AGENDA DOCUMENT NO. 12-24-B

FEDERAL ELECTION COMMISSION
Washington, DC 20463

2012 APR 26 A 9:37

April 26, 2012

AGENDA ITEM

For Meeting of 4-26-12

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Anthony Herman AH
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Subject: AO 2012-11 (Free Speech) (Draft C)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 26, 2012.

Attachment

ADVISORY OPINION 2012-11

Benjamin T. Barr Esq.
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Wyoming Liberty Group
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DRAFT C

Dear Messrs. Barr and Klein:

We are responding to your advisory opinion request on behalf of Free Speech, concerning the application of the Federal Election Campaign Act, as amended (the "Act"), and Commission regulations to Free Speech's proposed plan to finance certain advertisements and ask for donations to fund its activities.

The Commission concludes that: one of Free Speech's proposed advertisements would expressly advocate the election or defeat of a clearly identified Federal candidate; (2) none of the proposed donation requests would be solicitations of "contributions"; and (3) Free Speech's proposed activities would not require it to register and report with the Commission as a political committee.

Background

The facts presented in this advisory opinion are based on your letter received on February 29, 2012, and your email received on March 9, 2012.

Free Speech describes itself as "an independent group of individuals which promotes and protects free speech, limited government, and constitutional accountability." Bylaws, Art. II. It is an unincorporated nonprofit association formed under the Wyoming Unincorporated Nonprofit Association Act, WYO. STAT. ANN. §§ 17-

22-101 to 115 (2012), and a "political organization" under 26 U.S.C. § 527 of the Internal Revenue Code.[1] It currently has three individual members.

Free Speech will not make any contributions to Federal candidates, political parties, or political committees that make contributions to Federal candidates or political parties. Nor is Free Speech affiliated with any group that makes contributions. Free Speech also will not make any coordinated expenditures.[2]

Free Speech plans to run 11 advertisements, which it describes as "discuss[ing] issues concerning limited government, public policy, the dangers of the current administration, and their connection with candidates for federal office." Free Speech will run these advertisements in various media, including radio, television, the Internet, and newspapers. Free Speech currently plans to run the following ads, which are described more fully in response to question 1 below.

Radio Advertisements

Free Speech plans to spend $1,000 on three advertisements to be aired on local radio station KGAB AM in Cheyenne, Wyoming. These advertisements, which Free Speech calls "Environmental Policy," "Financial Reform," and "Health Care Crisis," will

[1] The Internal Revenue Code defines a political organization as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for [the tax-]exempt function" of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of presidential or vice presidential electors. 26 U.S.C. § 527(e).

[2] Free Speech's bylaws prohibit its members, officers, employees, and agents from engaging in activities that could result in coordination with a Federal candidate or political party. Bylaws, Art. VI. And members, officers, employees and agents have a duty to "ensure the independence of all speech by the Association about any candidate or political party . . . in order to avoid coordination." Bylaws, Art. VI, Sec. 3.

be aired 60 times between April 1 and November 3, 2012. Free Speech currently plans to allocate its budget evenly among the three advertisements, spending $333.33 for each.

Newspaper Advertisements

Free Speech plans to spend $500 on two advertisements that will appear in the *Wyoming Tribune Eagle* on May 12 and May 27, 2012. Free Speech plans to spend $250 on each advertisement. The advertisements – "Financial Reform" and "Health Care Crisis" – will include pictures as well as text.

Internet Advertisements

Free Speech plans to spend $500 on two advertisements that will appear on Facebook. The advertisements will appear for a total of "200,000 impressions on Facebook within Wyoming network" between April 1 and April 30, 2012. Free Speech plans to spend $250 on each advertisement. The two advertisements, entitled "Gun Control" and "Environmental Policy," will include pictures as well as text.

Television Advertisements

Free Speech plans to spend $8,000 on four advertisements that will appear on the local television network KCWY in Cheyenne, Wyoming. The advertisements will appear approximately 30 times between May 1 and November 3, 2012. Free Speech plans to spend $2,000 on each of the four advertisements. The advertisements are entitled "Gun Control," "Ethics," "Budget Reform," and "An Educated Voter Votes on Principle."

In total, Free Speech plans to spend $10,000 to run the advertisements described above. Free Speech "would like to speak out in similar ways in the future."

Free Speech has identified one individual donor willing to give it $2,000 or more, and would like to ask other individuals to donate more than $1,000 "to help support its

speech." Free Speech would also draw upon funds from its three members to pay for advertisements costing more than $2,000. Free Speech, however, will not accept donations from individuals who are foreign nationals or Federal contractors. Free Speech plans to ask for donations from individuals through four separate donation requests, which are described in response to question 2 below.

Questions Presented

1. Will Free Speech's proposed advertisements be "express advocacy" and subject to the Act and Commission regulations?

2. Will Free Speech's proposed donation requests be solicitations subject to the Act and Commission regulations?

3. Will the activities described in this advisory opinion request require Free Speech to register and report to the Commission as a political committee?

Legal Analysis and Conclusions

Question 1. Will Free Speech's proposed advertisements be "express advocacy" and subject to the Act and Commission regulations?

One of the communications proposed by Free Speech would be deemed "express advocacy" under 11 C.F.R. § 100.22(a).

The concept of "express advocacy" originated in *Buckley v. Valeo*, 424 U.S. 1 (1976). There, the Court held the Act's definition of expenditure to be vague and overbroad.[3] As the Court explained, "[i]n its efforts to be all-inclusive, . . . the provision raises serious problems of vagueness, particularly treacherous where, as here, the

[3] The Act's original disclosure provisions for independent expenditures were originally written more broadly, to cover any expenditure made "for the purpose of . . . influencing" the nomination or election of candidates for federal office.

violation of its terms carries criminal penalties and fear of incurring those sanctions may deter those who seek to exercise protected First Amendment rights." *Id.* at 76-77 (footnote omitted). To cure these defects, the Supreme Court construed "expenditure" to reach only funds used for communications that "expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. It explained that "expressly advocate" required "*explicit* words of advocacy of election or defeat of a candidate." *Id.* at 43 (emphasis added). The Court explained that this "explicit words of advocacy" construction means "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44, n.52.

In direct response to the Court's decision in *Buckley*, Congress amended the Act in 1976 to define "independent expenditure" as "an expenditure by a person advocating the election or defeat of a clearly identified candidate . . . ." 2 U.S.C. § 431(17) (1976). This was in turn defined to mean communications that included "express advocacy." This change "reflect[ed] the Court's opinion in the *Buckley* case,"[4] and specifically "define[d] 'independent expenditure' to reflect the definition of that term in the Supreme Court's decision in *Buckley v. Valeo*."[5]

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[4] Federal Election Campaign Act Amendments of 1976, Report to Accompany H.R. 12406 (Report No. 94-917), 94th Cong., 2d Session, at 82 (Minority Views).

[5] Federal Election Campaign Act Amendments of 1976, Report to Accompany S. 3065 (Report No. 94-677), 94th Cong., 2d Session (Mar 2, 1976) at 5. Congress changed the independent expenditure reporting requirements "to conform to the independent expenditure reporting requirements of the Constitution set forth in *Buckley v. Valeo* with respect to the express advocacy of election or defeat of clearly identified candidates." Joint Explanatory Statement of the Committee of Conference on the 1976 amendments to the FECA at 40. *See* also Congressional Record (Senate), S 6364 (May 3, 1976) (Sen. Cannon explained that the legislation was "codifying a number of the Court's interpretations of the campaign finance laws....").

The post-*Buckley* congressional amendments happened before the Supreme Court ruled in *FEC v. Massachusetts Citizens For Life ("MCFL")*, 479 U.S. 238 (1986). In *MCFL*, the Court relied on *Buckley*, and explained that "in order to avoid problems of overbreadth, the Court held that the term 'expenditure' encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate,'" *Id.* at 248-49 (citing *Buckley*, 44 U.S. at 80) and reiterated footnote 52 of *Buckley*, which defined express advocacy to mean words such as "vote for," "elect," and "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 249 (citing *Buckley*, 44 U.S. at 44, n.52). The Court then maintained the construction of the statutory language it had used in *Buckley*: "[T]he definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates." *Id.* at 248.

Factually, *MCFL* concerned a newsletter distributed by an incorporated non-profit issue group, that stated "Vote Pro Life," and next to which was a list of candidates and indications as to whether those candidates were pro-life. Specifically, in September 1978 (prior to the September primary elections), MCFL distributed a "Special Edition" newsletter. The front page of the newsletter stated "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE" followed by a statement to the reader that "[n]o pro-life candidate can win in November without your vote in September." *MCFL*, 479 U.S. at 243. "'VOTE PRO-LIFE' was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the poll to remind voters of the name of the 'pro-life' candidates." *Id.* The newsletter also included a disclaimer that stated "this special election edition does not represent an endorsement of any particular candidate."

Id. The newsletter included a listing of all the state and federal candidates that would be on the Massachusetts primary ballot, "and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues." *Id.* Candidates with a "y" next to their names were those who supported MCFL's issues; candidates with a "n" by their names opposed MCFL's issues; and an asterisk was placed next to the names of "incumbents who had made a 'special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." *Id.* at 243-44. Thirteen candidates' pictures were included in the newsletter and all "13 had received a triple 'y' rating, or were identified either as having a 100% favorable voting record or as having stated a position consistent with that of MCFL. No candidate whose photograph was featured had received even one 'n' rating." *Id.* at 244.

In holding that the newsletter contained express advocacy, the Court noted that "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons... Just such an exhortation appears in the 'Special Edition.'" *Id.* at 249. The Court noted that the newsletter "urges voters to vote for 'pro-life' candidates" and "also identifies and provides photographs of specific candidates fitting that description." *Id.* The Court concluded that the newsletter "provides in effect an explicit directive: vote for these (named) candidates. The fact that the message is marginally less direct than 'Vote for Smith' does not change its essential nature. The Edition goes beyond issues discussion to express electoral advocacy." *Id.*

Subsequent to *MCFL*, the Ninth Circuit ruled in *FEC v. Furgatch,* 807 F.2d 857 (9th Cir. 1987). There, the Court held that "[s]peech may only be termed 'advocacy' if it

presents a clear plea for action, and . . . it must be clear what action is advocated [*i.e.*,] . . . a vote for or against a candidate . . ." *Id.* at 864. Factually, *Furgatch* concerned anti-Carter newspaper ads that ran about a week before the 1980 election. *Id.* at 858. The advertisement was captioned "DON'T LET HIM DO IT." *Id.* It made a number of specific references to the upcoming election and the election process (*e.g.*, "The President of the United States continues to degrade the electoral process"; "He [the President] continues to cultivate the fears, not the hopes of the voting public"; "If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning"). *Id.* The advertisement specifically mentioned current and former opponents of the President (*e.g.*, "[The President's] running mate outrageously suggested Ted Kennedy was unpatriotic"; "[T]he President himself accused Ronald Reagan of being unpatriotic"). *Id.* After criticizing Carter for his campaign tactics, the advertisement stated: "If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT!" *Id.*

The Ninth Circuit held that the express advocacy threshold will be met only if a communication "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Furgatch*, 807 F.2d at 864. The court further held that "[t]his standard can be broken into three main components":

- "[S]peech is 'express' . . . if its message is unmistakable and unambiguous, suggestive of only one plausible meaning";

- "[S]peech may only be termed 'advocacy' if it presents a clear plea for action"; and
- "[Speech] must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate . . . ."

Id. The court then emphasized that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy." *Id.*

In analyzing the advertisement, the court said that "the words we focus on are 'don't let him.' They are simple and direct. 'Don't let him' is a command . . . . the only way to not let him do it was to give the election to someone else." *Id.* at 864-65. The Ninth Circuit held that the action urged was thus a vote against a candidate, and the advertisement constituted express advocacy.[6] That this clear plea for action requirement was central to the holding of *Furgatch* was made clear by the Ninth Circuit in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003): "*Furgatch* ... presumed express advocacy must contain some explicit *words* of advocacy." *Id.* at 1098 (emphasis in original).

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[6] In *Furgatch*, the court set out a three-part standard for express advocacy, the second part of which is absent from Section 100.22(b). *Furgatch*, 807 F.2d at 864 ("First, even if it is not presented in the clearest, most explicit language, speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a *clear plea for action*, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.") (emphasis added).

In the wake of *MCFL*, *Furgatch*, and other cases, the Commission amended its regulatory definition of "express advocacy." As the Commission explained at the time, the reworking of its regulations was done for clarity, and that the modifications simply "reworded" the prior regulation "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates," and added "a somewhat fuller list of examples" of the "expressions set forth in *Buckley*." *See* Explanation and Justification for Final Rules on Express Advocacy ("Express Advocacy E&J"), 60 Fed. Reg. 35291, 35293 (July 6, 1995). Section 100.22(a) defines "expressly advocating" as any communication that:

> Uses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice,' 'vote against Old Hickory,' ''defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s) which in context can have no other reasonable meaning that to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'

The Commission also added a new section to define "express advocacy." At the time, the Commission made clear that the new section was not an expansive test, but instead was merely providing "clarity" to reflect the Ninth Circuit's decision in *FEC v. Furgatch*. The Commission did not adopt a standard that would have included "suggestions to take actions to affect the result of an election," *id.* at 35294, but instead adopted Section 100.22(b), which defines "expressly advocating" as any communication that:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

The Express Advocacy E&J does not elaborate on what sort of "external factors" are to be considered, only that they ought to be "pertinent." *Id.* at 35294. It does say that such contextual considerations will be done on a "case by case" basis. *Id.* at 35295. It also explains that the Commission declined to adopt a specified number of days before an election within which a communication could be deemed express advocacy. *Id.* The Express Advocacy E&J also said that the rules of 100.22(b) "do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages." *Id.* Moreover, "the subjective intent of the speaker is not a relevant consideration because *Furgatch* focuses the inquiry on the audience's reasonable interpretation of the message." *Id.* Finally, the Express Advocacy E&J said that "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy . . . if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Id.* The Commission did "not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis." *Id.*

Section 100.22(b) has been deemed unenforceable by a number of courts.

See Va. Soc'y for Human Life v. FEC, 263 F.3d 379, 392 (4th Cir. 2001) ("*VSHL*") (holding that 100.22(b) "violates the First Amendment" because "[t]he regulation goes too far because it shifts the determination of what is 'express advocacy' away from the words 'in and of themselves' to "the unpredictability of audience interpretation" (quoting *FEC v. Christian Action Network, Inc.*; 110 F.3d 1049, 1051, 1057 (4th Cir. 1997))); *Maine Right to Life Comm., Inc. v. FEC ("MRLC")*, 914 F. Supp. 8, 13 (D. Maine 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir.1996), *cert. denied*, 522 U.S. 810 (1997) (Section 100.22(b) held "contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"); *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding "that 11 C.F.R. § 100.22(b)'s definition of 'express advocacy' is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley v. Valeo*.").

Thereafter, the Commission stated publicly that it would not enforce Section 100.22(b) in either the First or Fourth Circuits.[7] However, the Commission continued to enforce that section in all other circuits, under the under the doctrine of intercircuit nonacquiescence, which provides that an agency need not modify a nationwide regulation in response to an adverse ruling of one or more of the circuit courts of appeals. *See*

[7] On September 22, 1999, the Commission decided by a vote of 6-0 to "formally confirm the Commission's position that because 11 C.F.R. § 100.22(b) has been found invalid by the United States Court of Appeals for the First Circuit, and has in effect been found invalid in the United States Court of Appeals for the Fourth Circuit, it cannot and will not be enforced in those circuits, unless and until the law of those circuits changed or overruled."

Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (Feb. 1989).[8]

Several courts outside the First and Fourth Circuits have also rejected a more expansive view of express advocacy. As noted above, the Southern District of New York held in *Right to Life of Dutchess Co.*, "that 11 C.F.R. § 100.22(b)'s definition of 'express advocacy' is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley v. Valeo*." 6 F. Supp at 254.

Additionally, in *FEC v. Survival Education Fund, Inc.*, 1994 WL 9658 (S.D.N.Y. 1994) (unreported), *aff'd in part, rev'd in part*, 65 F.3d 285 (2d Cir. 1995), the district court determined that a mailer which included a two-page letter criticizing the Reagan Administration's policies in Central America, called for protests outside of the Republican National Convention, and provided an "Anti-War Ballot" which listed a check-box next to the word "no" and several purported administration policies did not constitute express advocacy. *Id.*

Likewise, in *FEC v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999), the D.C. District Court rejected the FEC's view that a number of election-related materials contained express advocacy.[9] For example, a mailer entitled "Reclaim America" was not express advocacy. The mailer stated that "the 1994 elections for Congress . . . will give

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[8] On September 22, 1999, the Commission decided by a vote of 6-0 to "formally confirm the Commission's position that because 11 C.F.R. 100.22(b) has been found invalid by the United States Court of Appeals for the First Circuit, and has in effect been found invalid in the United States Court of Appeals for the Fourth Circuit, it cannot and will not be enforced in those circuits, unless and until the law of those circuits changed or overruled."

[9] The court used the standard announced by the Ninth Circuit in *FEC v. Furgatch*, the case upon which Section 100.22(b) is based.

Americans their first opportunity to deliver their verdict on the Clinton Presidency. If America's 40 million eligible Christian voters are going to make our voices heard in the elections this November . . . we must stand together, we must get organized, and we must start now," that "America's 40 MILLION Christian voters have the potential to make sweeping changes in our government . . . IF Christians get to the ballot box and IF Christians have accurate information about how their elected representatives are voting," and that the mailing was intended to give Christians a "chance to make the politicians in Washington feel the power of the Christian vote." *Id.* at 57.

The court also concluded that a "Congressional Scorecard" produced by the Christian Coalition which listed how federal office holders voted on several issues, indicated the organization's preferred position on those issues, and provided an overall score measuring that Congressman's level of agreement with the Christian Coalition did not constitute express advocacy where the scorecard indicated that it was "designed to give Christian voters the facts they need to hold their Congressmen accountable." *Id.* at 57-58.

Subsequently, Congress passed the Bipartisan Campaign Reform Act of 2002, colloquially called McCain-Feingold.[10] Senators McCain and Feingold first introduced legislation in 1997 to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.'" *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997). This early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in

[10] Pub. L. 107-155, 116 Stat. 81 (Mar. 27, 2002).

any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office." *See* 143 Cong. Rec. S10107,10108.

Eventually, McCain-Feingold's sponsors abandoned their effort to redefine "expenditure" and instead proposed the regulation of "electioneering communications," "in contrast to the earlier provisions of the . . . bill." *See* Brief of Defendants at 50-51, *McConnell v. FEC*, 251 F. Supp.2d 176 (D.D.C. 2003). In part to respond to concerns raised by the bill's opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between so-called "genuine" issue advocacy and a narrowly defined category of television and radio advertisements, broadcast in proximity to federal elections, "that constitute the most blatant form of [unregulated] electioneering." 144 Cong. Rec. S906, S912 (Feb. 12, 1998). The earlier provisions of the McCain-Feingold bill that sought to tinker with the meaning of "express advocacy" were dropped.[11]

Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with 'clear and narrowing wording' which strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in *Buckley* and *MCFL*. Senator Snowe explained that the provision specifically did not alter prior law regarding express

[11] Congress is currently considering legislation that would, *inter alia*, modify the definition of "independent expenditure" to include both express advocacy and the functional equivalent of express advocacy. Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2012 or DISCLOSE 2012 Act, H.R. 4010, 112th Cong. § 2.

advocacy, and that the bill specifically did not apply a "no other reasonable meaning," test of the sort found in *Furgatch* or Section 100.22(b) because it was too ambiguous and vague:

> We are concerned about being substantially too broad and too overreaching. The concern that I have is it may have a chilling effect. The idea is that people are designing ads, and they need to know with some certainty without inviting the constitutional question that we have been discussing today as to whether or not that language would affect them as whether or not they air those ads. That is why we became cautious and prudent in the Senate language that we included and did not include *Furgatch* [the case upon which 100.22(b) is based] for that reason because it invites ambiguity and vagueness as to whether or not these ads ultimately would be aired or whether somebody would be willing to air them because they are not sure how it would be viewed in terms of being unmistakable and unambiguous. That is the concern that I have. 147 Cong. Rec. S2711 (March 22, 2001).[12]

This legislative history shows that Congress did not alter the construction given the Act in *Buckley* and *MCFL*. Moreover, when Congress revises a statute, its decision to leave certain sections unamended (as it did in McCain-Feingold) constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *See Cottage Sav. Ass'n v. Comm'r of Internal Revenue*, 499 U.S. 554, 562 (1991).

A number of plaintiffs, including Senator Mitch McConnell, challenged McCain-Feingold, and argued that the new electioneering communication provisions were

[12] Senator McCain, the principal sponsor of the entire bill, was of the view that both *Buckley* and *MCFL* limited the pertinent parts of the Act to express advocacy: "With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, federal election law contribution limits and disclosure requirements should apply only if the ads contain 'express advocacy.'" 148 Cong. Rec. S2141 (March 20, 2002). McCain-Feingold itself makes clear that independent expenditures and electioneering communications cannot be the same thing. *See* 2 U.S.C. § 434(f)(3)(B)(ii) ("The term 'electioneering communication' does not include—a communication which constitutes an expenditure or an independent expenditure under this Act.").

unconstitutional because the statute went beyond *Buckley's* "express advocacy" limitation. In its initial response, the FEC said:

> It is plain to see from [*Buckley*] that the freedom claimed by plaintiffs "to spend as much as they want to promote candidate[s] and [their] view[s]" so long as they "eschew expenditures that in express terms advocate the election or defeat" of those candidates, arose from *Buckley's* "exacting interpretation of the statutory language" in FECA "necessary to avoid unconstitutional vagueness," and not as an absolute guarantee that emanates directly from the First Amendment itself.

See Opposition Brief of Defendants at 59, *McConnell v. FEC*, 540 U.S. 93, No. 02-0582 (2003). The FEC also made clear *MCFL* imposed the *Buckley* construction on the post-*Buckley* legislative amendments:

> [A]s the Court explained [in *MCFL*], *MCFL* merely applied the same rationale relied upon in *Buckley* – namely, curing vagueness in statutory language that defined "expenditures" in terms of a speaker's "purpose to influence an election" – and placed a "similar" express advocacy construction on FECA § 441b.

Id. at 60.

And finally, the FEC was unequivocal that the First Circuit's decision in *MRLC* turned on the reach of the statute, not on constitutional abstract:

> [T]he lower courts have repeatedly and accurately described Buckley's express advocacy test as a saving construction of a potentially unconstitutional statute, not itself a standard of constitutional law. . . . In *Right to Life of Duchess Cty., Inc. v. FEC*, and *Maine Right to Life, Inc. v. FEC*, the courts rejected the FEC's regulatory definition of express advocacy insofar as it includes communications that "[w]hen taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s)." They based their decision on the conclusion that this definition of express advocacy "is not authorized by FECA . . . as that statute has been interpreted" by the Supreme Court.

Id. at 61-62.

One member of the three judge panel agreed with the FEC. She reviewed the cases that held Section 100.22(b) unenforceable and endorsed the result in those cases—

that the FEC lacked the authority to redefine a statutory test that only Congress or the Supreme Court could redefine. She said Section 100.22(b) was "plagued with vague terms" that place the speaker at the "mercy of the subjective intent of the listener." *McConnell v. FEC*, 251 F. Supp.2d 176, 601 (D.C. Cir. 2003) (Kollar-Kotelly, J., memorandum op.).

On appeal, the Supreme Court agreed. The Court confirmed that "[t]he narrowing construction adopted in *Buckley* limited the Act's disclosure requirement to communications expressly advocating the election or defeat of particular candidates." *McConnell v. FEC*, 540 U.S. 93, 102 (2003). The Court described *Buckley's* limiting construction of the otherwise vague and thus overbroad statute as "strict," and noted that "the use or omission of 'magic words' . . . marked a bright statutory line separating 'express advocacy' from 'issue advocacy.'" *Id.* at 126 (emphasis added). Agreeing with the FEC's arguments, the Court repeatedly emphasized that *Buckley* was "the product of statutory interpretation rather than a constitutional command." *Id.* at 191-92 (emphasis added) (noting that the Court in *MCFL* had previously "confirmed the understanding that *Buckley's* express advocacy category was a product of statutory construction."). As the Court explained:

> We concluded that the vagueness deficiencies could "be avoided only by reading [the Act] as limited to communications that include explicit words of advocacy of election or defeat of a candidate. We provided examples of words of express advocacy, such as "vote for," "elect," "support," . . . "defeat," [and] "reject," and those examples eventually gave rise to what is now known as the "magic words" requirement.

Id. at 191 (internal citations omitted). The Court characterized *Buckley* and *MCFL* as having drawn a "strict" line, *id.* at 126, that was "an endpoint of statutory interpretation,

not a first principle of constitutional law" *Id.* at 190 (emphasis added). In fact, the Court noted that "advertisers [can] easily evade the line by eschewing the use of magic words." *Id.* at 193. And *McConnell* made clear that the statutory endpoint remained unchanged: there are at least thirteen instances where *McConnell* equated the term "express advocacy" with the so-called "magic words" test.[13] Turning to the challenged electioneering communication provision, the Court noted "that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 192. The Court found that it did not suffer from the same vagueness that had plagued the definition of "expenditure," and upheld the electioneering communication ban on its face, "to the extent it was the functional equivalent of express advocacy." *Id.* at 206.

Thus, although it upheld the constitutionality of BCRA's electioneering communications provision, *McConnell* maintained the statutory construction of "expenditure" set forth in *Buckley* and *MCFL*.[14] Numerous circuit courts likewise have held that the express advocacy requirement was not altered by *McConnell* and remains a viable way to cure an otherwise vague statute. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) ("*NYMO*"); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRTL*"); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. denied*, *Stumbo v. Anderson*, 543 U.S. 956

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[13] *McConnell*, 540 U.S. at 126 (2 references), 127 (2 references), 190 (2 references), 192, 193 (2 references), 193-94, 216-17, 219. The McConnell dissenting opinion similarly used "express advocacy" to mean communications that contain the "magic words" of footnote 52 of *Buckley*. *See* 540 U.S. at 281, 322.

[14] The Commission's Office of General Counsel has in the past made this point. *See* MUR 5634 (Sierra Club), GCR #2 at 10 ("*McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than it did in *Buckley*.)."

(2004); *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004).[15] Therefore, *McConnell* did not, *sub silentio*, overrule cases that held Section 100.22(b) to be beyond the Act, nor did it provide support for Section 100.22(b). As a result, *VSHL* and *MRLC* are still applicable, and Section 100.22(b) should remain unenforceable in the First and Fourth Circuits until the Commission receives further guidance.

In 2004, Wisconsin Right to Life brought a suit challenging McCain-Feingold's electioneering communication ban, specifically alleging that certain ads it wished to run that concerned judicial nominations were not the functional equivalent of express advocacy, as set forth in *McConnell*. Several years later, the Supreme Court agreed that McCain-Feingold could not constitutionally prohibit the advertisements at issue regarding judicial nominations. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). According to the Court, although this statute was not vague, it was still

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[15] Likewise, in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), the D.C. Circuit repeatedly equated express advocacy with a so-called "magic words" requirement. For example, the court said:

> In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court, invoking constitutional avoidance, construed FECA's limitation on expenditures to apply only to funding of communications that "express[ly] . . . advocate the election or defeat of a clearly identified candidate for federal office," i.e., those that contain phrases such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'" Thus, by avoiding these "magic words," organizations unable to make "expenditures"—such as corporations and unions— could fund so-called "issue ads" that were "functionally identical" to campaign ads and just as effective.

Id. (citing *Buckley*, 424 U.S. at 43-44 n.52; *McConnell*, 540 U.S. at 126; and *MCFL*, 479 U.S. at 249) (internal citations omitted) (emphasis added). *See also*, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (upholding the requirement that SpeechNow.org file as a political committee, but making clear that the reporting regime was triggered by *Buckley's* "magic words" standard, stating:

> 'Express advocacy' is regulated more strictly by the FEC than so-called 'issue ads' or other political advocacy that is not related to a specific campaign. In order to preserve the FEC's regulations from invalidation for being too vague, the Supreme Court has defined express advocacy as communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.').

Id. at 689, n.1.

overbroad, as it captured non-campaign advertisements. As explained by Chief Justice Roberts, *McConnell* had limited the reach of the statutory ban to the functional equivalent of express advocacy. *WRTL*, 551 U.S. at 456. The Chief Justice further explained that in addition to the statutory criteria defining electioneering communication, an advertisement came within the reach of the statute's then-existing ban on corporate- and union-funded electioneering communications "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. *Id.* at 469-70.

In considering the matter, a number of Justices made clear that express advocacy still meant express words of advocacy, a standard left unchanged by *McConnell*. For example, in his concurring opinion, Justice Scalia stated this directly when describing what the Court did in *Buckley*, and he further added that he did not believe the Constitution allows a broader interpretation: "If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." *Id.* at 495 (Scalia, J. concurring in part and concurring the judgment). Chief Justice Roberts, in response to Justice Scalia, agreed with Justice Scalia's premise that *Buckley* established a bright line express magic words test, but instead explained that his appeal to vote test is not in conflict with *Buckley*. According to the Chief Justice, the appeal to vote test serves a different purpose than the express advocacy test, because *Buckley's* so-called magic words requirement was a product of statutory construction, not a constitutional limit on regulation. *Id.* at 474, n.7. Justice Souter, writing in dissent, also characterized the express advocacy test as a magic words standard by acknowledging that *MCFL* "held that the prohibition [on corporate and union expenditures] applied 'only to expenditures for

communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office'" and that "'[E]xpress terms,' in turn, meant what had already become known as 'magic words,' such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 513 (Souter, J. dissenting) (internal citations omitted).

Subsequent to *WRTL*, Citizens United, a non-profit corporation organized under Section 501(c) of the Internal Revenue Code, sued the Commission. It had produced a movie, entitled "Hillary – The Movie," and wished to air the movie on pay-for-view cable television. The Court determined that the movie was an electioneering communication that was the functional equivalent of express advocacy, since it "calls Senator Clinton 'Machiavellian,'... asks whether she is 'the most qualified to hit the ground running if elected President,'... and the narrator reminds viewers that 'a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House.'" *Id.* at 890. Nonetheless, the Court held that the movie could not be banned. Importantly, no party argued that "Hillary the Movie" contained express advocacy and, thus, constituted an independent expenditure. The Court also turned back an as-applied challenge to the McCain-Feingold electioneering communication reporting obligations. *Id.* at 916.

Most recently, the United States District Court for the Eastern District of Virginia held that two ads were the functional equivalent of express advocacy and, thus, could come within 11 C.F.R. § 100.22(b). This case is on appeal before the United States Court of Appeals for the Fourth Circuit. *See Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736, 749-50 (E.D. Va. 2011) *appeal docketed*, No. 11-1760 (4th Cir. argued Mar. 21, 2012).

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As noted above, the FEC has, in the past, applied Section 100.22(b) in jurisdictions outside the First and Fourth Circuits under the doctrine of intercircuit nonacquiescence. This doctrine is the obverse of the general rule that a decision of a circuit court of appeals is not binding on a sister court. *See, e.g,, Holland v. Nati'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002). However, this rule is not absolute. In fact, if a circuit court has found unlawful "a rule of broad applicability," the usual result "is that the rule is invalidated, not simply that the court forbids its application to a particular individual." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting, but expressing the view of all justices on this question); *see also Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

It appears the Commission has only applied the doctrine of intercircuit nonacquiescence to this regulation. By contrast, in *Shays v. FEC*, 337, F. Supp. 2d 28 (D.D.C 2004) ("*Shays I*"), after the district court struck down a regulation excluding internet communications from the definition of "public communication," rather than engage in nonacquiescence, the Commission revised its regulation. And when the D.C. Circuit struck down five Commission regulations in *EMILY's List v. FEC*, rather than engage in nonacquiescence, the Commission excised the regulations at issue. Similarly, after *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir 2010), and *Carey v. FEC*, 2011 WL 2322964 (D.D.C. 2011), the

Commission applied a decision regarding its regulations nationwide, rather than merely in the D.C. Circuit.

Applying Section 100.22(b) in some circuits but not others would subject nationally broadcast political advertisements to inconsistent regulatory standards.[16] This would, in turn, frustrate a fundamental purpose of the Act—ensuring a uniform campaign finance system.[17]

Since intercircuit nonacquiescence (1) has only been applied in the context of Section 100.22(b); (2) has not been applied in subsequent instances; and (3) should not be applied to rules broad applicability—like those regarding the First Amendment and its interplay with Federal campaign finance law, which involves the potential regulation of speech on a nationwide level—Section 100.22(b) should no longer be enforced outside the First and Fourth Circuits on the basis of intercircuit nonacquiescence until the Commission receives further guidance. And, as noted above, neither should Section 100.22(b) be enforced within the First and Fourth Circuits without further judicial or legislative instruction.

The Supreme Court's decision in *WRTL* does not affect the applicability of Section 100.22(b).[18] Chief Justice Roberts, in his controlling opinion, limited the then-

[16] The Commission notes that the use of advertising mediums that provide national coverage is becoming more and more commonplace. People and groups are turning to mediums such as the internet with the use of Facebook ads and Google ads, as well as national cable media buys to reach larger audiences with their messages. These mediums provide a low cost, effective way for groups to reach national audiences.

[17] To effectuate this purpose, the Act contains a broad preemption clause. *See* 2 U.S.C. § 453.

[18] Neither does *McConnell v. FEC*, 540 U.S. 93 (2003). While the Court did state that "the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command," it did so in the context of facially upholding a separate legal provision—the electioneering communications provision. *McConnell*, 540 U.S. at 191-92. Importantly, the Court did not overturn the holding in *Buckley* that the vague and overbroad definition of

existing prohibition on electioneering communications to communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" (*i.e.*, "the Roberts test"). *WRTL*, 551 U.S. at 469-70. While this language bears some similarities to Section 100.22(b), it cannot make Section 100.22(b) consistent with the Act because there are critical distinctions between "expenditures" and "electioneering communications."

BCRA specifically exempted any "communication which constitutes an expenditure or independent expenditure under this Act" from the definition of "electioneering communication." 2 U.S.C. § 434(f)(3)(B)(2)(ii). Since *Buckley*, only communications that contain express advocacy may be deemed expenditures. Thus, as a matter of law, if a communication contains express advocacy, it cannot be considered an electioneering communication. This is the reason the *WRTL* Court adopted the Roberts test – because, to be consistent with BCRA's exemption of "expenditure" from the definition of "electioneering communication," the same standard used to define an expenditure could not also be used to define an electioneering communication subject to the then-existing ban on corporate and labor union funding. Therefore, if Section 100.22(b) is equivalent to the Roberts test set forth in *WRTL*, then Section 100.22(b) is inconsistent with the Act.[19]

"expenditure" was limited to express advocacy. *Id.* at 192. Thus, the Commission cannot use *McConnell* to revive Section 100.22(b). Rather, it is still bound by *Buckley* and its limitations on the statutory definition of "expenditure," as interpreted by *VSHL* and *MLRC*.

[19] Section 100.22(b) also appears to be much broader than the Roberts test. Chief Justice Roberts specifically noted that the electioneering communication "test is only triggered if the speech meets the brightline requirements of BCRA § 203 [the definition of electioneering communications] in the first place." *WRTL*, 551 U.S. at 474 n.7. Speech subject to Section 100.22(b) does not, by terms of the regulation, need to meet similar brightline requirements.

Given the legal history of Section 100.22(b), Section 100.22(b) should not be applied to a communication to determine whether it contains express advocacy. Rather, under current legal conditions, Section 100.22(a) is the sole means by which a communication may be deemed an independent expenditure.

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The "Environmental Policy" Radio Advertisement

> President Obama opposes the Government Litigation Savings Act. This is a tragedy for Wyoming ranchers and a boon to Obama's environmentalist cronies. Obama cannot be counted on to represent Wyoming values and voices as President. This November, call your neighbors. Call your friends. Talk about ranching.

The "Environmental Policy" radio advertisement does not constitute express advocacy under Section 100.22(a). It contains no "magic words" and does not associate a candidate with an issue and then ask viewers to base their votes on that issue. Nor does the advertisement contain an electoral slogan. Rather, this is an issue ad describing what the speaker believes are the harmful effects on ranching resulting from President Obama's opposition to a particular bill. It asks listeners to call neighbors and friends to talk about ranching. While the communication does include a reference to November—the month in which the presidential election will be held— that, by itself, is not an electoral exhortation. In fact, the communication asks its listeners to talk, not vote. Merely including the month November in an otherwise issue-focused communication does not transform it into express advocacy under Section 100.22(a).

The "Financial Reform" Radio and Newspaper Advertisements

> President Obama supported the financial bailout of Fannie Mae and Freddie Mac, permitting himself to become a puppet of the banking and

> bailout industries. What kind of person supports bailouts at the expense of average Americans? Not any kind we would vote for and neither should you. Call President Obama and put his antics to an end.[20]

The "Financial Reform" advertisements, which Free Speech proposes to air on the radio and run in newspapers, contain express advocacy as defined by Section 100.22(a). This section is based in part on the Supreme Court's decision in *MCFL*, which as noted above, involved a flyer that included the phrase "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE" and contained an exhortation to "VOTE PRO- LIFE" after identifying candidates who were the pro-life. The Court held the flyer was express advocacy. Here, the "Financial Reform" ad states that "President Obama supported the financial bailout of Fannie Mae and Freddie Mac," and then asks "What kind of person supports bailouts at the expense of average Americans?" It answers the questions with "[n]ot any kind of person that we would vote for and neither should you." Thus, "Financial Reform" is express advocacy under *MCFL*'s formulation of express advocacy: it identifies a candidate (President Obama) with a position on an issue (bailouts) and then states that the viewers should vote against those who take that issue position ("What kind of person supports bailouts ...? Not any kind we would vote for and neither should you."). Such a formulation, according to *MCFL*, "provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." *MCFL*, 479 U.S. at 249.

Moreover, this conclusion is not altered by the final sentence: "Call President Obama and put his antics to an end." The ad contains two different statements directed at

[20] The script for the radio version of the Financial Reform advertisement is the same as the text of the print version. The only difference between the two, besides the format, is the newspaper advertisement's inclusion of a full-page picture of President Obama.

the viewer: (1) "Not any kind we would vote for and neither should you;" and (2) the statement "Call President Obama and put his antics to an end." These are two different statements that make two different points; however, the addition of the statement, "Call President Obama and put his antics to an end," does not negate the fact that the ad contains express advocacy under Section 100.22(a). This is similar to *MCFL*, where the Court held that a "disclaimer" stating "[t]his special election edition does not represent an endorsement of any particular candidate" did not "negate [the] fact" that the flyer contained express advocacy. *MCFL*, 470 U.S. at 249.

The "'"Health Care Crisis" Radio and Newspaper Advertisements

> Script: President Obama supports socialized medicine, but socialized medicine kills millions of people worldwide. Even as Americans disapproved of ObamaCare, he pushed ahead to make socialized medicine a reality. Put an end to the brutality and say no to socialized medicine in the United States.[21]

The "Health Care Crisis" advertisements, which Free Speech proposes to air on the radio and run in newspapers, do not constitute express advocacy under Section 100.22(a). It lacks any words of advocacy that would constitute express advocacy under either *Buckley* or *MCFL*, and it does not include any electoral slogans. Thus, it makes no electoral references but, rather, calls on viewers to "say no to socialized medicine in the United States." While it does reference President Obama in an unfavorable manner, merely mentioning a candidate in a negative (or a positive) light does not transform an otherwise issue-oriented advertisement into express advocacy.

[21] Like the script for the radio and print versions of the "Financial Reform" advertisements, the script for the two versions of the "Health Care Crisis" advertisements is the same. The only difference between the two advertisements, besides the format, is the newspaper advertisement's inclusion of a "[f]ull picture of a family picture torn in half."

The "Gun Control" Facebook Advertisement

(Picture of handgun, 110 pixels wide by 80 pixels tall)
(Title: Stand Against Gun Control)
Obama supports gun control. Don't trust him. Support Wyoming state candidates who will protect your gun rights.

The "Gun Control" advertisements, which Free Speech proposes to publicize on Facebook, do not constitute express advocacy. The advertisement does not contain words of advocacy like those listed in Section 100.22(a). Instead, it criticizes President Obama's support of gun control and exhorts viewers to "[s]upport Wyoming state candidates." Again, like "Health Care Crisis," mentioning a Federal candidate in an unfavorable manner does not, by itself, cause a communication to come within Section 100.22(a).

The "Environmental Policy" Facebook Advertisement

(Picture of a Wyoming ranch, 110 pixels wide by 80 pixels tall)
(Title: Learn About Ranching)
Obama's policies are a tragedy for Wyoming ranchers, and he does not represent our values. This November, learn about ranching.

The "Environmental Policy" Facebook advertisement does not constitute express advocacy. The advertisement does not contain words of advocacy like those listed in Section 100.22(a). And though the communication does include a reference to November, that does not convert an otherwise issue-oriented advertisement into express advocacy.

The Gun Control Television Advertisement

Audio:	Video:
Guns save lives.	Newspaper clippings with headlines describing self-defense with firearms fade in,

	piling up one atop another.
That's why all Americans should seriously doubt the qualifications of Obama, an ardent supporter of gun control.	Clippings dissolve to a picture of President Obama, and one newspaper headline below him: "President Obama defends attorney general regarding ATF tactics (LA Times, Oct. 6, 2011)"
This fall, get enraged, get engaged, and get educated. And support Wyoming state candidates who will protect your gun rights.	Dissolves to a picture of the Wyoming state flag, panning down to the Wyoming Capitol Building

The "Gun Control" television advertisement does not constitute express advocacy. The advertisement does not contain words of advocacy relating to a *Federal* candidate like those listed in Section 100.22(a). While it does state that "all Americans should seriously doubt the qualifications of Obama, an ardent supporter of gun control," it calls on viewers to support Wyoming state candidates "who will protect your gun rights." Thus, the only call to action is for support of state, not Federal, candidates. And like the "Environmental Policy" communications, the inclusion of the temporal "this fall" would not transform this advertisement into express advocacy because it otherwise does not include without any "magic words" or electoral slogans, at least with respect to Federal candidates.

The "Ethics" Television Advertisement

Audio:	Video:
Who is President Obama?	Picture of President Obama shaking hands with Hugo Chavez.

He preaches the importance of high taxes to balance the budget, but nominates political elites who haven't paid theirs.	Fade to another picture of Obama giving State of the Union, superimposed "Obama Aims $1.4 Trillion Tax Increase at Highest Earners (San Francisco Chronicle, Feb. 14, 2011)"
He talks about budget and tax priorities, but passes a blind eye to nominees who don't contribute their fair share.	Cut to picture on left side of screen of Secretary of Treasury Timothy Geithner giving testimony, superimposed "Geithner apologizes for not paying taxes (CBS News, Feb. 18, 2009)"
Call President Obama and tell him you don't approve of his taxing behavior.	Picture fades in on right side of screen of Tom Daschle, superimposed "Tax Woes Derail Daschle's Bid for Health Chief (NPR, Feb. 3, 2009)" Fade to picture of President Obama and Michelle Obama enjoying themselves in Hawaii.

The "Ethics" television advertisement does not constitute express advocacy. The advertisement does not contain words of advocacy like those listed in Section 100.22(a). It contains neither magic words nor electoral slogans. Instead, the advertisement criticizes President Obama based on statements about his "budget and tax priorities" and his nominees' asserted lack of compliance with their tax obligations. It then exhorts viewers to "[c]all President Obama and tell him you don't approve of his taxing behavior." In short, the advertisement contains no electoral references and, thus, is beyond the reach of Section 100.22(a).

The Budget Reform Television Advertisement

AUDIO:	Video:
Congresswoman Lummis supported the Repeal Amendment, which would have restored fiscal sanity to our federal debt.	Picture of Representative Lummis, superimposed "Tea Party Pushes Amendment to Veto Congress (AOL News, Dec. 1, 2010)"
Congresswoman Lummis is brave in standing against the political elite and deserves your support. Make your voice heard.	Small videos of Representative Lummis fade in, speaking on news programs, meeting with people, etc.
Do everything you can to support Congresswoman Lummis this fall and work toward fiscal sanity.	Wyoming flag fades in the background, returning to original picture of Rep. Lummis.

The "Budget Reform" television advertisement does not constitute express advocacy. Although the advertisement does state "support Congresswoman Lummis," the advertisement does not come within the reach of Section 100.22(a), since the support sought is policy-driven, not electoral (*e.g.*, support her "this fall and work toward fiscal sanity"). No election is explicitly referenced, nor is Lummis ever identified as a candidate. In other words, merely using "support" in a communication does not, by itself, turn an otherwise issue-oriented advertisement into express advocacy. And although the ad includes a reference to "this fall," it is used in the context of Congresswoman Lummis's "work toward fiscal sanity" and, thus, does not turn the use of the word "support" into electoral advocacy.

The Educated Voter Votes on Principle Television Advertisement

Audio:	Video:

Across America, millions of citizens remain uninformed about the truth of President Obama.	Picture of President Obama shaking hands with Hugo Chavez.
Obama, a President who palled around with Bill Ayers.	Picture of Bill Ayers in Weather Underground days, superimposed "Bill Ayers Dishes on Hosting a Fundraiser for Barack Obama (Big Government, Nov. 29, 2011)."
Obama, a President who was cozy with ACORN.	"House votes to Strip Funding for ACORN (Fox News, Sept. 17, 2009)"
Obama, a President destructive of our natural rights.	Video of an ATF raid, fade to a video of TSA scanning individuals in line for airport.
Real voters vote on principle. Remember this nation's principles.	Fades to still shot of the Bill of Rights, superimposed "Remember this nation's principles."

The "Educated Voter Votes on Principle" advertisement does not constitute express advocacy. The advertisement mentions "real voters" who "vote on principle" and then follows with a call to action to "[r]emember this nation's principles." Nevertheless, the advertisement does not expressly state which candidate such voters should vote for, nor do the references to "principle" and "this nation's principles" provide explicit directions about how "real voters" should vote, even if one concludes such directions are implied. Thus, unlike in *MCFL*, where the communication clearly listed certain candidates as pro-life and then exhorted the reader to "Vote Pro-Life," here, the advertisement does not clearly tie President Obama to any "principle." Again, the

communication may imply that "real voters" should vote against President Obama, but *MCFL* requires something more – a clear association between a candidate and an issue and then an exhortation to vote on the basis of that issue. That does not exist here. Thus, the terms used in "Principle" do not constitute express advocacy under Section 100.22(a).

Question 2. Will Free Speech's proposed donation requests be solicitations subject to the Act and Commission regulations?

No. For the reasons stated below, none of the proposed donation requests will constitute solicitations nor would any money received as a result of these requests be considered contributions unless the money is converted into expenditures.

Under Commission regulations, "[a]ll public communications ... by any person that solicit any contribution" are required to include disclaimers that include the identity of the person making the solicitation and whether a candidate, authorized committee of a candidate, or an agent of either authorized the solicitation. 11 C.F.R. 110.11(a)(3), (b). A public communication is "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 C.F.R. 100.26. Exempted from the definition are "communications over the Internet, except for communications placed for a fee on another person's Web site." *Id.*

In *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995) ("*SEF*"), the Second Circuit held that a written solicitation indicating that money received in response to a solicitation will be spent to elect or defeat a Federal candidate must carry disclaimers

informing the public of whether the organization is coordinating with a candidate or his agents. *Id.* at 295. Although the court did not limit its determination to a finding of express advocacy, it stated that a solicitation "may still fall within the reach of 441d(a) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id.*

The material at issue in *SEF* was overwhelmingly electoral in nature. It included numerous electoral statements (*e.g.*, "Vote Peace in '84"); allusions to the consequences of the 1984 presidential election (*e.g.*, "Americans who will be voting in November need to know the facts about how four more years of Reagan leadership will affect our nation and the world."); and the group's intended use of the money received in response to the communication (*e.g.*, "your special election year contribution will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped."). *Id.* at 288-89 (emphasis in the original). The court held that these types of statements left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." *Id.* at 295. Thus, the *SEF* court concluded the communication required a disclaimer under 2 U.S.C. § 441d.

In addition to requiring disclaimers on solicitations, the Act defines the term "contribution" to include "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." 2 U.S.C. 431(8)(A)(i); *see also* 11 C.F.R. 100.52(a). The Act requires "any person" who "solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public

political advertising" to include a specified disclaimer in the solicitation. 2 U.S.C. 441d(a); *see also* 11 C.F.R. 110.11(a)(3).

In *Buckley*, the Court narrowed the statutory term "contribution" to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; (3) donations given to other persons or organizations but "earmarked for political purposes." *Buckley* at 24, n.78. In order to avoid the "hazards of uncertainty" regarding the meaning of "earmarked for political purposes," the Second Circuit interpreted the phrase to include only donations "that will be converted to expenditures subject to regulation under FECA." *SEF*, 65 F.3d at 295.

In addressing Survival Education Fund's concerns that "[b]ecause [they] in some sense use all contributions 'for political purposes,' they contend that they will be at a loss to know when a solicitation triggers FECA disclosure requirements and subjects them to a potential civil penalty," the court stated that "[t]he only contributions 'earmarked for political purposes' with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA. Thus, Buckley's definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions in § 431(8)(A)(i), as applied to groups acting independently of any candidate or his agents and which are not 'political committees' under FECA." *Id.* at 294-95. The court also said a request for funds is a "solicitation" if it "leaves no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year." *Id.* at 295.

SEF's holding served as the basis for a Commission regulation, no longer extant, that stated that "[a] gift, subscription, loan, advance, or deposit of money or anything of value made in response to any communication is a contribution to the person making the communication if the communication indicated that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. 100.57(a) (repealed 2010). This provision was struck down in *EMILY's List v. FEC*, 581 F.3d 19 (D.C. Cir. 2009). Importantly, as noted above, *SEF* was a disclosure case—it did not hold that money received from a solicitation would become contributions merely based on their receipt. Rather, the money received only becomes a contribution when it is used for expenditures. *SEF*, 65 F.3d at 295.

Therefore, while *SEF* may be relied upon to determine whether requests for money are solicitations under the Act, its holding cannot be used to support the proposition that all money received in close proximity to a solicitation may be deemed contributions. Thus, money received by Free Speech in response to or at a time proximate to the dissemination of a solicitation does not become a contribution, potentially triggering political committee status, unless Free Speech converts the money into expenditures.

Finally, if Free Speech were to disseminate a solicitation indicating that a portion of the funds received in response will be used to advocate the election or defeat of a Federal candidate and if some of those funds are actually converted into expenditures, it would not necessarily mean that *all* funds raised in response to the request would be "contributions" subject to the limitations, prohibitions, or reporting obligations of the Act. The Commission lacks the statutory authority to make such a presumption. *See*

EMILY's List, 581 F.3d at 21 (holding that the statute does not permit the FEC to "treat as hard-money 'contributions' all funds given in response to solicitations indicating that 'any portion' of the funds received will be used to support or oppose the election of a federal candidate...[t]he statutory defect in the rule is that, depending on the particular solicitation at issue, it requires covered non-profits to treat as hard money certain donations that are not actually made 'for the purpose of influencing' federal elections."); *see also Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (2010).[22] Again, only the funds converted into expenditures would be considered contributions.

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The "War Chest" Donation Request

> Friends of freedom celebrated when the Supreme Court decided Citizens United. Now, more than ever, we can make the most effective use of your donations this coming fall. Donations given to Free Speech are funds spent on beating back the Obama agenda. Beating back Obama in the newspapers, on the airways, and against his $1 billion war chest.

This donation request does not require a disclaimer under 2 U.S.C. § 441d(a). The donation request indicates that the funds requested will be "spent on beating back the Obama agenda. Beating back Obama in the newspapers, on the airwaves, and against his $1 billion war chest." While the request does mention "this coming fall," "[b]eating back Obama," and "his $1 billion war chest," such language does not "clearly indicat[e] that the contributions will be targeted to the election or defeat of a clearly identified candidate

[22] All prior Commission matters that relied upon such a theory were invalidated by *EMILY's List*, and abandoned by the Commission when it removed Section 100.57 from its regulations, and chose to give *EMILY's List* nationwide effect.

for federal office." *SEF*, 65 F.3d at 295. First, "this coming fall" is not inherently electoral. In fact, the request itself provides the meaning for this phrase: that Free Speech will use the donations raised this fall to beat back the Obama agenda. The other language appears in a sentence fragment that expands upon the previous sentence regarding "beating back the Obama agenda." Moreover, Obama is never identified as a candidate, and the phrase "his $1 billon war chest" is not inherently electoral, as it presumably includes funds raised by the Democratic Party generally, funds that can be spend in a variety of ways. Such language is a far cry from the language present in *Survival Education Fund*, such as: "Vote Peace in '84"; "Americans who will be voting in November need to know the facts about how four more years of Reagan leadership will affect our nation and the world"; "your special election year contribution will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped."

Since this donation request does not solicit contributions under the Act, and Free Speech does not propose spending any funds on "expenditures" under the Act, funds raised will not be subject to the limitations, prohibitions or reporting requirements of the Act.[23]

[23] In the past, the Commission may have considered this sort of donation request to not only require a disclaimer, but to presumptively require that all funds raised in response to the request to be subject to the limitations, prohibitions and reporting requirements of the Act. *See, e.g.*, MUR 5487 (Progress for America Voter Fund), Conciliation Agreement at ¶¶ 22, 26 (concluding that direct mail pieces using the phrase "help us promote President Bush's agenda in Pennsylvania with the greatest possible strength between now and November 1st" solicited contributions because they supposedly "clearly indicate that the funds received would be targeted to the election of George W. Bush"). The legal theory upon which such determinations were based was rejected in *EMILY's List v. FEC*, as noted above, as being unconstitutional and beyond the Commission's statutory authority. Per the holding of the D.C. Circuit, which the Commission has already accepted as having nation-wide effect, such matters are no longer good law. *See, e.g.*., MUR 5365 (Club for Growth); MUR 5403 (Americans Coming Together); MUR 5440 (The Media Fund); MUR 5487 (Progress for America Voter Fund); MUR 5511 (Swiftboat Veterans and POWs for Truth); MUR 5542

The "Strategic Speech" Donation Request

> This fall, 23 Democrat incumbents are up for election in the U.S. Senate. Seven have already decided to retire, but some, like John Tester of Montana, haven't gotten the message. With your donation, we'll strategically speak out against the expansion of government-run healthcare and so-called 'clean energy' boondoggles like Solyndra, which Senators like Tester fully support. It's time to retire failed socialist policies.

This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The donation request clearly indicates how the funds requested will be spent: by "strategically speak[ing] out against the expansion of government-run healthcare an so-called 'clean energy' boondoggles like Solyndra," which the request claims Senators like Tester support. This point is emphasized by the concluding line, which makes clear it is discussing policy: "It's time to retire failed socialist policies." The donation request lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. The language used in this donation request is not at all like that present in *Survival Education Fund*: "Vote Peace in '84"; "Americans who will be voting in November need to know the facts about how four more years of Reagan leadership will affect our nation and the world"; "your special election year contribution will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped."

Since this donation request does not solicit contributions under the Act, and Free Speech does not propose spending any funds on "expenditures" under the Act, funds

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(Texans for Truth); MUR 5568 (Empower Illinois Media Fund); MUR 5753 (League of Conservation Voters 527); MUR 5754 (MoveOn.org Voter Fund).

raised will not be subject to the limitations, prohibitions or reporting requirements of the Act.

The "Checking Boxes" Donation Request

> 'Leading from behind,' President Obama takes advice from socialist staffers, usually choosing from a checklist of oppressive, debt-driving policies without even considering freedom-based and fiscally-conscious alternatives. Checking the right box on the November ballot is important, but like Obama's memos it's just not enough. Take the lead in making the message of Free Speech heard: your donation will inform real American leadership.

This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The donation request clearly indicates how the funds requested will be spent: "making the message of Free Speech heard" by "inform[ing] real American leadership." Although the donation request includes the phrase "[c]hecking the right box on the November ballot is important," neither that phrase nor the sentence of which it is a part solicits funds. It does not in any way indicate that funds will be used to target the election or defeat of a clearly identified candidate; on the contrary, it can be read as stating that funds will be spent on things unrelated to "checking the right box on the November ballot," such as Free Speech's "message" to "inform real American leadership." Other language in the donation request criticizes Obama's policy choices. The donation request lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. The language used in this donation request is not at all like that present in *Survival Education Fund*: "Vote Peace in '84"; "Americans who will be voting in November need to know the facts about how four more years of Reagan leadership will affect our nation and the world"; "your

special election year contribution will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped."

Since this donation request does not solicit contributions under the Act, and Free Speech does not propose spending any funds on "expenditures" under the Act, funds raised will not be subject to the limitations, prohibitions or reporting requirements of the Act.

The "Make Them Listen" Donation Request

> In 2010, the Tea Party movement ushered in an historic number of liberty-friendly legislators. But President Obama and his pals in Congress didn't get the message: Stop the bailouts. No socialized healthcare. End oppressive taxes. But we won't be silenced. Let's win big this fall. Donate to Free Speech today.

This donation request does not require a disclaimer under 2 U.S.C. § 441d(a). The request arguably references an election, since it claims that a "number of liberty-friendly legislators" were elected in the 2010 mid-term elections. But the request does not clearly reference a future election. Although it does state, "[l]et's win big this fall," this is not a clear reference to an upcoming election similar to the communication at issue in *Survival Education Fund*, nor is it a clear statement that any funds raised would be used to target the election or defeat of a clearly identified candidate. When read in the context of the rest of the donation request, winning in the fall is not "clearly indicating

that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. [24]

The request states that neither Obama nor "his pals" in Congress got the message the people sent in 2010: that "bailouts" need to stop, "socialized healthcare" is unacceptable, and "oppressive taxes" need to come to an end. The request can be read as then saying that although Obama and his allies in Congress still have not heard this message, Free Speech "will not be silenced," and they will continue to advocate in favor of these policy choices. They will continue to do so "this fall," and they hope to "win big" then – which could be read to mean legislative votes in the Congress regarding ending "bailouts," "socialized healthcare" and "oppressive taxes."

Question 3. Will the activities described in this advisory opinion request require Free Speech to register and report to the Commission as a political committee?

No, the activities described in this advisory opinion request will not require Free Speech to register and report to the Commission as a political committee.

The Act and Commission regulations define a "political committee" as "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. The Supreme Court construed the term "political committee" to encompass only

[24] For example, if the donation request said "let's win big this fall at the ballot box," or "let's win big this fall on election day," that would bring the request much closer to coming within the reach of the Act as it was construed by the Second Circuit in *SEF*.

organizations that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.[25] The *Buckley* Court added the "major purpose" test out of concern that defining "political committee" only in terms of annual contributions or expenditures "could be interpreted to reach groups engaged purely in issue discussion." *Id.*

The Commission has reiterated *Buckley's* formulation of the test on a number of occasions. *See, e.g.,* Brief for the Respondents at 5, *The Real Truth About Obama, Inc., v. FEC ("RTAO")*, 130 S. Ct. 2371 (U.S. 2010) (No. 09-724) ("Under the major purpose test, an organization will not be regulated as a political committee unless its 'major purpose . . . is the nomination or election of a candidate'" (citing *Buckley*, 424 U.S. at 79)), Political Committee Status, Supplemental Explanation and Justification ("2007 Political Committee Status Supplemental E&J"), 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (the Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose ''major purpose'' is the nomination or election of a Federal candidate can be considered ''political committees'' under the Act" (citing *Buckley*, 424 U.S. at 79.)). The Commission has not defined or clarified the major purpose test through rulemaking, and instead has opted to consider it on a case-by-case basis. *Id.* at 5596.

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[25] Some courts have held that the *Buckley* major purpose test was the product of statutory interpretation, *see National Organization for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir. 2011), *cert. denied* (Feb. 27, 2012); *Human Life of Washington, Inc., v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), *cert. denied* (Feb. 22, 2011), and thus would constitute the end-point of the Commission's statutory authority. *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5602 (Feb. 7, 2007) ("The major purpose doctrine did not supplant the statutory 'contribution' and 'expenditure' triggers for political committee status, rather it operates to limit the reach of the statute in certain circumstances.") (emphasis added).

The Court reaffirmed the major purpose test in *MCFL*, when it determined that a nonprofit corporation's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." 479 U.S. at 252 n.6. The Court noted that "[a]ll unincorporated organizations whose major purpose is not campaign activity, but who occasionally make independent expenditures on behalf of candidates, are subject only to these [independent expenditure reporting] regulations."[26] *Id.* at 252-53. However, if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262 (citing *Buckley*, 424 U.S. at 79).

The nature and scope of the major purpose test was further examined in *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2005) and *FEC v. GOPAC, Inc.*, 917 F. Supp 851, 859 (D.D.C. 1996). In those cases, district courts examined the public and non-public statements, as well as the spending and contributions, by particular groups.

Subsequent courts, in reviewing state laws governing political committees, have set forth similar fact-based tests to determine a group's major purpose. In *NMYO*, the Tenth Circuit articulated the resulting test as follows: "There are two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." 611 F.3d at 678. Under this test,

[26] The phrase "engages in activities on behalf of political candidates" seems to have been used interchangeably with the term "independent expenditures" *Compare MCFL*, 479 at 252-53 with *id* at 252 n.6.

if either prong is satisfied, then the organization's major purpose is the election or nomination of a candidate.[27]

The Fourth Circuit similarly held in *NCRTL,* 525 F.3d at 289:

> While '*the* major purpose' of an organization may be open to interpretation, it provides potentially regulated entities with sufficient direction to determine if they will be designated as a political committee. Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under 'fair warning' that it may fall within the ambit of *Buckley*'s test.

Thus, a determination of a group's major purpose requires the examination of the following: (1) a group's central organizational purpose; and (2) a comparison of a group's spending on campaign activities with its spending on activities unrelated to campaigns.

Though the Commission has been reluctant to establish a rule or a specific set of factors to be applied when making a major purpose determination, in the 2007 Political Committee Status Supplemental E&J, it did endorse reviewing the same types of information that courts had already utilized in their own major purpose analyses. Thus, by reviewing a group's public and non-public statements, like those reviewed by district courts in *Malenick* and *GOPAC*, the Commission can determine the central organizational purpose of a group. And an examination of a group's various types of spending allows the Commission to establish whether that group's "independent spending [has] become so extensive that the organization's major purpose may be regarded as

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[27] The political committee statutes and regulations at issue in *NMYO* required disclosure, which the court contrasted with statutes that limit or prohibit speech. Thus, the court undertook an "exacting scrutiny" analysis of those statutes and regulations. *NMYO*, 611 F.3d at 677 (citing *Buckley* and *Doe v. Reed*, 130 S. Ct. 2811 (2010)).

campaign activity." *MCFL*, 479 U.S. at 262; *see also* Supplemental E&J ("The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity.").

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According to the budget estimates provided by Free Speech, Free Speech plans on spending $2,000 on radio, newspaper, and internet communications. Depending on funds raised, it has budgeted an additional $8,000 for television ads. Because the Commission has determined that one communication proposed by the requester would constitute express advocacy, the amount paid for such communications could exceed $1,000. Assuming that Free Speech does spend more than $1,000 on that communication, the Commission must next determine if Free Speech's major purpose is the nomination or election of a candidate.

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A. Central Organizational Purpose

To determine a group's purpose, courts have relied primarily on the materials created and utilized by that group. In *Malenick*, the court reviewed the group's announced goals, brochures, fundraising letters, and express advocacy communications sent to its members, all of which indicated that the major purpose of the group in question was the election of Federal candidates.[28] 310 F. Supp. 2d at 235. In *GOPAC,* the court predominantly reviewed both letters sent by GOPAC and undisputed discussions that GOPAC had with one of its contributors, none of which indicated that the group's major

[28] The court also noted that the record contained the undisputed testimony of the group's primary donor, who stated that it "was the objective of the whole ... concept to get major donors involved so that the ideally conservative candidates could be elected." *Malenick*, 310 F. Supp. 2d at 235.

purpose was the election or nomination of Federal candidates, but rather the election of state candidates.[29] 917 F. Supp at 862-65.

Importantly, the court in *GOPAC* rejected reliance on certain other types of proffered evidence. First, the Commission attempted to rely on an audiotape and transcript of a meeting between two unidentified individuals as evidence that support for GOPAC was also support for a particular Federal candidate. *Id.* at 862. The court determined that, without more, "such a transcript ... probably does not constitute significantly probative material evidence upon which a trier of fact could decide for the [Commission.]" *Id.* (internal citations and quotations omitted).

Second, the Commission presented a statement from a magazine article in support of its belief that GOPAC "provid[ed] a forum for candidates to appear and solicit contributions" and, thus, made in-kind contributions to those candidates. *Id.* at 864. While also disputing the article itself, the court stated that "a magazine article is not significantly probative nor is it material evidence on which a trier of fact could reasonably find that GOPAC served as a fundraising mechanism for federal candidates." *Id.*

Thus, it appears that official statements from a group, including a group's organizing documents or statement of purpose, or other materials put forth under the group's name, including fundraising documents or press releases, are to be used to determine an entity's central organizational purpose, rather than articles and other statements that do not have the imprimatur of the group in question.

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[29] The court also cited to deposition testimony and GOPAC's "1989-1990 Political Strategy Campaign Plan and Budget. *GOPAC*, 917 F. Supp at 866.

Here, Free Speech's mission states that it "promotes and protects free speech, limited government and constitutional accountability. We operate independently of any candidate and advocate positions on various political issues including free speech, sensible environmental policy, gun rights, land rights, and control over personal health care." Importantly, Article IV of its by-laws specifically prohibits the Association from making "independents expenditures – communications of express advocacy of the election or defeat of a clearly identified candidate for federal office by use of specific words like 'vote for,' 'elect,' 'defeat,' or 'reject.'" Thus, its organizational documents clearly establish its intent to both focus on issues and avoid electoral speech.

Furthermore, none of Free Speech's donation requests would be considered solicitations under Commission regulations and *SEF*. These requests coupled with the group's organizational documents do not indicate that Free Speech's major purpose is the nomination or election of Federal candidates. Rather, the fact that the other solicitations evoke the group's desire to influence the public debate on a range of issues supports the validity of the group's stated purpose.

B. Extensive Independent Spending on Behalf of Candidates

Review of an entity's organizational documents and official statements does not end the inquiry into major purpose. An examination of a group's major purpose is necessarily an after-the-fact exercise wherein the Commission must determine whether a group properly refrained from registering and reporting as a political committee. Thus, the Commission must determine whether a group's *ex ante* subjective determination of its major purpose is established *ex post* by its objectively verifiable statements and spending. Thus, in *MCFL*, the Supreme Court noted that if a group's "independent spending

become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." 479 U.S. at 262 (*citing Buckley*, 424 U.S. at 79).

To do so, the Commission must compare a group's spending on campaign activities—specifically, its spending on express advocacy—with its spending on activities unrelated to campaigns.[30] It is not clear the Commission can go much further and consider non-express advocacy communications run by a group that reference a candidate, regardless of time or content, to be evidence of "nomination or election of a candidate." To do so would be going beyond the statutory limitation imposed upon the Act in *Buckley*. *See Buckley*, 424 U.S. at 79 ("To fulfill the purposes of the Act ['political committees'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.") & 80 (noting that by construing "expenditure" "to reach only funds used for communications that expressly advocate the election or defeat of a clearly

[30] In doing so, the time period in which the Commission looks when comparing electoral communication with the total communications of a group is also crucial. Limiting review to short time periods or time periods other than those utilized by the group in question may provide an incomplete picture of that group's major purpose. If, for example, a group is created in the middle of a calendar year or election cycle, but it intends to remain in existence after that time frame ends, refraining from looking outside that artificial time frame could cause the Commission to judge that group on a schedule other than that used by the group to determine *ex ante* its major purpose. Not surprisingly, a group concerned about federal issues would focus some of its time and spending on Federal elections in the months preceding a general Federal election. The election constitutes a point in time when many Americans are paying attention to political arguments and issues. Thus, linking issues to candidates and elections is not surprising. But if a group continues to be active past that election date, such spending is also evidence of its stated purpose.

identified candidate" ensures that the term only captures "spending that is unambiguously related to the campaign of a particular federal candidate.").

Congress has not altered the limitations placed upon the Act by the Court. In fact, legislative history demonstrates that electioneering communications cannot be used to determine political committee status. Senator Jeffords, one of the leading sponsors of the electioneering communication provisions, stated that the provision "will not require such groups [such as National Right to Life Committee or the Sierra Club] to create a PAC or another separate entity." 147 Cong. Rec. S2813 (Mar. 27, 2001).[31] Thus, organizations remain free to run non-express advocacy communications without having to register and report to the FEC as a political committee.

This view of the major purpose test was recently confirmed by the Tenth Circuit, the circuit in which the requestors are located. As noted above, in *NMYO*, the Tenth Circuit conducted the major purpose analysis by comparing spending on express advocacy or contributions to candidates with total spending to determine whether a preponderance of the latter was spent on the former. In doing so, it relied on both *MCFL*

[31] Sen. Jeffords explained that Congress did not intend to require groups that run electioneering communications to register as PACs:

> Now let me explain what the Snowe-Jeffords provision will not do: The Snowe-Jeffords provision will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications;
> It will not prohibit such groups from accepting corporate or labor funds;
> It will not require such groups to create a PAC or another separate entity;
> It will not bar or require disclosure of communications by print media, direct mail, or other non-broadcast media;
> It will not require the invasive disclosure of donors; and
> Finally, it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes.

147 Cong. Rec. S2813 (Mar. 27, 2001).

and *Colorado Right To Life Committee, Inc .v. Coffman,* 498 F.3d 1137, 1152 (10th Cir. 2007), and held that there was no preponderance of spending on express advocacy; in fact, there was no indication of any spending on express advocacy.[32]

Likewise, the court in *GOPAC* rejected the use of a fundraising letter as evidence that the group's major purpose was the election or defeat of a candidate because, "[a]lthough [a Federal candidate] is mentioned by name, the letter does not advocate his election or defeat nor was it directed at [that candidate's] constituents. ... Instead, the letter attacks generally the Democratic Congress, of which [the candidate] was a prominent member, and the franking privilege ... and requests contributions." 917 F. Supp. at 863-64. *Malenick*, in which the court held that the major purpose test was met, only relied on express advocacy communications, rather than communications that merely mentioned a candidate. 310 F. Supp. 2d at 235 (noting the 60 fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

[32] Although other Circuits have articulated different versions of the major purpose test, those decisions were reviewing laws that differed significantly from the Act as construed by *Buckley*. For example, the Ninth Circuit reviewed a state statute that imposed political committee status on groups with "a" major purpose of electing or nominating a candidate. *Brumsickle*, 624 F.3d 990. By way of comparison, the federal law looks to "the" major purpose, a distinction that the Fourth Circuit has already deemed critical. *See Leake,* 525 F.3d 274. *See also McKee*, 723 F. Supp.2d 245 (D. Me. 2010), *aff'd* 649 F.3d 34 (1st Cir. 2011), No. 11-599, *cert. denied* (Feb. 27, 2012) (upholding state statute, but making clear that the major purpose test of *Buckley* was a result of statutory construction). Moreover, the Commission has already publicly confirmed that major purpose is determined by a comparison of a group's campaign spending to the remainder of its spending. *See* Brief of Appellees Federal Election Commission and United States Department of Justice, *RTAO,* No. 11-1760 at 71 (4th Cir. 2011) ("As *Coffman* notes, *MCFL* 'suggested two methods to determine an organization's 'major purpose': (1) the examination of the organization's central organizational purpose; *or* (2) comparison of the organization's independent [express advocacy] spending with overall spending."). In other words, the Commission does not subdivide non-campaign spending. *Cf, Brumsickle*, 624 F.3d at 1011 (in dicta, explained that where one group spends 40% of its time and resources on political advocacy, 30% of its time and resources producing merchandise, and 30% of its time and resources on research whereas an otherwise identical group that spends 45% of its time and resources on political advocacy, 45% of its time and resources on producing merchandise, and 10% of its time and resources on research, "[p]olitical advocacy is 'the' major purpose for the former group (because political advocacy commands the largest share of the group's time and resources), but it is just 'a' major purpose of the latter (because the group expends equal time and resources on political activity and merchandise production.").

Similarly, in *Real Truth About Obama*, the only potential spending the court reviewed were two proposed advertisements that the court deemed to be the functional equivalent of express advocacy. Slip Op. at 24.

Moreover, *WRTL* illustrates that merely mentioning a Federal candidate in a communication does not necessarily make them electoral in nature; in fact, the Court held that the electioneering communications at issue in *WRTL* were issue advertisements. Thus, using such communications to determine a group's major purpose could result in the Commission doing exactly what *Buckley* warned against – interpreting the definition of "political committee" "to reach groups engaged purely in issue discussion." *WRTL*, 424 U.S. at 79.

In *WRTL*, the Court rejected the following arguments used to support the proposition that mentioning a Federal candidate in an communication running before the relevant electorate prior to an election constituted the functional equivalent of express advocacy: (1) an appeal to contact a candidate is the same as an appeal to elect or defeat that candidate; (2) mentioning a candidate in relation to an issue is a more effective type of electioneering than express advocacy; (3) the fact that the group running the communication had in the past actively opposed the candidate being referenced; (4) the group ran the advertisements at issue in close proximity to elections, rather than near actual legislative votes on issues; (5) the group ran the advertisements when the Congress was not in session; and (6) in its advertisements, the group cross-referenced a website that contained express advocacy. 551 U.S. at 470-73. Since, according to the controlling opinion in *WRTL*, none of those characteristics render a communication the functional equivalent of express advocacy, it is unclear why paying for communications containing

such characteristics but no express advocacy would be relevant for determining political committee status. Otherwise, a group that otherwise runs only electioneering communications or other communications that mention a candidate but do not contain express advocacy—spending that is, by definition, not campaign related—could nevertheless become a political committee, whose spending is, as *Buckley* notes, "by definition, campaign related," merely by spending $1,001 to distribute an independent expenditure or receiving $1,001 in contributions.

While *Buckley* did not construe "expenditure" to mean "express advocacy" when a group was already a political committee, it does not follow that the "express advocacy" construction was not, or should not be, part of the major purpose test in order to determine whether a group was a political committee. In *Buckley*, the Court was concerned that a group would qualify as a political committee simply because it spent $1,001 on expenditures or contributions. Therefore, it held that only those groups whose major purpose was the nomination or election of a Federal candidate qualified as a political committee. While the Court did state that political committees "fall within the core area sought to be addressed by Congress," it approved the "major purpose" limitation because groups engaged in issue advocacy did not fall into that same core area. *Buckley*, 424 U.S. at 79. And the "major purpose" test is designed to ensure that issue groups would not be considered political committees. Thus, in light of the reasoning behind the rationale underlying the narrowing of "expenditure," it does not appear the Commission may consider more than express advocacy communications when examining a group's spending as part of a major purpose analysis.

Buckley narrowed that definition to ensure that, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." 424 U.S. at 45. If political committee status could be imposed on groups that "eschew expenditures," it is unclear how they would be "free to spend as much as they want to promote" any candidate.[33]

Given the totality of the proposed communications, the vast majority of which are not expenditures, so long as Free Speech does not spend more than half of its money on express advocacy communications, Free Speech's spending would not be "so extensive that the organization's major purpose may be regard[ed] as campaign activity." *MCFL*, 479 U.S. at 262. Since its major purpose is not nomination or election of a federal candidate, it would not be a political committee.

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This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestors may not rely on that conclusion as support for its proposed activity. Any person involved in any specific

[33] In *Brumsickle*, the Ninth Circuit states, in dicta, that a group that "spends 40% of its time and resources on political advocacy, 30% of its time and resources producing merchandise, and 30% of its time and resources overseeing academic research" would have as its major purpose the election or nomination of a candidate. 624 F.3d at 1011. In reaching its decision, the court specifically held that the *Buckley* major purpose test was not a constitutional test, but rather was an interpretation of a specific federal statute, created to avoid covering groups "engage[d] purely in issue discussion." *Id.* at 1009-10. Since, by the court's own terms, the major purpose test only applies to federal law, its analysis of Washington state law has no bearing on the federal definition of political committee.

transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

The cited advisory opinions are available on the Commission's Web site, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at http://www.fec.gov/searchao.

On behalf of the Commission,

Caroline C. Hunter
Chair