Boyd Wiggam (Wyoming Bar # 6-4059)
WYOMING LIBERTY GROUP
1902 Thomes Ave.
Ste. 201
Cheyenne, WY 82001
(307) 632-7020 [Tel.]
(307) 632-7024 [Fax]
boyd.wiggam@wyliberty.org

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNNAMED PLAINTIFF #1, UNNAMED PLAINTIFF #2, PILLAR OF LAW INSTITUTE, Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	)	C.A. No. 16-CV-135-S

PLAINTIFFS' REPLY BRIEF TO MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

1. Introduction

On June 17, 2016, the Defendant Federal Election Commission ("FEC") filed its Opposition to Plaintiffs' Motion for Preliminary Injunction. Doc. No. 18. On that same day, this Court ordered Plaintiffs to file an Expedited Reply Brief to Defendant's Opposition. Doc. No. 19.

Since the FEC has relied on particular advisory opinions and precedent that would permit Plaintiffs to engage in their course of conduct, no oral argument or consideration of Plaintiffs' request for injunctive relief is required at this time.

2. The FEC's Position That Certain Advisory Opinions Will Protect In-Kind Donations and that Pillar's Delegate Scholarships Are Protected Under *Massachusetts Citizens for Life* Sufficiently Protects Plaintiffs' First Amendment Rights

Although the FEC describes Plaintiffs' case as a "lawsuit in search of an enforcement threat," FEC advisory opinions and practice support the recognition of Plaintiffs' injury in this case. Defendant Federal Election Commission's Opposition to Plaintiff's Motion for Preliminary Injunction, Doc. No. 18, at 1 (hereinafter "FEC Reply"). For example, it is true that in Advisory Opinion 1983-23 (LTV Corp.), the Commission decided that a for-profit corporation's cocktail reception at a convention would not constitute a prohibited contribution. 1983 WL 909288. But it is also true that in Advisory Opinion 1978-22 (Heftel), the FEC decided that a candidate hosting a "hospitality room" at a convention *would* constitute a contribution. 1978 WL 456875. This was because it was "reasonable to infer that [the host's] attendance at the convention, and the activity occurring in the 'hospitality room,' will have the effect of furthering [the host's] candidacy." *Id.* So, although some advisory opinions may permit activity similar to the Plaintiffs', others do not, causing the quandary before this Court. All of this guidance rests in deciding whether the FEC will consider a certain monetary or in-kind donation as one that might influence an election and thus constitute a "contribution . . . in connection with any . . . political convention . . . held to select candidates for any political office." 52 U.S.C. § 30118(a).

The 2016 election season has been most contentious, and as this memorandum is being prepared "delegate revolts" are continually discussed in the media. *See, e.g.*, Michael Gerson, *A delegate revolt has become Republicans' only option*, WASH. POST, June 20, 2016, *available at* https://www.washingtonpost.com/opinions/a-delegate-revolt-has-become-republicans-only-option/2016/06/20/2a5999ec-3713-11e6-8f7c-d4c723a2becb_story.html. It is sensible to believe the FEC would interpret delegate autonomy projects as "influencing any election." 52 U.S.C. §

30101(8)(A). Delegate autonomy, as described in Plaintiffs' Verified Complaint (Doc. No. 1), is the notion that delegates are "unbound" and may select whomever they desire as a nominee regardless of primary election results. In this sense, delegate autonomy is both a historical and legal principle, but it also carries with it the sense that delegate autonomy projects could upend the nomination of Donald Trump in the Republican Party, which, to put it mildly, would likely influence an election.

That a particular course of conduct may implicate both relevant policy issues—the scope and freedom of delegate action—as well as impact an election—selecting another nominee other than Trump—was well recognized in *Buckley v. Valeo*. 424 U.S. 1 (1976). "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 41. "Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.* This, then, is why the Supreme Court noted that the ambiguity of the phrase "for the purpose of influencing" does "pose[] constitutional problems" and "raises serious problems of vagueness," because it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 76–77. But this phrase, which "raises serious problems of vagueness," is all the FEC offers as instruction for the public to decide whether a given monetary or in-kind donation is a contribution (and perhaps prohibited), or not.

It is a welcome event that the FEC elected to rely on advisory opinions allowing Pillar to distribute books and provide *pro bono* legal services to delegates, and for the Unnamed Plaintiffs to accept them. But the FEC could have just as easily decided that because delegate autonomy efforts would likely influence the presidential election, they would qualify as contributions, and thus be illegal under the FECA It certainly would have had administrative support to do so. *See*

Advisory Opinion 1978-22 (Heftel), 1978 WL 456875. Because the FEC has decided that Pillar's book distribution and *pro bono* legal representation projects would be protected under AO 1983-23 (LTV Corp.), there is no need for injunctive relief here.

Pillar's third activity, providing $500 delegate scholarships to help defray delegate travel and convention attendance costs, could be similarly targeted under 52 U.S.C. § 30118. Because these scholarships would allow pro-autonomy delegates a better opportunity to participate in the Republican National Convention, and thus have a better opportunity to upend Trump's nomination, they could influence a federal election. However, the FEC has affirmed its fidelity to *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), and explained that even Plaintiffs' "proposed stipends (Compl. ¶ 31), would nevertheless be permitted under the Supreme Court's decision in *MCFL*." FEC Reply at 17.

Recognizing the import of *MCFL* and the rarity of cases involving delegates, the FEC notes "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." FEC Reply at 19. This guidance does not exist in the form of any statute, rule, regulation, or advisory opinion. Rather, the FEC has undertaken a good faith litigation position that it will not apply 52 U.S.C. § 30118 against MCFL corporations wishing to provide direct monetary donations such as Pillar's to convention delegates. For the interim, this is sufficient to protect Plaintiffs' First Amendment rights, preserve judicial resources, and avoid an unnecessary hearing.

3. Plaintiffs Do Not Forgo First Amendment Protection Due to Last Minute Political Developments and Lengthy Administrative Processes

The FEC's counsel considers Plaintiffs' reading of the law to be incorrect, and Plaintiffs may go about the activities detailed in this case without fear of running afoul of the FECA. Due to this, it would be nearly absurd to disagree with the FEC's positions. Nevertheless, the points of

legal contention in this case, detailed above, are real and must be noted, for purposes of the record and in the event the parties cannot reach a satisfactory settlement. Just as importantly, the legal issues in this case were raised by sudden circumstances never before witnessed in the history of the FECA.

It was only in early May that Donald Trump became the presumptive Republican nominee. *See* Emily Schultheis, *Ted Cruz drops out of presidential race after Indiana loss*, CBS NEWS, May 3, 2016, http://www.cbsnews.com/news/ted-cruz-drops-out-of-presidential-race-after-indiana-loss/. Though respectful of delegate autonomy and party conventions, these issues were simply not Pillar's focus until around this same time, when the organization began to confer with delegates who expressed fear of legal retaliation, among other forms. *See* Unnamed Plaintiffs' First Memorandum in Support of Protective Order, Doc. No. 16. It was during the process of exploring how Pillar might help the Unnamed Plaintiffs with issue advocacy and legal defense that the concerns in this case arose—that is, in May of 2016, last month. *Cf.* FEC Reply at 23–24. This action, researched and briefed to the best of counsel's ability, was not ready for consideration by either this Court or the FEC until just before the date of filing. *See* Doc. No 1 (filed May 25, 2016).

Plaintiffs' counsel is, indeed, "familiar with" the FEC's advisory opinion process. FEC Reply at 22. They are also familiar with the potential pitfalls of this process. *See* Advisory Opinion 2012-11 (Free Speech), http://saos.fec.gov/aodocs/AO%202012-11.pdf (an inconclusive, split opinion, issued 72 days after request). These concerns, along with counsel's good-faith belief in its legal positions, supported the decision to seek judicial relief. Furthermore, although Pillar could have availed itself of the advisory opinion process independently, it could have done so on behalf of the Unnamed Plaintiffs without disclosing their identities. 11 CFR 112.1(a) ("An authorized

agent of the requesting person may submit the advisory opinion request, but the agent shall disclose the identity of his or her principal.").

Campaign finance cases are difficult enough without seal motions and protective orders; these were undertaken because the Unnamed Plaintiffs are real, as are their concerns. If anything, this should dispel accusations that this case is an "apparent effort to generate a case or controversy[.]" FEC Reply at 1. Counsel will proceed with efforts settle this matter, utilizing the same good faith with which this case was brought.

4. Conclusion

Plaintiffs and Defendant will be in discussions to settle this suit. Until that point, Plaintiffs ask that their motion and supporting documents for preliminary injunctive relief be postponed.

Respectfully submitted,

/s/ Stephen Klein
Stephen R. Klein
Benjamin Barr
PILLAR OF LAW INSTITUTE
455 Massachusetts Ave. NW
Ste. 359
Washington, DC 20001-2742
(202) 815-0955 [Tel.]
stephen.klein@pillaroflaw.org
benjamin.barr@pillaroflaw.org

Boyd Wiggam (Wyoming Bar # 6-4059)
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1902 Thomes Ave.
Ste. 201
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June 21, 2016

CERTIFICATE OF SERVICE

I, Stephen Klein, hereby certify that on this 21st day of June, 2016, the foregoing Reply Brief to Memorandum in Opposition to Motion for Preliminary Injunction was electronically served on Defendant's counsel via the Court's CM/ECF system.

/s/ Stephen Klein