UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEA PARTY LEADERSHIP FUND, *et al.* Plaintiffs, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	)	Civil Case No. 1:12-cv-01707-RWR

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Tea Party Leadership Fund, Mr. John Raese, and Mr. Sean Bielat, by their undersigned attorney, respectfully move this Court for an order granting summary judgment pursuant to Fed. R. Civ. P. 56. As demonstrated in the accompanying Memorandum of Points and Authorities in Support thereof, "there is no genuine issue as to any material fact and [Plaintiffs are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Dated February 11, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEA PARTY LEADERSHIP FUND, *et. al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Case No. 1:12-cv-01707-RWR
	)	
FEDERAL ELECTION COMMISSION	)	
999 E Street, NW	)	
Washington, DC 20463	)	
	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Tea Party Leadership Fund ("TPLF"), Mr. John Raese, and Mr. Sean Bielat (collectively "Plaintiffs") respectfully submit this Memorandum of Points and Authorities in Support of their Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h).

PRELIMINARY STATEMENT

The First Amendment to the United States Constitution protects the freedom of all to exercise their individual rights to free speech and association without being forced to first surmount unnecessary, arbitrary obstacles. Yet the Federal Election Commission ("FEC") commands nascent political speakers to wait six months before speaking freely on issues of pressing public concern – including the election of candidates to public office. "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

Plaintiffs bring this constitutional challenge to a statutory provision that broadly abridges First Amendment rights of political speech and association without furthering any legitimate governmental interest. As enforced by the FEC, this law is unconstitutional on its face and as applied to Plaintiffs. The six-month waiting period, codified at 2 U.S.C. § 441a(a)(4) ("the Provision"), requires political committees wait half a year before they may contribute to federal candidates for political office in the amount of $5,000—a level Congress has determined poses no threat of corruption. *See* 2 U.S.C. § 441a(a)(2)(A).

TPLF, a non-connected political action committee, and its more than 25,000 donors, wished to contribute to political candidates in this non-corrupting amount in the

most recent federal elections. Messrs. Raese and Bielat, as federal candidates for office, wished to accept these contributions. Yet, because six months had not elapsed since TPLF's initial registration, the Provision prohibited TPLF and Messrs. Raese and Bielat from engaging in their desired political speech until after the general election. Thus, the Provision deprived Plaintiffs and countless donors of their constitutional rights to speech and association at the very moment it mattered most.

The Provision is an anachronism from a bygone era. In 1974, Congress amended the Federal Election Campaign Act ("the FECA") in pointed response to the Watergate scandal and reports of rampant corruption and serious financial abuse in the 1972 presidential campaign. To define and deter such illegal campaign contributions, Congress imposed on political action committees ("PACs") a host of registration requirements. Congress defined the term "political committee" as "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). Under the 1974 Amendments, no individual could contribute in excess of $1,000 to any candidate per election, and additional amendments two years later further imposed an aggregate contribution limit to any and all candidates and PACs 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 Supreme Court reviewed the multiple registration requirements for PACs, concluding the requirements served the general purpose of preventing corruption and, specifically, *prevented individuals from circumventing base contribution limits*. *Id.* at 35-36. Thus, *Buckley* determined the government has a valid interest in *specifically preventing* circumvention of contribution limits. *See id.*

In 1976, Congress responded to the Court's concerns, again amending the FECA to prohibit this very avenue of circumvention. Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976) ("the 1976 Amendments"). The 1976 Amendments imposed additional contribution limits *and* "nonproliferation provisions"[1] directly aimed at preventing individuals from evading contribution limits. *Id.* Henceforth, PACs sponsored by the same organization or individual would be treated as "affiliated" and held to a single contribution limit. *Id.* Thus, the 1976 Amendments conclusively prevented contributors from funneling, short of illegal earmarking, contributions to candidates 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 become, by 1977, a "prophyla[ctic]-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 circumvention of contribution limits. The 1976 Amendments legislatively nullified *Buckley's* rationale for requiring PACs to wait six months before making non-corrupting

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

contributions up to $5,000 to candidates. Accordingly, these amendments fundamentally altered the campaign finance paradigm and rendered the Provision constitutionally defective. That no court has subsequently reviewed the Provision makes it no less flawed.

After the 1976 Amendments, no compelling (or even valid) reason exists to enforce the Provision as an anti-corruption measure. Accordingly, the Provision currently serves as nothing more than an invalid 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 to encompass all statutes that have the effect of inhibiting speech before its utterance. *See Thomas v. Collins*, 323 U.S. 516, 539 (1945). Forcing a political committee to wait six months before enjoying the same amount of speech as other similarly situated speakers is just such a statute: the Provision employs an arbitrary administrative barrier to preclude certain speakers' speech before its utterance. Requiring speakers to wait six months before speaking is entirely ineffective in satisfying the FEC's purported goal of preventing corruption, as there is no corruption the Provision could possibly prevent.

The FEC deprived Plaintiffs of their most important constitutional guarantees during the most critical time for political speech—before the general election—and continues to infringe on countless other putative political speakers' rights. Indeed, eight federal elections—special primary elections and special general elections—are already scheduled within the next six months, and the valuable speech of countless speakers will be entirely foreclosed.

In the face of such grave First Amendment injuries, the FEC's flawed justifications cannot save the Provision's constitutionality. The FEC steadfastly continues to cite an anti-corruption rationale (now invalidated), and implausibly suggests the Provision is necessary to prevent circumvention (now impossible). Central to its defense is *Buckley*, the seminal campaign finance case that actually *supports* Plaintiffs' position. Indeed, *Buckley* expressly held a six-month waiting period foreclosing political speech could be constitutional *only* if necessary to prevent circumvention of contribution limits. With such circumvention now impossible, *Buckley* directs that the Provision be found unconstitutional. As a matter of law, the six-month waiting period currently operates as an invalid prior restraint that inhibits political speech. This Court should therefore follow *Buckley*, declare the Provision unconstitutional, and grant summary judgment for Plaintiffs.

STATEMENT OF FACTS

Plaintiff the Tea Party Leadership Fund is a non-connected PAC that registered with the FEC on May 9, 2012. Verified Compl. ¶ 4. TPLF quickly amassed several thousand donors and hundreds of thousands of dollars in small-dollar contributions from its grassroots donors. TPLF further contributed to a number of candidates for federal office in the maximum amount of $2,500 permitted by law. Among these candidates were Plaintiff Mr. John Raese, the 2012 Republican candidate for the United States Senate from West Virginia, and Plaintiff Mr. Sean Bielat, the 2012 Republican challenger for the House of Representatives from Massachusetts Fourth congressional district. VC ¶ 24-25. As TPLF continued to draw into association many thousands of like-minded contributors, TPLF desired to contribute an additional $2,500 of its grassroots support to Messrs.

Raese and Bielat. But the Provision barred TPLF from contributing to Messrs. Raese and Bielat until days *after* the November elections. VC ¶ 4. As a result, TPLF's speech was preemptively foreclosed, and Plaintiffs Raese and Bielat were forever deprived of those funds by operation of law. VC ¶¶ 38, 50.

Plaintiffs previously submitted an Advisory Opinion Request to the FEC that asked the FEC to recognize the inapplicability of this particular statute in the wake of overwhelming legal authority against such preemptive restraints on speech. VC ¶ 51. The FEC declined the opportunity to follow the Constitution, VC ¶¶ 53-55, claiming they had no authority to deviate from the statutory text despite having done so in the past when examining other now-unconstitutional provisions. *See* AOR 2010-09; AOR 2010-11. Immediately thereafter, TPLF commenced this litigation.

STANDARD OF REVIEW

Summary judgment is the "preferred means of dealing with First Amendment cases due to the chilling of First Amendment rights inherent in expensive and time-consuming litigation." *Hickey v. Capital Cities*, 792 F.Supp. 1195, 1199 (D. Or. 1992) (citing *Basilius v. Honolulu Pub. Co., Ltd.*, 711 F.Supp. 548, 550 (D. Hawaii 1989)). Accordingly, summary judgment is favored because "unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights and because speedy resolution of cases involving free speech is desirable." *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992). *See also Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965) ("hazard of loss or substantial impairment of [First Amendment rights] may be critical"); *NAACP v. Button*, 371 U.S. 415, 431-433 (1963); *Stuart v.*

Gambling Times, 534 F.Supp. 170, 172 (D.N.J. 1982) (summary judgment is the "preferable means of dealing with First Amendment cases").

"A party is entitled to summary judgment if the pleadings, depositions, and affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law." *EMILY's List v. FEC*, 569 F. Supp.2d 18, 34 (D.D.C. 2008) (citing Fed. R. Civ. P. 56(c) and *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994)). The condition that there be no "genuine issue of material fact" does not make summary judgment improper if there is some disagreement as to any fact: instead, "[b]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). This case presents a plain question of constitutional law—whether requiring speakers to wait six months before speaking freely amounts to a prior restraint on speech—that is well suited for immediate resolution through summary judgment. There is no genuine issue of material fact, and Plaintiffs are entitled to judgment as a matter of law.

ARGUMENT

I. Plaintiffs Have Standing To Bring This Case

As a preliminary matter, Plaintiffs reaffirm they have standing to bring this claim to protect their constitutional rights. The FEC strenuously and unconvincingly argued this case demanded discovery to satisfy standing concerns. The FEC suggested TPLF intentionally delayed registering with the FEC to create the Article III controversy necessary to challenge the Provision. Nonetheless, according to the FEC, this case is

moot because the six-month period passed for TPLF and now—well after the general election—TPLF is free to speak on equal terms with other PACs, and because candidates Raese and Bielat are no longer candidates.

The FEC is wrong. Plaintiffs' claims are well within the doctrine of "capable of repetition, yet evading review." *See Weinstein v. Bradford*, 423 U.S. 147 (1975). In Plaintiffs' Motion to Stay Discovery and Reply Memo in Support of this Motion, Plaintiffs fully articulated the reasons this doctrine applies. In short, countless PACs and candidates will continue to confront identical barriers to those faced by Plaintiffs. Indeed, Plaintiffs pointed to two special elections on the near horizon where the Provision would foreclose nascent PACs from full advocacy. Plaintiffs' Motion to Stay Discovery at 6. Failure to recognize Plaintiffs' standing here would permit the FEC to take advantage of the natural pace of litigation and potentially evade every future constitutional challenge to the Provision.

Events have demonstrated the prescience of Plaintiffs' claims. On February 8, 2013, Plaintiff Sean Bielat formed an authorized committee and filed a Statement of Candidacy with the FEC as a candidate for the April 30, 2013 special primary election for Senate in Massachusetts. A declaration to this effect is attached to this memorandum. This announcement forecloses the FEC's prior argument that Plaintiffs claims are not within the capable of repetition yet evading review doctrine. Indeed, Mr. Bielat currently wishes to solicit and accept contributions to the full extent of the law, but will be unable to solicit or receive this amount from any PACs registered after October 31, 2012. Every PAC registering less than six months before the Massachusetts special election will be barred from exercising the same non-corrupting speech that other PACs enjoy because of

the Provision. The continuing injury to Plaintiffs' First Amendment rights in such close proximity to an election makes the resolution of this constitutional question all the more urgent.

II. The Six-Month Waiting Period Amounts to an Unconstitutional Prior Restraint

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Because prior restraints—laws requiring permits, licenses, waiting periods or *any* official permission to speak—naturally abridge the freedom of speech. The United States Supreme Court has repeatedly emphasized prior restraints are particularly suspect. "*Any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam,* 372 U.S. 58 at 70 (emphasis added). Accordingly, courts allow waiting periods only in the face of an acute government interest in preventing corruption, and only when the limitation is no broader than necessary to achieve that interest. *California Medical Association v. FEC,* 453 U.S. 182, 203 (1981) ("*CalMed*").

Here, the Provision abrogates well-established principles of constitutional law proscribing prior restraints. With no valid anti-corruption interest at stake, the Provision nonetheless broadly limits speech before its utterance, prohibiting nascent PACs from exercising the same right to speech enjoyed by entrenched political insiders. This restriction is particularly detrimental to grassroots organizations, who spontaneously respond to salient political events and whose unplanned speech is vital to the political process and deserves the greatest protection—not premature suppression at the hands of

an overzealous federal regulator. *See Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1008 (9th Cir. Ariz. 2003).

The Supreme Court previously permitted this waiting period *only* in the face of an acute government interest in preventing corruption—specifically, the corruption rooted in the circumvention of contribution limits. *Buckley,* 424 U.S at 35-36. But this anti-circumvention rationale cannot render the Provision constitutional today. After *Buckley,* Congress addressed the very corruption problem the Court previously determined the government had a valid interest in rectifying. With no anti-circumvention interest at stake, the waiting period requirement is invalid as an unjustifiable prior restraint, and is unconstitutional. *See CalMed,* 453 U.S. at 203.

The Supreme Court construes prior restraints broadly to encompass any government restrictions having 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); *see also Ariz. Right to Life PAC,* 320 F.3d at 1008 ("Restricting spontaneous political expression places a severe burden on political speech because, as the Supreme Court has observed, 'timing is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all'") (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

In fact, 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. Jehovah's Witnesses challenged the law as an unconstitutional prior restraint. While noting the ordinance was generally applicable, the Court found its application to religious and political causes was unjustified. *Id.* at 165. 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 even requiring registration with the State before making a meaningful contribution is an unconstitutional prior restraint, in part because it burdens "spontaneous speech." *Watchtower Bible,* 536 U.S. at 167.

Finally, laws that function as the *equivalent* of a prior restraint cannot escape First Amendment scrutiny. In *Citizens United v. FEC,* 558 U.S. 310 (2010), the Supreme Court construed prior restraints to include not just a permit or license, but also FEC Advisory Opinions. Although the FEC regulatory scheme was "not a prior restraint in the strict sense of that term," since "prospective speakers [were] not compelled by law to seek an advisory opinion from the FEC before the speech takes place," the Court recognized it "function[ed] *as the equivalent* of a prior restraint" and was a "governmental practice[] of the sort that the First Amendment was drawn to prohibit." *Id.* at 895- 96 (emphasis added).

In light of Supreme Court precedent, the FEC's protestation that the Provision is not a prior restraint (merely because it does not take the form of a license or permit) is inapt. *See* Def.'s Opp'n at 24- 25. Indeed, the Provision is functionally and legally identical to the aforementioned invalidated laws that imposed a cost on the speaker before speaking: the waiting period similarly delays, discourages—and even prevents—

proposed lawful speech. *See, e.g., Bantam Books*, 372 U.S. at 70-71. Of particular import is the waiting period's impact on spontaneous political speech. *Watchtower Bible,* 536 U.S. at 167.

The FEC posits because TPLF already had some opportunity to speak and "already made contributions to many candidates," the Provision cannot be a prior restraint that "bars" speech. Def.'s Opp'n at 24. The FEC apparently suggests if some speech is allowed, the fact that other desired speech is foreclosed does not amount to a prior restraint. *See id.* Yet, this skewed rationale supports government censorship. Such reasoning is not only anathema to the First Amendment but has also suffered clear defeat at the hands of the Supreme Court. *See, e.g., New York Times Co. v. The United States*, 403 U.S. 713 (1971) (holding that the government's attempt to prevent newspapers from publishing certain articles on matters of public interest amounted to an unconstitutional prior restraint).

Given these grave constitutional concerns, this Court cannot simply defer to Congress's judgment, as the FEC suggests. Def.'s Opp'n at 21. Since *Near v. Minnesota*, when the Supreme Court concluded prior restraints were repugnant to the First Amendment, the Court has been continually vigilant in invalidating prior restraints, in any form. 283 U.S. 697 (1931); *see also Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Watchtower Bible*, 536 U.S. 150 (1990), *et al*. This Court should do the same.

III. The Six-Month Waiting Period Requirement is No Longer Closely Drawn to Preventing Actual or Potential Corruption

In order for a speech restriction to survive to survive constitutional scrutiny, it must be narrowly tailored to further a compelling government interest in preventing corruption or its appearance. *See, e.g., Citizens United,* 130 S. Ct. at 908-909 (identifying

the sole interest sufficiently compelling to limit contributions to political organizations as preventing the actual or apparent quid pro quo corruption of candidates); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"). Laws burdening political speech are subject to strict scrutiny, which requires the government to prove the law "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, 551 U.S. at 464.

The FEC cannot demonstrate a compelling, or even valid, interest in forcing TPLF to wait six months before making non-corrupting contributions. The FEC attempts to justify enforcing this prior restraint by invoking the anti-corruption, anti-circumvention rationale articulated in *Buckley*. Def.'s Opp'n at 9-13. But *Buckley* explicitly held the only government interest sufficient to proscribe speech is preventing corruption. There, the government had an anti-corruption interest in preventing circumvention of base contribution limits. But because subsequent legislation rendered such circumvention impossible, the burden falls on the FEC to demonstrate how the Provision is *still* closely drawn to preventing corruption—something the FEC has failed to do.

IV. *Buckley* Does Not Foreclose a Ruling in Plaintiffs' Favor

A. *Buckley* Did Not Rule on the Waiting Period in the Present Context

When the Supreme Court decided *Buckley*, the campaign finance landscape was vastly different. To remedy perceived abuses in the 1972 elections, Congress had passed legislation seeking to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley*, 424 U.S. at 26, n.28. The Provision

was included in this legislation, which allowed "political committees" to contribute up to $5,000 to any candidate with respect to any election 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). In order to contribute that maximum non-corrupting amount, rather than the much lower limit available to individuals, a group must receive contributions from more than 50 persons and make contributions to five or more candidates for federal office. *Buckley*, 424 U.S. at 35. The group must also register with the FEC as a political committee under 2 U.S.C. § 433 (1970 ed., Supp. IV) for at least six months.

Buckley conclusively protected political speech and association while simultaneously recognizing some qualifications on speech might survive constitutional scrutiny—but *only* to serve the single valid government interest in eliminating corruption. *See id.* at 26-29. The *Buckley* Court thus determined regulations on "registration, contribution, and candidate conditions serve[d] the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id.* at 35-36. By affirming the D.C. Circuit Court's holding, the Supreme Court clarified that without this "six-month protective shield," individuals could evade the contribution limits, and "two or three persons could acquire the $5,000 committee contribution authority . . . merely by organizing themselves as a political committee." *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). Accordingly, this anti-circumvention rationale formed the *sole basis* for holding the Provision constitutional. *See id.* The inevitable corollary of such reasoning is that if individuals could not evade the contribution limits

by organizing themselves as a PAC, the six-month protective shield would be rendered unnecessary—and its prior constitutional protection would disappear.

B. The 1976 FECA Amendments Resolved *Buckley*'s Anti-Circumvention Concerns

In response to the *Buckley* Court's circumvention concerns, Congress amended the FECA, enacting supplementary measures to prevent the feared evasion of contribution limits in the Federal Election Campaign Act Amendments of 1976. Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). As the FEC notes, the 1976 Amendments were intended "to limit additional methods of circumventing contribution limits—*methods that the prior version of FECA had not addressed*." Def.'s Motion in Opp'n at 6 (emphasis added). First, Congress enacted new contribution limits that prohibited individuals from contributing more than $5,000 to a PAC and limited multicandidate committees to contributing $15,000 per year to a national party committee. Further, the 1976 Amendments added the nonproliferation provisions—a prophylactic measure designed specifically to prevent circumvention of base contribution limits. *Id.* Finally, the new law provided 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).

Congress's changes to the FECA meant no matter how many PACs an individual established subsequent to the 1976 Amendments, those PACs could not *collectively* give more than $5,000 per candidate per election. In short, the 1976 Amendments foreclosed the ability of those wishing to circumvent the contribution limit. The 50-person contributor requirement ensured PACs were not controlled by one person, and the requirement the PAC contribute to five or more candidates guaranteed it was not

established to support a single candidate. Notably, with over 20,000 donors and an average donation of under $50, TPLF easily fulfills these requirements, which together render the FEC's notion of circumvention unworkable.

Thus, the 1976 Amendments handily remedied the circumvention problem, which concerned the *Buckley* Court. Through this "fix," individuals were no longer able to evade the contribution requirements through subterfuge. With the prior circumvention risk entirely rectified—and the government's anti-corruption interest simultaneously dissolved—there can be no constitutionally permissible rationale to require newly formed PACs to wait six months to contribute to the full, non-corrupting extent of the law. In this manner, the 1976 Amendments transformed the Provision from a justifiable anti-corruption measure into an unconstitutional restriction on political speech.

C. The Rationale Established in *Buckley* and Confirmed by its Progeny Supports a Ruling for Plaintiffs

Undeterred by the unconstitutionality of its position, the FEC argues even if the six-month waiting period is now obsolete, this Court should ignore this inconvenience because "this Court does not have the authority to overrule *Buckley*." Def.'s Motion in Opp'n at 13. But the FEC's argument misses the point: this Court need not overrule *Buckley* in order to find for Plaintiffs. Succinctly put, a ruling the Provision is unconstitutional would not disturb *Buckley*.

The FEC obfuscates the issue, perhaps unwittingly, by succumbing to a classic legal fallacy. It conflates the Supreme Court's final determination that a statutory provision was constitutional with the Court's underlying reasoning—that the government can have a valid interest in limiting corruption and its appearance. *Buckley,* 424 U.S. at 26-29. Indeed, Plaintiffs do not suggest this Court "disregard *Buckley*," Def.'s Motion in

Opp'n at 14, but instead ask this Court to read *Buckley* for its plain conclusion: the Supreme Court justified the prior restraint based only on the government's legitimate interest in circumvention. Absent that interest, *Buckley*, and a long history of Supreme Court First Amendment jurisprudence, mandate this prior restraint be found unconstitutional.

The FEC rejoins with *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), where the Supreme Court considered whether a pre-dispute agreement to arbitrate securities claims was enforceable. *Id.* at 478. But *Rodriguez* is inapt, and not merely because it has nothing to do with the First Amendment. There, the Court of Appeals independently assumed the Supreme Court now favored arbitration as a means of dispute resolution, so it was not bound by directly controlling Supreme Court precedent that held just the opposite. Further, the *Rodriguez* court on its own volition overturned this precedent based on a statute Congress had never modified post-hoc. Thus, the Court of Appeals clearly overstepped its authority.

Here, the Supreme Court's holding on the Provision in *Buckley* does not directly apply, nor do Plaintiffs' arguments rest on reasons rejected in subsequent decisions. In *Rodriguez*, the Court of Appeals considered the Securities Act of 1933, not changed or amended since the Supreme Court's prior decision addressing the same exact issue in *Wilko v. Swan*, 346 U.S. 427 (1953). Therefore, *Wilko* directly controlled the outcome. Here, this Court is considering the constitutionality of a *different* statute; indeed, a statute Congress amended *in direct response* to *Buckley*'s holding.

Plaintiffs have never challenged *Buckley*'s central holding: the government has an interest in limiting corruption or its appearance, provided the statute is "closely drawn"

and "avoid[s] unnecessary abridgment of associational freedoms." *Wagner v. FEC*, No. 11-1841, 2012 WL 1255145, at *6 (D.D.C. Apr. 16, 2012) (quoting *Buckley*, 424 U.S. at 25). But because post-*Buckley* congressional modifications addressed the Court's specific grounds for finding the restraint valid, the anti-circumvention interest no longer exists. The resulting statute is no longer closely drawn to the now-vanished interest, and the Provision cannot be upheld.

D. The FEC's Argument that the Six-Month Waiting Period is Still Effective in Preventing Circumvention of Contribution Limits or Deterring Corruption is Unavailing

The FEC puts forth several anti-corruption interests in an attempt to save the Provision. First, the FEC broadly argues the "registration requirement" continues to limit circumvention of personal contribution limits. *See* Def.'s Motion in Opp'n 16-17. Yet, the FEC obscures the real issue, expounding upon the general virtues of requiring PACs to meet *some* registration requirements. A speech restraint is not a mere ministerial registration requirement. The Provision interjects time between a group's formation and that group's desire to speak freely and fully. Referring to this Provision as a "registration requirement" does not render it somehow constitutional. Indeed, despite the curative force of the 1976 Amendments, the FEC steadfastly contends the government has a valid interest in preventing circumvention of contribution limits—but fails to adequately demonstrate how this government interest is *presently* furthered by the Provision.

Instead of definitive legal arguments, the FEC creatively trots out an unsubstantiated parade of potential horribles and attempts to create a nonexistent slippery slope argument. First, the FEC suggests the possibility of "massive contributions to candidates" through the use of "unearmarked contributions to political committees."

Def.'s Opp'n at 18, quoting *Buckley*, 424 U.S. at 38. But the average contribution to TPLF is less than $50. Moreover, the 1976 Amendments prevent TPLF from contributing $5,000 to any particular PAC and then directing those funds to a particular candidate: that is an *earmarked* contribution which the FECA requires be reported as such, and which counts against TPLF's contribution limit. 2 U.S.C. §§ 441a(a)(8).

Thus, even if TPLF could "go to the internet" to locate these supposed overnight PACs, as the FEC suggests, TPLF cannot lawfully "channel" large contributions through these PACs, because the contribution limits still apply. Indeed, the most TPLF can give to any PAC is still the same non-corrupting amount of $5,000. *See* Def.'s Opp'n at 19; *see* 2 U.S.C. 441(a)(2)(A). The FEC, of course, has not proffered any evidence of TPLF's effort to engage in such nefarious conduct. In fact, this has never occurred, precisely *because* the FECA criminalizes such conduct. The FEC's suggestion that two separate organizations will criminally conspire to engage in an activity that has never occurred is facetiously obdurate. Indeed, a PAC that desired to support a candidate's election could easily do so within the law by simply spending funds on independent expenditures.

V. The Six-Month Waiting Period is Overly Broad and Imposes an Unjustifiable Constitutional Burden

The FECA'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*, 424 U.S. at 14-15 (internal citations omitted). The First Amendment also vigorously protects political association: "[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). Due to the

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. *See, e.g.*, *Citizens United*, 130 S. Ct. at 908-909.

In line with this tradition, contribution limits to campaigns are constitutionally permissible only when two requirements are simultaneously present: the government must have a valid interest in preventing corruption, and the law cannot unnecessarily burden First Amendment rights in achieving this interest. *See CalMed*, 452 U.S. at 203. The controlling opinion in *CalMed* mandates "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.* (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*, No. 11-1841 at *6 (quoting *Buckley*, 424 U.S. at 25).

Taking account of this settled law, and that the 1976 Amendments rendered the Provision entirely useless in preventing corruption or the circumvention of contribution limits, the six-month waiting period is not closely drawn to avoiding corruption, and unnecessarily abridges speech and associational freedoms.

VI. Plaintiffs Brought Suit Without Delay to Protect Their Constitutional Rights

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Courts have recognized individuals cannot be tasked with somehow anticipating such

constitutional injury. "Ordinary citizens should not be forced to anticipate and predict possible constitutional violations and be burdened with protecting against them, on pain of losing their rights." *Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579, n.2 (S.D. W. Va. 2000). As the Supreme Court has conclusively determined, "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day." *Citizens United,* 130 S. Ct. at 889.

Plaintiffs wished to exercise their First Amendment freedoms and the Provision barred them from doing so, unquestionably causing an irreparable injury: Plaintiffs lost their right to speak. To escape this reality, the FEC does not contend Plaintiffs suffered no actual harm, but instead suggests their constitutional injury was somehow self-inflicted. Def.'s Opp'n at 26-29.

First, the FEC posits TPLF erred in "choosing" to register too late as a PAC. Def.'s Opp'n at 26-27. The FEC complains TPLF sent its paperwork by registered mail rather than immediately sending its form "by overnight delivery to ensure registration by May 3." The overnight delivery method, as the FEC contends, would have allowed TPLF to qualify for the higher contribution limits three days prior to the general election. *Id.* But surely First Amendment rights cannot be so tenuous as to hinge upon the vagaries of postal delivery service.

The FEC fails to account for the fact that, as a grassroots organization which relies almost entirely on contributions from mostly small dollar donors, TPLF is not an expert in campaign finance law—nor is such required. *See Citizens United,* 130 S. Ct. at 889. Despite Supreme Court admonition to the contrary, the FEC seemingly expects

every PAC comprised of ordinary, like-minded individuals to anticipate a constitutional injury and protect against it, on consequence of losing their rights. *See Nade*r, 112 F. Supp. 2d 575 at 579. But "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day." *Citizens United*, 130 S. Ct. at 889. The penalty for not being sufficiently "lawyered up"? The loss of Plaintiffs' rights to free speech when they mattered most—before the general election.

The FEC continues undeterred in blaming Plaintiffs, characterizing the instant case as an "inexcusably late-filed suit" and accusing Plaintiffs of employing dilatory tactics. Def.'s Opp'n at 1, 27. The FEC argues Plaintiffs should have filed a lawsuit immediately, Def.'s Opp'n. at 28, but cites no authority for its proposition an unconstitutional law is rendered constitutional because a plaintiff brought suit later than the government might prefer.

Indeed, Plaintiffs requested an Advisory Opinion from the FEC, then filed suit immediately after the FEC denied the request. But even if Plaintiffs had failed to act as quickly as technically possible, such a lapse would not result in the loss of Plaintiffs' constitutional rights. "[E]ven when such individuals […] have failed to act with dispatch to challenge the law," they "should not have to sacrifice First Amendment rights because [the government] imposed unconstitutional requirements." *Nader*, 112 F. Supp. 2d at 579, n.2.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to GRANT their Motion for Summary Judgment.

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Respectfully submitted,

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