Jack Speight (Wyoming Bar No. 4-0983)
4021 Snyder Ave
Cheyenne, WY 82001
307.635.1239 [Tel.]
jbspeight@gmail.com

Benjamin T. Barr
10737 Hunting Lane
Rockville, MD 20850
202.595.4671 [Tel.]
benjamin.barr@gmail.com

Stephen R. Klein
Wyoming Liberty Group
1902 Thomes Ave
Ste. 201
Cheyenne, WY 82001
307.632.7020 [Tel.]
307.632.7024 [Fax.]
stephen.klein@wyliberty.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH Plaintiff, v. FEDERAL ELECTION COMMISSION Defendant.	)	Civil Case No. 12-CV-127-S

PLAINTIFF'S MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

1. Introduction

The FEC has filed a motion to dismiss with this Court, arguing that Free Speech's challenge should be dismissed under Federal Rule of Civil Procedure 12(b)(6) or alternatively under Rule 41(b). For the reasons articulated in this memorandum, neither position has merit and the Defendant's motion should be denied.

Although Free Speech disagrees with nearly all of the FEC's characterizations in these pleadings, one area of consensus exists. Both parties agree that this case "involves purely legal questions" properly resolved through future cross motions for summary judgment. *See* Def.'s Mem. in Support of Motion to Dismiss (Docket No. 34) at 1 ("This case presents purely legal questions that have been fully and extensively briefed by both parties and amicus curiae….). Because of this, Plaintiff Free Speech will file its own motion for summary judgment pending the resolution of the motion to dismiss since there are no disputes as to any material fact and judgment should be rendered as a matter of law.

In resolving the motion to dismiss, this Court must accept as true "all well-plead factual allegations in the complaint and viewing them in the light most favorable to the plaintiff." *Commonwealth Property Advocates, LLC v. Mortgage Electronic*, 680 F.3d 1194, 1201–02 (10th Cir. 2011). In assessing the matter, this Court may consider not just the complaint, but "also the attached exhibits and documents incorporated into the complaint by reference." *Smith v. United States,* 561 F.3d 1090, 1098 (10th Cir. 2009). For Plaintiff to survive the motion to dismiss, this Court need only find that the complaint contains sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And claims have facial plausibility when they plead factual content that allows this Court to draw reasonable inferences that the defendant is liable for the actions alleged. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

2. The FEC's Deep-Seated Confusion Over its Own Regulations

Consistent with its earlier pleadings, the FEC goes to great lengths to market its massive regulatory regime as merely "disclosure." As explained by the FEC, since eight Justices decided that entirely different disclosure requirements for wholly different disclosure laws were upheld in *Citizens United v. FEC*, all other disclosure laws should henceforth be upheld. Def.'s Mem. (Docket No. 34) at 2. But the FEC fails to admit that all systems of disclosure are not the same. Plaintiff steadfastly reaffirms that unwieldy regulatory programs that even the FEC cannot understand plainly violate the protection of the First Amendment.

a. Labeling a Bizarre and Massive Regulatory Program Mere "Disclosure" Does not Make it So

Looking past the simplistic veneer of the FEC's argument that all disclosure is disclosure and that all disclosure is valid illustrates critical faults in defendant's arguments. Plaintiff is trapped within a regulatory maze constructed by the FEC that even the Commission itself cannot escape. Whatever this system may be, it is not mere disclosure. This causes real injuries for prospective speakers, especially when speakers ask the FEC for prior permission to speak and the agency offers but a shrug.[1]

Although the FEC suggests anyone may speak freely under the current regime, few grassroots groups would be willing to take it up on this handy offer. *See* Transcript of Sep. 12, 2012 hearing in *Free Speech v. FEC* at 25 ("Ms. Chlopak: To be clear, plaintiff is free to run each of its proposed ads and more and to solicit and spend unlimited sums of money to pay for them"), 35 ("The Court: But it's not a grant of immunity. Ms. Chlopak: It is not a grant of

[1] As noted elsewhere by Plaintiff, this reasoning is not somehow peculiar to *Citizens United*. Whenever government creates shifting, undeterminable, and overbroad regulatory programs that stifle speech, it is the appropriate judicial response to strike or limit their applicability. It matters not whether the regulatory mission involves potentially obscene speech, potentially defamatory speech, potentially injurious speech, or potentially campaign-related speech. *See, e.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012); *Buckley v. Valeo*, 424 U.S. 1 (1976). What matters is that government is never permitted to work these evils in the first place.

immunity. That's correct."). Speakers who guess incorrectly about whether their speech contains an undefined "electoral portion" or a mysterious "external event" (both likely subject to regulation) face the "heavy costs of defending against FEC enforcement." *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010). But, the FEC argues, this is merely "disclosure," something we should all celebrate, and a reason to dismiss this suit. This then begs the question: what is "disclosure"?

The FEC does not operate a simplistic one-size-fits-all disclosure program. Within the FEC's separate rules of disclosure for 33 different types of political speech (applied to some 71 different types of legal entities) rests an array of disclosure regimes. *Id.* Speaking about disclosure as if it existed in the singular is like suggesting poison ivy is fairly representative of all plants since "plants are plants." Rather, the term "disclosure" involves a wide collection of sub-types of disclosure, just as plants involve detailed sub-types and variations. Attention to these details is critical in either instance. Many medical professionals would approve of rubbing an aloe plant on a burn wound to speed recovery. Few would endorse rubbing poison ivy on the same. Similarly, the (electioneering communications) disclosure regime at issue in *Citizens United* is an example of *one* disclosure sub-type deemed acceptable due to its easily understood and applied provisions. *Id.* at 913–16. That the Supreme Court approved one sub-type of disclosure does not mean *all* forms of disclosure were approved. *See* Pl.'s Mem. in Support of Preliminary Injunction Motion (Docket No. 20) at 19 n.10.

As Plaintiff demonstrated in its earlier pleadings, for purposes of this lawsuit the FEC maintains three very distinct regulatory regimes for political speakers.[2]

i. Three Categories of Regulated Speech with Very Different Regulatory and Constitutional Requirements

[2] *See, e.g.*, First Am'd Ver. Compl. (Docket No. 24) at ¶¶47–49 (detailing PAC requirements), ¶50 (detailing reporting requirements for independent expenditures and electioneering communications and the resulting confusion of how to report them under the current regime), ¶61 (detailing PAC problems), ¶¶71–79 (detailing express advocacy speech standards and triggers), ¶¶97–106 (detailing PAC status problems and major purpose test uncertainties).

The first regulatory regime involves electioneering communications at controversy in *McConnell v. FEC*, *Wisconsin Right to Life (WRTL)*, and *Citizens United*. *See* 2 U.S.C. § 434(f)(3)(A). As explained by Chief Justice Roberts in *WRTL*, electioneering communications are different from expenditures (and less burdensome to comply with) because electioneering communications offer brightline rules about the scope of regulation up front. In footnote seven of that case, the Chief Justice, responding to Justice Scalia's criticism, explained that any test for deciding regulable electioneering communications must "meet[] the brightline requirements of BCRA 203 in the first place." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 n.7 (2007). Chief Justice Roberts reached this conclusion because electioneering communications only implicate speech that: (a) occurs within 30 or 60 days of an election, (b) is targeted to 50,000 people or more, (c) is carried by specific types of media (broadcast, television, and more), and (d) which mention a clearly identified candidate. *See* 2 U.S.C. § 434(f)(3)(A)(i). Absent meeting these factors, speech is not regulated as an electioneering communication. In addition, the electioneering communications regime offers a relatively simple one-time reporting requirement that only takes effect at spending levels in the aggregate of $10,000 unless communications are made within 24 or 48 hours of an election. When individuals do file, they file "Form 9" which is all of four pages, and the related instructions are five pages in length. The electioneering communications provisions, importantly, do not impose political committee status. They do not impose sophisticated organizational demands, the assumption of heavy regulatory burdens, or the like. They involve, instead, simple one-time reporting for communications. This is mere "disclosure."[3]

The second regulatory regime found at the FEC involves independent expenditures with reporting filed by non-PAC entities or persons. These filers file "Form 5" with the FEC—a

[3] This is precisely the point the *en banc* Eighth Circuit recently made as well, noting that requiring "one-time disclosure only when a substantial amount of money was spent—matched the government's disclosure purpose" and ongoing reporting, organizational changes, and other related PAC burdens (treasurer, specific recordkeeping, segregated funds, and more) went beyond the government's disclosure purpose and proved too burdensome as a matter of law. *See Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 2012 WL 3822216 (8th Cir. 2012).

relatively easy form asking what type of independent expenditures were made (supporting or opposing which candidate in what amount) and contributions received (how much and from whom). Form 5 totals two pages and its instructions only require three pages. This second regulatory regime is what the *Massachusetts Citizens for Life* Court recognized as constitutionally appropriate disclosure because it met the government interest in providing information to the electorate without being too burdensome for speakers. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 252–53 (1986) (detailing the differences between non-PAC reporting requirements appropriately tailored to the government interest at hand and intrusive PAC requirements going beyond these), 266 (O'Connor, J., concurring) ("In my view, the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act"). Notably, Form 5 is not challenged by Free Speech other than its need to know what speech is considered an "independent expenditure." This regime, too, is mere "disclosure."

The third relevant regulatory regime overseen by the FEC involves political committee status. *See* Pl.'s Mem. (Docket No. 20) at 30–32; First Am'd Ver. Compl. (Docket No. 24) at ¶¶ 43–49, 97–106. This is the regulatory regime identified by Justice Kennedy in *Citizens United*, writing for the majority, where he explained that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days." 130 S. Ct. at 897. This is also the regulatory regime criticized by the *MCFL* Court because it "may create a disincentive for such organizations to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." 479 U.S. at 254–55. Political committees file Form 3, which is 10 pages in length in

its most basic form, and its instructions come in at some 20 pages. The FEC's informal guide for political committees takes up 124 pages. This is not mere "disclosure."

Of the three sub-types of disclosure and related regulatory burdens discussed here, Plaintiff challenges the third—political committee status. Defendant confuses and conflates all three sub-types of disclosure into one, asserting that any government program advancing "disclosure," no matter how onerous, is constitutionally sound. While the FEC attempts to argue that disclosure imposes no serious limits on First Amendment freedoms, *see* Def.'s Mem. (Docket No. 34) at 2, the *MCFL* Court carefully explained that any regulatory requirements reaching beyond the basic informational interests found in Form 5 were constitutionally invalid for issue advocacy groups. 479 U.S. at 255 n.7 ("the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak" and "while 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize 441b as an infringement on First Amendment activities."). The FEC's current regulatory structure and practices impose the very same PAC burdens the *MCFL* and *Citizens United* Courts warned about against anyone whose speech seems or feels too "electoral." Still, the FEC assures us this is mere "disclosure." It is not.

ii. The FEC: Censorship with a Smile

If not mere "disclosure," what rests before this Court? The challenged system is nothing short of the nation's farthest-reaching and most effective system of prior restraint. These programs pop up from decade to decade before the federal courts and are routinely stricken, no matter if the regulators' intent is to protect the children, save the nation's morals, or shut down grassroots speech to purify politics. Each program ignores the firm assurance of the First Amendment that speakers may express themselves in loud, tasteless, reserved, or profound ways—all without the intervention of speech bureaucrats to approve, license, or sanction their speech.

Like the film censorship program at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965), the absence of procedural safeguards means that the FEC's regime "necessarily produce[s] a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Here, speech remains trapped and entangled for months while the Commission continues to shrug and offer no guidance for understanding the challenged regulations and policies. If Free Speech speaks it will remain subject to the very real criminal and civil enforcement penalties overseen by the FEC and Department of Justice. This is not mere "disclosure." This is speech suppression.

Like the anti-obscenity program at issue in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the mere act of classifying speech even without "direct regulatory or suppressing functions" constitutes a system of informal censorship. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 n.19 (1968). This is because systems like the one here "provide[] no safeguards whatever against the suppression of [non-regulable speech], and therefore constitutionally protected, matter." *Bantam Books*, 372 U.S. at 70. All they can offer is the promise that if citizens bow in compliance to the state, all will be satisfactory. This is not mere "disclosure." This is speech suppression.

Like the film licensing program reviewed in *Interstate Circuit*, the FEC maintains a stalwart system of speech licensing while never understanding that it licenses speech. The problem in just such a situation is that if a speaker is "unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the [] public. Rather than run that risk, he might choose nothing but the innocuous" to communicate. 390 U.S. at 684. Here, Free Speech might be "free" to communicate as often and as loudly as it likes about ranching in general, but if it gets too close to "external events" related to the Obama or Romney presidential campaigns, problems arise. Of course, no one knows what those "external events" may be. If Free Speech dares to communicate about ranching *and* includes direct references to the Obama or Romney candidacy, the risk gets even higher. If Free Speech removes all salient information from its advertisements and strips them down to "nothing but the innocuous," its speech is perhaps free, but bland. To the "extent that vague standards do not

sufficiently guide the censor, the problem is not cured merely by affording de novo judicial review. Vague standards, unless narrowed by interpretation, *encourage erratic administration* whether the censor be administrative or judicial; 'individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.'" *Id.* at 685, *citing Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 701 (1959) (Clark, J., concurring) (emphasis added).

The FEC is a commission defined by its penchant for erratic administration. And that is what this Court is left with: not a rosy system of "disclosure" for the American public; not a system of easily understood and applied regulations; not a system understood by even the FEC itself. What is before this Court is the nation's largest system of prior restraint, deserving relief, not dismissal.

iii. Precedent and the Constitution do not Permit Unreasonably-Defined and Impossible-to-Comply-With Laws

While the FEC attempts to cabin *Citizens United* as simply a case about bans on corporate speech, a greater truth emerges. True enough, part of the evils remedied in the FEC's loss in *Citizens United* involved corporations being banned from speaking and their inability to solicit support for political speech from their members. The FEC would have this Court believe that is the end of the story. It is not.

What preceded *Citizens United* are principles of import. This is because they illustrate what grassroots have been fighting against for more than 30 years—government efforts to shut down speech, advertently or inadvertently. Recall that in *MCFL*, the Supreme Court explained that small groups would curtail and limit their speech because of the overbroad application of political committee provisions to them. *MCFL*, 479 U.S. at 254–55. But this was not just because a corporate ban was in place. Rather, the plurality, with Justice O'Connor joining in concurrence, reasoned something more significant. This realization is that unless attendant constitutional protections are in place, PAC status imposes a whole host of regulatory burdens on issue advocacy groups that are unsupportable by any government interest in disclosure. Consider

the following excerpts from *MCFL* with unsupportable burdens identified by bolded numbers in brackets for easy identification.

> This means that MCFL must comply with several requirements in addition to those mentioned. Under 432, it must **[1]** appoint a treasurer, 432(a); **[2]** ensure that contributions are forwarded to the treasurer within 10 or 30 days of receipt, depending on the amount of contribution, 432(b)(2); **[3]** see that its treasurer keeps an account of every contribution regardless of amount, **[4]** the name and address of any person who makes a contribution in excess of $50, **[5]** all contributions received from political committees, **[6]** and the name and address of any person to whom a disbursement is made regardless of amount, 432(c); **[7]** and preserve receipts for all disbursements over $200 and all records for three years, 432(c), (d). Under 433, MCFL must **[8]** file a statement of organization containing its name, address, the name of its custodian of records, and its banks, safety deposit boxes, or other depositories, 433(a), (b); **[9]** must report any change in the above information within 10 days, 433(c); **[10]** and may dissolve only upon filing a written statement that it will no longer receive any contributions nor make disbursements, and that it has no outstanding debts or obligations, 433(d)(1).
>
> Under 434, MCFL must file either monthly reports with the FEC or reports on the following schedule: **[11]** quarterly reports during election years, **[12]** a pre-election report no later than the 12th day before an election, **[13]** a postelection report within 30 days after an election, and **[14]** reports every 6 months during nonelection years, 434(a)(4)(A), (B). These reports must contain information regarding the **[15]** amount of cash on hand; **[16]** the total amount of receipts, detailed by 10 different categories; **[17]** the identification of each political committee and candidate's authorized or affiliated committee making contributions, **[18]** and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; **[19]** the total amount of all disbursements, detailed by 12 different categories; **[20]** the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; **[21]** persons to whom loan repayments or refunds have been made; **[22]** the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation. 434(b). In addition, MCFL may solicit contributions for its separate segregated fund **[23]** only from its "members," 441b(b)(4)(A), (C), which does not include those persons who have merely contributed to or indicated support for the organization in the past.

MCFL, 479 U.S. at 253–54.

The *MCFL* Court lists *twenty-three* constitutionally relevant burdens to explain why imposing PAC status on issue organizations is inappropriate. Following *Citizens United*, the corporate bans have been lifted, making PAC status one factor less burdensome. The FEC proclaims freedom when twenty-two unconstitutional restraints against First Amendment liberties remain in place. Twenty-two regulations guaranteed to stifle, suffocate, and bury grassroots groups in regulatory red tape. There are at least twenty-two reasons this is not a system of mere "disclosure" and which support invalidation of the challenged regime that arbitrarily places PAC status on grassroots groups like Free Speech.

The truths of *MCFL* did not end there. *Citizens United* reiterated these truths when the FEC argued to the Supreme Court that PACs are easy-to-operate organizations that impose no burdens against speakers—the same argument it is making here. After suffering a loss in *WRTL* and being chastised by the Court for crafting lengthy and complicated speech codes, the Commission went back to the drawing board and invented a "two-part, 11-factor balancing test" to decide regulable speech. *Citizens United*, 130 S. Ct. at 895. This test shifted the determination of how to comply with federal election law from average citizens, as the First Amendment commands, to political professionals. And it relied on hunches, intuition, and the shifting feelings of speech bureaucrats to decide the scope of its regulatory authority. These evils remain wrong regardless the title of the regulatory program being challenged. That the FEC continues these trends in other areas of regulation is the very issue before this Court—and an issue very much in need of adjudication, not dismissal.

What matters most here is the ability of grassroots groups of any political stripe nationwide to get out and share their views. Under the current regime, they cannot. As Justice Kennedy explained in *Citizens United*, even the demand to form PACs does not alleviate First Amendment problems. "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United*, 130 S. Ct. at 897. These truths continue to be recognized everywhere except the FEC. And these truths exist as a matter of law by the Supreme Court, not as conjecture by Free Speech's counsel.

In the present case, disclosure is not disclosure any more than poison ivy is an aloe plant. Dressing up bizarre and incomprehensible regulatory systems as mere disclosure still leaves a constitutional injury ripe for meaningful relief by this Court. Thus, ensuring that the relevant regulatory triggers that invoke PAC status are objective and have some semblance of clarity is a constitutional imperative—ensuring that small groups and average Americans can easily comply with the law.

b. 100.22(b) Offers no Sensible Guidance

"The challenged regulation . . . defines 'expressly advocating' and thus provides guidance on whether a communication is an 'independent expenditure' subject to statutory disclosure requirements." Def.'s Mem. (Docket No. 34) at 2. The FEC cannot point to decades of enforcement matters and dizzying "Explanations and Justifications" for its rules and consider it "guidance." But that is exactly what the FEC means when it argues that section 100.22(b) is a model of clarity and guidance. Never mind that the Commission itself could not articulate a single, sensible understanding of the regulation when asked to do so through the advisory opinion process.

Section 100.22(b) matters because it operates to define which speech counts towards a finding of PAC status and when disclaimer and reporting obligations are incurred for speech. Absent clear definitions here, the FEC can only expect that all speakers will bow in compliance for *all* speech by including disclaimers and complying with its reporting obligations. Of course, the FEC cannot even agree on which reporting obligations are triggered for speech, leaving speakers again at the mercy of the FEC to decide if it picked the correct reporting form (Form 3, 5, or 9). First Am'd Ver. Compl. (Docket No. 24) EXHIBIT K at 5–11; Transcript of Sept. 12, 2012 hearing in *Free Speech v. FEC* at 45.

Disclosure requirements going beyond simple reporting to political committee registration and reporting (PAC Status) are a substantial burden on political speech that cannot be imposed upon issue advocacy organizations. *MCFL*, 479 U.S. at 255–56; *Citizens United*, 130 S.Ct. at 897. Thus, issue advocacy organizations must be subject only to brightline regulations that allow them to know the boundaries between regulated and unregulated speech.

This is important for two reasons. First, speakers unable to afford complicated PAC compliance measures must be able to tailor their speech to remain outside of its ambit. Second, brightline rules offer guidance about how to comply with the law once speaking. Absent objective, brightline rules, speakers are subject to the swaying mercy of the FEC, who may launch investigations and enforce penalties for violation of the law.

The FEC argues that § 100.22(b)—the PAC status linchpin—is not vague or overbroad, yet asserts that the regulation "provides guidance" for determining express advocacy. Def.'s Memo at 2 (Docket No. 34). Although § 100.22(b) works in conjunction with § 100.22(a), this is not the full scope of the FEC's "guidance." In order to understand § 100.22(b), the FEC expects Free Speech and similarly situated groups to read thousands of pages of previous enforcement matters. "Political Committee Status," 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007); MUR 6073 (Patriot Majority 527s), First General Counsel Report at 9 (FEC 2009) ("developments in the law . . . include[] the distillation of the meaning of 'expenditure' through the enforcement process . . ."). These faults were detailed at length in Plaintiff's First Amended Verified Complaint and Memorandum in Support of Preliminary Injunctive Relief. Docket No. 24 at ¶¶ 76–77; Docket No. 20 at 18 n. 9. However, even with the benefit of its rich history of "distillation," the FEC could not sufficiently answer any of Free Speech's key questions in its advisory opinion process. *See* First Am'd Ver. Compl. (Docket No. 24) EXHIBIT G. The FEC's only course of argument, then, is to suggest that there are no resulting burdens in PAC status thus somehow curing the vagueness and overbreadth inherent in the reach of § 100.22(b).

Maintaining a regulation that: (a) goes beyond the Commission's statutory authority, *see Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D. Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), (b) violates basic notions of vagueness and overbreadth protection, *Broadrick v. Oklahoma*, 413 U.S. 601, 615–18 (1973); *Buckley*, 424 U.S. at 41–44, (c) attach criminal and civil penalties for its violation, 2 U.S.C. § 437g(d), that (d) even the FEC itself cannot explain how to comply with cannot be deemed permissible in light of the protection of the First Amendment. *See* First Am'd Ver. Compl. (Docket No. 24) at ¶¶ 31–42.

c. Political Committee Status Changes Day by Day

The FEC claims that its "case-by-case approach to determining whether a group is a 'political committee' comports with the Supreme Court's requirement that such groups have the 'major purpose' of nominating or electing a federal candidate." Def.'s Mem. (Docket No. 34) at 3. Free Speech did not "agree[]" with FEC regarding the major purpose test. *Id.* at 3–4. What it argued was that the Commission does not enjoy standardless discretion to launch fact-intensive inquiries. Immediately following the sentence the FEC quotes is the distinction: "[T]here must be *comprehensible standards* that guide this fact-intensive inquiry." Pl.'s Mem. (Docket No. 20) at 33 (emphasis added). Free Speech cited myriad "facts" relied on by the FEC over the years that leave the test vague and overbroad. *Id.* at 34. The FEC only defends this case-by-case, fact-intensive approach broadly, and once again expects the test itself to be understood with the help of hundreds of pages of previous enforcement matters. Def.'s Mem. (Docket No. 26) at 33–34, *citing* 72 Fed. Reg. at 5,595 ("several recently resolved administrative matters . . . provide considerable guidance to all organizations regarding . . . political committee status."). But the record informs this Court that the "facts" referenced are so far-reaching that the major purpose test is but a vague and overbroad formality to imposing PAC status on any organization passing the expenditure threshold that is itself dependent on the vague and overbroad section 100.22(b). What this Court is left with is a cleverly disguised system that allows speech bureaucrats to decide, by whim, which groups are regulated (extensively) and which go free.

Furthermore, Free Speech's as-applied challenge to major purpose makes this even more apparent. Free Speech discussed a "fact" utilized by three FEC commissioners during Free Speech's advisory opinion request. Three commissioners believed that Free Speech's *issue advocacy* that "will attack or oppose a clearly identified Federal candidate" would be counted toward a PAC finding when determining major purpose. Pl.'s Mem. (Docket No. 20) at 35, *citing* Ver. Compl. (Docket No. 1) EXHIBIT C at 24. In other words, issue-advocacy organizations may be PACs when they engage in issue advocacy if that speech is just a bit too strong or attacks too much. The FEC does not counter this overbroad application of the test to Free Speech. Instead, it simply insists that this limitless test falls under the scope of discovering

a "central organization purpose." Def.'s Mem. (Docket No. 26) at 35, *citing Colorado Right to Life Cmte. v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007). The FEC also continues to reiterate its justification for mere "disclosure," and takes the constitutionality of "major purpose" as *carte blanche* to impose PAC status on any and all political associations for any reason, ignoring the heavy burdens that come with it. However, these burdens remain substantial, and law must be understandable for groups like Free Speech that wish to avoid such burdens.

d. No Agreement About Solicitations

The FEC claims that "the Commission's policies for determining whether a group is a political committee and whether a request for donations solicits regulable 'contributions' each implicate only disclosure requirements." Def.'s Mem (Docket No. 34) at 2. Free Speech re-asserts that PAC status implicates not "only" disclosure requirements, and goes far beyond the least restrictive means that could serve the governmental interest in informing the public. *MCFL*, 479 U.S. at 262 ("The state interest in disclosure . . . can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.")

Prior to its motion to dismiss, the FEC asserted that "Plaintiff fails to identify any flaw in Advisory Opinion Draft B's analysis" and argues that the two ads identified in Draft B as "solicitations" meet the test of *Survival Education Fund*. Def.'s Mem. (Docket. No. 26) at 39; *see FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995); *see also* First Am'd Ver. Compl. (Docket No. 24), EXHIBIT C at 18, 20–21. Free Speech disagrees, and half the Commission disagreed as well. Pl.'s Mem. (Docket No. 20) at 36; First Am'd Ver. Compl. (Docket No. 24) at ¶¶ 86–96; *Id.*, EXHIBIT D at 38–40, 42–43. After considering the "War Chest" donation request, three commissioners concluded in Advisory Opinion Draft C that its "language is a far cry from the language present in *Survival Education Fund* . . . ." *Id.*, EXHIBIT D at 39. Regarding the "Make Them Listen" request, these three commissioners drew the same conclusion. *Id.*, EXHIBIT D at 42–43. The history of the "solicitation" standard illustrates its facial vagueness and overbreadth; the opposing conclusions of the Commission when applying it to Free Speech establish its as-applied unconstitutionality.

To say there is agreement between the Draft B bloc of FEC commissioners and the Plaintiff is seriously wrong.[4] As noted in Plaintiff's First Amended Verified Complaint, one set of commissioners explained that how one understands what constitutes a solicitation is through toiling through lengthy conciliation agreements and General Counsel Reports issued by the FEC in enforcement matters. *See* First Am'd Ver. Compl. (Docket No. 24) EXHIBIT C at 17–18 n.6. This same set of commissioners explained that even though *EMILY's List* struck § 100.57 as unconstitutional, "nothing in the opinion undermined the general premise that a solicitation that indicates that donated funds will be used to support or oppose the election of a clearly identified candidate results in 'contributions.'" *Id.*; *see* First Am'd Ver. Compl. (Docket No. 24) at ¶93; *see also EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

Like the other challenged provisions, the FEC's solicitation "standard" lacks basic clarity and guidance for interested persons to tailor their activities in compliance with the law. This has been adequately documented and argued through this case and remains relevant for the adjudication of this dispute. First Am'd Ver. Compl. (Docket No. 24) at ¶¶ 86–96.

3. Plaintiff Properly Alleged its Claims

The FEC moves on to allege that if this Court does not agree with its views on the substance of the law, the complaint should still be dismissed without prejudice. *See* Def.'s Mem. (Docket No. 34) at 4–5. Additionally, it argues that Plaintiff did not sufficiently distinguish its as-applied and facial challenges. Rule 8 provides that parties make only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Beyond being "short and plain," a pleading must be specific enough to "give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957). Consistent with the Federal Rules of Civil Procedure, pleadings chocked full

[4] As discussed in oral argument on Plaintiff's request for preliminary injunctive relief, attorneys for the FEC seem to be representing *half* the FEC commissioners. Transcript of Sept. 12, 2012 hearing in *Free Speech v. FEC* at 13–14. In this matter, three commissioners agreed upon one set of broad regulatory principles (represented in the Draft B Advisory Opinion, First Am'd Ver. Compl. (Docket No. 24) EXHIBIT C) and another three agreed on constitutionally limited regulatory principles (represented in the Draft C Advisory Opinion, *Id.* at EXHIBIT D).

of simplified "labels and conclusions" or containing "a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

To support its claims, the FEC cites wild cases often filed by *pro se* litigants to suggest Plaintiff's First Amended Verified Complaint should be dismissed. For example, the FEC cites *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158 (10th Cir. 2007)—a case involving a state inmate who named "at least 20 individual defendants, as well as scores of John and Jane Doe defendants, in a 42-page complaint that is, through much of the document, often difficult to comprehend." *Id.* at 1160. Or consider *Mann v. Boatright*, 477 F.3d 1140 (10th Cir. 2007), where the court explained that nowhere in "her 99-page, single-spaced pleading could we find 'a short and plain statement of the claim showing that [she] is entitled to relief.'" *Id.* at 1147, *citing* Fed. R. Civ. P. 8(a). After tilting at *pro se* windmills, the Commission then argues that it would be "prejudiced by having to respond to each of plaintiff's irrelevant allegations and its 'wordy and unwieldly' characterizations of fact and law." Def.'s Mem. (Docket No. 34) at 5, *citing Nasious*, 492 F.3d at 1162.

In the vast arena of election law, complicated and cumbersome regulatory codes have become the norm. *See, e.g.*, *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (detailing a record over 100,000 pages in length to challenge BCRA provisions of the FECA); *Citizens United*, 130 S. Ct. at 896–96 (detailing the prolix and cumbersome nature of federal election law). That complicated and prolix laws seem to be in fashion stems from the actions of the Congress and the FEC, not the Plaintiff. Free Speech must wade through these unfortunate complexities and boil them down to discernible claims while providing adequate notice to the FEC. That proves to be no easy task. Argue too little, as the appellants in *Real Truth About Abortion v. FEC* did, and the reviewing court may find deficiencies in the stated claims necessary for relief. 681 F.3d 544, 558 n.5 (4th Cir. 2012). Argue just enough and the FEC complains about having to respond to too much information. Fortunately, the Tenth Circuit, like many other circuits, embraces liberal rules of pleading, allowing the FEC to use summary judgment to "avoid expensive trials and frivolous claims" if it believes Plaintiff's claims are

without merit. *New Home Appliance Ctr., Inc. v. Thompson*, 250 F.2d 881, 883 (10th Cir. 1957). Plaintiff has alleged legally cognizable claims with particularity meeting the requirements of the Federal Rules of Civil Procedure.

The FEC may not enjoy having to respond to the mountain of complexity it has created, but it is obligated to do so. Free Speech's Complaint contains evidence of a regulatory system so unbound from the rule of law that it consistently violates protected First Amendment rights. *See* First Am'd Ver. Compl. (Docket No. 24) at ¶¶ 70–106. These facts are relevant to a finding of facial unconstitutionality. Contained in Free Speech's Complaint, as detailed herein, is evidence of the good faith efforts of Plaintiff to comply with its administrative remedies and the utter chaos produced by the FEC in doing so. *Id.* at ¶¶ 31–42. These facts are relevant to a finding of as-applied unconstitutionality. Contained in Free Speech's Complaint are fair notices of the legal claims attendant to several complicated areas overseen by the FEC and accurately divided into separate areas for ease of review:

- Challenges to 11 C.F.R. 100.22(b), facially and as-applied;
- Challenges to the FEC's political committee status practices, facially and as-applied;
- Challenges to the FEC's use of the "Major Purpose Test," facially and as-applied.
- Challenges to the FEC's determination of a "solicitation," facially and as-applied.
- A Challenge to the entirety of these practices as an invalid prior restraint.[5]

Thus, Plaintiff has alleged four specific claims in its First Amended Verified Complaint. Each details relevant facts to support as-applied and facial claims. As-applied claims thoroughly describe the nature of Free Speech's attempt to obtain clarity with the FEC's operations below and include, in exhaustive detail, copies of relevant proceedings demonstrating its good faith intent to do so. Facial claims include relevant administrative evidence of the regular practices and policies of the FEC connected to these claims. Plaintiff is obliged to brief this Court on relevant legal claims and evidence, even when complicated, supporting them to survive the

[5] Each of these regulatory subsystems interact to compromise an entire system. Plaintiff neatly dissects each section individually but also illustrates to this Court how they operate in tandem, as is necessary to make a complete showing in this case.

pleading requirements of the Federal Rules of Civil Procedure. Because it has done so, no dismissal is appropriate here.

CONCLUSION

For the forgoing reasons, Plaintiff requests that this Court deny defendant's Motion to Dismiss.

Dated: October 2, 2012

/s/ Stephen R. Klein

Stephen R. Klein
Wyoming Liberty Group
1902 Thomes Ave
Ste. 201
Cheyenne, WY 82001
307.632.7020 [Tel.]
307.632.7024 [Fax.]
stephen.klein@wyliberty.org

Benjamin T. Barr
10737 Hunting Lane
Rockville, MD 20850
202.595.4671 [Tel.]
benjamin.barr@gmail.com

Jack Speight (Wyoming Bar No. 4-0983)
4021 Snyder Ave
Cheyenne, WY 82001
307.635.1239 [Tel.]
jbspeight@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2012, I the below listed persons received copies of this document by electronic mail via Electronic Case Filing pursuant to Fed. R. Civ. P. 5(b)(2)(E):

Anthony Herman
Federal Election Commission
aherman@fec.gov

Erin Chlopak
Federal Election Commission
echlopak@fec.gov

David Kolker
Federal Election Commission
dkolker@fec.gov

Lisa Stevenson
Federal Election Commission
lstevenson@fec.gov

Nicholas Vassallo
United States Attorney's Office
nick.vassallo@usdoj.gov

/s/ Stephen Klein

Stephen Klein