UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAUN MCCUTCHEON and MCCUTCHEON FOR FREEDOM,	)	Civil Action No. _____
Plaintiffs,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs SHAUN MCCUTCHEON and MCCUTCHEON FOR FREEDOM respectfully move this Court pursuant to Fed. R. Civ. P. 65(a)(1) for a preliminary injunction barring Defendant FEDERAL ELECTION COMMISSION from investigating them, commencing administrative proceedings against or concerning them, imposing civil fines or other sanctions, ordering the reversal of the transaction, or making a criminal referral concerning Plaintiffs, because:

(i) McCutcheon and/or MFF transfers the $50,000 of McCutcheon's personal funds in MFF's account to the LNC's general treasury; or

(ii) McCutcheon deposits or transfers any amount of additional funds in MFF's account, and McCutcheon and/or MFF subsequently transfers such funds, in any amount, to either the LNC's or RNC's general treasury.

A Memorandum of Law with supporting Declaration is attached.

Pursuant to DC LCvR 7(m), Plaintiffs certify that they have not conferred with counsel for Defendant, because this motion is being filed and served simultaneously with the Complaint and, consequently, counsel for Defendant have not yet entered appearances.

Respectfully submitted,

Dated September 4, 2020

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

INTRODUCTION

Plaintiffs Shaun McCutcheon and McCutcheon for Freedom ("MFF"), his presidential candidate committee, sought an advisory opinion from the Federal Election Commission ("FEC" or "Commission") pursuant to 52 U.S.C. § 30108(a) to confirm the legality of intended transfers of funds to national political party committees which Plaintiffs wished to make. Federal law required the Commission to issue an advisory opinion responding to Plaintiffs' inquiry within sixty days. 52 U.S.C. § 30108(a)(1). It failed to do so. Consequently, Plaintiffs have been deprived of the statutory safe-harbor against burdensome administrative investigations, civil fines, and criminal referrals that an advisory opinion would have provided. *See id*. § 30108(c); *see also Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (holding that the Commission's failure to issue an advisory opinion "deprives the plaintiff[s] of a legal right—[52 U.S.C. § 30108(c)'s] reliance defense, which [they] would enjoy if [they] had obtained a favorable resolution in the advisory opinion process"). Moreover, the threat of such consequences continues to chill Plaintiffs from engaging in their constitutionally protected activities. This Court should issue a preliminary

injunction barring the Commission from initiating administrative proceedings against Plaintiffs, imposing civil fines or other sanctions on them, requiring them to reverse their transactions, or referring them for criminal prosecution for any of the transactions described in their advisory opinion request in which they engage while the preliminary injunction remains in effect

BACKGROUND FACTS

A. Shaun McCutcheon's Presidential Campaign

Plaintiff Shaun McCutcheon unsuccessfully sought the Libertarian National Committee's ("LNC") nomination for President in the 2020 election. *See* Declaration of Shaun McCutcheon in Support of Advisory Opinion Request ¶ 3 (hereinafter, "McCutcheon Decl.," attached as Ex. 1). He began his campaign on May 1, 2020, by obtaining an employee identification number and opening a bank account for his candidate committee, MFF. *Id*. ¶ 6. The campaign was entirely self-funded. *Id*. ¶ 7. On May 6, McCutcheon wired $50,000 of his personal funds to MFF in support of his campaign. *Id*. ¶ 8. Later that month, he transferred an additional $15,000 of personal funds to make additional funds available for his campaign. *Id*. ¶ 9. MFF spent a total of approximately $15,000 of the personal funds McCutcheon had transferred to it. *Id*. ¶ 10.

McCutcheon's campaign manager was Mike Byrne, a seasoned veteran of numerous Republican House and Senate campaigns. *Id*. ¶ 11. Ron Nielsen, who had been the campaign manager for Libertarian presidential candidate Gary Johnson in the 2012 and 2016 elections, served as Special Advisor to the McCutcheon campaign. *Id*. McCutcheon also received volunteer assistance from other Johnson 2016 personnel. *Id*.

Due to the constraints imposed by COVID-19, McCutcheon and his team ran his campaign over the Internet, relying on a campaign website, online video, targeted e-mails and text messages, and online and social media communications. *Id*. ¶ 10. McCutcheon's campaign website was

http://www.mccutcheonforfreedom.com. *Id.* ¶ 12. The campaign uploaded a video of McCutcheon to the Internet when he announced his candidacy. *Id.* ¶ 14. MFF worked with several outside data providers and digital advertising firms to run paid political advertisements targeted directly to Libertarian Party members who were Libertarian National Convention delegates on Facebook. *Id.* ¶ 13. Campaign personnel also contacted these delegates directly through online advertisements served through their home IP addresses via a major third-party ad provider, and sent more than 500,000 e-mails and text messages. *Id.*

The Libertarian Party held its national convention over the Internet on May 23, 2020. *Id.* ¶ 15. McCutcheon did not receive the party's nomination for either President or Vice President. *Id.* McCutcheon then suspended his campaign for President. *Id.* ¶ 16. At the time (and continuing to now), approximately $54,000 of the personal funds McCutcheon had contributed to MFF remained in its account. McCutcheon wishes to transfer $50,000 of those funds to the Libertarian National Committee's general treasury account. *Id.* ¶ 17. He also wishes to deposit additional personal funds into MFF's account, which may then subsequently be transferred to the general treasury account of either the LNC or RNC without limit. *Id.* ¶ 19. He wishes to make these transfers at the earliest possible time so they can have the greatest impact over the course of the general election campaign.

B. The FEC's Failure to Address Plaintiffs' Advisory Opinion Request

Pursuant to 52 U.S.C. § 30108(a)(1), McCutcheon and MFF submitted an advisory opinion request to the FEC on May 29, 2020. *See* Compl., Ex. 1; McCutcheon Decl. ¶ 21. That statute provides:

> Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act . . . or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by

> the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

52 U.S.C. § 30108(a)(1). Federal law creates a "safe harbor" for people who act in reliance on advisory opinions. *Id*. § 30108(c)(2). The safe harbor provision specifies, "[A]ny person who relies upon any provision or finding of an advisory opinion . . . and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act . . . ." *Id*.

Plaintiffs sought an advisory opinion to prevent the chill to the exercise of their First Amendment rights created by the prospect of burdensome and intrusive administrative proceedings, civil fines, and referral for criminal prosecution for engaging in their intended transfers. *Id*. ¶ 22. Their advisory opinion request—accompanied by a sworn declaration from McCutcheon, *see* Compl. Ex. 2, explained the facts set forth above, and asked the following questions:

> 1. May Shaun McCutcheon transfer $50,000 of the personal funds he has deposited into the account of MFF, his authorized principal presidential candidate committee, to the general, unrestricted federal account of the Libertarian National Committee, Inc. ("LNC") (FEC ID #C00255695), a national political party committee?
>
> 2. If so, after making the transfer described above in #1, may McCutcheon deposit unlimited amounts of additional personal funds into MFF's account, and then transfer them to the general, unrestricted federal account of the LNC? If so, is there a date on which it would become illegal for him to do so?
>
> 3. May McCutcheon deposit unlimited amounts of additional personal funds into MFF's account and then transfer them to the general, unrestricted federal account of the Republican National Committee ("RNC"), a national political party committee, without regard to 52 U.S.C. § 30116(a)(1)(B)'s limits? If so, is there a date on which it would become illegal for him to do so?

See Advisory Opinion Request, Compl. Ex. 1, at 2.

The Advisory Opinion Request also identified the grounds on which McCutcheon and MFF believed there was a substantial likelihood that the FEC may erroneously and illegally deny their request. There was a substantial risk the Commission would erroneously:

1. treat a transfer to the LNC of the personal funds that MFF had received from McCutcheon as an illegally excessive contribution from McCutcheon himself to the LNC, in violation of 52 U.S.C. § 30116(a)(1)(B)'s and 11 C.F.R. § 110.01(c)(1)(i) (establishing $35,500 annual limit); *see also* 84 FED. REG. 2,504 (Feb. 7, 2019) (providing inflation adjustments);

2. treat a transfer to the LNC of the personal funds that MFF had received from McCutcheon as an illegally excessive contribution from MFF to the LNC, in violations of the limits on contributions from a political committee or other "person" to a national political party committee in violation of 52 U.S.C. § 30116(a)(1)(B) and 11 C.F.R. § 110.1(c)(1) (establishing $35,500 annual limit); *see also* 84 FED. REG. 2,504 (Feb. 7, 2019) (providing inflation adjustments); or

3. treat McCutcheon's initial transfer of personal funds to MFF as an illegally excessive contribution from an individual to a candidate committee in violation of 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) (establishing $2,800 per election limit); *see also* 84 Fed. Reg. at 2,504, if MFF uses those funds to subsidize large contributions or transfers to the LNC rather than expenditures on behalf of McCutcheon's campaign.

See Advisory Opinion Request, Compl. Ex. 1, at 4-7.

On June 9, 2020, Commission staff contacted McCutcheon's and MFF's undersigned counsel to obtain clarification on a few minor points connected to the request. Commission staff then sent a follow-up e-mail memorializing that conversation, to which undersigned counsel responded by e-mail. *See* FEC E-mail Correspondence, Compl. Ex. 3. The Commission deemed

the advisory opinion request "complete" upon receipt of that information on June 9. *See* Closeout Letter, Compl. Ex. 4, at 1.

In late July, Commission staff contacted McCutcheon and MFF through undersigned counsel, asking they waive or extend the statutorily mandated 60-day deadline for the Commission to respond to an advisory opinion request. McCutcheon and MFF declined, insisting on their right to obtain a ruling to eliminate the chill to the exercise of his First Amendment rights. McCutcheon Decl. ¶ 23.

On August 10, 2020, FEC Associate General Counsel Nevin F. Stipanovic sent McCutcheon and MFF the Closeout Letter, stating "the Commission was unable to render an advisory opinion in this matter. . . . The Commission currently lacks a quorum of four Commissioners to take action on advisory opinion requests." *See* Compl. Ex. 4, at 1; McCutcheon Decl. ¶ 24.

During the time McCutcheon's advisory opinion request was pending before the Commission—from June 9, 2020 through August 10, 2020—the FEC maintained a quorum for several weeks. The Commission is comprised of six Commissioners. 52 U.S.C. § 30106(a)(1). An affirmative vote of four Commissioners is required to approve an advisory opinion request. *See id*. § 30106(c). Throughout early 2020, only three seats on the Commission were filled. On May 19, 2020, the Senate confirmed a fourth Commissioner, Trey Trainor. *See* Zach Montellaro, *FEC Reaches Quorum After Senate Confirms Trainor*, POLITICO (May 19, 2020), https://www.politico.com/news/2020/05/19/fec-reaches-quorum-senate-confirms-trey-trainor-269659. Trainor was sworn in on June 5, 2020. *See* Rebecca R. Ruiz, *After Functioning for 28 Days, U.S. Election Regulator Will Be Powerless Again*, N.Y. TIMES (June 26, 2020), https://www.nytimes.com/2020/06/26/us/federal-election-commission.html. The Commission

maintained a quorum until the resignation of Commissioner Caroline C. Hunter on July 3, 2020. *Id*. Thus, for 28 days—nearly half the time Plaintiffs' advisory opinion request was pending—the Commission maintained a quorum. And, in any event, the Commission's failure to maintain a quorum does not negate the Commission's duty under 52 U.S.C. § 30108(a)(1) to issue advisory opinions within 60 days. Nor does that failure deprive Plaintiffs of their right to receive the protection of 52 U.S.C. § 30108(c)(2)'s safe harbor provisions when engaging in legal and constitutionally protected political association, expression, and other activities.

Due to the Commission's failure to fulfill its statutory duty under 52 U.S.C. § 30108 to issue an advisory opinion and grant Plaintiffs safe harbor protection, Plaintiffs remained chilled from making their intended transfers of funds to national political party committees. If they attempt to exercise their constitutional and statutory rights, they face the prospect of burdensome administrative proceedings, civil fines, and even referral for criminal prosecution, based on how future Commissions over the next five years, *see* 28 U.S.C. § 2462 (civil statute of limitations); 52 U.S.C. § 30145(a) (criminal statute of limitations), may choose to interpret the byzantine intricacies of campaign finance law. Moreover, even if the Commission does not itself independently choose to act, a private party may challenge its decision to refuse to enforce federal campaign finance law against Plaintiffs, *see* 52 U.S.C. § 30109(a)(8), and even be permitted to enforce the relevant provisions of the FECA itself, *id*. § 30109(a)(8)(C). "Therefore, even without a Commission enforcement decision, [Plaintiffs] are subject to litigation challenging the legality of their actions" if they are not protected by an advisory opinion. *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995).

Without the realistic prospect of such adverse consequences from either the Commission or private parties, McCutcheon would have transferred the $50,000 from MFF's account to the

LNC's general treasury account. McCutcheon Decl. ¶ 26. He likewise would have transferred substantial additional personal funds to MFF's account, which would then be transferred to the LNC's and RNC's general treasury accounts. *Id*.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

The Supreme Court has recognized that the First Amendment protects the right to make political contributions. *See Buckley v. Valeo*, 424 U.S. 1, 20-22 (1976) (per curiam). They are primarily a form of political association, though they also involve an element of political expression, as well. *Id*. Burdens on the right to make political contributions are subject to a "rigorous" form of intermediate scrutiny. *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014).

The complexities of federal campaign finance law may deter people from exercising these critical First Amendment rights, however. To alleviate that chill, Congress established the advisory opinion process, which allows people to confirm the legality of their intended contributions, transfers, and other activities under the Federal Election Campaign Act, as amended, ("the FECA") before performing those acts and subjecting themselves to the possibility of civil and criminal enforcement proceeding. *See Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir. 1980) (holding the advisory opinion process "mitigates whatever chill may be induced by the statute [FECA]"). Plaintiffs attempted to take advantage of the advisory opinion process, but to no avail.

52 U.S.C. § 30108(a)(1) requires the FEC to respond to advisory opinion requests within 60 days. Plaintiffs submitted an advisory opinion request concerning three "***Intended Transfers***":

1. McCutcheon and MFF wish to transfer $50,000 of the personal funds McCutcheon had deposited into MFF's account to the LNC's general treasury, pursuant to 52 U.S.C. § 30114(a)(4) and 11 C.F.R. § 113.2(c).

2. McCutcheon wishes to transfer additional personal funds into MFF's account pursuant to 11 C.F.R. § 110.10, and then subsequently transfer those funds to the LNC's general treasury, pursuant to 52 U.S.C. § 30114(a)(4) and 11 C.F.R. § 113.2(c).

3. McCutcheon wishes to transfer additional personal funds into MFF's account pursuant to 11 C.F.R. § 110.10, and then subsequently transfer those funds to the RNC's general treasury, pursuant to 52 U.S.C. § 30114(a)(4) and 11 C.F.R. § 113.2(c), in amounts likely to exceed the FECA's contribution limits.

During approximately half of that 60-day period for Plaintiffs' request, the FEC had a quorum, but failed to address their request. During the remainder of that period, the FEC lacked a quorum. Accordingly, the Commission issued a Closeout Letter stating that it would not be issuing an advisory opinion within the statutorily mandated period. *See* Closeout Letter, Compl. Ex. 4. By failing to issue an advisory opinion, the Commission deprived plaintiffs of the possibility of taking advantage of 52 U.S.C. § 30108(c)(2)'s safe harbor protection, which would shield them from sanctions under the FECA for acting in reliance on the advisory opinion. *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (holding that the Commission's failure to issue an advisory opinion "deprives the plaintiff[s] of a legal right—[52 U.S.C. § 30108(c)'s] reliance defense, which [they] would enjoy if [they] had obtained a favorable resolution in the advisory opinion process"). Consequently, Plaintiffs are left in the constitutionally untenable position of either refraining from exercising their constitutional and statutory rights, or engaging in their intended transfers and facing the prospect of administrative investigations, civil fines, and even referral for

criminal prosecution for the next half-decade. 28 U.S.C. § 2462 (civil statute of limitations); 52 U.S.C. § 30145(a) (criminal statute of limitations). As noted above, even if the Commission itself does not act against Plaintiffs, under the FECA's unique enforcement provisions, private parties may seek judicial approval to enforce the statute against Plaintiffs themselves. *Chamber of Commerce*, 69 F.3d at 603 (holding that, "even without a Commission enforcement decision, [Plaintiffs] are subject to litigation challenging the legality of their actions" if they are not protected by an advisory opinion).

Plaintiffs have given the Commission an opportunity to opine on the FECA's applicability and fully exhausted their administrative remedies. *Cf. Nat'l Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193-94 & n.7 (D.C. Cir. 1986) (recognizing the FEC's primary jurisdiction over the FECA). Consequently, this Court should resolve the issue itself, and grant a preliminary injunction prohibiting the FEC from initiating administrative proceedings against Plaintiffs, imposing civil fines or other sanctions on them, requiring them to unwind their transactions, or referring them for criminal prosecution, for any Intended Transfers in which they engage while the preliminary injunction remains in effect. At the conclusion of this case, this Court should ultimately issue a declaratory judgment concerning the legality of the Intended Transfers and accompanying permanent injunction. *See* 28 U.S.C. § 2201.

In *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), the Supreme Court articulated four requirements for preliminary injunctions. "A plaintiff seeking a preliminary injunction must establish[:] [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. Plaintiffs satisfy all of these requirements.

First, Plaintiffs are likely to succeed on the merits of their claims. Count II alleges the FEC violated 52 U.S.C. § 30108(a)(1) by failing to issue an advisory opinion within 60 days of receiving Plaintiffs' completed request. *See* Compl. ¶¶ 36-44. Count III contends that this violation was arbitrary, capricious, an abuse of discretion, and contrary to law, and that the FEC unlawfully withheld both an advisory opinion and the statutory safe harbor from Plaintiffs in violation of the Administrative Procedures Act, 5 U.S.C. § 706(1), (2)(A). And Count IV claims that, having exhausted their administrative remedies and given the FEC an opportunity to exercise primary jurisdiction over this matter, Plaintiffs are entitled to a declaratory judgment concerning their right to engage in the Intended Transfers.

The FEC's Closeout Letter forthrightly acknowledges that the Commission was not issuing an advisory opinion in response to Plaintiffs' request, even though 60 days had elapsed from the time it became final. *See* Closeout Letter, Compl. Ex. 4. The FEC's inaction flatly violated 52 U.S.C. § 30108(a)(1), which requires it to issue an advisory opinion "[n]ot later than 60 days after the Commission receives from a person a complete written request." Plaintiffs' advisory opinion request satisfied all of that provision's requirements: it concerned application of the FECA and the Commission's regulations to three "specific transaction[s] or activit[ies]" by Plaintiffs. 52 U.S.C. § 30108(a)(1). By failing to issue an advisory opinion, the Commission denied Plaintiffs the protections of 52 U.S.C. § 30108(c)(2)'s safe harbor. *See Unity08*, 596 F.3d at 865. Plaintiffs are likely to demonstrate they are entitled to a remedy for the Commission's violation of § 30108(a)(1).

They are likewise likely to succeed in demonstrating the substantive legality of the underlying Intended Transfers. McCutcheon is a candidate for the Libertarian Party's nomination for President in the 2020 election, *see* 52 U.S.C. § 30101(2), and MFF is his authorized (and

principal) candidate committee, *see id*. § 30101(5)-(6); *see also id*. § 30102(e)(1). Consistent with constitutional requirements, *see Buckley*, 424 U.S. at 21, 51, FEC regulations permit candidates to make unlimited expenditures, *see* 11 C.F.R. § 110.10. That provision states, "[C]andidates for Federal office may make unlimited expenditures from personal funds." 11 C.F.R. § 110.10. The FEC has construed this provision to allow candidates to transfer unlimited amounts of personal funds to their candidate committees. *See* FEC, *Mulloy*, A.O. 1984-60, at 2 (Jan. 11, 1985) (stating a candidate's right to "make unlimited expenditures from his or her personal funds[] includ[es] contributions to the candidate's principal campaign committee"); *accord Collins*, A.O. 1985-33 at 1 (Nov. 22, 1985). As a candidate, McCutcheon was entitled to transfer $65,000 to his candidate committee, *cf*. McCutcheon Decl. ¶¶ 8-9, and remains entitled to transfer unlimited additional amounts of personal funds to it.

Likewise, federal regulations permit candidate committees to transfer unlimited amounts of their funds to national political party committees. 11 C.F.R. § 113.2(c) provides, "[F]unds in a campaign account . . . [m]ay be transferred without limitation to any national, State, or local committee of any political party." Thus, MFF may transfer $50,000 of the personal funds it received from McCutcheon to the LNC's general treasury. *Cf*. McCutcheon Decl. ¶ 17. MFF also may transfer to the LNC's or RNC's general treasury unlimited amounts of any other funds it receives, including any additional personal funds McCutcheon provides to the MFF. *Cf*. *id*. ¶ 19. In short, Plaintiffs are likely to succeed in demonstrating that the Intended Transfers are legal.

Second, a preliminary injunction is necessary to prevent irreparable injury. The Commission's failure to issue an advisory opinion as required by 52 U.S.C. § 30108(a) has deprived Plaintiffs of the opportunity to take advantage of the statutory safe harbor provided by 52 U.S.C. § 30108(c)(2). *See Unity08 v. FEC*, 596 F.3d at 865 (holding that the Commission's

failure to issue an advisory opinion "deprives the plaintiff[s] of a legal right—[52 U.S.C. § 30108(c)'s] reliance defense, which [they] would enjoy if [they] had obtained a favorable resolution in the advisory opinion process"). The very reason Congress enacted the advisory opinion process was to allow people to avoid the chill of facing potential sanctions for exercising their constitutional rights in the face of a complex campaign finance regulatory scheme. *See Martin Tractor*, 627 F.2d at 384-85.

Due to the FEC's failure to issue an advisory opinion, Plaintiffs remain chilled from exercising their constitutional rights by making the Intended Transfers. *See* McCutcheon Decl. ¶¶ 17, 19-20, 25-26. As the Supreme Court has recognized, "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) (plurality op.); *accord Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009). Irreparable harm arises where the plaintiff "cease[s]" First Amendment activities due to the chilling effects of government restrictions. *Nat'l Treas. Emps. Union v. United States*, 927 F.2d 1253, 1255 (D.C. Cir. 1991); *accord Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006). Since the FEC has failed to issue an advisory opinion as required by 52 U.S.C. § 30108(a), this Court should issue a preliminary injunction to alleviate the chill to Plaintiffs' activities.

The November election is presently about 11 weeks away. As the Supreme Court has recognized, "There are short timeframes in which speech can have influence" on the electorate. *Citizens United v. FEC*, 558 U.S. 310, 334 (2010). Plaintiffs' ability to associate with the LNC and RNC will be "stifled" if it must wait until the end of a "protracted lawsuit," *id.*, to be able to make the Intended Transfers without being subject to private complaints, *see* 52 U.S.C. § 30109(a)(8); *Chamber of Commerce*, 69 F.3d at 603, administrative proceedings, civil fines, and

potentially even criminal referrals. "By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on." *Citizens United*, 558 U.S. at 334. Interim relief is necessary to prevent irreparable injury to the Plaintiffs.

Third, the balance of hardships tilts in favor of the Plaintiffs. *Winter*, 555 U.S. at 20. The FEC had the opportunity to opine on the legality of Plaintiffs' activities and failed to issue an advisory opinion. *Cf.* 52 U.S.C. § 30108(a)(1). The Commission will suffer no legally cognizable burden from having this Court now step in to determine the likely legality of Plaintiffs' Intended Transactions. Moreover, since the Intended Transactions are legal, *see supra* pp. 11-12, the Commission will suffer no hardship from an injunction barring it from investigating plaintiffs, commencing administrative proceedings against them, or imposing civil or criminal sanctions on them for engaging in those transactions. Conversely, the Plaintiffs will suffer substantial harm from either continuing to abstain from their political association and speech, or facing the prospect of the Commission or a private party targeting them for engaging in those activities, commencing administrative proceedings, and imposing civil fines or even referral for criminal prosecution. *See Unity08*, 596 F.3d at 865 (emphasizing the D.C. Circuit's "reluctance to require parties to subject themselves to enforcement proceedings" to obtain adjudications of their rights, particularly "where, as here, First amendment rights are implicated and arguably chilled"); *see also Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (same).

Finally, a preliminary injunction is not against the public interest. The public has a strong interest in having this Court mitigate the substantial chilling effect created by the FECA's pervasive complexities and ambiguities. *See Martin Tractor Co.*, 627 F.2d at 384-85; *see also Common Cause v. FEC*, 842 F.2d 436, 447 n.31 (D.C. Cir. 1988) (recognizing Congress' interest

in ensuring that the FECA does not "deter participation in the political process"); *cf. Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005) (recognizing that "federal campaign finance law is complex"). The FEC is generally responsible for performing this function by issuing advisory opinions that clarify the FECA's applicability to particular situations and provide "safe harbor" protection for those who rely on them. *See* 52 U.S.C. § 30108(c)(2). Given the FEC's failure to act, a preliminary injunction would further those important interests, promote Plaintiffs' participation in the political process, and enforce First Amendment values.

CONCLUSION

For these reasons, this Court should issue a preliminary injunction prohibiting Defendant; its officers, agents, employees, and attorneys; and other persons acting in active concert or participation with the Defendant, from investigating Plaintiffs, commencing administrative proceedings against or concerning Plaintiffs, imposing civil fines or other sanctions on them, ordering them to unwind or reverse the transaction, or making a criminal referral of Plaintiffs, because:

(i) McCutcheon and/or MFF transfers the $50,000 of McCutcheon's personal funds in MFF's account to the LNC's general treasury; or

(ii) McCutcheon deposits or transfers any amount of additional funds in MFF's account, and McCutcheon and/or MFF subsequently transfers such funds, in any amount, to either the LNC's or RNC's general treasury.

Respectfully submitted,

Dated September 4, 2020

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