interest in limiting corruption or its appearance to justify imposing a six-month waiting period before multicandidate committees are permitted to contribute to candidates of their choice to the full extent of the law. 2 U.S.C. § 441a(a)(2)(A). As will be demonstrated below, the 1976 Congressional Amendments already effectively addressed potential circumvention issues, enacting prophylactic measures to prevent individuals from evading contribution limits. Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). As such, the six-month waiting period does nothing to prevent corruption. The FEC then has no compelling—or even legitimate—interest in forcing TPLF to wait six months before making its permitted maximum contributions. Moreover,

circumvention in this instant situation is no more likely than with any long-existing political committee; thus, the statute is unconstitutional as applied.

B. The Waiting Period Requirement is No Longer Closely Drawn to Prevent Actual or Potential Corruption

1. Requiring Political Committees to Wait Six Months Before Making Contributions has Been Rendered Useless in Preventing Corruption

While the six-month waiting period was a permissible means of preventing corruption in 1974, since Congress amended the Federal Election Campaign Act ("FECA") in 1976, the waiting period is now entirely unnecessary. Initially, in 1974, Congress defined the term "'political committee' [to] mean[] an organization registered as a political committee under section 303 of the Federal Election Campaign Act of 1971 for a period of not less than 6 months, which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." Federal Election Campaign Act Amendments of 1974, § 101(b)(2), Pub. L. 93-443, 88 Stat. 1263, 1275-76 (Oct. 15, 1974). At that time, no individual could make a contribution in excess of $1,000 to any candidate per election, and there was an aggregate contribution limit to any and all candidates and political committees of $25,000 per calendar year. *Id.* at 1276, § 101(b)(3). The 1974 Amendments also instituted a $5,000 contribution limit per candidate per election for PACs and party committees, with no aggregate limit on the amount PACs and party committees could contribute to all candidates. *Id.* at 1275; § 101 (b)(2).

In 1975, the *Buckley* Court reviewed the six-month waiting period, issuing its opinion in early 1976. 424 U.S. 1 (1976).

> Section 608(b)(2) permits certain committees, designated as "political committees," to contribute up to $5,000 to any candidate with respect to any election for federal office. In order to qualify for the higher contribution ceiling, a group must have been registered with the Commission as a political committee under 2 U.S.C. § 433 (1970 ed., Supp. IV) for not less than six months, have received contributions from more than 50 persons, and, except for state political party organizations, have contributed to five or more candidates for federal office.

Id. at 35. The Court held that the six-month limit exists to prevent circumvention of the base contribution limit to candidates:

> Appellants argue that these qualifications unconstitutionally discriminate against *ad hoc* organizations in favor of established interest groups and impermissibly burden free association. The argument is without merit. Rather than undermining freedom of association, the basic provision enhances the opportunity of *bona fide* groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of *preventing individuals from evading the applicable contribution limitations by labeling themselves committees*.

Id. at 35-36 (emphasis added).

In 1976, however, as a response to the Court's opinion in *Buckley*, Congress amended FECA to directly address circumvention concerns. In short, the 1976 Amendments aimed to prevent individuals from evading the base contribution limits to candidates, the very aim of the six-month waiting period requirement. Congress enacted a*dditional* contribution limits, prohibiting individuals from contributing more than $5,000 to a PAC and limiting multicandidate committees to contributing $15,000 per year to a national party committee. Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). Importantly, the Amendments also enacted the so-called nonproliferation provisions, a prophylactic measure aimed at preventing circumvention of the base contribution limits under federal campaign law. *Id.; see* 2 U.S.C. § 441a(a)(5).[2] All PACs sponsored by the same

[2] The anti-proliferation rules provide that, "For purposes of the limitations provided by paragraph (1) and (2) [the contribution limits], all contributions made by political committees establish or financed or maintained or controlled

organization would henceforth be treated as "affiliated" and held to a single contribution limit. *Id.*

To understand how the law would have worked in practical terms before the 1976 Amendments, at the time the *Buckley* Court issued its landmark opinion, consider this scenario. A wealthy individual who wanted to pour all of his resources into helping one congressional candidate could have given—in the two-year period that comprises an election cycle—$2,000 directly to the candidate ($1,000 primary and general) then contributed $10,000 ($5,000 per year) to four PACs he created that would, in turn, contribute $5,000 per election to the candidate. This individual could still have created a fifth PAC that could accept his remaining $8,000 ($5,000 in year one; $3,000 in year two) to reach the individual's overall aggregate limit of $50,000 in a two-year election cycle ($25,000 per calendar year with two calendar years in each election cycle). Under the Act *Buckley* reviewed, it was fairly easy for one individual to lavish $50,000 on one candidate during an election cycle.

By contrast, note how impossible that scenario had become by 1977. The same individual still could have given $2,000 to a congressional candidate directly ($1,000 per election, primary and general). Yet, no matter how many PACs the individual established, those PACs could not give any more than $5,000 per candidate per election under the new anti-proliferation rules. By the year 1977, the requirement that 50 persons contribute to the PAC ensured that the PAC was not wholly controlled by one person, and the requirement that the PAC contribute to 5 or more candidates ensured that the PAC was not established to shower support on a single candidate. Thus, after these requirements are met, there is no reason to make the PAC wait six months to contribute $5,000 per candidate per election.

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by … any … person … or group of such persons, shall be considered to have been made by a single political committee." 2 U.S.C. § 441a(a)(5).

The 1976 Amendments had a profound effect by preventing wealthy contributors from funneling, short of illegal earmarking[3], candidate contributions above the base limits Congress had already determined pose no cognizable threat of corruption. *See generally* 2 U.S.C. §§ 441a(a)(1) and (2). As a result, the six-month waiting period enacted in 1974 had, by 1977, become a "prophyla[xis] --upon-prophylaxis," see *FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449, 478-79 (2007), making it entirely ineffective in preventing corruption and therefore obsolete.

2. The Six-Month Waiting Period is Overly Broad and Does Not Sufficiently Justify the Resulting Constitutional Burden

The Act's contribution limits "operate in an area of the most fundamental First Amendment activities" and the protections provided by that "'constitutional guarantee ha[ve their] fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo,* 424 U.S. 1, 14-15 (internal citations omitted). It is equally true that the First Amendment protects political association and "[g]overnmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex. rel. Patterson,* 357 U.S. 449, 461-62 (1958). Thus, due to the judicially-recognized importance of First Amendment rights in our nation's tradition, which are unquestionably paramount during the conduct of campaigns and elections, the Supreme Court has repeatedly subjected laws that burden political speech and association to exacting scrutiny.

In line with this tradition, contribution limits to campaigns are constitutionally permissible only when the government has a valid interest in preventing corruption, and the law does not unnecessarily burden First Amendment rights in achieving those ends. *See California*

[3] Federal law already prohibits the undisclosed earmarking of a contribution through an intermediary. *See* 2 U.S.C. §§ 441a(a)(8) and 441f. This means any contribution to a candidate made by an individual must be credited to that individual—preventing circumvention. The Act's anti-earmarking provisions are just another reason there can be no circumvention of the Act's base limits should TPLF rightly be permitted to make $5,000 contributions to candidates before six months elapse.

Medical Association v. FEC, 452 U.S. 182 (1981). Indeed, even if, as *Buckley* held, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," 424 U.S. at 21, under exacting scrutiny, there is a no-broader-than-necessary tailoring requirement. The controlling opinion in *California Medical Association v. FEC*, 453 U.S. 182 (1981) (*CalMed*), requires "that contributions to political committees can only be limited if those contributions implicate the governmental interest in preventing actual or potential corruption [of candidates], and if the limitation is no broader than necessary to achieve that interest." *Id.* at 203 (Blackmun, J., concurring in part and in the judgment). This reaffirms *Buckley*'s requirement that "[a] restriction that is closely drawn must nonetheless 'avoid unnecessary abridgement of associational freedoms.'" *Wagner v. FEC*, No. 11-1841, 2012 WL 1255145, at *6 (D.D.C. Apr. 16, 2012) (quoting *Buckley v. Valeo*, 424 U.S. at 25).

Taking account of this settled law and the reality that the 1976 Amendments rendered any waiting period requirement entirely useless in preventing corruption or circumvention of the base contributions limits, the six-month waiting period is not closely drawn to avoiding corruption or its appearance. With no valid government anti-corruption interest at play, the waiting period impermissibly burdens Plaintiffs' First Amendment freedoms.

And there should be on concern in permitting TPLF to enjoy the same contribution limits, the levels of political association, enjoyed by other political committees. To paraphrase the Supreme Court in *Davis v. FEC*, "[G]iven Congress' judgment that liberalized limits for [multicandidate committees] do not unduly imperil anticorruption interests, it is hard to imagine how the denial of liberalized limits to [groups who have yet to wait six months] can be regarded

as serving anticorruption goals sufficiently to justify the resulting constitutional burden." 554 U.S. 724, 741 (2008).

C. The Waiting Period Amounts to an Unconstitutional Prior Restraint

The United States Supreme Court has time and again emphasized that prior restraints—laws requiring permits, licenses, waiting periods or other official permission to speak—are particularly suspect. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The Supreme Court has construed prior restraints broadly to encompass registration requirements or even ministerial restrictions that have the effect of barring or discouraging speech before its utterance, reserving special concern for registration requirements that act to ban spontaneous speech. *See Thomas v. Collins*, 323 U.S. 516 (1945). In *Thomas v. Collins*, the Supreme Court stated that "[a]s a matter of principle 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." *Id.* at 539.

The Court again applied this principle in a recent case, holding that even purely ministerial restrictions may not be imposed as a precondition to speech. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). In *Watchtower Bible*, the Court considered a town ordinance that required door-to-door canvassers to register and obtain a permit before calling on residents at their homes. *Id.* at 165. The law was challenged by a Jehovah's Witness group that planned to distribute pamphlets. While noting that the ordinance was generally applicable, the Court found its application to religious and political causes problematic.

Id. at 165. Thus, even though the permits were free and had apparently never been refused, the Court struck down the requirement as a prior restraint. The Court stated: "Even if the issuance of permits…is a ministerial task…a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Id.* at 165-66. Together, *Thomas* and *Watchtower Bible* illustrate that simply requiring registration with the State before making a meaningful contribution is an unconstitutional prior restraint, in part because it burdens "spontaneous speech." *Cf. Watchtower Bible,* 536 U.S. at 167.

While a political committee is not required to obtain a permit or license, the waiting period of 2 U.S.C. § 441a(4)(a) is functionally and legally identical to licensing laws in that it similarly delays proposed speech activity while the speaker jumps through bureaucratic hoops. Undeniably, requiring a political committee to register with the Commission and wait for six months to elapse before contributing $5,000 per election to a candidate is a prior restraint that does nothing to prevent corruption or limit circumvention of contribution limits. Here, TPLF has thousands of mostly small dollar donors making an average contribution of less than $40; indeed, TPLF has received only 5 contributions of $1,000. With no corruption or corruptive threat present, TPLF is nonetheless prevented from speaking to a level Congress has determined poses no threat of corruption. Indeed, for TPLF, the six-month waiting period will run mere days after the election; forever depriving the requestors and the thousands of individuals who contribute to the Tea Party Leadership Fund of their rights to association and speech.

It is true under federal law that only after a group of individuals accepts or spends $1,000 and demonstrates a major purpose of campaign activity, *see Buckley,* 424 U.S. at 79, must the group register with the Commission, and the group has ten days after crossing the threshold to do so. 11 CFR 102.1(d). But the fact that a political committee must first register with the

Commission *and then* wait an additional six months to make a $5,000 contribution to a candidate is a prior restraint on speech unjustified by an important or compelling government interest when the group has amply established (by receiving contributions from far more than 50 persons and making contributions to more than 5 candidates) that it is indeed a committee making contributions on behalf of a great many persons.

The Supreme Court struck the registration requirement in *Watchtower Bible*, despite acknowledging that it was generally applicable and seemed to be directed at preventing fraud. To uphold the far more restrictive – yet wholly ineffective at preventing corruption – six-month waiting period here substantially burdens the speakers without achieving any legitimate interest.

II. Plaintiffs Will Suffer Irreparable Harm Without an Injunction

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Under the mandatory waiting period required by 2 U.S.C. § 441a(a)(4), TPLF and its thousands of donors cannot make the $2,500 additional contributions ($5,000 per candidate per election in total) to candidates permitted to multicandidate political committees. Further, Messrs. Raese and Bielat cannot accept the additional contributions, totaling $5,000 each. TPLF is ready, willing, and able to contribute the funds, and Mr. Rease and Mr. Bielat will readily accept these contributions, if permitted. The only thing standing between TPLF and its ability to speak is the six-month waiting period imposed by 2 U.S.C. § 441a(a)(4). Plaintiffs' rights are in fact being impaired right now; there is nothing speculative about their claims. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (stating that "[w]here a

plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed").

III. An Injunction Will Not Substantially Injure Others

The Supreme Court has made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the censor." *WRTL*, 551 U.S. at 469, 474. Thus, while the FEC can be said to have an interest in enforcing the campaign finance laws, under the Supreme Court's approach to First Amendment rights in *WRTL*, the FEC's interest simply cannot trump the First Amendment rights of Plaintiffs. An injunction will not harm the FEC.

IV. An Injunction Will Further the Public Interest

The Supreme Court "has long viewed the First Amendment as protecting a marketplace for the clash of differing views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981). "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citations and quotations omitted). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs … includ[ing] discussion of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Thus "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (U.S. 1976).

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Here, Plaintiffs' activities are at the core of the First Amendment. TPLF must be permitted to contribute up to $5,000 per candidate per election without being forced to wait six months, or TPLF and its thousands of grassroots donors will be deprived of their constitutional rights to speech and association. Recognition by this court of the waiting period as unconstitutional will remedy the injury to Plaintiffs' First Amendment interests.

V. Plaintiffs Have Standing to Seek the Injunction

To establish standing, plaintiffs must demonstrate three elements: (1) an injury in fact, (2) a causal connection between the injury and the defendant's conduct, and (3) a likelihood that the injury will be redressed by a decision favorable to the plaintiff. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is satisfied when plaintiffs make a showing of an "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 560. Plaintiffs have established an injury in fact capable of relief issued by this court.

Within the context of the First Amendment, the Supreme Court has announced relaxed standing requirements for pre-enforcement challenges. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965) (detailing expanded standing principles for pre-enforcement First Amendment

challenges); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (self-censorship is a harm that can be alleged without actual prosecution); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (1995) ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution"). Would-be speakers bringing pre-enforcement challenges must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," and illustrate that there exists a "credible threat of prosecution" under the law in question. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In this special arena, where a statute on its face "restricts a party from engaging in expressive activity, there is a presumption of a credible threat of prosecution." *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388 (4th Cir. 2001).

Here, Plaintiffs have announced an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed" by law. *Babbitt*, 442 U.S. at 298. Specifically, TPLF is prepared to contribute an additional $2,500 each to Messrs. Raese and Bielat, but TPLF cannot make—and Messrs. Raese and Bielat cannot accept—these contributions due to the six-month waiting period required by 2 U.S.C. § 441a(a)(4).

By operation of the law, Plaintiffs must hinder their speech and association until a definitive ruling is issued by this court protecting the constitutional rights of TPLF, its donors, and Messrs. Raese and Bielat. Because federal elections occur every two years, its injuries are ongoing. *See Virginia Soc'y*, 263 F.3d at 389 (First Amendment injury is ongoing where it relates to proscribed speech concerning federal elections).

TPLF has the present ability and concrete plans to engage in constitutionally-protected conduct that is subject to the reach of the challenged laws. Yet, its speech and association are

chilled by fear of prosecution by the Federal Election Commission. The single remaining course of action available to TPLF is to risk enforcement penalties—a potential peril never permitted by the First Amendment.

VI. The Court Should Waive the Bond Requirement Under F.R.C.P. 65(c)

Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction shall issue without the giving of security by the applicant in an amount determined by the court. However, "[i]t is within the Court's discretion to waive Rule 65(c)'s security requirement where it finds such a waiver to be appropriate in the circumstances." *Cobell v. Norton,* 225 F.R.D. 41, 50 n.4 (D.D.C. 2004). In non-commercial cases, courts often waive the bond requirement where the likelihood of harm to the non-moving party is slight and the bond requirements would impose a significant burden on the moving party. *See, e.g., Temple Univ. v. White,* 941 F.2d 201, 219 (3d Cir. 1991); *Comm. on Jobs Candidate Advocacy Fund v. Herrera,* 2007 U.S. Dist. LEXIS 73736, at *17-*18. Cases raising constitutional issues are particularly appropriate for a waiver of the bond requirement. *See Odgen v. Marendt,* 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003); *Smith v. Bd. of Election Comm'rs,* 591 F. Supp. 70, 71 (N.D. Ill. 1984).

Here, an injunction will not harm the FEC, *see* Argument III *supra*, and the bond requirements would impose a significant burden on Plaintiffs. Further, the fundamental First Amendment issues implicated here make a waiver of the bond requirement particularly appropriate for Plaintiffs. Accordingly, Plaintiffs respectfully request that the court waive the bond requirement in the event that it grants Plaintiffs' motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin the six-month waiting period requirement contained in 2 U.S.C § 441a(a)(4).

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*Motions for *Pro Hac Vice* to be filed.