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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH,	)	
Plaintiff,	)	Civ. No. 2:12-127 (SWS)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MOTION TO DISMISS
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Defendant Federal Election Commission ("Commission") respectfully moves the Court to dismiss this case with prejudice for failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). As grounds for this motion, the Commission refers to (and incorporates by reference herein) its Opposition to Plaintiff's Motion for Preliminary Injunction (Docket No. 26) ("FEC Inj. Br."), in which the Commission demonstrated the legal deficiencies of plaintiff's claims and the constitutionality of (1) the Commission's regulatory definition of "expressly advocating," 11 C.F.R. § 100.22; (2) the Commission's method for determining whether a group is a "political committee" as defined by 2 U.S.C. § 431(4)(A) and construed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); and (3) the Commission's standard for determining whether a request for donations is a solicitation for contributions under 2 U.S.C. § 441d(a). Because the resolution of this case depends exclusively on legal questions that have been fully and extensively briefed by both parties and amicus curiae (*see* Docket Nos. 20, 26, 29) — and recently addressed by both parties during nearly two hours of oral argument (*see* Docket No. 31) — this Court may decide the merits of this case now, in connection with its consideration of plaintiff's request for a preliminary injunction.

In the alternative, should the Court decline to dismiss this case with prejudice, the Commission requests that the case be dismissed without prejudice under Federal Rule of Civil Procedure 41(b). Plaintiff's First Amended Verified Complaint (Docket No. 24) violates Federal Rule of Civil Procedure 8, which requires that a pleading contain "a *short and plain* statement of the claim showing that the pleader is entitled to relief" and that "[e]ach allegation must be *simple, concise, and direct*." Fed. R. Civ. P. 8(a)(2), (d)(1) (emphases added).

For these reasons and those set forth in the accompanying Memorandum in Support of the Commission's Motion to Dismiss, the Commission requests that the Court grant this Motion and dismiss the case.

Respectfully submitted,

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Dated: September 24, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, the foregoing Federal Election Commission's Motion to Dismiss was filed electronically with the Clerk of Court through the Court's ECF system, and served by electronic filing on the following recipients:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 2:12-127 (SWS) MEMORNADUM IN SUPPORT OF MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Plaintiff's First Amended Verified Complaint (Docket No. 24), fails to state a claim on which relief can be granted and accordingly should be dismissed with prejudice. Fed. R. Civ. P. 12(b)(6). As grounds for this motion, Defendant Federal Election Commission ("Commission") refers to (and incorporates by reference herein) its Opposition to Plaintiff's Motion for Preliminary Injunction (Docket No. 26) ("FEC Inj. Br."), in which the Commission demonstrated that plaintiff's claims are legally untenable. Although the complaint contains broad allegations regarding the Commission and its conduct, it appears to state a constitutional challenge to three discrete aspects of federal campaign finance law: (1) the Commission's regulatory definition of "expressly advocating," 11 C.F.R. § 100.22; (2) the Commission's method for determining whether a group is a "political committee" as defined by 2 U.S.C. § 431(4)(A), and construed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); and (3) the Commission's standard for determining whether a request for donations is a solicitation for contributions under 2 U.S.C. § 441d(a).

This case presents purely legal questions that have been fully and extensively briefed by both parties and amicus curiae (*see* Docket Nos. 20, 26, 29), and were recently addressed by both parties during nearly two hours of oral argument (*see* Docket No. 31). The Court may therefore decide the merits of this case now, in connection with its consideration of plaintiff's request for a preliminary injunction. As outlined below and detailed in the Commission's prior brief and oral argument, plaintiff fails to demonstrate that the regulation and policies it challenges are unconstitutional on their face or as applied to plaintiff, and its constitutional challenges thus fail as a matter of law. This case should accordingly be dismissed with prejudice.

Specifically, plaintiff's claims fail as a matter of law because:

- In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Supreme Court struck down the statutory prohibition on corporate spending for independent expenditures. At the same time, eight Justices agreed that disclosure requirements for campaign-related speech are "less restrictive" of speech than a limit on spending, *id.* at 915, because such requirements "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64; *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). The Court thus held that disclosure requirements are subject to intermediate, or "exacting," scrutiny and upheld such requirements, even for communications that merely mention a candidate but contain no direct candidate advocacy. *Id.* at 914-16. Such disclosure requirements are substantially related to the important governmental interest of informing the electorate about the sources and financing of candidate-related speech. *Id.* (*See* FEC Inj. Br. at 2-5, 24-25.)
- The challenged regulation, 11 C.F.R. § 100.22(b), defines "expressly advocating" and thus provides guidance on whether a communication is an "independent expenditure" subject to statutory disclosure requirements. Because *Citizens United* struck down the prohibition on direct corporate financing of independent expenditures in 2 U.S.C. § 441(b), the Commission's regulatory definition of expressly advocating, which had helped to implement that ban, no longer operates to restrict corporate (or union) speech. Section 100.22(b) now only triggers disclosure obligations in connection with such speech. (*See* FEC Inj. Br. at 2-5.)
- Likewise, for plaintiff and similarly situated groups that do not make any contributions to candidates, 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. These requirements are highly similar to the disclosure provisions that the Supreme Court in *Citizens United*

— and subsequently several Courts of Appeals — found to be substantially related to the important governmental interest of informing the electorate about the sources and financing of campaign advocacy. (FEC Inj. Br. at 24-27, 36-38, 39-41.) Such disclosures foster "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916. The Fourth Circuit thus rejected the very arguments raised by plaintiff here in holding that section 100.22(b) is constitutional and in overruling its own earlier conclusion to the contrary. *Real Truth About Abortion v. FEC*, 681 F.3d 544, 548-55, 550 n.2 (4th Cir. 2012) ("*RTAA*") (overruling constitutional holding in *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001)). (*See* FEC Inj. Br. at 18-22.)

- The Commission's 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. *Buckley*, 424 U.S. at 79. The Commission's approach is also entirely consistent with the Tenth Circuit's holding that a group's major purpose can be determined by examining its "central organizational purpose." *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677-78 (10th Cir. 2010). (*See* FEC Inj. Br. at 32-36.) The Commission's case-by-case approach to determining a group's major purpose has been upheld both under the Administrative Procedure Act as a proper exercise of the Commission's discretion, *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007), and as a constitutional exercise of the "inherently . . . comparative task" necessitated by the Supreme Court's "major purpose" requirement, *RTAA*, 681 F.3d at 556. As the Fourth Circuit recently recognized, "[t]he necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *RTAA*, 681 F.3d at 557 (collecting cases). (*See* FEC Inj. Br. at 34-35.) And plaintiff *agreed* in its

Memorandum in Support of its Motion for Preliminary Injunction that it is "undoubtedly true that in conducting the major purpose analysis, fact-intensive inquiries are often appropriate." (Pl.'s Mem. at 33 (Docket No. 20).)

- Plaintiff and the Commission *agree* that the proper legal standard for determining whether a request for donations is a "solicitation" for "contributions" is the test articulated by the Second Circuit in *FEC v. Survival Education Fund, Inc.*, 60 F.3d 285 (2d. Cir. 1995). (FEC Inj. Br. at 38-41.) And regardless of whether plaintiff's donation requests solicit regulable contributions, plaintiff remains free to spend unlimited funds on such requests and to solicit unlimited funds for its express advocacy. (FEC Inj. Br. at 39-40.)
- Because plaintiff does not meaningfully distinguish its purported as-applied challenges from its facial claims, the as-applied challenges fail for the same reasons as the facial challenges. (FEC Inj. Br. at 16-17 & nn.13, 30.)

In the alternative, should the Court decline to dismiss this case with prejudice under Rule 12(b)(6), this action should be dismissed *without* prejudice under Rule 41(b). Plaintiff's First Amended Verified Complaint (Docket No. 24), violates Federal Rule of Civil Procedure 8, which requires that a pleading contain "a *short and plain* statement of the claim showing that the pleader is entitled to relief" and that "[e]ach allegation must be *simple, concise, and direct*." Fed. R. Civ. P. 8(a)(2), (d)(1) (emphases added). The Tenth Circuit "has long recognized that defendants are prejudiced by having to respond to pleadings [that are] wordy and unwieldy," and the district courts are not obliged to assess the merits of "pleadings [that are] rambling." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162-63 (10th Cir. 2007). The Tenth Circuit has explained that "[e]mploying Rule 41(b) to dismiss a case without prejudice for failure to

comply with Rule 8 of course allows the plaintiff another go at trimming the verbiage," and thus "a district court may, without abusing its discretion, enter such an order without attention to any particular procedures." *Id.* at 1162 & n.3 ("In numerous unpublished decisions, we have affirmed district courts' dismissals of actions without prejudice for failure to comply with Rule 8 under our basic abuse of discretion standard.") (collecting cases); *Mann v. Boatright*, 477 F.3d 1140, 1148 (10th Cir. 2007) (explaining that "Rule 8 serves the important purpose of requiring plaintiffs to state their claims intelligibly" and affirming dismissal where plaintiff "made her complaint unintelligible 'by scattering and concealing in a morass of irrelevancies the few allegations that matter'") (quoting *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003)).

Plaintiff's complaint eschews the "simplicity, conciseness and clarity" required by Rule 8, in favor of verbose characterizations of the Commission itself, the Commission's alleged historical success rate in unrelated lawsuits, and various judicial decisions and legal provisions. *E.g.* First Amend. Compl. ¶¶ 1, 4, 12, 24-27, 39, 47, 49, 53-55, 68, 72, 75-76, & n.1; *see Mann*, 477 F.3d at 1148 ("'Something labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint.'") (quoting *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996)). The Commission would be prejudiced by having to respond to each of plaintiff's irrelevant allegations and its "wordy and unwieldy" characterizations of facts and law. *Nasious*, 492 F.3d at 1162. Thus, even if the Court declines to dismiss this case with prejudice under Rule 12(b)(6), at a minimum it should be dismissed

without prejudice for failure to comply with Rule 8, while "allow[ing] the plaintiff another go at trimming the verbiage" and providing the required "short and plain statement" of its claims.

CONCLUSION

For all the foregoing reasons, and those set forth in the Commission's Opposition to Plaintiff's Motion for Preliminary Injunction (Docket No. 26), the Commission requests that the case be dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6). In the alternative, should the Commission's request for dismissal with prejudice be denied, the Commission requests that the case be dismissed without prejudice under Rule 41(b) for failure to comply with Rule 8's pleading requirements.

Respectfully submitted,

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I hereby certify that on September 24, 2012, the foregoing Federal Election Commission's Memorandum in Support of Its Motion to Dismiss was filed electronically with the Clerk of Court through the Court's ECF system, and served by electronic filing on the following recipients:

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