

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

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FREE SPEECH		)	
	Plaintiff,	)	
		)	
v.		)	Civil Case No. 12-CV-127-S
		)	
FEDERAL ELECTION COMMISSION		)	
		)	
	Defendant.	)	
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MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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## 1. Introduction

Plaintiff Free Speech moves for a preliminary injunction for reasons set forth below and in its accompanying Memorandum in Support of Motion for Preliminary Injunctive Relief filed contemporaneously with this motion. Fed. R. Civ. P. 65(a). Plaintiff notes that it will be filing a motion to amend its Verified Complaint and is presently following Local Rules and working with the Defendant Federal Election Commission (“FEC”) to achieve just this. A motion to amend along with a First Amended Verified Complaint is expected to be filed soon. In accord with Local Rule 7.1(a), counsel conferred on July 10, 2012 about this non-dispositive motion by telephone and the FEC opposes it.

In order to secure a preliminary injunction, the following elements must be established: (1) there is a substantial likelihood of success on the merits, (2) irreparable injury will result without an injunction, (3) the threatened injury to the moving party would outweigh any damage to the opposing party, and (4) issuing the injunction would not be adverse to the public interest. *Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1234 (10th Cir. 2011); *see also International Snowmobile Mfrs. Ass’n v. Norton*, 304 F. Supp. 2d 1278, 1286 (D. Wyo. 2004). Plaintiff submits that because a preliminary injunction presents no monetary risk to the FEC, any bond should be waived or set at \$1. Fed. R. Civ. P. 65(c).

In the Tenth Circuit, where movants establish that the latter three elements alone tip in their favor, injunctive relief may also be warranted. *See Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). Post-*Mineta*, the U.S. Supreme Court issued *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). There, the Supreme Court rejected the Ninth Circuit's relaxed approach to preliminary injunctions based on a “possibility” of irreparable harm. *Id.* at 22. The Court instructed that movants seeking preliminary injunctive relief must demonstrate that irreparable injury is likely in the absence of an injunction. *Id.* Even where a likelihood of success on the merits is established, the mere speculative possibility of irreparable injury will not suffice as a basis for injunctive relief. In the First Amendment context, *Winter* does nothing to alter the fact that once movants establish a likelihood of success, injury to First Amendment interests follows as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“loss of First

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).

## **2. Free Speech has Demonstrated a Substantial Likelihood of Success on the Merits**

As described thoroughly in its Memorandum in Support of Motion for Preliminary Injunctive Relief, Free Speech will succeed on the merits of this challenge. The FEC maintains more than “568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions” that effectively operate to inhibit and chill speech nationwide. *Citizens United v. FEC*, 130 S.Ct. 876, 895 (2010). Guessing incorrectly about the scope, meaning, or applications of the challenged provisions leads to extensive investigations by the FEC and hefty civil penalties. Even in the wake of its many losses on constitutional grounds, the FEC has not afforded clarity, comprehensibility, or precision to the challenged regulations, policies, and practices, rendering them void both on their face and as applied to Free Speech. *See id.* at 893.

## **3. Irreparable Injury will Occur if First Amendment Freedoms are not Protected**

Once a substantial likelihood of success on the merits has been established, the loss of First Amendment freedoms, even minimally, constitutes irreparable harm as a matter of law. *See Elrod*, 427 U.S. at 373–74; *see also Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001). In order to stop the chill of the challenged provisions against Free Speech, and speakers nationwide not before this court, nationwide injunctive relief is appropriate to remedy the injury in question.

## **4. The Balance of Harms Tips in Free Speech’s Favor**

A threatened injury to plaintiff’s constitutionally protected speech will usually outweigh the harm, if any, the defendants may incur from being unable to enforce what appears to be an unconstitutional statute. *See American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Here, Plaintiff’s political speech—speech deemed an “essential mechanism of democracy”—is muted by the octopus-like grasp of the challenged provisions. *Citizens United*, 130 S. Ct. at 898. Any “reliance harm” suffered by Defendant with respect to its regulatory system can be cured by this Court acknowledging Advisory Opinion Draft C from the Free

Speech advisory opinion process as being the correct statement of law for interim guidance until the FEC has time to promulgate new regulations and policies consistent with the First Amendment. *See* Free Speech Verified Complaint, EXHIBIT D.

#### **5. Issuing the Injunction Works in Favor of the Public Interest**

Vindicating First Amendment liberties is “clearly in the public interest.” *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 823 F.Supp.2d 36, 52 (D.D.C. 2011) (“the public interest . . . will be served by ensuring that plaintiffs’ First Amendment rights are not infringed before the constitutionality of the regulation has been definitively determined”) (quoting *Stewart v. District of Columbia Armory Bd.*, 789 F.Supp. 402, 406 (D.D.C. 1992)). Because of this, protecting these rights favors the public interest and ensures that speech uttered “during a campaign for political office” invokes the “fullest and most urgent application” of the First Amendment. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

#### **6. Conclusion**

For the reasons contained herein and in the accompanying Memorandum in Support of Motion for Preliminary Injunctive Relief, Free Speech prays that this Court grant this motion and preliminarily enjoin the FEC from enforcing the challenged provisions and policies facially and as applied until a final hearing on the merits may be had. Plaintiff requests a prompt oral argument in support of this motion because of the complex legal issues involved and complicated points of constitutional law and to effectuate the Federal Rules of Civil Procedure, favoring a “just, speedy, and inexpensive determination.” Fed. R. Civ. P. 1.

Dated July 13, 2012

Respectfully submitted,

/s/ Stephen 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