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. 1:12-cv-01707-RWR

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

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INTRODUCTION

The Tea Party Leadership Fund PAC was awed when it received a note in shaky handwriting from an elderly grandmother, along with a $5 contribution, saying it was all she could afford to give, but also saying she believes so deeply in the fate of this country that she would it send it anyway. It was an awe-inspiring example of political speech and association. It is astounding that the Federal Election Commission (FEC) considers this grandmothers small act of speech and political association (and that of more than ten thousand other grandparents, veterans, and small business owners) to be so corrupting that it cannot permit it to occur at the same level as established insiders such as the Teamsters DRIVE PAC, Pharmaceutical Research & Manufacturers of America Better Government Committee, and BP Corporation North America Inc. PAC.

Plaintiffs acceded to the FEC's request to file its Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction on November 1, 2012 (Docket No 3), despite the urgency of this matter. Plaintiffs have done everything possible to raise these issues once they became aware of their effect, did so through the appropriate administrative agency which chose to enforce an unconstitutional statute, and then sought relief as quickly as possible from this Court. Plaintiffs received Defendants memorandum at 6:27 p.m., yesterday evening. In the interest of time, and because it is important this Court have time to review and rule upon the preliminary injunction motion before the end of November 6, 2012, the date of the 2012 general election, Plaintiffs rely primarily on their Memorandum in Support of Emergency Preliminary Injunction and quickly submit this Reply Memorandum in Support of Emergency Preliminary Injunction to the Court to expedite consideration of the motion, noting here only the most glaring of the numerous errors in Defendants memorandum in opposition (hereinafter "Opp'n at _").

This challenge is brought 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 of contributions 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).[1]

The Tea Party Leadership Fund ("TPLF") is a non-connected political action committee that easily fulfills the primary prerequisites to attaining multicandidate status – and the underlying intent that it be a "bona fide" committee; 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). Clear precedent casts this as an unconstitutional prior restraint that cannot be allowed to deprive the rights of speech and association of thousands of individuals who care so deeply about the fate of their country that they have joined together to advocate collectively what they cannot achieve on their own.

[1] Plaintiffs and the FEC agree this case also challenges the contribution limit at 2 U.S.C. § 441a(a)(1)(A), as-applied to Plaintiffs, that is, the $2,500 limit (adjusted for inflation) that any person may make to a candidate per election. *Cf.* Opp'n at 8, n.7.

ARGUMENT

Plaintiffs John Raese and Sean Bielat are in races to represent the citizens of their respective State and district, and cannot wait until after November 6 to receive additional assistance from the Tea Party Leadership Fund. Candidates Raese and Bielat need this court to recognize that the six-moth waiting period is an intolerable prior restraint that, after the post-*Buckley* Amendments of 1976, does nothing to prevent circumvention of the base contribution limits to candidates or to prevent corruption. 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.

I

TPLF now has received contributions from well over 10,000 individuals, contributions averaging less than $50 to TPLF, and only a single contributor whose net contributions aggregated to $1,500. And yet the FEC argues that "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." Opp'n at 18. The FEC cites to pre-FECA-amendment language in *Buckley*: "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." Opp'n at 18, *quoting Buckley v. Valeo,* 424 U.S. 1, 38 (1976).

First, there are no individuals contributing "massive amounts" here—the average contribution to TPLF is less than $50—and no concern that any individual will corrupt a candidate by giving to TPLF. In fact, the FEC has the electronic reports filed by this Committee of receipts and expenditures through October 17, 2012, and could very easily compare each

itemized contributors name against the FEC's own database of itemized contributions to candidates and determine whether any potential excessive contribution is even mathematically possible. It has not; a telling sign that it cannot muster any iota of evidence to support its speculative claims of circumvention.

Second, the anti-earmarking provisions, in place and noted by the *Buckley* Court in the quote the FEC cites, would prevent TPLF from telling any PAC to give any of its $5,000 (to the subsequent PAC) to a particular candidate. Third, the post-*Buckley* amendments prevent any PAC from giving more than $5,000 to any other PAC who can in turn make contributions to a candidate. This $5,000 limit, condoned by Congress, curtails any possible corruption. Fourth, any PAC affiliated with TPLF would share the limit, so there is no PAC-proliferation risk, that is, no risk the TPLF can clone itself to repeat $5,000 contributions in the same election to the candidates it favors. 2 U.S.C. § 441a(a)(5) (affiliated PACs share contribution limits). Even if, as the FEC worries, TPLF can go to "the internet," Opp'n at 19, to find PACs who like certain candidates, the fact remains that the most TPLF can give to any PAC is $5,000—an amount set by Congress to prevent corruption. 2 U.S.C. § 441a(a)(2)(A).

Given the anti-circumvention constructs enacted after *Buckley*, what does the six month waiting period add? Nothing. The six-month waiting period is now an unconscionable prior restraint this Court should lift so that candidates Raese and Bielat can receive needed support that cannot possibly be corrupting from TPLF and its thousands of grassroots citizen-donors on or before the November 6th election, as this case heads to a determination on the merits.

II

The FEC cites *California Medical Association v. FEC*, 453 U.S. 182 (1981) (*CalMed*), to demonstrate that anti-circumvention measures are valid. Opp'n at 14. But the *CalMed* opinion

helps Plaintiffs: the case upheld one of the anti-circumvention measures Congress enacted in 1976 in light of *Buckley*. Specifically, it upheld one of the anti-circumvention measures on which Plaintiffs rely: the $5,000 contribution limit on contributions to PACs.

The FEC suggest this Court should just defer to Congress' judgment, Opp'n at 21, and uphold the six-month waiting period as an additional prophylaxis Congress needs over above the post-*Buckley* amendments. But *Thomas v. Collins,* 323 U.S. 516 (1945), and *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), counsel that this Court cannot simply defer to legislatures on prior restraints. "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 FEC's protestation that a six-month waiting period to engage in non-corrupting speech and political association is not a restraint is inapt; to the contrary, 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. This Court cannot simply defer, nor accede to the FECs argument that a restriction that only limits speech based on the identity of the speaker is somehow permissible.

III

The FEC also argues that Plaintiffs overly rely on *Citizens United v. FEC*, 130 S. Ct. 878 (2010). Opp'n at 17. Not at all. Plaintiffs cite and repeatedly explain the anti-circumvention

interest discussed in *Buckley* and show that it is cured by the post-*Buckley* amendments to FECA. Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). Plaintiffs are correct to note that 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); *see also Citizens Against Rent Control v. City of Berkley,* 434 U.S.290, 437-38 (1981) ("*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. 2 U.S.C. § 441a(a)(2)(A). TPLF wants nothing more than to make contributions at the level made by every other PAC. The FEC fails to notice that there is no valid government interest in limiting corruption, circumvention or its appearance that will justify imposing a six-month waiting period before TPLF is permitted to contribute to candidates of its choosing to the full extent of the law. The 1976 Congressional Amendments already effectively addressed potential circumvention issues by 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 has no compelling—or even legitimate—interest in forcing TPLF to wait six months before making its permitted maximum contributions. Circumvention in this situation is no more likely than with any long-existing political committee; thus, the waiting period is unconstitutional as applied.

IV

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 before this case goes to the merits. 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 above, and in more detail in Plaintiffs' Memorandum in Support of Preliminary Injunction, each of these factors weighs in Plaintiffs' favor.

"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").

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 – before the election when such speech maters. 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.

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) and application of the $2,500 (inflation-adjusted) contribution limit from TPLF to candidates at 2 U.S.C. § 441a(a)(1)(A).

Dated: 2 November, 2012

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/s/

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