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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARTER-MONDALE REELECTION COMMITTEE, et al.,	:	
Petitioners,	:	
v.	:	
FEDERAL ELECTION COMMISSION,	:	
Respondent,	:	
and	:	Case No. 80-1842
REAGAN FOR PRESIDENT GENERAL ELECTION COMMITTEE,	:	
and	:	
RONALD REAGAN,	:	
Applicants for Intervention.	:	

MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTIONS FOR STAY PENDING REVIEW AND PENDING CONSIDERATION OF PETITION FOR A WRIT OF MANDAMUS, PROHIBITION OR INJUNCTION

Of Counsel:

JONATHAN C. ROSE
STEPHEN W. BROGAN
ROBERT F. McDERMOTT, JR.
JANET L. MILLER
ROBERT C. WEBER
MARY LOUISE WESTMORELAND

JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

PATRICK F. McCARTAN
JAMES R. JOHNSON
1735 Eye Street, N.W.
Washington, D.C. 20006

Attorneys for Reagan for President General Election Committee and Ronald Reagan

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INTRODUCTION

The case and the issues before this court are unique. Shorn of technical nicety, the case involves nothing other than an attempt by the likely Democratic Party nominee for President to prevent the Republican Party nominee from conducting his campaign for the Presidency. The vehicle chosen by the incumbent President is, ironically enough, the federal election laws which were enacted by Congress to ensure that the American electorate was presented with a fair and free choice in Presidential elections.

It is, however, not contemplated or permissible under the United States Constitution or the statutes involved that one major party candidate be permitted to deposit a collection of unverified newspaper articles with the Court and thereby prevent his opponent from conducting his campaign. Nor is it contemplated or permissible under the Act for one candidate to enlist the judicial branch as a tool of his campaign strategy.

In the political campaign context, the Supreme Court has expressly and realistically held that the expenditure of money is the equivalent of the ability to engage in political speech, Buckley v. Valeo, 424 U.S. 1, 19 (1976). The Supreme Court has also noted that, "timing is of the essence in politics." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 162 (1969). To enter a stay of even the most

limited duration in a case so pregnant with first amendment considerations based on the unsworn innuendo filed by Petitioners is simply impermissible. As Justice Black stated in a similar context, "every moment's continuance of [restraint on speech] amounts to a flagrant, indefensible, and continuing violation of the First Amendment." New York Times Co. v. United States, 403 U.S. 713, 715 (1971).

STATEMENT OF THE CASE

On July 23, 1980, petitioners Carter-Mondale Reelection Committee ("CMRC"), the authorized campaign committee supporting the candidacies of President Carter and Vice President Mondale, and the Democratic National Committee ("DNC") instituted this action by the filing of a Petition for Review, Petition for a Writ of Mandamus, Prohibition or Injunction, Motions for Stays pending this Court's consideration of the foregoing petitions, and a supporting memorandum. The gist of Petitioners' pleadings is that the Federal Election Commission (the "FEC" or "Commission") may not certify Ronald Reagan, the Republican party presidential nominee, as eligible to receive federal campaign funds until it first considers and resolves an administrative complaint recently filed with the FEC by the Petitioners themselves against

Governor Reagan and cetain other parties.*/ This administrative case is styled Carter-Mondale Reelection Committee v. Ronald Reagan, et al., MUR 1252 (Federal Election Commission).

Petitioners also request this Court to take the unprecedented step of restraining the FEC from certifying to the Secretary of the Treasury that Mr. Reagan qualifies for federal campaign funds pursuant to the Fund Act. Petitioners are not entitled to a stay or any other form of relief, however, because a denial of certification and funds to Governor Reagan, even if temporary, would violate his first amendment rights as a prior restraint, is contrary to the plain language and clear policy of the Acts, would require this Court to invade the primary and exclusive jurisdiction of the FEC, would work irreparable harm on the Reagan campaign and would adversely affect the public interest.

Petitioners' administrative complaint was filed on July 2, 1980, and names as respondents Ronald Reagan, his authorized campaign committee, the Republican National Committee and several unauthorized political committees which

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*/ The pertinent statutes are the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. (1976) (the "Campaign Act") and the Presidential Election Campaign Fund Act, as amended, 26 U.S.C. § 9001 et seq. (1976) (the "Fund Act"). (The Campaign Act and the Fund Act are collectively referred to as the "Acts").

have expressed support for Governor Reagan.*/ In that administrative complaint, which is supported only by extracts or articles from the media and one affidavit admittedly not based on personal knowledge, Petitioners allege that expenditures made by certain unauthorized political committees which have announced support for Reagan and other candidates must be attributed to Reagan under the Acts because the persons in control of those committees may be "working in parallel" with the authorized Reagan campaign. See ¶ 4 of the Robert S. Strauss Affidavit, incorporated in Exhibit A.**/

Not having been successful to date in their attempt to gain FEC assurance that it will refuse to certify Governor Reagan because of his opponent's complaint, and apparently not willing to file their Petitions for Review in the manner

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*/ The administrative complaint was apparently filed by Petitioners with this Court as a public document, in contravention of the FEC's confidentiality regulations. 11 C.F.R. § 111.21.

**/ While Petitioners' counsel candidly admitted in a letter to the FEC that a denial of campaign funds to Reagan was the "principal relief" being sought by the Petitioners from the FEC, Petitioners also requested the FEC to investigate its charges immediately and, in general, to grant its complaint expedited treatment, which request was denied. On Friday, July 18, 1980, Reagan did in fact submit his request for federal funds to the FEC. (Mr. Reagan's request was attached by Petitioners to their papers as part of their Exhibit B.).

authorized and required by 26 U.S.C. § 9011, Petitioners now approach this Court, making essentially the same claims they had made in their administrative complaint and requesting precisely the same "principal relief" -- a denial of federal campaign funds to the sole major party candidate opposing their candidate.

Petitioners admit in their papers that their claimed right to relief in this Court undeniably requires the Court to make some type of finding regarding the validity or bona fides of the allegations which Petitioners have made in the administrative complaint. The Court, however, is expressly not permitted to make such findings, for Congress has stated that any action regarding the substance of complaints of election law violations is within the primary exclusive jurisdiction of the FEC, and not the Courts.

As set forth in detail below, the theories advanced by Petitioners in support of their request for extraordinary relief are based upon a construction of the Act which would violate the first amendment and which is supported neither by the language of the Acts themselves or the Congressional purpose underlying them. Petitioners are not entitled to the extraordinary relief which they seek from this Court, for they cannot satisfy even one of the four necessary requirements which must be met before such relief will issue.

They are unable to establish that they have any probability of success on the merits of their claim, let alone that degree of probability of success which is required by the case law, for the construction of the Acts underlying their argument is not supported by the statutory language and, more importantly, would result in the imposition of a prior restraint on Governor Reagan's speech. They are unable to establish that they will be irreparably injured absent the requested relief. They are unable to establish that issuance of the requested relief will cause no undue or substantial harm to Governor Reagan. Finally, they are unable to establish that the requested relief -- which would, for the first time in memory, constitute a judicially ordered interruption of a major party candidate's campaign efforts for the office of President -- is compatible in any way with the public interest.

ARGUMENT

When, As In This Case, Extraordinary Relief Is Requested Which Will Irreparably Impair The Right Of A Major Party Nominee To Campaign For The Presidency, Strict Adherence To The Statutory Command And To The Traditional Requirements For Such Extraordinary Relief Is Mandated.

The issuance of extraordinary interim relief, such as a stay, temporary restraining order or preliminary injunction is never a matter of right but is, instead, a most unusual remedy reserved for those extraordinary cases in which the

petitioner's right is clear and the remedies available through the normal judicial process are inadequate. See, e.g. Dorfman v. Boozer, 134 U.S. App. D.C. 272, 277-278, 414 F.2d 1168, 1173-4 (D.C. Cir. 1969).

The decision whether such relief is justified requires a careful balancing of interests and a consideration of the effects of issuance or nonissuance for all concerned. The courts, therefore, have developed a strict and formidable four pronged test which must be met by a party seeking such relief:

> It is well established, as a general rule, that in order to obtain preliminary injunctive relief, the moving party must satisfy four prerequisites, viz: (a) a strong showing of probability of success on the merits; (b) irreparable injury in the absence of preliminary relief; (c) absence of substantial harm to others if relief is granted; and (d) compatibility of the relief requested with the public interest. Mackay v. Hoffman, 403 F. Supp. 467, 470, (D.D.C. 1975), citing Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

Accord, Sampson v. Murray, 415 U.S. 61 (1974); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 222, 559 F.2d 841, 843 (D.C. Cir. 1977); Jacksonville Port Authority v. Adams, 181 U.S. App. D.C. 179, 180, 556 F.2d 52, 57 (D.C. Cir. 1977).

Here, where the issuance of the requested relief threatens to destroy the right of a major party nominee to

campaign for the Presidency and to remove his right to political speech in a national campaign, each of the four prongs of this accepted test has particular urgency and requires close scrutiny. Petitioners fail to meet even one of these prongs, and the requested relief therefore should be denied.

A. There Is No Likelihood That Petitioners Can Succeed On The Merits Of Their Claim Because Their Construction of the Acts Would Violate The First Amendment, And Is Contrary To Both The Express Statutory Language And Legislative Intent.

To meet the first prong of the test for obtaining preliminary relief, Petitioners must show a "substantial likelihood" or "strong showing of probability" of success on the merits of their claim that the FEC cannot certify a major party candidate while an administrative complaint, filed by his election opponents, is pending before the FEC. See Delaware & Hudson Railway Co. v. United Transportation Union, 146 U.S. App. D.C. 142, 450 F.2d 603 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971); District 50, United Mine Workers of America v. International Union, United Mine Workers of America, 134 U.S. App. D.C. 34, 412 F.2d 165 (D.C. Cir. 1969); International Association of Machinists & Aerospace Workers v. National Railway Labor Conference, 310 F. Supp. 905 (D.D.C. 1970). To satisfy this test, Petitioners must demonstrate far more than a mere possibility that they might prevail in their ultimate claim.

Not only must they demonstrate that the FEC may, if it chooses, consider pending enforcement matters as relevant to certification decisions, but also that there is a substantial likelihood or strong probability that, as a matter of law, it must do so. This the Petitioners cannot do, because such a construction of the Acts would run afoul of the first amendment and constitute a prior restraint, and is wholly unsupported by the statutory language.

(i) The relief requested will abridge first amendment rights and is not authorized by the acts.

The firmly expressed Congressional intent that the certification process not act as a bar to political speech for serious candidates was recognized by the Court of Appeals in Committee to Elect Lyndon LaRouche v. FEC, 613 F.2d 834 (D.C. Cir. 1979) cert. denied 100 S. Ct. 1019 (1980), a case relied upon heavily by Petitioners. In LaRouche, the Court construed the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 et seq. (the "Primary Act") and, recognizing the "important impact" of the certification process upon a candidate's first amendment rights, held, inter alia, that the Commission could not delay a certification under the Primary Act, or investigate the supporting documentation to a candidate's certification submission, unless that material contained patent irregularities which, reviewed under strict and objective statutory

standards, suggested a possibility of fraud. In LaRouche the Court held that because of the impact the certification process has on the exercise of first amendment rights, any action taken by the Commission must be subject to the exacting scrutiny required by the first amendment:

> The certification decision has an important impact on the exercise of first amendment rights; inasmuch as campaign funds "are often essential if 'advocacy' [of belief and ideas] is to be truly or optimally 'effective.' 613 F.2d at 844, citing Buckley v. Valeo, 424 U.S. at 65-66.

The LaRouche court's analysis clearly demonstrates that a denial of certification cannot be sustained without a compelling governmental interest, the presence in the statute of objective and narrowly defined standards against which the propriety of FEC action can be determined and the absence of less restrictive alternatives. Indeed, the Court characterized its ruling as but a "limited exception" to the general rule that the FEC may not go beyond the face of a candidate's certification submission. Basing its decision upon the unique policies behind the Primary Act (i.e., to prevent federal funds from being distributed to non-serious candidates in primary elections), the statutory language requiring a candidate claiming funds under the Primary Act to "establish his qualifications," and the fact that a broader interpretation of the statute or the FEC's authority could be

constitutionally impermissible as a prior restraint on the exercise of first amendment rights, it held that the FEC could require the candidate to include in his certification submission the supporting documentation which established that the candidate had indeed raised the $5,000 threshold amount in at least 20 states.

In many respects, LaRouche provides a direct and instructive analogy to the present matter, for in LaRouche, the Court held that no investigation of the correctness of a candidate's certification submission could delay the certification process unless, because of objective standards present in the Act itself, the FEC had before it -- in the candidate's submission materials -- evidence of the possibility of fraud against the government. Notably, the Court in LaRouche also held that it was an error for the FEC to have begun an investigation of LaRouche's eligibility for matching funds during the certification process because the evidence before the FEC, disturbing as it was, still did not suggest the possibility of fraud. As discussed more fully below, the certification criteria under the Fund Act are completely different from those in the Primary Act in that they require certifications by a candidate as to conduct in futuro. Section 9005 of the Fund Act, unlike the provision involved in LaRouche, also provides no objective standards which could be employed by a court to review FEC action and, if

some "establishment" element were read in, would unreasonably require a candidate to prove a negative.

(ii) The statutory language does not permit the construction urged by petitioners.

The language of the Fund Act clearly provides that once a major party candidate has "met all applicable conditions for eligibility . . . set forth in Section 9003," the FEC "shall certify" to the Secretary of the Treasury that such candidate is "entitled" to receive payments. 26 U.S.C. § 9005(a) (emphasis added). Under 26 U.S.C. § 9003, the only requirements which a major party candidate must meet in order to be considered an "eligible candidate" are (1) that he "agree" to furnish the Commission with certain reports and evidence and to permit an audit and examination by the FEC; and (2) that he "certify" that he will not incur qualified campaign expenses in excess of the aggregate amount of payments received, and that he has not and will not accept contributions to defray qualified campaign expenses.*/

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*/ Under 26 U.S.C. § 9005, the FEC is to certify the amounts to which eligible candidates are entitled under 26 U.S.C. § 9004. Section 9004(d) requires that, to be eligible to receive payments, the candidate must also certify that he will not knowingly make campaign expenditures from his personal funds in excess of $50,000. Thus, the last phrase of 26 U.S.C. § 9005(a) relating to "entitlement" under § 9004 incorporates by implication another certification statement which must be executed for certification.

Once the major party candidate submits the statutorily mandated statements in proper form, he is "eligible" to receive payments.*/

The Fund Act further provides that "eligible candidates of each major party," i.e., those who have met the requirements relating to major party candidates in § 9003, "shall be entitled" to payments of federal campaign funds. 26 U.S.C. § 9004(a) (emphasis added). Hence, once the eligibility requirements of § 9003 are met, a major party candidate has a statutory entitlement to campaign funds and the FEC, within 10 days, "shall certify" that major party candidate to the Secretary of the Treasury for "payment in full" of the appropriate amounts. 26 U.S.C. § 9005(a). The Secretary of the Treasury then "shall pay" those amounts to the candidate. 26 U.S.C. § 9006(b). See also, 11 C.F.R. §§ 141.1-143.3 (1980).

The Congressional intent to ensure streamlined certification processes in general elections and prompt payment of funds to serious candidates such as major party nominees, is well expressed in the Senate Report accompanying the 1974 amendments:

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*/ The term "eligible candidate," used in § 9005, is defined in the Fund Act to mean those persons who have met the conditions set forth in § 9003. 26 U.S.C. § 9002(4).

> Once someone becomes an unquestionably serious candidate, by virtue of his being a major party nominee, he should be assured of adequate financing to run a fully informative and effective campaign. [However], the use of matching payments is appropriate in the primary phase, . . . when it does not yet clear who may be the serious candidates and who may be frivolous ones. But such a scheme, or partial funding, in the general election would require candidates who have established their legitimacy to devote too much time and endless fundraising at the expense of providing competitive debate of the issue for the electorate. S. Rep. No. 689, 93rd Cong., 2d Sess. 6 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 102 (1977) (hereafter cited as "1974 History") (emphasis added). */

As is plain from this rather straightforward statutory process, there is no allowance in the Fund Act for factors other than the major party candidate's compliance with § 9003 to affect the determination of whether a major party candidate is "eligible" or "entitled" to receive federal campaign funds.**/ That these statutory provisions do in fact mean

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*/ Recognizing the fact that major parties have established stability over the years, the Fund Act creates further preferences in favor of major party candidates. For example, the funds allocated to major party candidates are to be equal, while those allocated to minor party candidates are determined only by relative strength of popularity. S. Rep. No. 689, at 12-13, supra, reprinted in 1974 History at 108-109.

**/ Congress in 1974 considered the possibility of requiring presidential candidates to submit documentary evidence to the FEC supporting their certification submission, but eliminated such a provision from the bill before passage: "The amendment . . . eliminated the procedure under which candidates were required to submit records

[Footnote continued on next page]

what they so plainly say is further established by the case law. While no case has ever presented this specific question under the Fund Act, the cases which have commented upon the qualifying factors and requirements for a major party candidate's eligibility have not even adverted to any factors or criteria which could affect a major party candidate's eligibility other than those expressly set forth in § 9003. See, e.g., Republican National Committee v. FEC, CCH Fed. Elec. Campaign Fin. Guide ¶ 9101 (S.D.N.Y. 1979); Republican National Committee v. FEC, 461 F. Supp. 570, 572-573 (S.D.N.Y. 1978).

[Footnote continued from previous page]

of expenses and proposed expenses in order to obtain certification . . . for payment." H. Rep. No. 1239, 93rd Cong., 2d Sess. 33 (1974), reprinted in 1974 History at 667; H. Conf. Rep. No. 1438, 93rd Cong., 2d Sess. 107 (1974), reprinted in 1974 History at 1051.

The Court of Appeals has read a requirement of minimum record production into the certification provisions of the Primary Act, no doubt in response to the differing policies animating the Primary Act (i.e., the need to prevent payments from going to frivolous candidates) and the significantly different nature of the matters to which a candidate must certify under that statute (i.e., in contrast to the primarily in futuro nature of the general election certification required under the Fund Act, the Primary Act requires a candidate to certify to matters such as his receipt of at least $5,000 in contributions from residents of at least 20 different states, none of which individual contributions can exceed $250.) See Committee to Elect Lyndon LaRouche v. FEC, 613 F.2d 834 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 1019 (1980).

(iii) The overall structure of the acts' enforcement provisions belies petitioners' claim that FEC certification decisions can be controlled or affected by matters alleged in pending administrative complaints.

The clear meaning of the statutory language is also bolstered by a careful examination of the structure of the enforcement mechanism which Congress fashioned. The overall structure of the Acts reveals that the certification and enforcement processes were created and meant to operate independently of each other and that the enforcement process was not to impede the certification of major party general election candidates for federal campaign funds. The enforcement process created by Congress requires the FEC to notify the person named in a complaint and give him an opportunity to respond before it "conducts any vote on the complaint, other than a vote to dismiss." 2 U.S.C.A. § 437g(a)(1). The Acts therefore require that an opportunity for response be given the respondent prior to any investigation, or any FEC determination, other than a simple dismissal. Since no action on a complaint other than dismissal may be taken by the FEC prior to its receipt of the response, the delay or denial of certification at a time when the FEC has not received a response would clearly run counter to the Congressional intent, as well as the clear language of the statute.

The Campaign Act mandates that an investigation of a complaint be made only if, after receiving the response, the FEC determines under § 437g(a)(2) that it has "reason to believe" a violation has been or is about to be committed. Nothing in the Act suggests that the FEC can take interim action on a complaint or shortcut the statutory timetable for the enforcement processes. See Hampton v. FEC, CCH Fed. Elec. Campaign Fin. Guide ¶ 9036 (D.D.C. 1977) at 50,440 n.16. ("[T]he [Campaign Act] appears to contain no provisions for the expedited consideration of complaints filed with the Commission.") Indeed, upon completion of the investigation, the Campaign Act requires that the respondent be notified of the results of the investigation and be given yet another opportunity to respond.

If the Commission then determines, by affirmative vote of 4 of its members, that there is "probable cause" of a violation, the Commission "shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion." 2 U.S.C. § 437g(a)(4)(A)(i). This provision requires the Commission to undertake negotiations before initiating a civil action and requires those negotiations to be held for at least 30 days, unless an election is imminent. Significantly, the Campaign Act states that this process must be

used to "correct or prevent" any violation. 2 U.S.C. § 437g(a)(4)(A)(i).*/

Contrary to Petitioners' claim, the legislative history of the enforcement provisions illustrates that this detailed enforcement procedure was not to be truncated or abandoned simply because of the pendency of a request for certification. The purpose of the detailed enforcement provisions was three-fold: to permit all investigations to be conducted as expeditiously as advisable given the delicate nature of alleged elections law violations; to limit unjustifiable litigation burdens that might otherwise be imposed on the courts and on the individuals against whom charges were filed, and to ensure non-partisan administration of the law. S. Rep. No. 677, 94th Cong., 2d Sess. 7 (1976), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 at 283 (1977) (hereinafter cited as "1976 History"); H. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976), reprinted in 1976 History at 804.

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*/ The Commission does have discretion to seek extraordinary relief from the courts in the event it determines that a violation has occurred or is about to occur which is of such a magnitude that the interests of the public would be greatly affected. In such a case, the Commission may "institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order," upon a vote of four members finding "probable cause," and after proceeding through the regular FEC procedures. 2 U.S.C. § 437g(a)(6)(A).

As these purposes may conflict at times, the balance created by the Congress must be observed by the Courts in order to effectuate the goals of the statute. Thus, "[t]he Commission must conduct all investigations expeditiously," H. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 45 (1976), reprinted in 1976 History at 1039, but "is required to make every endeavor to correct or prevent the [alleged] violation by informal methods prior to instituting any civil action." S. Rep. No. 677 at 7, supra, reprinted in 1976 History at 283 (emphasis added). As stated in the House Report:

> [T]he substantial civil remedies provided represent a delicate balance designed effectively to prevent and redress violations, and to winnow out, short of litigation, insubstantial complaints and those matters as to which settlement is both possible and desirable. H. Rep. No. 917 at 4, supra, reprinted in 1976 History at 804. */

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*/ Noting the tension between the purposes embodied in the Campaign Act, Representative Hays further commented that:

> [T]he Commission should be accorded the independent powers necessary to enforce the law promptly and efficiently but subject to effective safeguards to assure that the Commission does not thwart the legislative will, or disregard the congressional determination that speedy settlement of complaints is preferable to the time-consuming and expensive process of litigation. [T]he mandatory conciliation procedure [embodies] these judgments. 122 Cong. Rec. H3778 (daily ed. May 3, 1976), reprinted in 1976 History at 1078 (emphasis added).

In addition to the many statements made by the Congress regarding the exclusive remedies provided by the Campaign Act, it is a basic legal principle, and one with full application to the election laws, that "precisely drawn [and] detailed [statutory provisions] preempt more general remedies." Walther v. Baucus, 467 F. Supp. 93, 94 (D. Mont. 1979), quoting from Brown v. General Services Administration, 425 U.S. 820, 833 (1976). The remedies available for alleged violations of the election laws are the precisely drawn and detailed statutory provisions discussed above.*/ Despite the specificity of these procedures and remedies, and despite Congress' painstaking considerations of these matters, Congress itself never created any interlock between the enforcement mechanism and the certification process so as to prevent certification of a major party general election candidate because of enforcement related matters. Since denial or

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*/ Not only did Congress consider the remedies to be exclusive, but it also considered them sufficiently varied to provide the Commission with all necessary flexibility to resolve any alleged compliance failures. See e.g., 122 Cong. Rec. S3517 (daily ed. March 16, 1976) (remarks of Sen. Cannon), reprinted in 1976 History at 349. ("In addition to exclusive civil enforcement authority, the bill gives the Commission a more varied assortment of enforcement powers . . . . The detailed enforcement procedures . . . will give the Commission a greater number of alternatives in enforcing the law, and at the same time afford a person who makes a good-faith attempt at compliance with the complex requirements of the act a greater degree of protection than presently available.")

delay of certification is not mentioned as one of the exclusive remedies available for alleged or proven violations of the election laws, such relief cannot be given to the Petitioners.

(iv) Petitioners' construction of the act runs directly counter to the policies underlying the acts.

In enacting the federal election laws, one of the Congress' primary concerns was the assurance of prompt payment of funds to serious presidential candidates so that these candidates could communicate their stand on the issues to the electorate. Such prompt payments would eliminate the necessity of the candidates "scrounging for funds to bring [their] case to the electorate", 120 Cong. Rec. S18539 (daily ed. October 8, 1974) (remarks of Sen. Humphrey), reprinted in 1974 History at 1093, and would permit all concerned to focus their attention on the issues. The Supreme Court itself acknowledged the importance of uninterrupted funding to the overall statutory scheme when, after striking down that part of the Campaign Act dealing with the composition of the FEC, the Court stayed its decision to give the Congress a 30 day grace period in which to reconstitute the FEC before its authority would lapse. Buckley v. Valeo, 424 U.S. 1, 216 (1976).

In the wake of Buckley, Congress received and reviewed a great deal of evidence regarding the potentially disastrous

effects upon election campaigns if the certification process somehow delayed prompt payment of federal funds to serious candidates. See, e.g., Federal Election Campaign Act Amendments, 1976: Hearings on S.2911, S.2912, S.2918, S.2953, S.2980 and S.2987 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 148-150, 156-157, 167-169 (1976) (hereafter cited as "1976 Hearings"), reprinted in 1976 History at 154-156, 162-163, 173-175 (Statements of Comptroller General Staats, FEC Commissioner Harris and Common Cause Vice-President Wertheimer); 122 Cong. Rec. S6366 (daily ed. May 3, 1976) (Remarks of Sen. Hatfield), reprinted in 1976 History at 1092. The remarks submitted to the Congress by Robert Strauss, then Chairman of the Democratic National Committee and now Chairman of one of the Petitioners, are of particular interest on this vital point. Because of Mr. Strauss' long experience in the political arena, and his well publicized role as an active supporter of the Acts, those remarks bear quotation at greater length:

> My responsibilities as Chairman of the Democratic National Committee, make me focus on the incalculable problems faced by my presidential candidates as long as the status of the FEC remains in question. Most of our candidates cannot sustain even a lapse of a few days in the payment of federal matching funds. Many of our campaigns are operating on a day-to-day cash flow. A time lapse in the certification and distribution of federal funds could be so disruptive to the political process

> that it could have a dangerous impact on the outcome of both the Democratic and Republican Presidential nominating systems. This must be avoided. 1976 Hearings at 205, reprinted in 1976 History at 211.

Chairman Strauss' comments, generously and fairly directed to both major parties in a non-partisan spirit, were correct and forceful in regard to the "dangerous impact" of fund cut-offs upon primary election candidates who still had access to privately-raised matching funds. They are far more correct and forceful when applied in the context of a general election for president, when one candidate is requesting that there be a total fund cutoff to his only major party opponent.

Furthermore, Petitioners' argument assumes, without more, that the policies of the federal election laws would be well served if the FEC or the Court found itself empowered to delay general election certification of major party candidates for the presidency because of the existence of a pending administrative complaint. This argument not only sorely misreads the Congressional purpose and intent, as described above, but it also would lead to a situation which would prove wholly unworkable. If certification determinations could be delayed or controlled by factors unrelated to the candidate's certification submission itself -- factors such as, for example, hearsay allegations by his political opponents to the effect that the candidate may, because of

the actions of others, eventually be deemed to be in violation of the federal election laws -- the major party certification process, intended to be a "clear" and "easy" means for funding campaigns,*/ would be distorted beyond recognition.

Congress, surely the governmental body most sensitive to the uses and misuses of politics, was well aware that the political climate would be particularly ripe for the filing of complaints as elections drew near. Although some complaints filed against a candidate by his opponent at a critical point of an election campaign can, no doubt, be well-founded, political strategy might cause some persons to file complaints in the hopes of creating negative publicity for an opponent's campaign, raising questions as to the opponent's integrity, or desiring to upset his campaign by seeking to cut off his access to federal funds. By separating the statutory mechanisms to be applied to the certification and enforcement processes, Congress attempted to isolate the area of the statute which was peculiarly vulnerable to political influence and partisan abuse (i.e., charges of election law violations), from the vital certification and funding provisions. Because the Act permits any person, not

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*/ See 1976 Hearings at 132 (statement by Assistant Attorney General Antonin Scalia), reprinted in 1976 History at 138.

only a major party candidate's general election opponents, to file a complaint with the FEC, Petitioners' argument would subject the entire certification process -- and thereby the nation's presidential election process -- to abuse at the caprice of any person who, for whatever reason, decided to file a complaint raising "substantial questions regarding a candidate whom he disliked at a particularly critical moment in the campaign.*/

Not only would such an eventuality lend itself to wholesale political exploitation of the Acts' procedures, it would inevitably require the courts to do that which Congress did not want them to do, i.e., become involved in some type of review and analysis of administrative FEC complaints during the 120-day period in which the FEC has exclusive and primary jurisdiction over such matters. In other words, Petitioners' requests that the Court enjoin the FEC because of the pendency of their FEC complaint will require the Court to review that complaint and make some judgments, however preliminary, as to whether its potential merits are of a type

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*/ Cf. An Analysis of The Impact Of The Federal Election Campaign Act, 1972-1978, Institute of Politics, John F. Kennedy School of Government, Harvard University, (October 1979) (hereafter cited as "Kennedy Institute Report"), prepared for the House Committee on Administration, which noted that "[a]n inherent danger of applying regulatory law to electoral politics is the prospect that an intrusive agency will shape electoral outcomes."

as would justify the disruption of the nation's presidential election process by the withholding of $29.4 million in federal campaign funds to which the Republican party's nominee is statutorily entitled. As set forth in the following section, the FEC's exclusive and primary jurisdiction precludes the Court from undertaking such inquiry and from making such judgment.

> (v) Petitioners' right to relief in this court depends, as they admit in their papers, upon a determination by this court that there is some merit to their administrative complaint and that it raises "substantial questions," and this court is, therefore, being asked to invade unlawfully the primary and exclusive jurisdiction of the FEC.

Because the regulation of federal campaign funding controls the very basis of the nation's democratic society -- elections -- Congress has devoted a great deal of time and attention to the overall statutory framework of the election laws and to the mechanism created for their enforcement. Indeed, since their initial passage, the Acts have been subjected to a continuing process of careful Congressional review, amendment, re-amendment, and "fine-tuning." The end result of this process has been the creation of a comprehensive regulatory scheme which not only sets forth a series of restrictions upon candidates for federal office and their supporters, but which also provides a detailed and specific mechanism for the investigation and enforcement of any

claimed violations of these strictures, and the ultimate review by the courts of administrative action.*/ The "principal relief" sought by Petitioners from this Court would require the Court to usurp the authority to rule upon election law matters from the body in which Congress specifically chose to place such matters, and would constitute an unlawful exercise of jurisdiction. The linchpin to Petitioners' argument is that the Court can award the requested relief because of the administrative complaint.

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*/ The ultimate standard of review of final FEC action to be utilized by an appellate court is limited to a correction of agency action that is "arbitrary and capricious." Under such a standard, the court must review the agency's decision in light of the relevant factors the agency considered. See e.g. F.P.C. v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976). Upon eventual review of an FEC certification, a court will consider the certification documents and all supporting materials and reports submitted by the candidate to determine whether those materials satisfy the requirement of § 9003.

LaRouche does not require a different conclusion. The court in LaRouche expressly recognized that the scope of its review was limited to a determination of whether the Commission's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 613 F.2d at 844. In accordance with the statutory limitation on the scope of its review, the LaRouche court made a careful, but necessarily limited, review of the FEC's action, considering only the decision of the FEC and the documents upon which the FEC based its decision. Significantly, the court in LaRouche held that the FEC could not look beyond the face of the materials unless they contained "patent irregularities." If the FEC may not go beyond the face of the document for purposes of certification, certainly a reviewing court cannot go beyond its face to determine whether the decision made by the FEC was arbitrary and capricious.

Because they well realize that the mere existence of an administrative complaint cannot be enough to upset the straightforward certification process, their theory requires the Court to exercise some judgment as to the merits of their complaint, and to enter a stay because they have raised "substantial questions" as to whether the laws have been violated. As set forth below, however, such judgments cannot be made by the Court.

One of the keystones of this entire statutory structure is found in Congress' decision to vest the FEC with exclusive and primary jurisdiction over the enforcement of the Acts and the handling of complaints of violations made thereunder. As Representative Hays, one of the principal sponsors of the Acts and Chairman of the Committee on House Administration, stated, this grant of exclusive primary jurisdiction to the FEC "should be read generously," and was intended "to centralize administration in the FEC to the maximum possible extent." 122 Cong. Rec. H3778 (daily ed. May 3, 1976), reprinted in 1976 History at 1078. That this decision to vest the FEC with exclusive jurisdiction is fundamental to the structure of the entire statutory framework is apparent throughout the Acts themselves (see, e.g., 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e), 437g; 26 U.S.C.

§§ 9005, 9007, 9010(c)), as well as throughout the legislative history.*/

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*/ Indeed, the paramount importance of the FEC's primary and exclusive jurisdiction to the overall Congressional plan appears as a continuing theme in all of the pertinent legislative history. See, e.g., H. Conf. Rep. No. 1438, 93rd Cong., 2d Sess. 94 (1974), reprinted in 1974 History at 1038; S. Rep. No. 677 at 3, 6, 7, supra, reprinted in 1976 History at 279, 282, 283; H. Conf. Rep. No. 1057 at 32, 33, 35, 43, supra, reprinted in 1976 History at 1026, 1027, 1029, 1037. As Representative Hays explained, Congress desired "to centralize the authority to deal with complaints alleging on any theory that a person is entitled to relief because of conduct regulated by [the 1976 Amendments to the Campaign Act.]" 122 Cong. Rec. H3778 (daily ed. May 3, 1976), reprinted in 1976 History at 1078 (emphasis added). See also 120 Cong. Rec. H10328 (daily ed. October 10, 1974) (remarks of Rep. Brademas), reprinted in 1974 History at 1106. "[I]t was the intent of the conferees that the Federal Election Commission have primary jurisdiction in all election law matters and that persons, individuals or organizations who may have complaints about possible violations first exhaust their administrative remedies with the Commission." (emphasis added). (Exhaustion of administrative remedies is not, of course, a condition precedent in actions under 26 U.S.C. § 9011(b)(1) in those situations otherwise properly brought to "implement or construe" the Fund Act.)

That this primary and exclusive jurisdiction over matters relating to or bottomed upon alleged violations or compliance failures extends to both the Campaign Act and the Fund Act is made even more clear by the remarks of Senator Cannon, Chairman of the Senate Committee on Rules and Administration: "The bill gives the Commission exclusive and primary jurisdiction for the civil enforcement of the [Campaign Act] and of the public financing of Presidential campaigns." 122 Cong. Rec. S3517 (daily ed. March 16, 1976), reprinted in 1976 History at 349 (emphasis added). See also, S. Rep. No. 677 at 7, supra, reprinted in 1976 History at 283; H. Conf. Rep. 1057 at 43, supra, reprinted in 1976 History at 1037.

Particularly instructive on this very point is the fact that both the House and Conference Reports relating to the 1976 amendments specifically liken the FEC's primary and exclusive jurisdiction to that of the National Labor Relations Board, as construed by the Supreme Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242-3, 245 (1959). Using this analogy, the conferees stated that Congress intended that "all complaints bottomed on an alleged violation" are to be within the FEC's "exclusive competence," and that "all other tribunals must therefore yield to the primary jurisdiction" of the FEC in such matters. H. Rep. No. 917 at 4, supra, reprinted in 1976 History at 804; H. Conf. Rep. No. 1057 at 35, supra, reprinted in 1976 History at 1029 (emphasis added). Congress could hardly have expressed its intention more clearly. Petitioners' argument requires the Court to intrude into that process, and, this Court "must therefore yield to the primary jurisdiction" of the FEC.

Congress' insistence upon creating a Commission with exclusive jurisdiction reflects its clear intention to "[entrust] administration of the [election law] policy for the nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience...." H. Rep. No. 917 at 4, supra, reprinted in 1976 History at 804. The legislative

history makes it abundantly clear that all questions of election law violations were, as a primary matter, to be referred to an independent commission so as to insulate, insofar as possible, such matters from the pressures of politics, which pressures are so evident in Petitioners' pleadings. See, 120 Cong. Rec. H7831 (daily ed. August 7, 1974) (remarks of Rep. Culver), reprinted in 1974 History at 839; 120 Cong. Rec. H10330 (daily ed. October 10, 1974) (remarks of Rep. Hays), reprinted in 1974 History at 1108; H. Rep. No. 917 at 3, supra, reprinted in 1976 History at 803. ("It is therefore essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse....").

The re-creation of an independent FEC in 1976 after Buckley evinces the firm Congressional conviction that all such questions be determined as an initial matter not by the courts, the Congress, or the executive, but instead by an independent body specially created to have particular knowledge of and sensitivity to the inherently political questions raised by complaints claiming election law violations. For just as Congress recognized the dangers inherent in private financing of national campaigns, so too it recognized, and meant to ensure against, the possibility that its cure of an old ailment might lead to a new disease. Representative Seiberling aptly summarized the Congressional concern and

interest in this regard by stating that the creation of an independent commission with primary and exclusive jurisdiction would both "[protect] the public interest against improperly influenced elections and at the same time prevent the [statute] from being used to influence elections improperly." 120 Cong. Rec. H10330 (daily ed. October 10, 1974), reprinted in 1974 History at 1108. The Congressman's warning about the potential use of Congress' cure as a tool which could be misued to influence elections improperly speaks volumes in the context of the multi-forum assault which Petitioners are currently mounting to prevent President Carter's only major party opposition from receiving federal campaign funds.

The FEC's exclusive primary jurisdiction over any claims to or theories of relief bottomed upon violations of the Act, admits of but a few, very discrete, exceptions, none of which justify or permit the type of "end-around" which has been called by Petitioners. The only significant limits which Congress found necessary to place upon this broad grant of exclusive authority were the limitation of the exclusive nature of FEC jurisdiction to a period of no more than 120 days from the date an administrative complaint is filed, 2 U.S.C. § 437g(a)(8)(A), and the availability of a judicial remedy once this period expires or the FEC otherwise takes final action on a complaint. 2 U.S.C. § 437g(a)(8); 26 U.S.C. § 9011.

Only if the Commission fails to act upon a complaint within that 120-day period may an action bottomed upon the matters in that complaint be brought by the aggrieved party in district court. 2 U.S.C. § 437g(a)(8). Within that statutory period, however, the FEC has virtually unlimited discretion as to whether it will investigate a complaint, and if so, how that investigation will be conducted, what priority it will be given, etc. Until such time as the statutory period has run its course, all decisions as to "such investigations are the exclusive domain of the FEC . . .," Walther v. FEC, 82 F.R.D. 200, 202 (D.D.C. 1979), and the judiciary has no jurisdiction to intrude into that process.

While Petitioners ask this Court to order the Commission to undertake an investigation of their charges, it is within the FEC's exclusive primary jurisdiction to determine whether a complaint should be the subject of an investigation. Pursuant to 2 U.S.C. § 437g(a)(2), a complaint may be investigated only if at least four members of the FEC have voted that there is "reason to believe" that the alleged violations have been or will be committed. Because this "reason to believe" and affirmative vote requirement must be satisfied before an investigation can be begun, it is clear that Congress did not intend for the FEC to investigate every complaint filed with it. It is also clear that the determination of whether that "reason to believe" does in fact exist

has been vested exclusively with the FEC. See, e.g., In re Federal Election Campaign Act Litigation, 474 F. Supp. 1044, 1046 (D.D.C. 1979).

In short, until such time as final FEC action is taken (such as a dismissal) or until the 120-day period has run its course, the courts have no jurisdiction over the FEC's conduct with respect to the handling of a complaint or with respect to the decisions being made or not made by the Commission. Petitioners' request that this Court enjoin FEC action on Reagan's certification would flatly require the Court to usurp the Commission's sole authority to determine whether any action should be taken because of or with respect to the Petitioners' administrative complaint and, if so, what nature of action was appropriate.*/

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*/ Congress did specifically consider the possibility that there would be instances when the public interest could require that a request be made to a Court for extraordinary relief, and it chose to place the authority to determine when such a request need be made in the FEC itself. Thus, in situations of gravity where the FEC deems that, because of the nature of the allegations in a complaint, some form of extraordinary relief is necessary, the FEC has been given express authority to seek such relief from the courts, after, inter alia, concluding, by an affirmative vote of at least four members, that there is "probable cause" to believe that a violation has occurred or will occur, and after first attempting to conciliate the matter administratively for a minimal period. 2 U.S.C. § 437g(a)(4)(5) and (6). Again, Congress made it clear that the decision of whether the public interest demanded that an attempt be made to obtain extraordinary relief was to be vested in

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The exclusivity of the FEC's primary jurisdiction over the enforcement of the Acts, over investigations of alleged violations, over the entire complaint handling process, and over decisions as to whether the public interest requires that interim relief be sought, all so clearly set forth in the Acts, has been firmly supported by the courts on those occasions when, as now, an attempt has been made by an allegedly aggrieved person to utilize a parallel judicial action for the purpose of seeking an order requiring the FEC to take certain action relating to the substance of or relief sought by an administrative complaint. See, e.g., In re Federal Election Campaign Act Litigation, 474 F. Supp. at 1045, supra. ("The issue of whether a particular charge merits an investigation is a sensitive and complex matter calling for an evaluation of the credibility of the allegation, the nature of the threat posed by the offense, the resources available to the agency, and numerous other factors. Congress has wisely entrusted this matter to the discretion of the Federal Election Commission and instructed the courts to interfere only when the Commission's actions are 'contrary to law.'"); Walther v. Baucus, 467 F. Supp. 93

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the sole discretion of its independent Commission. H. Rep. No. 917 at 63-64, supra, reprinted in 1976 History at 863-864; H. Conf. Rep. No. 1057 at 47, supra, reprinted in 1976 History at 1041.

(D. Mont. 1979). See generally, Cort v. Ash, 422 U.S. 66, 74-6 (1975); Gabauer v. Woodcock, 594 F.2d 662, 673 (8th Cir.), cert. denied, 444 U.S. 841 (1979) ("Congress has explicitly expressed its desire to have the FEC engage in methods of conference, conciliation and persuasion before litigation ensues over any federal election laws.... We should not permit circumvention of such negotiation under the guise of a parallel cause of action.") (emphasis added.)

The Petitioners' argument must be seen for what it is -- a dubiously motivated request that this Court interfere in proceedings which Congress has mandated are not to be interfered with by the courts at this point in time. As the Congress warned, "[i]t is therefore essential in this sensitive area that the system of administration and enforcement . . . does not provide room for partisan misuse or for administrative action which does not comport with the intent of the enabling statute." H. Rep. No. 917 at 3, supra, reprinted in 1976 History at 803. This case presents a paradigmatic example of the very type of partisan misuse of the Acts which Congress so forcefully decried. The Court should summarily reject Petitioners' request for a stay, and permit the FEC to proceed in its discretion with its administrative proceedings.

B. The Only Irreparable Harm Which Could Occur In This Case Would Be The Irreparable Harm Governor Reagan Would Suffer If A Certification Of His Eligibility To Federal Campaign Funds Is Enjoined.

Traditionally, the second prong of the test for extraordinary interim relief such as a stay requires the plaintiff to show that he will suffer irreparable harm in the absence of relief. In this case, however, it is Governor Reagan, not the Petitioners, who may suffer irreparable harm, and he will suffer that harm only if Petitioners are awarded the relief sought. Because an applicant for such relief is also required to show that the requested relief will not "wreak greater harm on the party enjoined," Petitioners' motion must be denied. Dorfmann v. Boozer, 134 U.S. App. D.C. 272, 277-279, 414 F.2d 1168, 1173-74 (D.C. Cir. 1969), citing District 50, United Mine Workers of America v. International Union, United Mine Workers of America, 134 U.S. App. D.C. 34, 412 F.2d 165 (D.C. Cir. 1969).

(i) A disruption in the timing scheduled for the distribution of funds would radically impair the Reagan campaign.

Any delay in the disbursement of federal election funds to Governor Reagan would not only cause him to lose campaign opportunities in the near future, but it would also impair his ability to engage in the long range planning neccessary to the conduct of a massive, national campaign. The Reagan campaign is now faced with the task of hiring a national

campaign staff, attempting to organize and obtain office space, phone banks, and other services vital to the conduct of a national presidential campaign. These tasks cannot, however, be presently accomplished because of the absence of campaign funds. Until these vital facilities and services are contracted for, the campaign cannot begin. Affidavit of William E. Brock, III ¶ 16, attached as Exhibit 1 ("Brock Affidavit ¶ 16"). Similarly, without funding, Governor Reagan will be able to make only the most limited campaign appearances, unlike the incumbents who carry the benefits of free travel and concomitant media coverage. Affidavit of Senator Paul Laxalt ¶ 8, attached as Exhibit 2 ("Laxalt Affidavit ¶ 8").

The consequence of disrupting Governor Reagan's ability to organize and develop a campaign strategy at this vital time would certainly continue to be felt throughout the campaign. (Laxalt Affidavit ¶ 19). In constructing a campaign strategy, a candidate, for example, must consider both questions of timing -- when he should spend his money -- and of technique -- which advertising media will be most effective. It is, however, impossible to develop a strategy in either respect without access to, or even assurance of, campaign funds.

This fact has been recognized by Petitioners and others sensitized to the American political process. Robert Strauss,

as Chairman of the Democratic National Committee, conceded this and aptly summarized the issue when he told the United States Senate, "[a] time lapse in the certification and distribution of Federal funds could be so disruptive to the political process that it could have a dangerous impact on the outcome of both the Democratic and Republican Presidential nominating systems." 1976 Hearings at 205, reprinted in 1976 History at 211. Surely the harm such disruption would cause would only be multiplied in the context of a general election.*/ (Laxalt Affidavit ¶ 10).

The uncertainty as to when, if ever, he would receive funds would also irrevocably damage Reagan's ability to utilize fully his advertising sources. It is generally recognized that mass media constitute "the most direct way to influence political participation." Republican National Committee v. FEC, CCH Fed. Elec. Campaign Fin. Guide ¶ 9101 (S.D.N.Y. 1979) Any productive mass media campaign requires,

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*/ Similar sentiments were expressed by Mr. Fred Wertheimer, an officer of Common Cause:

> The Federal Election Commission has established and implemented a system of certification of Presidential candidates and disbursement of public matching funds. These candidates have based their campaigns on the availability of public financing. Their ability to communicate with the voters and the other values noted by the Court is at stake. It is essential that the system of disbursement that is now in place not be replaced or interrupted. 1976 Hearings at 168, reprinted in 1976 History at 174.

however, a great deal of careful and skillful planning. If Governor Reagan's access to Federal funds is delayed, his ability to utilize this critical source of information dissemination will be limited, if not destroyed.

The pervasive nature of the harm that lack of campaign funds can cause was recognized by the Supreme Court in Buckley v. Valeo, 424 U.S. at 19. There, the Court's tacit recognition of the fact that an inability to purchase advertising media restricts a a candidate's basic ability to compete, led it to conclude that a limitation on spending is a limitation on speech. Restricting Reagan's access to federal campaign funds at the eleventh hour thus effectively curtails his ability to engage in "political speech" in a manner which the Supreme Court has ruled to be unconstitutional. The muzzling of a candidate, whether by depriving him of the right to speak or by depriving him of the means by which to exercise that right, leads to the same result -- his campaign, and the nation's political process, is necessarily and irreparably harmed.

(ii) Having chosen to forego private financing Governor Reagan no longer has a reasonable alternative to federal funds.

In a theoretical sense, the availability of federal funds does not preclude a general election candidate from choosing to finance his campaign from private sources. Even

a candidate who could have generated substantial funds from private sources cannot, however, having made the decision to rely on federal monies, shift to those private sources on short notice without severe dislocation of his campaign effort. (Laxalt Affidavit ¶ 10). In addition, a candidate who chooses to fund his campaign privately cannot qualify for federal funding. Therefore, were Reagan temporarily prevented from receiving federal funds, he would not be free to use private contributions to fund his campaign during that period.

The raising of private funds presents significant logistical problems, as well. Fund-raising is a time consuming process which in and of itself is quite expensive.*/ Not only would such a private fund raising effort preclude campaign expenditures in this very crucial "launching period," it also would require that already limited campaign resources and energies be diverted from a Presidential campaign to a fund-raising campaign. As discussed above, such a result would reintroduce into presidential politics all of the major problems the Congress wished to resolve in passing the Act -- the diversion of a candidate's attention from substantial campaign issues to fund raising issues.

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*/ See e.g. Kennedy Institute Report at 9.

(iii) Issuance of an injunctive order of any type would irrevocably "taint" the Reagan campaign with the appearance of impropriety.

The issuance of even a temporary stay in the context of a hotly contested Presidential election would irrevocably taint Ronald Reagan with the appearance of impropriety. Once labeled as having been cut off from federal funding, even temporarily, by the order of a federal court on allegations of violating the election laws, Governor Reagan -- faced with an electorate which has become increasingly anxious about, and attuned to, charges of corruption and "white collar crime" -- would bear a heavy and insurmountable burden even before the political issues facing the country were discussed. This would be true even if the Court, after a thorough examination of the facts, were subsequently to rule in Governor Reagan's favor on the merits, because by that time the damage -- in this case the widespread negative publicity -- would already have been completed. (Laxalt Affidavit ¶ 12). For this reason alone, the Court should be most reluctant to permit itself to be used as a political tool of the incumbent President's campaign.

(iv) Interim injunctive relief of any type and for any duration would unjustifiably deny Mr. Reagan his right of free speech guaranteed by the first amendment.

The Supreme Court in Buckley v. Valeo, supra, realistically and explicitly recognized that, in the context of a

general election campaign for the presidency, money is the equivalent of speech:

> A restriction on the amount of money a a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. Buckley v. Valeo, 424 U.S. at 19.

The Court of Appeals for this Circuit has specifically noted that the certification decision plays a critical role in the effectuation of first amendment rights:

> [t]he certification decision has an important impact on the exercise of first amendment rights; inasmuch as campaign funds "are often essential if 'advocacy' [of belief and ideas] is to be truly or optimally 'effective.' Committee to Elect Lyndon LaRouche v. FEC, 613 F.2d 834, 844 (D.C. Cir. 1979) quoting Buckley v. Valeo, 424 U.S. at 65-66.

As noted earlier, Governor Reagan has complied with the pertinent stautory requirements for eligibility to receive federal funds, and in reliance on his statutory entitlement to such funds has abjured his right to accept private contributions and expend all the funds he might otherwise receive from the public. The FEC may not, consistent with the first amendment, deny or delay federal funds once a candidate has satisfied the eligibility criteria. Nor may this Court, by

satisfied the eligibility criteria. Nor may this Court, by granting a stay deny or delay those same funds without impermissibly and irreparably restraining Mr. Reagan's freedom of speech.

It is well settled that "even the temporary deprivation of first amendment rights constitutes irreparable harm." Citizens for A Better Environment v. City of Park Ridge, 567 F.2d 689 (7th Cir. 1975). Congress, in appreciation of the acute dangers attendant to regulation in the first amendment area, designed a scheme which provides for fair and effective enforcement of the election laws without restraining a candidate's speech by denying campaign funds, and which still protects the valid governmental interest in punishing violations of the election laws. The constitutional underpinning to this Congressional scheme is the principle that,

> a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) (emphasis in original).

Petitioners' request for a stay is, in essence, an invitation to ignore Congressional concerns for first amendment rights and to create judicially the prior restraint on a first amendment right that Congress deliberately withheld from the FEC. Only a threatened violation of the law of the clearest and most dangerous sort might conceivably

justify such a restraint. Thomas v. Collins, 323 U.S. 516, 540 (1945). The allegations of the complaint filed with the FEC do not amount to violations of the campaign laws, nor could they, constitutionally, in light of the teachings of Buckley v. Valeo, supra; Kusper v. Pontikes, 414 U.S. 51 (1973) and Dombrowski v. Pfister, 380 U.S. 479 (1965). Indeed, the only affidavits made on personal knowledge, which are before the Court -- as opposed to those based on hearsay and guesswork -- are the affidavits submitted with this memorandum. Those affidavits make it clear that Petitioners' trial by newspaper cannot justify a prior restraint.

Petitioners have failed to provide the overwhelming showing required to justify the prior restraint on speech sought in the form of interim relief pending review. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963). Nothing presented supports even the slightest delay which might result if their request is granted. As Justice Harlan noted in his concurring opinion in Shuttlesworth v. City of Birmingham:

> [T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. 394 U.S. 147, 162-63 (1969).

IV. Denial of Injunctive Relief Will Not Subject Petitioners to Irreparable Harm.

Another prong of the test which Petitioners must satisfy if they are to qualify for extraordinary relief is to demonstrate that they will be irreparably harmed if such relief is not granted. Specifically, Petititioners are obligated to demonstrate that if they are not granted the preliminary relief they seek at this time, they will suffer an injury for which they cannot be compensated at a later date.

This concept of irreparable harm requires them to establish the likelihood of injuries and damages which are present and actual, not those which are speculative. Connecticut v. Massachusetts, 282 U.S. 660 (1930), cited in Ashland Oil, Inc. v. FTC, 409 F. Supp. 297 (D.D.C. 1976). See also West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066 (D.D.C. 1970). A basic principle in this regard, and one which has full application to the present case, is that a party is not entitled to injunctive relief when it has set forth only its "conclusions of what would, could, or might happen . . . ." Reporters Committee for Freedom of the Press v. American Telephone & Telegraph, Co., 192 U.S. App. D.C. 376, 593 F.2d 1030, 1067 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979) (emphasis in original).

Petitioners' claim in this case is wholly speculative both in the wrongs it alleges and in the harm claimed to flow

therefrom. There is no evidence supportive of the claim that Governor Reagan is the beneficiary of illegal campaign expenditures. Nor is there any evidence to support a claim that the issuance of preliminary relief is necessary to protect Petitioners from being irreparably harmed even if such expenditures were being undertaken. Finally, it is ludicrous to assume that the Reagan campaign will immediately spend the entire $29.4 million immediately after certification -- a claim upon which Petitioners' request for stay must necessarily be based.

E. Issuance Of An Order Staying The Commission From Certifying Reagan As Eligible To Receive Federal Campaign Funds Would Be Contrary To The Public Interest.

The final element of the test for extraordinary relief -- the effect that the issuance of preliminary relief would have on the public interest -- argues most decisively for the denial of relief here. While Petitioners claim they have raised important and significant issues, the relevant question in this regard is whether the public interest requires a stay of certification while such issues are being considered by the FEC.

No right is more fundamental to the American political structure than the right to freedom of speech. Indeed, the Supreme Court has stated that "[freedom of] 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). In Buckley v. Valeo, supra, the Supreme Court held that the right to make campaign expenditures, and the fundamental right to freedom of speech were inextricably linked in the context of presidential campaigns. It went on to note that: "[t]he first amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." Buckley v. Valeo, 424 U.S. at 49, supra.

An injunction preventing the disbursement of federal funds to Reagan would disrupt the political speech of the two major party Presidential candidates and would unquestionably halt the full and free discussion of vital issues, severely impairing the rights of the American public.*/ Petitioners allege that the election process will be tainted if Reagan is allowed to expend funds to which he is later found not to be entitled. The truth of the allegation that Reagan will receive unlawful funds is highly doubtful. (Brock Affidavit ¶ 13, Laxalt Affidavit ¶ 4) The proposition that the improper release of federal funds could "taint" the election

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*/ Indeed, some analysts have suggested that the major problem with current political campaigns is that too little, rather than too much, money is spent since "[l]imited campaign funds often mean limited campaign activity, which, in turn, means a poorly informed and apathetic electorate." Kennedy Institute Report, supra, at 9.

process in any meaningful manner is, however, even more suspect. The real danger that the election may be tainted would stem, instead, from granting injunctive relief.

The premise of the first amendment, and of the democratic institutions which depend upon it, is that the public can assess political expression for itself and make its own judgments. As Buckley makes clear, the public has far more to fear from suppression of ideas and expression, than from a surfeit. The requested injunction would deny the rights of the electorate as well as the rights of the members of the independent committees, and the rights of Reagan.

An injunction would "taint" the election in yet another way. In enacting and subsequently amending the election laws, Congress was quite cognizant of the need to balance the candidate's interest in a fair election with the public need for regulation which least restricted the free flow of political expression. Accordingly, Congress sought to structure laws which would allow for elections which were free from corruption and free from the appearance of corruption; without allowing the Act to be "used to influence elections improperly." 120 Cong. Rec. H10,330 (daily ed. October 10, 1974), reprinted in 1974 History at 1108.

The disruption of the electoral process posed by the instant situation is precisely that which Congress sought to avoid. The issuance of any order would forever taint

the Reagan candidacy in the minds of some voters and at the same time it would cast an atmosphere of impropriety over the entire election which would be difficult to dispel.

CONCLUSION

The foregoing discussion establishes that Petitioners can meet none of the four independent tests which must be satisfied in order for preliminary relief to issue from this Court. Petitioners are not likely to succeed on the merits of their claim, nor can they establish that they will be irreparably harmed in the absence of the requested relief. Governor Reagan would clearly suffer great injury were a preliminary order entered. Moreover, the public interest in free and democratic elections demands that this Court not inject itself into the presidential campaigns.

Putting aside its trappings, this case resembles nothing so much as raw political gamesmanship. It is lamentable that the incumbents' election committee felt compelled to

attempt to utilize the federal election laws in such a manner. It would be even more lamentable, and also unlawful, were this Court to permit them to succeed."

Respectfully submitted,

Patrick F. McCartan
James R. Johnson

1735 Eye Street, N.W.
Washington, D.C. 20006

Attorneys for Reagan for
President General Election
Committee and Ronald Reagan

Of Counsel:

Jonathan C. Rose
Stephen W. Brogan
Robert F. McDermott, Jr.
Janet L. Miller
Robert C. Weber
Mary Louise Westmoreland

Jones, Day, Reavis & Pogue
1735 Eye Street, N.W.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

Copies of the foregoing Memorandum In Opposition were delivered, by hand, this 24th day of July, 1980 to the following counsel for the parties:

Charles N. Steele, Esq.
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Thomas Wilson, Esq.
1735 New York Avenue
Sixth Floor
Washington, D.C. 20006

Attorney for Applicants
for Intervention Reagan
for President General
Election Committee and
Ronald Reagan