Daniel A. Petalas (dpetalas@fec.gov)
Acting General Counsel

Lisa J. Stevenson (lstevenson@fec.gov)
Deputy General Counsel – Law

Kevin Deeley (kdeeley@fec.gov)
Acting Associate General Counsel

Erin Chlopak (echlopak@fec.gov)
Acting Assistant General Counsel

Jacob S. Siler (jsiler@fec.gov)
Attorney

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNNAMED PLAINTIFF #1, *et al.*,	)	
Plaintiffs,	)	Civ. No. 2:16-cv-135 (SWS)
v.	)	
FEDERAL ELECTION COMMISSION,	)	PRELIMINARY INJUNCTION OPPOSITION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This is a lawsuit in search of an enforcement threat. Pillar of Law Institute and two unnamed delegates to the Republican National Convention seek to have this Court enjoin the Federal Election Commission ("Commission") from enforcing the Federal Election Campaign Act ("FECA" or "Act") in a way that would prohibit non-profit corporations from providing convention delegates certain educational materials, legal services, and travel stipends without charge. But plaintiffs' request has one major shortcoming: FECA, as construed by the Commission and courts, does not prohibit the conduct proposed here and the Commission has never taken the position that it does.

Plaintiffs are not entitled to a preliminary injunction — which remains "an extraordinary and drastic remedy" — when they have not shown that their proposed conduct would violate the statute they challenge and in the absence of any likelihood of enforcement by the Commission. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *see Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). This remains true even in the First Amendment context, when plaintiffs allege that they are entitled to pre-enforcement review because they are chilled from exercising their right to speak or associate as they choose. *See, e.g., Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006).

In an apparent effort to generate a case or controversy, plaintiffs misread the relevant provisions of the Act to conclude that their proposed conduct would be prohibited. But their analysis misapplies the plain text of the statute and ignores relevant judicial and Commission decisions interpreting its scope. In fact, plaintiffs themselves acknowledge (Prelim. Inj. Mem. at 16) that the logic of certain Commission advisory opinions should permit the proposed conduct at issue in this lawsuit, thus undermining their arguments to the contrary and underlining their

own lack of standing to pursue their claims.

Under these circumstances, plaintiffs have not met their burden of establishing that their proposed conduct is proscribed by FECA and that they face a credible threat of enforcement by the Commission. Plaintiffs' request for a preliminary injunction should be denied.

BACKGROUND

I. PARTIES AND CLAIMS

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. *See generally* 52 U.S.C. §§ 30106-17. Congress empowered the Commission to "formulate policy" with respect to the Act, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," *id.* § 30107(a)(8); to issue advisory opinions construing the Act, *id.* § 30107(a)(7); and to civilly enforce against violations of the Act, *id.* § 30106(b)(1).

As alleged in the complaint, the Pillar of Law Institute ("Pillar") describes itself as a "program of the Wyoming Liberty Group, a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code." (Compl. ¶ 11.) According to its website, Pillar advocates regarding First Amendment issues, including by "pursuing litigation." Pillar of Law Institute, https://www.pillaroflaw.org/index.php/about/our-mission (last visited June 16, 2016). It publicizes its efforts at impact litigation through press releases. *See* Pillar of Law Institute, https://www.pillaroflaw.org/index.php (last visited June 16, 2016). As a 501(c)(3) nonprofit, Wyoming Liberty Group ("Wyoming Liberty") may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). Wyoming Liberty's reported funding reflects that nearly all of its donors are individual contributors: "approximately eight (8) foundations and public charities have been donors to the Organization and

approximately 109 individuals have also contributed." Wyoming Liberty Group, Excerpted 2014 Form 990, at 7, attached as Exhibit A to this Memorandum.[1]

Pillar seeks to associate with delegates to the Republican National Convention to promote "the principle that political parties are private institutions entrusted to select their own leadership and members without outside interference," a notion that plaintiffs label "delegate autonomy." (Prelim. Inj. Mem. at 2.) To achieve these goals, Pillar wishes to distribute certain educational materials to all delegates nationwide. These materials — specifically, two books that allegedly retail for a combined total of $122.24 — would provide delegates with "a background on the history of presidential nominating conventions in the United States" and describe "the constitutional rights of delegates and political parties." (Compl. ¶¶ 28, 42 (describing Pillar's desire to provide copies of two books, respectively entitled "National Party Conventions 1831-2008" and "The First American Political Conventions: Transforming Presidential Nominations, 1832-1872").) Pillar would also like to offer its attorneys to provide *pro bono* legal representation of delegates should they face threats of defamation, libel, campaign finance, or other lawsuits or forms of legal intimidation for expressing support of delegate autonomy. (*Id.* ¶ 30.) Finally, Pillar wishes to provide a limited number of delegates with $500 travel stipends to attend the convention. (*Id.* ¶ 31.)

The unnamed individual plaintiffs are two duly selected delegates to the Republican National Convention who wish to receive these funds, services, and materials from Pillar. (Compl. ¶¶ 25-26, 33.)

As plaintiffs repeatedly plead, these materials "would not support or oppose the election or defeat of anyone running for federal office." (Compl. ¶ 28; *cf. id.* ¶¶ 7, 32 & n.2 (noting

[1] The Court may take judicial notice of public records such as Wyoming Liberty's public reports to the IRS. *United States v. Bagby*, 696 F.3d 1074, 1083 n.7 (10th Cir. 2012).

Pillar's desire to engage in similar conduct with respect to the Democratic National Convention and the 2020 presidential election cycle); Prelim. Inj. Mem. at 3 & n.3 (same).)

Plaintiffs claim that they may not engage in their proposed activities because a provision of FECA, 52 U.S.C. § 30118, prohibits non-profit corporations like Pillar from providing funds or discounts on services to delegates to a convention.

II. STATUTORY AND REGULATORY BACKGROUND

A. The Bar on Corporate Contributions and Expenditures

The statute at issue in this case, 52 U.S.C. § 30118, makes it unlawful for "any corporation whatever . . . to make a contribution or expenditure in connection with . . . any primary election or political convention or caucus held to select candidates" for "presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress." 52 U.S.C. § 30118(a). The words "contribution" and "expenditure" are defined terms under the Act. *See id.* § 30101(8)(A), (9)(A). FECA's general definitions limit those terms as they are used in the Act to "only those contributions and expenditures that are made 'for the purpose of influencing any election for Federal office.'" *FEC v. Akins*, 524 U.S. 11, 15 (1998) (quoting provisions of FECA now codified at 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i)).[2] In the context of corporations, however, FECA also defines

[2] More precisely, a "contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A). An expenditure is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* § 30101(9)(A). Commission regulations make clear that "the term *anything of value* includes all in-kind contributions" and that "the provision of any goods or services without charge" is an "in-kind contribution." 11 C.F.R. § 100.52(d)(1). The Act also "sets forth detailed categories of disbursements, loans, and assistance-in-kind that do not count as a 'contribution' or an 'expenditure,' even when made for election-related purposes." *Akins*, 524 U.S. at 15 (citing FECA provisions now at 52 U.S.C. § 30101(8)(B), (9)(B)).

"contribution" and "expenditure" to include, *inter alia*, anything of value (other than certain bank loans) given "to any candidate, campaign committee, or political party or organization, in connection with any election." 52 U.S.C. 30118(b)(2); *see also* 11 C.F.R. 114.1(a)(1) (regulatory definition of corporate contributions and expenditures).

At the same time, the Act provides that the payment of "compensation for the personal services of another person which are rendered to a political committee without charge *for any purpose*" is a contribution. 52 U.S.C. § 30101(8)(A)(ii) (emphasis added). For example, the Commission has explained that a corporate law firm makes a contribution to a political committee if it pays the usual compensation of an attorney that drafts a brief on behalf of a political committee at no charge to the committee, regardless of the nature of the case. Advisory Op. 2006-22 (The Wallace Committee), 2006 WL 2786813 (Sept. 18, 2006). In the same advisory opinion, the Commission further indicated that when free or discounted services are provided to individuals or groups that are not political committees, they are contributions only if the services are rendered "for the purpose of influencing any election for Federal office." *Id.* at *2 (describing FECA's prohibition on corporate contributions and expenditures and contrasting the statute's "two ways" of defining "contribution," one of which includes compensation for personal services rendered to a political committee without charge for any purpose, and the other of which includes "'anything of value made by any person for the purpose of influencing any election for Federal office'") (quoting 52 U.S.C. § 30101(8)(A)(i), 30118(b)(2) (then codified at 2 U.S.C. §§ 431(8)(A)(ii), 441b(b)(2))).

Longstanding Commission regulations have applied these statutory provisions in the context of national nominating conventions. Those regulations provide that "funds received and spent *for delegate selection activities* are contributions and expenditures made to influence

federal elections." Contributions to and Expenditures by Delegates to National Nominating Conventions, 52 Fed. Reg. 35,530, 35,530 (Sept. 22, 1987) (emphasis added); *see* 11 C.F.R. § 110.14(c)(1). This is so because the "term 'election' is defined to include a national nominating convention, as well as any primary election held to select delegates to such a convention." Contributions to and Expenditures by Delegates to National Nominating Conventions, 45 Fed. Reg. 34,865, 34,866 (May 23, 1980). Thus, the Commission has long-since concluded that "[a]mounts received or spent to further the selection of a delegate are received or spent for the purpose of influencing a national nominating convention or for the purpose of influencing a primary election held to select delegates to such a convention" and are "contributions" or "expenditures." *Id.* Because of this, the Act provides that delegate-selection activities may not be funded from an impermissible source, including a corporation's general treasury fund. 11 C.F.R. § 110.14(c)(2).

Importantly, delegates are no different than candidates in this regard. Neither may accept money or free goods and services from corporate entities made for the purpose of influencing an election for federal office. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 149 (2003) (holding that FECA's ban on corporate contributions to candidates for federal office could be constitutionally applied to nonprofit advocacy corporations); *United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012) (concluding that *Beaumont* remains good law); *Protect My Check, Inc. v. Dilger*, --- F. Supp. 3d ---, 2016 WL 1306200, at *9 (D. Ky. Mar. 31, 2016) (same).

At the same time, however, delegates are not themselves "candidates" under FECA because they do not seek to be nominated or elected to "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." 52 U.S.C. § 30101(2), (3); *see also* Contributions to and Expenditures by Delegates to National

Nominating Conventions, 52 Fed. Reg. at 35,530. Because they are not candidates, delegates are not subject to the contribution limits applicable to candidates, 52 U.S.C. § 30116(a)(1). *See* 11 C.F.R. §110.14(d)(1). The net result is that while delegates face the same restrictions as candidates on the source of funds received for the purpose of influencing a federal election, they do not face the same dollar limits on contributions that are applicable to candidates.

B. *MCFL* Exemption

Section 30118's bar on corporate contributions and expenditures is also subject to important judicial limitations. Most relevant here, the Supreme Court has held that certain nonprofit advocacy corporations cannot constitutionally be barred from making independent expenditures expressly advocating the election or defeat of a clearly identified federal candidate. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). A corporation qualifies for a so-called *MCFL* exemption if it satisfies three "essential" features: the entity (1) was "formed for the express purpose of promoting political ideas," and does not engage in business activities; (2) has "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union," and does not accept contributions from such entities. *Id.* at 263-64. The Tenth Circuit has held that "*MCFL* does not establish an immobile set of parameters," and that the ultimate question is "whether a corporation is more like the 'type of traditional corporatio[n] organized for economic gain,' or the voluntary political association of *MCFL*." *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1148 (10th Cir. 2007) (quoting *MCFL*, 479 U.S. at 259) (alteration in original).

While the Supreme Court has rejected the argument that this exemption must be applied in the context of corporate contributions to *candidates*, *see Beaumont*, 539 U.S. at 149, neither the courts nor the Commission has ever enforced section 30118 to bar an *MCFL* corporation from making contributions or expenditures to a delegate to a national convention.

C. Advisory Opinion Requests

The Act permits any person to submit a "written request concerning" the application of, *inter alia*, FECA or Commission regulations "to a specific transaction or activity," to which the agency must respond within sixty days. 52 U.S.C. § 30108(a). For highly significant, time-sensitive requests, the FEC expedites its process and endeavors to issue opinions within 30 days. FEC, *Advisory Opinion Procedure*, 74 Fed. Reg. 32,160, 32,162 (July 7, 2009). Neither Pillar nor the individual plaintiffs requested an advisory opinion regarding their proposed activities.

ARGUMENT

I. STANDARD OF REVIEW

"A preliminary injunction is an extraordinary and drastic remedy." *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015) (internal quotation marks omitted). To prevail on their motion for one, plaintiffs must establish (1) a substantial likelihood of prevailing on the merits of their lawsuit; (2) that they will likely be irreparably injured without an injunction; (3) that the balance of harms weighs in favor of issuing a preliminary injunction; and (4) that the injunction, if issued, will not harm the public interest. *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 (10th Cir. 2010). As the moving party, plaintiffs must, "*by a clear showing*," carry the burden of persuasion. *Mazurek*, 520 U.S. at 972; *see Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1075 (10th Cir. 2009).

Plaintiffs must show a "credible threat of prosecution" to have standing to "sue for prospective relief against enforcement" on the basis that a regulation chills First Amendment activities). *See, e.g.*, *Winsness*, 433 F.3d at 732.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIMS

A. Plaintiffs Lack Standing Because There Is No Credible Threat of Prosecution

Plaintiffs are unlikely to succeed on the merits of their claims because they lack standing to bring a pre-enforcement challenge to section 30118. To establish Article III standing, a plaintiff must demonstrate (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Colo. Outfitters Ass'n v. Hickenlooper*, --- F.3d ---, 2016 WL 1105363, at *3 (10th Cir. Mar. 22, 2016). With regard to injury in fact, the "mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Winsness*, 433 F.3d at 732. Rather, "in the context of a pre-enforcement challenge" to a statute, "a plaintiff must typically demonstrate (1) 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged] statute,' and (2) that 'there exists a credible threat of prosecution thereunder.'" *Colo. Outfitters Ass'n*, 2016 WL 1105363, at *3 (alteration in original) (quoting *Susan B. Anthony List*, 134 S. Ct. at 2342).[3]

Plaintiffs here fail both elements of the pre-enforcement standing test. First, they have not established that their proposed conduct is proscribed by the language of the FECA provision they challenge. *See Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d

[3] In *Colorado Outfitters*, the Tenth Circuit noted that the statute at issue "imposes civil liability as well as criminal penalties," but that the plaintiffs had waived any argument that the "quasi-civil character" of the statute "might impact the appropriate test for the plaintiffs' standing." 2016 WL 1105363, at *3 n.7. FECA, too, imposes both civil and criminal penalties, but other courts have applied the same "credible threat of . . . prosecution" standard to determine a plaintiff's standing to bring a pre-enforcement challenge to the Act. *See Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (internal quotation marks omitted).

1086, 1100 (D. Kan. 2015) (holding that plaintiff lacked standing to make pre-enforcement challenge to statute because the "intended future conduct is not arguably proscribed by the statute"). Second, they have not established any credible threat that the Commission would enforce the Act against them if they engage in any of the activities they propose. To the contrary and as detailed below, Commission and judicial precedent confirm that no such enforcement would occur if the particular proposed conduct were to take place.

1. Commission Authority Confirms That Pillar's Plan to Provide Delegates with Educational Materials and Pro Bono Legal Services Is Not Prohibited By FECA

The first two types of spending plaintiffs propose — providing certain educational materials and *pro bono* legal services to delegates — are neither contributions or expenditures under FECA's general definition, 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i), nor are they otherwise prohibited by the ban on corporate contributions or expenditures in section 30118. Indeed, the Commission has never concluded that a corporation would be barred from engaging in either of these activities, and the FEC's own advisory opinions indicate that it would not so conclude.[4]

a. Section 30118 Does Not Prohibit the Provision to Delegates of Non-Advocacy Educational Materials

Section 30118 does not prohibit Pillar from providing non-advocacy educational materials to delegates under the circumstances alleged in plaintiffs' verified complaint. To the contrary, the Commission has repeatedly expressed approval of corporations providing non-advocacy educational materials. In Advisory Opinion 1988-22 (Republican Associates), for

[4] In contrast, the Commission has concluded that payments of "travel and subsistence during the delegate selection process, including the national nominating convention" are considered "expenditures" by the delegate, and therefore "must be made from funds permissible under the Act." 11 C.F.R. § 110.14(c)(2), (e)(1). For the reasons explained below, however, Pillar has not shown that any money it intends to provide to defray convention attendance costs would be impermissible under an exemption to FECA courts have already granted. *See*, *infra* pp. 17-21.

example, the Commission concluded that it was permissible for a tax-exempt corporation to "maintain a library composed of publications concerning 'campaign management' and clippings from newspapers and other periodicals related to political events, personalities and issues" and to provide free access to these materials to all registered Republicans including candidates. 1988 WL 170417, at *7 (Jul. 5, 1988). Plaintiffs' proposal here is essentially identical, in that they too seek to provide delegates with access to educational materials concerning the rights and responsibilities of delegates at a convention. (Compl. ¶¶ 6, 29, 42.)

Likewise, in Advisory Opinion 2004-07 (MTV News), the Commission concluded that a corporation could provide "election-related educational materials at community events," even though such activity fell outside the scope of the press exemption, so long as those materials did "not expressly advocate the election or defeat of a clearly identified candidate or political party." 2004 WL 830044, at *4 (Apr. 1, 2004). There is little difference between MTV News's conduct and the conduct Pillar wishes to undertake here. Like MTV News, Pillar seeks to distribute educational materials about an election to the relevant electorate. In Advisory Opinion 2004-07, the Commission concluded that such activities were permissible as long as the materials did not constitute express advocacy. As explained *supra* p. 3, that condition is met here: plaintiffs have explicitly pleaded that the educational materials they seek to distribute "would not support or oppose the election or defeat of anyone running for federal office." (Compl. ¶ 28.)

In addition, in a recent enforcement action the Commission similarly found no reason to believe an author had provided an excessive in-kind contribution to a presidential campaign by providing a candidate with information from his forthcoming book that the candidate then used against one of his rivals. The Commission unanimously concluded that, despite the fact that the information was highly critical of another candidate for president and was later used in the

campaign, the provision of information from the author to the candidate was not "for the purpose of influencing" the presidential election. *In the Matter of Rand Paul for President, Inc.*, MUR 6938, Factual & Legal Analysis, at 5 (Mar. 2, 2016), http://eqs.fec.gov/eqsdocsMUR/16044390609.pdf; *see* Certification, MUR 6938 (Feb. 22, 2016), http://eqs.fec.gov/eqsdocsMUR/16044390599.pdf. Here too, providing delegates with general educational information about the history of party conventions and delegate rights — which does not expressly advocate for the selection or rejection of any particular candidate for the nomination — would not be an activity undertaken "for the purpose of influencing" a convention.[5]

b. Section 30118 Also Does Not Prohibit Pillar's Proposal to Provide Pro Bono Legal Services

Pillar's proposed provision of *pro bono* legal services to delegates also would not be prohibited by section 30118. Defending a defamation lawsuit does not "further[] the selection of a delegate to a national nominating convention," and therefore is not covered by 11 C.F.R. § 110.14(c)(1). Nor would the defense of potential civil claims be for the purpose of influencing any election. In fact, in Advisory Opinion 1981-13 (Frank E. Moss), the Commission considered whether it was permissible for a former candidate to raise corporate money to defray his legal expenses for defending a civil slander claim filed against him for comments made during the campaign. 1981 WL 721625 (Mar. 16, 1981). The Commission concluded that the candidate was permitted to raise corporate funds for this purpose because donations to defray the costs of

[5] Even if Pillar had not verified that its proposed educational materials will not support or oppose any particular candidate at the convention (*see* Compl. ¶ 28), Pillar may be precluded from influencing the results of the convention for reasons completely unrelated to FECA. Wyoming Liberty is a 501(c)(3) nonprofit. The Internal Revenue Code is a separate statute over which the Commission has no authority, but entities like Wyoming Liberty clearly may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3).

defending against a civil slander suit was not a contribution or expenditure under the Act. *Id.* at *1; *see also* Advisory Op. 2011-01 (Robin Carnahan for Senate), 2011 WL 7629546, at *3 (Feb.17, 2011) (concluding that "nothing in the Act or Commission regulations would limit or prohibit" a candidate from establishing a fund to raise money from corporate entities to pay for legal expenses for defending civil suits).

That Pillar wishes to donate these legal services without charge does not change this analysis. In another advisory opinion, the Commission permitted a corporate law firm to pay the normal wages of its attorneys who provided free legal services to a presidential campaign committee in defense of a civil lawsuit alleging that the committee had "not properly allocated costs between political and official travel." Advisory Op. 1980-04 (Carter/Mondale Presidential Committee), 1980 WL 642624, at *1 (Feb. 1, 1980). The Commission concluded that there was no "basis under the Act for treating donated legal services to defend against a civil action as services rendered for the purpose of influencing the election of any person to Federal office." *Id.* at *1.[6] Similarly here, Pillar may provide legal counsel to delegates on a *pro bono* basis without running afoul of section 30118.

A footnote in plaintiffs' preliminary injunction brief (Prelim. Inj. Mem. at 14 n.4) clarifies that their concern that the *pro bono* representation proposed here would be prohibited is based on a misinterpretation of an FEC advisory opinion. Contrary to plaintiffs' assertion (*id.*),

[6] After the Commission issued Advisory Opinion 1980-04, it amended the relevant definition of "contribution" in its regulations to include compensation paid by one person for personal services of another that are rendered to a political committee without charge "for any purpose" to reflect an amendment made to the Act. *See* Advisory Op. 2006-22 (Wallace for Congress), 2006 WL 2786813, at *3-4; 11 C.F.R. § 100.54. Here, however, Pillar seeks to offer *pro bono* legal services not to a political committee but to individual delegates, and its proposed services therefore fall outside the scope of the amended definition. Under the circumstances presented here, the Commission's analysis of whether *pro bono* legal services are rendered for the purpose of influencing the election of any person to Federal office remains relevant.

in Advisory Opinion 2006-22 (Wallace for Congress), the Commission did not broadly conclude that "*pro bono* corporate-funded legal representation is prohibited, even in constitutional cases." Instead, the Commission concluded a corporate law firm could not prepare an *amicus curiae* brief on behalf of a candidate in a case involving a competing candidate's ballot eligibility. 2006 WL 2786813, at *1-2. In that matter, unlike here, the legal services at issue directly related to a candidate's electoral prospects, *and* were provided to a political committee. Advisory Opinion 2006-22 is thus plainly inapposite to the circumstances presented in this case.

c. The Commission Routinely Considers Whether Proposed Conduct is Undertaken For the Purpose of Influencing Any Election for Federal Office in Determining Whether the Conduct is Prohibited by FECA

Plaintiffs' argument that their proposed conduct is unconstitutionally proscribed by the Act is based on at least two fundamental yet interrelated misinterpretations of FECA. First, plaintiffs argue that "money given to a convention delegate *by an individual*" does not fall within the definition of a "'contribution' under the law." (Prelim. Inj. Mem. at 4 (emphasis added).) Not so, as such money would be a "gift . . . of money" and would be a contribution if "made . . . for the purpose of influencing any election for Federal office," including a national nominating convention. 52 U.S.C. § 30101(8)(A)(i). And Commission regulations make clear that "[f]unds received or disbursements made for the purpose of furthering the selection of a delegate to a national nominating convention are contributions or expenditures" because they are made "for the purpose of influencing a federal election," 11 C.F.R. § 110.14(c), even if there are no limits on the amount of such contributions to delegates, 11 C.F.R. § 110.14(d)(1).

Second, plaintiffs erroneously assert — without citation — that the Commission does not undertake any inquiry into the purpose or effect behind a corporation providing a good or service at less than the usual and normal charge for such goods or services before finding it is prohibited

by section 30118(a). (Prelim. Inj. Mem. at 12.) In fact, with respect to gifts to delegates, Commission regulations expressly impose that limitation. *See* 11 C.F.R. § 110.14(c)(1).

Plaintiffs' errors fundamentally undermine their assumption that their proposed conduct is prohibited. Contrary to plaintiffs' argument, the Commission does undertake a purposive inquiry in determining whether the provision of free or discounted goods and services by a corporation to delegates is prohibited by FECA. In Advisory Opinion 1983-23 (LTV Corp.), the Commission considered whether a for-profit corporation could invite delegates to a cocktail reception and hospitality facility where free food and beverages would be provided during the 1984 Republican National Convention. 1983 WL 909288 (Oct. 3, 1983). As here, the corporation expressly disclaimed any intent to use the reception or facility "for soliciting contributions" to candidates "or for expressly advocating the election or defeat of a candidate for Federal office." *Id.* at *1. The FEC concluded that section 30118 did not bar the proposed conduct because the "payments for both the reception facility and the cocktail reception would not constitute contributions or expenditures under the Act." *Id.* at *2. It reached that conclusion precisely because "the purpose of" the facility and the reception was not to influence the outcome of the convention. *Id.* ("This response is conditioned on your assertions that no attempt will be made to influence the outcome of the Convention in any manner, and that the purpose of these functions is neither to solicit contributions to, nor to advocate the election or defeat of, any candidate for Federal office."). Advisory Opinion 1983-23 confirms that the Commission already undertakes precisely the analysis that plaintiffs argue is lacking.

Plaintiffs' arguments assume without further analysis that advisory opinions addressing in-kind contributions to candidates and political committees apply equally in the context of delegates to a national convention. Nearly every advisory opinion cited by plaintiffs addresses

proposed discounts or free services *to candidates or political committees*. (*See* Prelim. Inj. Mem. at 12 (citing Advisory Op. 2004-06 (MeetUp), 2004 WL 830046, at *1 (Mar. 25, 2004) (analyzing whether internet site could offer free services to "candidates, political committees, and their supporters") and Advisory Op. 1996-02 (CompuServe), 1996 WL 233874, at *1 (Apr. 25, 1996) (analyzing whether company could offer free accounts "to all candidates for Federal and statewide elective offices")). But a separate provision of FECA effectively presumes that services provided to political committees without charge are election related. *See* 52 U.S.C. § 30101(8)(A)(ii) ("The term 'contribution' includes . . . the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge *for any purpose*." (emphasis added)); 11 C.F.R. § 100.54 (same). That presumption makes sense because a political committee is necessarily one that has as its major purpose the election or defeat of federal candidates, so there is no need to further analyze whether the services are intended to influence or otherwise connected to a federal election. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).

In the context of discounted or free goods and services to *delegates*, however, no such rule applies. The Commission *has* permitted corporations to provide discounted goods and services to delegates, so long as the purpose behind the donations was not to "advocate the election or defeat of[] any candidate for Federal office." Advisory Op. 1983-23 (LTV Corporation), 1983 WL 909288, at *2.

Plaintiffs' own brief establishes that the Commission is unlikely to enforce FECA in the way they suggest. Plaintiffs repeatedly assert that corporate-funded educational materials and *pro bono* legal services of the type plaintiffs propose should be permitted by the logic of previous Commission actions. (*See, e.g.*, Prelim. Inj. Mem. 16 (stating that providing *pro bono*

legal services "to delegates unrelated to the support or opposition of a candidate . . . should be protected under" the reasoning of previous Commission advisory opinions); *id* at 17 (noting that the Commission approved an educational stipend paid by a 501(c)(3) organization for a student to volunteer for a campaign).) Plaintiffs themselves thus underscore their inability to meet their burden to show that their proposed conduct is prohibited by FECA.

In sum, plaintiffs' proposals to provide in-kind donations of educational materials and legal services to delegates are not prohibited by the text of section 30118, as confirmed by multiple Commission advisory opinions interpreting and applying that text. But even if there were any doubt regarding the scope of section 30118, the canon of constitutional avoidance would support the Commission's position that these activities are not contributions or expenditures. *See Olmos v. Holder*, 780 F.3d 1313, 1320-21 (10th Cir. 2015) ("[W]hen a particular construction would raise serious constitutional problems, the court will avoid that construction unless doing so would plainly conflict with Congress's intent."). Because plaintiffs have not established that FECA bars Pillar from providing educational materials and *pro bono* legal services to delegates as described in the complaint, plaintiffs lack standing.

2. Plaintiffs' Proposed Activity is Also Permissible Under *MCFL*

Even if plaintiffs' proposed activity was otherwise prohibited by FECA's text, such activity, including plaintiffs' proposed stipends (Compl. ¶ 31), would nevertheless be permitted under the Supreme Court's decision in *MCFL*. In that decision, the Supreme Court held that section 30118 could not be constitutionally applied to prohibit independent expenditures by a nonprofit, voluntary political association that had specified characteristics. *MCFL*, 479 U.S. at 263-64. Under the *MCFL* exemption, corporate independent expenditures are not barred so long as the corporation making them: (1) was "formed for the express purpose of promoting political ideas," and did not engage in business activities; (2) had "no shareholders or other persons

affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *Id.* "*MCFL* does not establish an immobile set of parameters," and the ultimate question is "whether a corporation is more like the 'type of traditional corporatio[n] organized for economic gain,' or the voluntary political association of *MCFL*." *Colo. Right to Life Comm., Inc.*, 498 F.3d at 1148 (quoting *MCFL*, 479 U.S. at 259) (alteration in original).

a. Pillar Qualifies for the MCFL Exemption

Plaintiffs themselves invoke the *MCFL* exemption (*see* Prelim. Inj. Mem. at 7-8), and the allegations in their Verified Complaint and materials subject to judicial notice, *see supra* p. 3 n.1, indicate that Pillar qualifies for that exemption.[7]

First, Pillar was formed to promote political ideas and does not engage in business activities. As alleged in the complaint, Pillar is "a program of the Wyoming Liberty Group, a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code." (Compl. ¶ 11.) It advocates for its interpretation of the First Amendment by "promoting the virtues of free speech and association," including by "pursuing litigation." Pillar of Law Institute, *Our Mission*, https://www.pillaroflaw.org/index.php/about/our-mission (last visited June 16, 2016). Wyoming Liberty, for its part, has as its mission to invite "citizens to prepare for informed, active and confident involvement in local and state government." Exh. A, at 1.

Second, neither Pillar nor its parent, Wyoming Liberty, has any "members or

[7] Even if subsequent facts come to light that might establish Pillar or Wyoming Liberty falls outside the scope of the *MCFL* exemption, plaintiffs' motion should still be denied. Plaintiffs bear the burden of establishing that they meet the requirements for a preliminary injunction, including that they have standing to sue. *See, e.g.*, *Beltronics, USA, Inc.*, 562 F.3d at 1075 (noting that "the party seeking the preliminary injunction" bears "the burden of proof"). Outside of their Verified Complaint, Plaintiffs have offered no exhibits, declarations, affidavits, or other evidence to satisfy their burden of establishing that the Commission would likely enforce the law in the way they suggest.

stockholders." Exh. A, at 6.

Third, although Pillar did not expressly plead that it meets the three *MCFL* factors and its precise funding sources are not entirely clear, Wyoming Liberty reported to the IRS that its "percentage of support received from the public is 26.69%," and that it received contributions from "approximately eight (8) foundations and public charities" and "approximately 109 individuals." Exh. A, at 7.

Thus, Pillar appears to fall squarely within the types of corporate organizations that are entitled to an *MCFL* exemption. *See, e.g.*, *Colo. Right to Life Comm.*, 498 F.3d at 1141-43, 1156 (holding that advocacy organization dedicated to "promote reverence and respect for human life" was an "*MCFL*-exempt entity").

b. The Commission Has Never Applied Section 30118 to Bar an MCFL Corporation From Providing the Funds, Services, and Materials That Pillar Seeks to Provide to Delegates

While the Supreme Court has rejected the argument that the *MCFL* exemption must be applied in the context of corporate expenditures to *candidates*, *see Beaumont*, 539 U.S. at 149, neither the courts nor the Commission have addressed whether 52 U.S.C. § 30118 bars an *MCFL* corporation from making contributions to a delegate to a national convention. It does not.

Contribution limits satisfy review if they are "closely drawn" to serve "a sufficiently important interest." *Buckley*, 424 U.S. at 25. Plaintiffs argue in passing that strict scrutiny should apply because section 30118 is purportedly a more serious infringement on their associational freedoms under the First Amendment. (Prelim. Inj. Mem. at 6.) Plaintiffs cite no case supporting the application of strict scrutiny in this context. And the Supreme Court has held that "[e]ven a significant interference with protected rights of political association" is reviewed under closely drawn scrutiny. *Buckley*, 424 U.S. at 25 (internal quotation marks omitted); *see also FEC v. Arlen Specter '96*, 150 F. Supp. 2d 797, 818-89 (E.D. Pa. 2001) (holding that in-

kind contributions are not subject to strict scrutiny). Indeed, closely drawn scrutiny applies even if the regulation involved is a ban on contributions, which prevents any association at all. *See Beaumont*, 539 U.S. at 161-63; *Wagner v. FEC*, 793 F.3d 1, 6 (D.C. Cir. 2015) (en banc) ("[T]he Supreme Court expressly rejected this argument in *FEC v. Beaumont*, concluding that both limits and bans on contributions are subject to the same 'closely drawn' standard.").

Although *MCFL* addressed only the independent expenditures of non-profit advocacy corporations that were not coordinated with a candidate, the Commission has never enforced the corporate contribution and expenditure bar against such an entity for providing funds or discounted goods or services to delegates. Nor would it in this case, because the conduct at issue is far closer to an independent expenditure directed at voters than a contribution to a candidate. This is particularly true with respect to the educational materials Pillar seeks to provide to delegates, which plaintiffs allege merely seeks to raise awareness of issues relating to delegate autonomy. The books Pillar seeks to disseminate — which, according to Pillar (and as the titles of the books suggest), merely describe political conventions through the nation's history — are essentially history textbooks regarding past conventions. (*See* Compl. ¶ 42.)

The *pro bono* legal services and stipends Pillar seeks to donate are also unlike corporate contributions to candidates. As described above, Pillar's proposed spending would not directly or indirectly provide anything of value to any particular candidate. This fact alone distinguishes the conduct at issue here from contributions to candidates, which by their very nature are designed to influence the outcome of an election by directly providing means for a candidate to fund his own campaign. Moreover, one of the rationales underpinning the ban on corporate contributions to candidates is to prevent the use of corporations "as conduits for 'circumvention of [valid] contribution limits.'" *Beaumont*¸ 539 U.S. at 155 (quoting *FEC v. Colo. Republican*

Federal Campaign Comm., 533 U.S. 431, 456 & n.18 (2001)) (alteration in original). But because delegates, who are not candidates, operate under no limits on the amount of contributions they may accept from permissible sources, this rationale does not apply.

In light of these factors, there is no credible threat that the Commission would enforce the bar on corporate contributions and expenditures in section 30118 against the plaintiffs for engaging in the activities proposed here.

B. Because Plaintiffs' Proposed Conduct is Not Prohibited, This Court Need Not Reach Plaintiffs' Remaining Constitutional Arguments

Because plaintiffs have failed to establish that they face a credible threat of Commission enforcement against them, this Court need not reach the remaining constitutional arguments presented in plaintiffs' motion. Plaintiffs cannot raise arguments regarding asymmetrical contribution limits and exceptions for in-kind donations to candidates and party committees when they are permitted to engage in the conduct they wish to pursue. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (noting that "a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" (internal quotation marks omitted)). Even assuming that plaintiffs' constitutional theory is correct, they lack standing to sue if their conduct is free from a danger of enforcement.

III. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM

As demonstrated above, the provisions challenged here do not prevent plaintiffs from engaging in their proposed activities and, therefore, do not unconstitutionally burden their First Amendment rights or cause irreparable harm. *See Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003) (explaining "[i]t is the movant's burden" to establish each factor).

At most plaintiffs' allegations present theoretical, not irreparable harm. "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman*, 348

F.3d at 1189 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir.1985); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)). Here, plaintiffs allege that they have "refrained from launching [their] delegate autonomy project" because of the corporate contribution prohibition in section 30118. (Prelim. Inj. Mem. at 18.) However, as explained above, plaintiffs' allegations do not establish a credible threat of Commission enforcement action against them. *See supra* pp. 9-21. Since plaintiffs lack a credible fear of suffering any "loss of First Amendment freedoms," (Prelim. Inj. Mem. at 18 (citing *Verlo v. Martinez*, No. 15-1319, 2016 WL 1395205 (10th Cir. Apr. 8, 2016)), the deprivation that they allege cannot serve as the basis for their claim of irreparable harm. Plaintiffs' speculative and uncertain claims stand in stark contrast to the pamphleteers in *Verlo v. Martinez*, the case on which plaintiffs rely, where it was not in dispute that the challenged provision "bar[red] Plaintiffs from engaging in their pamphleteering" in particular areas. 2016 WL 1395205, at *8.

Indeed, if there were any legitimate doubt regarding the legality plaintiffs' planned activities, plaintiffs had the option under 52 U.S.C. § 30108 to ask the Commission for an advisory opinion. The advisory opinion process is a "chill-reducing" and "relatively riskless" mechanism, *Martin Tractor Co. v. FEC*, 627 F.2d 375, 388 (D.C. Cir. 1980), and "in issuing advisory opinions, the Commission fulfills its statutorily granted responsibility to interpret the Act." *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001); s*ee also McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) ("[S]hould plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification … and thereby 'remove any doubt there may be as to the meaning of the law' " (internal quotation marks and citation omitted)). Counsel for plaintiffs are familiar with the process, and employed it to develop what they considered a "detailed record" in support of claims for another case. Suppl. Br. and Addendum for Appellant

at 4-5, *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (No. 13-8033), http://www.fec.gov/law/litigation/freespeech_fs_suppl_brief.pdf. Here, where plaintiffs' impact litigation could have been averted, they made no such requests.

Furthermore, Pillar's altruistic "concern[] that many delegates will suffer financial hardships in attempting to attend the Republican National Convention" and its desire to offer $500 stipends to help defray such costs is not a basis for injunctive relief. (Compl. ¶ 31.) Any concern regarding such a harm not only is speculative, it is also reparable. There is no allegation that a delegate will not attend the convention absent the stipend, and it is "well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm . . . ." *Heideman*, 348 F.3d at 1189 (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2948.1, at 152-53 (2d ed.1995)). Extraordinary preliminary injunctive relief is unnecessary when the proposed stipend can be disbursed to the delegates at the conclusion of any litigation. At best, plaintiffs have alleged, but not met their burden of establishing, the "possibility of irreparable harm [which] is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiffs have not made that "clear showing."

Finally, plaintiffs' own delay in seeking relief "'may be viewed as inconsistent with a claim that plaintiff[s are] suffering a great injury or, in the case of preliminary injunctive relief, that there is an urgent need for immediate relief and that a judgment would be rendered ineffective unless some restraint is imposed on defendant pending an adjudication on the merits.'" *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1221 (D. Utah 2004) (quoting 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2946 at pp. 113-

14 (1995)), *aff'd*, 425 F.3d 1249 (10th Cir. 2005).

Plaintiffs filed their motion for a preliminary injunction on June 3, 2016, with the convention just weeks away. The delegate autonomy principles they advocate, however, are far from novel. Indeed, the very titles of the books "Pillar would like to offer . . . to delegates detailing principles of delegate autonomy" — "National Party Conventions 1831-2008" and "The First American Political Conventions: Transforming Presidential Nominations, 1832-1872" (Compl. ¶ 42) — underscore that the principles it seeks to promote have been documented for well over a century. Likewise, the statutory provision plaintiffs challenge, 52 U.S.C. § 30118, has been in place for more than a century, deriving from Tillman Act of 1907. *See* Ch. 420, 34 Stat. 864. And the prospect of a contested convention has been something for which delegates to the Republican convention and the public have been intensely preparing for over four months. There is no basis for expedited relief here.

On the contrary, the disruptive potential of an injunction at this late date in the election context could cause confusion among political actors and undermine the public's confidence in the federal campaign finance system. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase."); *Iowa Right To Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1049 (S.D. Iowa 2010) (declining to impose preliminary injunction that would "radically change Iowa's campaign finance rules mid-stream during an election"); *Anderson v. FEC*, 634 F.2d 3, 5 (1st Cir. 1980) (denying preliminary injunction when "[p]laintiffs did not commence this action until late in the campaign"). The statutory provisions governing the conventions have been in place for a long time; plaintiffs' "[d]elay . . . tends to indicate at least reduced need for such drastic, speedy action." *Utah Gospel Mission*, 316 F. Supp. 2d at 1221

(months long delay in bringing action "belies any irreparable injury to their rights") (internal quotation marks omitted).

Since "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (internal quotation marks and citation omitted), plaintiffs' failure on this element alone warrants denial of any preliminary injunction.

IV. THE BALANCE OF HARMS FAVORS THE COMMISSION AND AN INJUNCTION WOULD BE ADVERSE TO THE PUBLIC INTEREST

In contrast to the imagined burdens plaintiffs seek to avoid, enjoining a statute and casting into doubt the rules that have long governed this election would substantially harm the Commission and the public. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A "presumption of constitutionality [] attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

The imminent harm to the public, if the scope of this provision is cast into doubt in the days leading up to the national party conventions (and just months before the general presidential election), far outweighs any interest plaintiffs have in a ruling from this Court. Both the public and the Commission have an overriding interest in maintaining the rules that are in place without judicial intervention.

CONCLUSION

For the foregoing reason, the Commission respectfully requests that the plaintiffs' motion for a preliminary injunction be denied.

Respectfully submitted,

Daniel A. Petalas (dpetalas@fec.gov)
Acting General Counsel

Lisa J. Stevenson (lstevenson@fec.gov)
Deputy General Counsel – Law

Kevin Deeley (kdeeley@fec.gov)
Acting Associate General Counsel

Erin Chlopak (echlopak@fec.gov)
Acting Assistant General Counsel

/s/Jacob S. Siler
Jacob S. Siler (jsiler@fec.gov)
Attorney

June 17, 2016

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
Tel: (202) 694-1650
Fax: (202) 219-0260

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2016, I filed the foregoing with the Clerk of Court using the Court's CM/ECF system, which served the following counsel:

Boyd Wiggam
Wyoming Liberty Group
1902 Thomes Ave.
Ste. 201
Cheyenne, WY 82001
boyd.wiggam@wyliberty.org

Benjamin Barr
Stephen R. Klein
Pillar of Law Institute
455 Massachusetts Ave., NW
Ste. 359
Washington, DC 20001-2742
benjamin.barr@pillaroflaw.org
stephen.klein@pillaroflaw.org

/s/ Jacob S. Siler
Jacob S. Siler