BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Club for Growth, Inc.	)	MUR 5365
Club for Growth, Inc. PAC	)	
Pat Toomey, in his official capacity as Treasurer	)	

OPPOSITION OF THE CLUB FOR GROWTH, INC., CLUB FOR GROWTH INC. PAC, AND PAT TOOMEY, IN HIS OFFICIAL CAPACITY AS TREASURER, TO THE GENERAL COUNSEL'S BRIEF

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May 31, 2005

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The Club for Growth, Inc. ("Club") is a membership organization formed for the primary purpose of promoting pro-growth governmental policies. As its Bylaws expressly provide:

> The Club for Growth is a nationwide political membership organization dedicated to advancing public policies that promote economic growth. The mission of the Club is to identify for our Members the political candidates running for elected office who believe in these ideals, to help finance their elections, and to monitor their performance in elected office. The Club also helps finance strategic issue campaigns to advance our policy goals. The Club's emphasis is to advance issues that are vital to keeping the American economy prosperous, such as tax rate reduction, fundamental tax reform, school choice, and personal investment of Social Security.

The Club has vigorously and openly pursued its primary purpose since its founding in 1999, acting in its own name and through its PAC.[1]

The Club uses a variety of tactics to advance its pro-growth objective. For example:

[1] The General Counsel's Brief tries to make the Club's organization mysterious and complicated. It is not. The Club for Growth, Inc. is a Virginia nonprofit corporation that has registered under section 527 of the Internal Revenue Code, and it administers a PAC as a separate segregated fund. These are the ony two entities at issue in this matter. To the extent there is interest in the accounts and other names mentioned by the General Counsel, they are explained in Appendix A.

- It created and aired widely acclaimed issue ads such as The Tax Blob, using a 1950's sci-fi horror theme to illustrate the need to curtail federal spending. (See Appendix B.)

- Its executives have maintained a grueling schedule of media appearances and writings to promote pro-growth policies.

- It has organized educational seminars on pro-growth policies and legislation, for both politically active citizens and for members of Congress.

- It has organized programs to hold professedly pro-growth legislators to their commitments, and, through its Club for Growth, Inc. PAC ("PAC"), it has supported pro-growth candidates.

But each of these tactics serves the Club's one principal purpose of advancing pro-growth policies. That purpose is entirely proper for a membership organization and it is not the purpose required of a political committee pursuant to the Federal Election Campaign Act of 1971, as amended.

The General Counsel's Brief stresses that Club materials sometimes speak of its "mission" as being support of candidates who will advocate pro-growth policies. But the Club's Bylaws and its activities make clear that soliciting member financing through the Club's PAC is just one tactic serving the Club's pro-growth purpose. The Club is not novel in employing some candidate-related activities to advance its primary policy goal. For example, the Commission found that systematic and extensive electoral activities were consistent with AIPAC's primary purpose of promoting pro-Israel policies. *See* MUR 2804. Likewise, the Breeden-Schmidt

Foundation did not impair its major purpose of promoting socialism by systematically supporting candidates as a means to its end. *See* Advisory Opinion 1996-3. Similarly, the Club here is a membership organization, not a political committee.

The Club has thousands of members who enthusiastically support its pro-growth goals. From 1999 through 2003, the only way to become a Club member was by paying dues. In mid-2003 the Club amended its Bylaws to include as members persons who affirmatively registered as such, adding them to the Club's mailing list and authorizing them to participate in an annual binding vote on a policy issue posed by the Club's leadership. The first such policy vote was held the following year and the membership overwhelmingly voted to make tort reform a policy priority. *See* General Counsel's Brief at 5.

As a membership organization, the Club is entitled to communicate frankly with its members about candidates whose pro-growth credentials have been verified by Club research and who thus appear likely to advance the Club's major purpose of implementing pro-growth policies. The Club exercises that right and, through its PAC, it regularly receives and forwards to recommended candidates contribution checks written by Club members. The PAC also is entitled to and does make expenditures to disseminate communications supporting candidates, activities detailed in its regularly filed FEC reports.

The Club's settled policy has been to refrain from express advocacy in its own public advertising. The General Counsel's Brief does not challenge any Club ads from 2003 to 2004, but asserts that some earlier ads (and supposed phone scripts) just crossed the express advocacy line. We show otherwise below. But more importantly, it is clear that the Club's ads intended to avoid express advocacy and most succeeded beyond doubt, as can be seen from the ads that are freely available on the Club's website <www.clubforgrowth.com/pastproject.php>.

The General Counsel's Brief devotes nearly 30 pages to discussing alternative theories as to why the Club's activities would be unauthorized if the Club were a political committee, a non-federal account of a political committee, or an ordinary commercial corporation – which it is not. By contrast, the Brief devotes only a few footnotes (at n.58) to the Club's true status as a membership organization. Because the Club will not be able to see or respond to arguments developed in the General Counsel's Reply Brief, this forces the Club to anticipate and respond to undisclosed positions, and requires the Commission to scrutinize with particular care Reply arguments that will not been subjected to adversary scrutiny and response.

The central point of this Opposition is that the Club is a membership organization whose structure and conduct is fundamentally lawful. That key point disposes of the core charges made in the General Counsel's Brief that: (1) the Club does not qualify as a membership organization because it is "organized primarily for the purpose of influencing" election; and (2) it is a "political committee" because its "major purpose" is the election of candidates. There is no need to speculate about how the Club's various activities might be classified if it were an ordinary commercial corporation or a political committee. It is not. The Brief's few remaining claims (e.g., that particular statements were implied express advocacy or reached some non-members) are mistaken, contrary to law, and, in any event, involve early and peripheral conduct of an evolving membership organization.

One final point: Because the Club operates at the very heart of the First Amendment, the government cannot require it to hedge, trim, and steer clear of potential restrictions. Instead, in an enforcement context (as opposed to rulemaking) the question is whether precise, objective, and tailored legal standards have been violated. Nothing like that occurred. Instead, the Club sought, with the advice of counsel, to respect all such standards. The General Counsel's reliance

on largely unstated legal standards that never have been precisely and narrowly defined by statute or regulation is both fundamentally unfair and contrary to the First Amendment.

I. THRESHOLD CONSIDERATIONS.

Two important threshold matters require brief discussion. First, the Commission's failure to follow mandatory statutory procedures for initiating this matter requires dismissal. Second, if the matter could lawfully proceed, factual inferences unfairly suggested in the General Counsel's Brief would require correction.

A. The Commission's Failure To Make Timely Service Of The Complaint, As Mandated By Statute, Requires That This Matter Be Dismissed.

On April 8, 2005, the Club filed a Motion to Dismiss due to fatal procedural defects committed by the Commission when it instituting this MUR. The Motion pursued an issue that the Club noted in its June 6, 2003, initial response to the Complaint (at n.1), and that it has presented throughout the proceeding. The General Counsel's Office refused to present the Motion to the Commission.[2] However, the current probable cause stage of the proceedings presents the Commission with an appropriate opportunity to rule on the Motion and dismiss this matter due to the Commission's failure to follow strict statutory requirements. Interestingly, although the General Counsel's Office accepted the Motion as part of the Club's response to the Commission's Reason To Believe findings, the Brief inexplicably says nothing about the issues raised by the Motion perhaps because there is no legitimate answer.

The arguments in the Motion are incorporated herein by reference. (See Appendix C.) To summarize, this MUR must be dismissed because the Commission did not comply with

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[2] The FECA and FEC regulations "contain no provision for the Commission to consider such a motion. Therefore, this Office will accept the Motion as part of your client's response to the Commission's reason to believe findings and will proceed accordingly."

statutorily mandated procedural safeguards afforded the Club and its PAC. First, the Commission did not notify the Club of the Complaint until after the 5-day notice period had lapsed. Second, the Commission named the PAC as a respondent without any basis in the Complaint for doing so, violating FECA and its own regulations.

The FECA clearly sets forth the procedural steps the Commission must follow in order for its enforcement proceedings to be lawful. Importantly, the Act states: "Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation." 2 U.S.C. § 437g(a)(1). "Section 437g is as specific a mandate as one can imagine" and "the procedures it sets forth—procedures purposely designed to ensure fairness not only to complainants but also to respondents—must be followed." *Perot v. Federal Election Comm'n*, 97 F.3d 553, 559 (D.C. Cir. 1996). These mandatory procedural requirements "bind the FEC's deliberations about, and investigation of, complaints." *Id.* at 558 (specifically citing the 5-day notice requirement and stating that the court "presume[s] this was done").

The Commission received the Complaint against the Club on May 13, 2003, but did not notify the Club of the Complaint until June 3, 2003, a full 21 days later. This constitutes a per se violation of the 5-day notification requirement found in section 437g(a)(1). Accordingly, the Complaint must be dismissed as to the Club.

The Commission did send the Complaint to the PAC, but that served no purpose since the Complaint nowhere mentions the PAC, much less allege that it violated the Act. To the contrary, the focus of the Complaint was an allegation – since dismissed by the Commission – that a Club ad (not a PAC ad) featuring Senator Tom Daschle was a regulated "electioneering

communication." Otherwise, the Complaint made a passing reference (not factual allegations) to political committee registration and reporting obligations. Those allegations could not have applied to the Club's PAC which was already registered and reporting as such to the Commission. Thus, the PAC was served with a Complaint that mentioned neither its name nor its activities and asked that it respond. That was a charade.

Section 437g(a)(1) permits the Commission to proceed with a Complaint only by notifying only those respondents "alleged in the complaint to have committed such a violation." There is no authority to proceed to the notice stage against an entity that is not even mentioned in the Complaint. Moreover, 11 C.F.R. § 111.5 precludes the General Counsel from proceeding against a party on the basis of an inadequate complaint. It makes a mockery of these careful procedures to send a party a document that does not even mention it, expect it to respond to nonexistent charges and then proceed on claims that were absent from the Complaint.

For these reasons, and as more fully explained in the Motion to Dismiss, the Commission should grant the Motion and dismiss the MUR.

B. Difficulties Created By The Commission's Own Extensive Delay Cannot Be Attributed To The Club.

A second threshold problem is that the General Counsel's Brief repeatedly accuses the Club of failing to cooperate in discovery, unfairly implying the Club must have been hiding something. The truth is very different. After the Club responded to the Complaint, the Commission took no action for a year and a half. When the matter inexplicably was resurrected, the General Counsel's Office realized that the Club's practices had evolved over the years and that communications it deemed most problematic occurred so long ago that the five-year statute of limitations would soon run.

Rather than focusing on the Club's more recent activities, or electing to seek targeted discovery that could be completed swiftly, the General Counsel's Office made blunderbuss discovery demands on an extremely short timetable. It then sought to force the Club to agree to toll the statute of limitations in return for a reasonable compliance schedule and phased discovery procedures that would avoid needless burden and massive intrusion into sensitive matters. The Club refused to give up its statutory rights, pointing out that the five-year limitation period was ample to allow both sides to proceed at a reasonable pace. It simply was not reasonable for the Commission to let the matter lay dormant for a year and a half[3] and then, just as the 2004 election cycle climaxed and the Club began simultaneously moving to new offices and changing its president, demand massive discovery on a schedule that would require the Club to abandon its core First Amendment activities.

Although the Club refused to be bullied, its tiny staff (further diminished by the departure of its president) worked hard to satisfy legitimate discovery demands on a schedule consistent with maintaining its other operations. In fact, the Club was diligently compiling responses to second and third generation inquiries when, without prior notice, the General Counsel's Brief was served. During the discovery period, the enforcement staff's position was not that the Club's timing was unreasonable, but simply that the Commission would not agree to it without an agreement to toll the statute of limitations.

The Commission should reject the unfair inferences suggested by the Brief.[4]

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[3] In a January 18, 2005, meeting, Ms. Julie McConnell explained that this matter was delayed due to "other agency priorities."

[4] Importantly, this is not a situation in which a respondent's surreptitious activities were detected just shortly before the statute of limitations deadline. The Club has operated with a very high profile, it has maintained an extensive website, and, as noted, the Complaint against the Club was simply allowed to sit for a year and a half. Moreover, the most important issue should be the Club's ongoing activities, as to which there is no statute of limitations issue.

II. THE FIRST AMENDMENT REQUIRES PRECISE AND NARROW DEFINITIONS OF THE "PURPOSE," "MEMBERSHIP," AND "EXPENDITURE" STANDARDS THAT ARE CENTRAL TO THIS CASE.

The central legal standards in this case are those that define the concepts "primary purpose," "membership," and "expenditure." Because these standards regulate core First Amendment activity and threaten civil and criminal sanctions, the First Amendment demands that they have a precise meaning that is narrowly tailored to the compelling interests they seek to serve.

A. Legal Definitions Of "Purpose," "Membership," And "Expenditure" Are Central To This Case.

"Expenditure" is a key concept here because FECA forbids most corporations to make "expenditures" and substantially burdens "expenditures" made by most other entities. Moreover, depending on its purpose, an entity that makes "expenditures" of more than $1,000 per year may be classified as a "political committee." 2 U.S.C. § 431(4)(A). Such a classification triggers onerous reporting requirements and other limitations on core First Amendment activity. 2 U.S.C. §§ 433; 434.

To preserve the First Amendment freedom of a "membership organization" to communicate with its members, FECA provides that spending for such communication generally is not an "expenditure." 2 U.S.C. § 431(9)(B)(iii). However, if a "membership organization" is "organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office" then such spending may be an "expenditure." *Id.* In that event, spending for membership communications may violate the prohibition on corporate expenditures or may satisfy the $1,000 political committee threshold.

Commission regulations take this restriction a step further and provide that an entity "organized primarily for the purpose of influencing the nomination for election, or election, of

any individual for Federal office" cannot be a "membership organization." 11 C.F.R. §§ 100.134(e)(6); 114.1(e)(1)(vi). The rationale seems to be that there is little point to being a membership organization that cannot communicate freely to its members.

The concept of primary organizational purpose serves another closely related role. As will be discussed in more detail below, *Buckley v. Valeo* narrowed "political committee" to include only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. 1, 79 (1976). *Buckley*'s "the major purpose" standard is the Court's restatement of the statutory reference to the primary purpose, i.e, "organized primarily for the purpose." 2 U.S.C. § 431(9)(B)(iii). The result is that many entities, such as the Club, are either a membership organization or a political committee, depending on their primary organizational purpose.

Finally, a membership organization also must have members and membership communications must be directed to such members. The Commission's regulations define "member" for this purpose. 11 C.F.R. §§ 100.134(f); 114.1(e)(2).

B. The First Amendment Requires That Such Standards Be Precise And Narrow.

Buckley holds that the legal standards for imposing substantial burdens on core First Amendment activity must be precise and narrowly tailored. 424 U.S. at 40-50, 75-82. This is particularly so where, as here, civil or criminal penalties are threatened. *Id.* at 40-41, 77. This First Amendment standard is much higher than the "fair notice" standard that due process demands of ordinary economic and social legislation. *Id.* at 41, 77. The reason is that, where core First Amendment rights are at issue, vague or broad laws that cause persons to hedge, trim, or steer wide of possible risk deprives both the person and society of the fundamental benefits that the First Amendment exists to provide. *Id.* at 41 n.48. By contrast, if someone drives in the

rain at 50 mph instead of 60 mph because the threshold for reckless driving is not clear, little is lost and it is not of constitutional dimension.[5]

Buckley illustrated the stringency of the First Amendment's demands in addressing FECA's definitions of regulated "expenditures" as spending "relative to" or "for the purpose of ... influencing" a federal election. 424 U.S. at 41-44, 78-80. *Buckley* held that such language was unconstitutionally vague and overbroad, but avoided holding the standards unconstitutional by narrowly construing them to require explicit words that expressly advocated the election or defeat of a clearly defined candidate. *Id.*[6]

In the course of construing "expenditure" to avoid invalidity for vagueness or lack of tailoring, *Buckley* pointed out that the statutory term "political committee" posed the same First Amendment concerns. 424 U.S. at 78-79. To avoid invalidity, *Buckley* held that "political committee" only reaches "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. This identical standard is repeated in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986)

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[5] Similarly, the Court is less demanding of standards that regulate speech that lies more toward the periphery of the First Amendment. The legal definition of obscenity, for example, does not come close to meeting the stringent standards that *Buckley* imposed on the definition of expenditure. Because the constitutional cost is less if peripherally protected speech is chilled, the Court tolerates more ambiguity.

[6] *McConnell v. FEC*, 540 U.S. 93 (2003), pointedly did not retreat from *Buckley*'s holding that the First Amendment demanded a high degree of precision, objectivity, and tailoring. Although *McConnell* recently affirmed an "electioneering communication" standard that supplants the express advocacy standard for some purposes, the Court stressed that the new standard was just as precise and objective as express advocacy, and its scope had been fully justified by the record. 540 U.S. at 193-94. The Brief expressly disavows (at 15 n.53) basing any charge on the theory that the concept of "expenditure" is broader than "express advocacy." Due process requires that the Club receive fair notice of the charges made against it. Since the Club has not been charged on such a theory, it will not further address the applicability of the express advocacy standard, though it will discuss below what that standard means.

(*MCFL*), and *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).[7] Indeed, *MCFL* held that the entity there was not a political committee because "the central organizational purpose" was not to influence elections. 479 U.S. at 253 n.6; *see also* MUR 4953, First General Counsel's Report at 34 (quoting and relying on that standard).

This narrowing construction on "political committee" was imposed by the same part of *Buckley* that stressed the need for precise and tailored standards where core First Amendment activity is being regulated. It was adopted by analogy to the limits that *Buckley* imposed on "expenditure," which the Court made highly precise and tailored. Because *Buckley*'s "the major purpose" standard was adopted for the purpose of providing constitutionally mandated precision, the Court must be taken to have spoken precisely. *See also FEC v. GOPAC*, 917 F. Supp. 851, 861-862 (D.D.C. 1996) (holding that "'bright-line' rules" are preferred and that the Commission must not loosen the definition of "political committee" to deny bright-line guidance).

The concept of "member" delineates highly protected conduct (membership communications) from conduct that may be penalized (public express advocacy). *See Chamber of Commerce v. FEC*, 69 F.3d 600, 604-5 (D.C. Cir. 1995). Thus, any claim that someone is not a "member" must likewise be based on precise and tailored standards. In short, wherever the General Counsel asserts that the Club's core First Amendment activities have subjected it to potential penalty, the Brief must identify a precise and narrow legal standard that has been violated. It does not and cannot do so.

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[7] As the FEC explained in successfully seeking *certiorari*, *Buckley*'s ruling was carefully considered and its formulation was essential to the holding in *MCFL*. *FEC v. Akins*, 524 U.S. 11 (1998), Pet. for Cert. at 15-16, 1997 WL 33485591 (Apr. 7, 1997).

III. THE CLUB'S CENTRAL ORGANIZATIONAL PURPOSE – TO ADVANCE PRO-GROWTH POLICIES – IS FULLY CONSISTENT WITH ITS STATUS AS A MEMBERSHIP ORGANIZATION AND PRECLUDES CLASSIFYING THE CLUB AS A POLITICAL COMMITTEE.

The General Counsel's assertion that the Club is a political committee and not a membership organization because the Club's purposes include encouraging election of pro-growth candidates is fundamentally mistaken. Only a central and overriding organizational purpose to engage in express advocacy could have those effects. The major purpose of the Club is to advance pro-growth policies. Any express electoral activities – which the General Counsel greatly exaggerates – are merely a tactic in pursuing the Club's primary goal.

A. The Law Looks Only To The Club's Primary Purpose, Not To Multiple Purposes.

The statute (and regulation) and *Buckley*'s narrowing construction speak of an entity's "primary" or "major" organizational "purpose." Nothing is said about multiple purposes. Importantly, *Buckley* used the phrase "the major purpose" of the organization precisely to cure vagueness. It is implausible that the Court, focused on providing precise guidance, would have used "the major purpose" to mean "one of an indefinite number of significant purposes."

Indeed, a multiple purpose standard would create, rather than cure, serious vagueness issues. Nothing in the statute, the regulation, or *Buckley* specifies how many such purposes count or how important a qualifying purpose must be. Such a standard would be void for vagueness.

Moreover, a multiple purpose standard would make nonsense of *Buckley*'s justification for its standard. *Buckley* explained that, where an organization with over $1,000 in regulated expenditures also had "the major purpose" of nominating or electing candidates, one could reasonably expect that FECA's requirements would affect only "the core area sought to be addressed by Congress" that is "by definition, campaign related." 424 U.S. at 79. Such an

assumption would make no sense, where an organization had multiple important goals, only one of which is to influence federal elections.

Sometimes the Commission speaks of "the major purpose" and sometimes it speaks of "a major purpose," but to our knowledge, it never has publicly provided a reasoned basis for imposing a multiple purpose standard.[8] Indeed, this is one of the points on which the Commission tried and failed to give rulemaking guidance. Notice 2004-15, Political Committee Status, 69 F.R. 68,056, 68,064-65 (Nov. 23, 2004).[9]

The Commission came close to adopting a single-purpose standard, however, in Advisory Opinion 2003-37, which concerned how to apply BCRA's "promote, support, attack, or oppose standard" to spending by an admitted political committee, Americans for a Better Country. In that Opinion, the Commission said that minor ambiguity in the words "promote," etc. might be tolerated because "[b]y their very nature, all Federal political committees ... are focused on the influencing of Federal elections. As organizations whose 'major purpose is the nomination or election of a candidate,' political committees ... 'can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, 'campaign related.'" (Quoting *Buckley*, 424 U.S. at 79).[10] As discussed above, such reasoning is plausible only if the

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[8] For example, in Advisory Opinion 1996-3 (Breeden-Schmidt Foundation) the Commission stated the test as "whether the organization's major purpose is campaign activity." Likewise, in Advisory Opinion 1996-13 (Townhouse Associates), the Commission held that the test is "whether the organization's major purpose is campaign activity."

[9] This entire rulemaking is highly significant. The Commission obviously recognized that the definition of political committee required clarification. The rulemaking was the Commission's chance to do so. Instead – after demonstrating the problem – the Commission failed to provide the necessary guidance to which the public had a right. Fundamental fairness, therefore, requires that the Commission not proceed against an entity alleged to be a "political committee" on anything but the narrowest interpretation of that term. *See also* section II.B. *supra*.

[10] The Commission suggested that, because political committees by definition are closely focused on electoral matters, standards governing the behavior of such committees may inherently be tailored to the interests behind campaign finance laws. Whether or not that

organization truly is "focused" on influencing federal elections, i.e., that is its one dominant purpose.

Similarly, MUR 2804 determined that, although the American Israel Public Affairs Committee made systematic and continuing efforts to promote pro-Israel federal candidates, including direct contributions and express advocacy, AIPAC was not a political committee because its electoral activity was subsidiary to its ultimate purpose of promoting pro-Israel policies. The General Counsel's Brief, which was incorporated into the May 29, 1992, General Counsel's Report and served as the presumptive explanation of the Commission's rationale said: "AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization." *FEC v. Akins*, 524 U.S. 11 (1998), J.A. at 37a-38a, 155a, 1997 WL 33487258 (Aug. 21, 1997). Since something that is not "a" major purpose cannot be "the" major purpose, this adroit formulation avoided expressly stating that only the central purpose controls. However, the factual recital made clear that promoting the nomination and election of pro-Israel candidates through express advocacy and otherwise was a significant part of AIPAC's settled operations, both in relative and absolute terms. Thus, the outcome at least precluded any notion that a substantial electoral purpose was enough.[11]

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reasoning is sound – an issue not presented here – it cannot apply to standards for determining whether an entity is a political committee, since the result would be circular. Moreover, the reasoning does not deal with classic vagueness concerns. Because a political committee operates at the core of the First Amendment, it cannot be forced to hedge or trim by ambiguous standards.

[11] The Commission's ruling had an adventuresome time in the courts. It was affirmed by a district court and by a panel of the D.C. Circuit. A majority of the en banc court then reversed, reasoning that the major purpose test did not apply where substantial contributions were shown. *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996). The Supreme Court granted *certiorari* on that issue in response to the Commission's arguments that *Buckley* and *MCFL* had established a categorical test that the en banc majority had disregarded. *FEC v. Akins*, 524 U.S. 11 (1998), Pet. for Cert. 1997 WL 33485591 (Apr. 7, 1997). However, after *certiorari* was granted, the D.C. Circuit held that the Commission's membership standards were unduly restrictive and the Commission undertook to draft expanded membership standards. Since the en banc court had

In Advisory Opinion 1996-3 (Breeden-Schmidt Foundation) the Commission applied the test "whether the organization's major purpose is campaign activity" to hold that a Foundation was not a political committee. The Commission first examined the declaration of trust, which directed that Foundation funds be distributed for "advancing the principles of Socialism [which] shall include, but not be limited to, subsidizing publications, establishing and conducting reading rooms, supporting radio, television, and the newspaper media and candidates for public office." This express specification of candidate contributions as one means of advancing Socialism was not deemed troubling. Instead, the Commission examined the Foundation's disbursements, noting that this was proper since all the Foundation did was spend money.[12] It found that, over the preceding six years, the Foundation's annual contributions to state and federal candidates had ranged from 4% to 48% of total distributions, with annual totals to federal candidates as high as $3,800. It would be hard to deny that an activity that was specifically authorized by the Foundation's organic document and that sometimes consumed up to 48% of its annual spending was among the Foundation's major purposes. Nevertheless, the Commission found that influencing elections was not "the Foundation's major purpose."

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relied on conduct that would be lawful if it involved members of AIPAC, the Supreme Court ruled that the federal courts should not address the major purpose issue until the membership regulations were clarified, and it vacated the en banc opinion to permit reconsideration after the Commission clarified the membership issue. 524 U.S. at 28. The vacatur, of course, deprived the en banc ruling of any effect. Moreover, although the *Akins* opinion carefully did not address the major purpose test, the grant of *certiorari* on that point demonstrates that at least four justices were skeptical of the en banc's ruling. (As the FEC's Petition made clear, the special role of the D.C. Circuit vis-à-vis challenges to dismissals of private complaints made it unlikely that there ever could be a circuit split. The FEC thus sought *certiorari* on the ground that the en banc court had misunderstood *Buckley* and *MCFL*.)

[12] The Commission noted that it had focused on disbursement activity because that was all the Foundation did, but that other activities could be relevant for other organizations.

In short the statute, regulation, and narrowing construction all look to one dominant organization purpose, not to multiple purposes. And although the Commission's language has not been entirely consistent, it has taken positions that came very close to adopting the one purpose test and has never made a reasoned public decision to the contrary.

B. Only The Primary Reason The Club Was Organized Is Relevant, Not Supposed Reason For Particular Acts.

Classification of an entity as a membership organization or political committee has long-term operational and reporting consequences. Not surprisingly, therefore, such classification depends on the primary reason the entity was organized, not on the reasons for particular acts. The statute and the regulation make this crystal clear, asking whether the entity was "organized primarily for the purpose of influencing" a federal election. *Buckley* likewise speaks of the major purpose of the organization, not the purposes of particular acts. And *MCFL* held that an entity that had made substantial expenditures for express advocacy was not a political committee because its "central organizational purpose" was not to elect candidates. 479 U.S. at 252 n.6.

This is a vital point. Individuals within an organization may have different purposes and their personal priorities may shift over time. It is a common experience that the task at hand often seems the most important to those involved. However, it would not be practical for an organization to pop in and out of membership organization or political committee status as personal priorities shift, particular projects are undertaken, or statements are made. Nor would it be practical to require contributors to monitor such events. Instead, those in charge of an entity and its compliance responsibilities must be able to rely on the primary reason the entity was organized, its major purpose as an institution.

The Commission often has accepted bylaws or comparable documents as sufficient to establish why an organization was organized. *See, e.g.*, Advisory Opinions 2005-3 (reviewing

two organizations' bylaws to determine if they are affiliated membership organizations), 2003-29 (reviewing organization's constitution to determine if it is a membership organization), 1999-40 (reviewing organizations' bylaws to determine if they are affiliated membership organizations).[13] Of course bylaws and charters may be amended, so the primary reason an entity is organized may change. Moreover, if an entity persistently acted contrary to its stated organizational purpose, one eventually might infer that a de facto amendment had occurred. Even in such a circumstance, however, what ultimately controls is the central reason the entity was organized, not reasons for particular acts of that entity. Here, as discussed below, the Club's activities and statements are consistent with its Bylaws.

C. **The Primary Purpose Must Be To Engage In Express Advocacy.**

Not just any political purpose will do. To the contrary, the statute and regulation require the primary "purpose of influencing the nomination or election" of a federal candidate. 2 U.S.C. § 431(9)(B)(iii); 11 C.F.R. §§ 100.134(e)(6); 114.1(e)(1)(vi). *Buckley*'s narrowing construction likewise specifies that the major purpose must be "the nomination or election of a candidate." 424 U.S. at 79 (emphasis added).

In one sense or another, a wide range of activities may be intended to influence an election. But *Buckley* held that the First Amendment forbids regulating core activity under imprecise, subjective, or overbroad standards. Thus, *Buckley* ruled that restrictions on spending "for the purpose of ... influencing" or "relative to" federal elections could be saved from invalidity only by imposing a precise, objective, and narrow meaning – the use of explicit words to expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 43-44, 79.

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[13] *Compare FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 205 (1982) (finding that organization did not qualify as a membership organization because its "own articles of incorporation and other publicly filed documents explicitly disclaimed the existence of members").

Buckley's reasoning is equally applicable to defining a purpose of influencing the nomination or election of a federal candidate in the primary purpose context. Construing such language to mean express advocacy provides precise, objective, and narrow guidance. And no equally precise and tailored standard has been adopted by Congress or the Commission. Thus, to be a political committee, an entity that is not under the control of a candidate must have "the major purpose" of engaging in "express advocacy" as *Buckley* defines the term.

D. The Club's Primary Purpose Is To Promote Adoption Of Pro-Growth Policies.

The Club's organizational documents, its public as well as internal communications, and testimony by its Executive Director all indicate that the Club is organized for the primary purpose of advancing its pro-growth agenda. The General Counsel's Brief's assertion that the Club's activities concerning candidate elections establish that its primary purpose is disqualifying is mistaken in law and fact.[14] Such activities are, instead, one mission upon which the Club embarks to advance its overall goal: advancing a pro-growth economic agenda.

1. Organizational Documents

The Club for Growth is so named for a reason. In 1999, the Club was incorporated and organized primarily for the purpose of advancing pro-growth economic policies. Its Bylaws are clear that this is the Club's dominant purpose:

> The Club for Growth is a nationwide political membership organization dedicated to advancing public policies that promote economic growth. The mission of the Club is to identify for our Members the political candidates running for elected office who believe in these ideals, to help finance their elections, and to monitor their performance in elected office. The Club also helps

[14] The General Counsel's Brief does not challenge the Club's status as a membership organization based on any of the other regulatory criteria. *See* 11 C.F.R. §§ 100.134(e); 114.1(e)(1).

finance strategic issue campaigns to advance our policy goals. The Club's emphasis is to advance issues that are vital to keeping the American economy prosperous, such as tax rate reduction, fundamental tax reform, school choice, and personal investment of Social Security.

As the Bylaws explain, the Club pursues its primary purpose of "advancing public policies that promote economic growth" by employing a variety of tactics. Those specifically listed in the Bylaws include: (1) identifying for its Members the political candidates running for elected office who agree with the Club's policy positions, (2) financing their elections through the Club's PAC, (3) monitoring their performance in elected office, and (4) financing strategic issue campaigns to advance the Club's policy goals.

Recognizing that the Club is not permitted to use its general treasury funds to engage in some of its tactics to advance its primary purpose, the Club established a connected PAC. The PAC was created to provide direct support to candidates and officeholders who agreed with the Club's overall purpose of advancing a pro-growth political agenda. The PAC makes direct candidate contributions, bundles contributions by Club members, expressly advocates the election or defeat of political candidates, and engages in so-called "electioneering communications." The Club itself does not engage in any of these activities, but supports them to carry out its primary purpose of promoting pro-growth policies. The PAC and its activities are tactics that the Club uses to advance its primary purpose of promoting pro-growth policies.

In short, all of the election related activities mentioned in the Bylaws are merely a means to an end. If the Club could achieve full implementation of its pro-growth policies without

supporting a single candidate, it would gladly do so. The Club is not like a campaign committee or similar candidate-controlled organization whose primary purpose is to elect candidates.

2. **Activities and Communications**

The Club's activities and statements are consistent with the Club's declared primary purpose of advancing a pro-growth agenda. For example, the Club's "Tax Blob!" advertisement – a reference to the 1950s horror/sci-fi film – humorously warns viewers that high taxes and budget surpluses are taking over the economy in the form of a "Tax Blob" that the Club is intent on stopping. *See* Appendix B. The Club took a more serious approach during the legislative debates on President Bush's proposed tax cuts when it ran advertisements criticizing Senators Voinovich and Snowe for not supporting President Bush's "proposed bold job-creating tax cuts" and exhorting them to "join President Bush's fight to cut taxes and fix the economy."

Also, Club executives devote enormous energy to television and radio appearances,[15] writings,[16] and meetings[17] to promote pro-growth policies. We cite to some examples in the

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[15] A sampling of various press appearances, speeches, and policy meetings by Stephen Moore and press appearances by David Keating are included in Appendix D.

[16] *See, e.g.*, National Review Online, Stephen Moore Archive, *available at* http://www.nationalreview.com/moore/moore-archive.asp (over 60 economic policy articles in 2003 and 2004); Stephen Moore, *A Wild and Crazy Guy*, Wall St. J., Oct. 11, 2004, at A18; Stephen Moore, *John Kerry's Acorn*, Wall St. J., Apr. 8, 2004, at A16; Stephen Moore, *Take a*

margin and urge the Commission to review the submissions so as to appreciate what a truly massive commitment the Club makes to these types of policy endeavors. For example, and as cited below, the Club's President authored more than 60 policy articles in 2003 and 2004 in National Review Online.

Likewise, the Club's public statements stress that the Club's primary purpose is policy-related and not candidate driven. Some pertinent examples follow.

- In its promotional and solicitation materials, the Co-Chairman of the Club, Richard Gilder, explains: "The Club is a political organization advancing pro-growth economic policies." Member donations will, among other things, "permit the Club to launch issue advocacy campaigns on free-market economic issues." "With this

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(Continued . . .)
Hike, Wall St. J., Jan. 2, 2004, at A8; Hugh Carey, Richard Gilder, et al, *Save Our City*, Wall St. J., May 9, 2003, at A10; Arthur B. Laffer & Stephen Moore, *A Tax Cut: The Perfect Wartime Boost*, Wall St. J., Apr. 7, 2003, at A26; Stephen Moore, *And These Are Republicans?*, Wall St. J., May 16, 2002, Richard Gilder & Thomas L. Rhodes, *Ailing Economy Needs A Dose of Bush Tax Cuts*, Wall St. J., July 16, 2002,
(Stephen Moore, *In Search of a Bush Supply Sider*, Nat'l Review, Dec. 11, 2002),
(Stephen Moore, *A Tax Cut with Dividends*, Wash. Times, Jan. 10, 2003, at A16).

Many of these and other publicly available writings are included in Appendix E.

17

[financial] muscle, we can change not just elections, but legislation, our goal."

- Stephen Moore and David Keating further explained in a January 12, 2001, memo to the Club's membership that electoral victories in 2000 were simply a stepping-stone toward advancing the Club's larger policy goals:

> Our primary goal now, of course, is to get our policy goals passed through a Republican congress. That's not going to be easy. With razor tight majorities in the House and Senate, the potentially useful role of the Club for Growth in steering the GOP in the right direction will be nothing but magnified. We need to get Congress to focus its energies on 3 or 4 issues in 2001 and even in Bush's first 100 days. These legislative priorities are: income tax rate cuts, death tax elimination, Social Security private accounts and budget cutting.

- Six months later, Congressman Ric Keller signed a fundraising solicitation on behalf of the Club which provided an additional explanation of its policy purpose:

> I would like to tell you a little bit about the Club for Growth. It originally began as a regular roundtable policy group. In 1999, this group decided that if it were going to truly affect public policy it must help elect individuals who would vote for and implement better fiscal policy. The group became The Club for Growth with a mission to advance pro-growth economic policies: *income tax reduction, tax simplification, capital gains tax reduction, estate tax repeal, overall reduction in government spending, and personal investment of Social Security*. Basically, the Club is an advocate of the Reagan vision of limited government and lower taxes.
>
> ...
>
> A strong, sound economy is the core issue affecting every aspect of daily life and, it is the Club's mission to improve it for all.

- Stephen Moore succinctly reinforced these points in a November, 2003, communication to the Club's membership in which he detailed the Club's

involvement in the debate over the Medicare prescription drug bill: "In fact, it is precisely for legislative battles like this -- where every single vote counts and where members of Congress are under intense pressure from the party establishment to 'go along to get along' -- that the Club for Growth exists."[18]

3.

[18]

4. **Section 527**

The Club's primary purpose of promoting pro-growth policies also is fully consistent with its tax-exempt status under section 527 of the Internal Revenue Code as a "political organization." *See* IRS Priv. Letr. Rul. 98-08-037 (Nov. 21, 1997) (ruling that nonprofit corporation engaged in issue advocacy – though not express advocacy – qualified for section 527 status). Indeed, the Club's section 527 registration states its purpose in the same language from the Bylaws that is quoted above ("dedicated to advancing public policies that promote economic growth" etc.)[19] This is no surprise. The Commission's recent Explanation and Justification of its Political Committee Status rulemaking confirmed that a "political organization" may qualify for 527 status without triggering "political committee" status under the FECA and regulation by

[19] *Available at* http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formId=10775&formType=E71.

the FEC. *See* 69 Fed. Reg. at 68065 (rejecting a proposed rule that an entity would automatically satisfy the political committee "major purpose" test just by virtue of having registered with the Internal Revenue Service under 26 U.S.C. § 527). Moreover, the Commission repeatedly has declined to evaluate tax matters, recognizing that the purpose of federal tax law and the constitutional standards that guide construction of the tax code are very different from those areas of speech and associational activities that the Commission regulates. *See, e.g.*, Advisory Opinions 2005-3, 2002-24 ("tax ... issues are not within its jurisdiction"); *MCFL*, 479 U.S. at 256 n.9 (direct regulation of political speech afforded full First Amendment protection, but taxation of political speech is not).

Ignoring these considerations, the General Counsel's Brief (at 4) seizes on the fact that when the Club first filed its section 527 registration, it stated: "The Club is primarily dedicated to helping elect pro-growth, pro-freedom candidates through political contributions and issue advocacy." This listing of two of the Club's tactics – "issue advocacy" and "helping elect pro-growth candidates" – sufficed for IRS purposes but did not fully reflect the Club's Bylaws. (It was likely prepared by clerical personnel in the Club's rush to comply with a new registration requirement that became effective immediately.)[20] When Club executives focused on the language of the form, they promptly amended it to include the current language noted above. As amended, the statement mirrors the language of the Club's Bylaws which accurately explains the Club's major purpose – promoting pro-growth policies by various means.[21]

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[20] *See* Amendments to Section 527 of the Internal Revenue Code of 1986, Pub. L. No. 106-230, § 3(d), 114 Stat. 477, 483 (2000).

[21] The General Counsel's Brief's reliance on *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004) ("*Triad*"), to assess the Club's primary purpose is perplexing. There the alleged political committee reportedly was defunct and did not make a defense, and the accused individual appeared pro se. *Id.* at 232 n.1, 2. The case gives no indication that the

E. The Club Does Not Engage In "Express Advocacy," Nor Is It The Club's Primary Purpose To Do So.

The General Counsel's Brief makes several charges that hinge on the concept of "express advocacy." *Buckley* crafted that concept to provide the precise, objective bright-line guidance that the First Amendment demands when core activity is burdened. 424 U.S. at 40-44. To that end, *Buckley* rejected tests that attempt to assess subjective purpose or understanding and demanded explicit words of express advocacy such as "vote for" or "vote against" a named candidate. *Buckley*'s goal was to insure that speakers need not hedge, trim, or steer clear to avoid uncertain standards. *Id.* at 43.

Buckley's reasons for limiting regulation of independent organizations to only those that engage in "express advocacy" were prescient:

> For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

424 U.S. at 42 (emphasis added).

(Continued . . .)
organization's organic documents were offered or that the pro se individual argued that such materials were important. The court focused on a stipulation made in proceedings before the Commission that the organization's "GOALS" were: "1) Return Republican House Freshman; 2) Increase by 30 the Republican House majority; [and] 3) Increase Senate Republicans to a Filibuster-proof 60." *Id.* at 235. Not surprisingly, the court concluded that the major purpose of the organization was the nomination or election of specific candidates. That holding says nothing relevant to this case where the Club's Bylaws have been offered and establish that the Club's major purpose is to promote pro-growth policies, a purpose that all of the Club's other activities are consistent with.

Buckley's bright-line formulation of "express advocacy" and concomitant reasoning was reaffirmed by the Court in *MCFL*.[22] Although the Commission tried to craft a looser standard of express advocacy based on an aberrant opinion by the Court of Appeals for the Ninth Circuit, *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), every Federal Court of Appeals to address *Buckley* and *MCFL* has rejected that approach. *See Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002) (collecting authority).[23] Two circuits have directly and expressly enjoined the Commission's alternative definition based on the *Furgatch* standard. *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *see also Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). Others, such as the Court of Appeals for the Fifth Circuit, have held that *Furgatch*-based language is "too vague and reaches too broad an array of speech to be consistent with the First Amendment." *See Moore*, 288 F.3d at 194.[24]

Buckley's protection of "discussion of issues and candidates" and observation that "campaigns themselves generate issues of public interest" are directly applicable here. The

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[22] Although *MCFL* clarified that *Buckley* did not demand absolutely direct advocacy, it did not retreat from demanding explicit and express advocacy. It merely held that the statement "vote pro-life" coupled with the names and photographs of candidates identified as "pro-life" could be read together to explicitly and expressly (though somewhat indirectly) advocate voting for the identified "pro-life" candidates. 479 U.S. at 249.

[23] Indeed, even the Court of Appeals for the Ninth Circuit has since backed away from its broadened standard by insisting that "express advocacy must contain some explicit *words* of advocacy." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003). The Commission itself has similarly embraced this limitation on the *Furgatch* standard in other enforcement proceedings. *See, e.g.*, MUR 5158 First General Counsel's Report at 16 ("Moreover, to contain express advocacy, a communication 'must contain some explicit *words* of advocacy.'").

[24] Although *McConnell v. FEC* held that Congress could formulate an alternative standard that was equally precise, objective, and tailored, 540 U.S. at 194, the Commission has not offered such a standard. The General Counsel's Brief (at n.53) elects not to argue that *McConnell* had any effect on the meaning of express advocacy, so we will not expand this point.

Club's communications often mention political candidates and their positions on issues. Furthermore, the Club frequently finds itself speaking on issues that are developed over the course of political campaigns. These activities constitute core First Amendment speech that is protected by *Buckley*. This protection is only lost if the Club's speech contains "express advocacy," which it did not.

The General Counsel's Brief does not claim that a single Club ad from 2003 or 2004 contains express advocacy. Indeed, of the more than twenty Club ads produced and available on its website, the General Counsel (at App. A) challenges only three, all from 2002 or earlier. The Brief questions only eight other Club communications, most of which date back to 2000 when the Club was in its nascent stages and when the campaign finance environment was significantly different. Importantly, many of these supposed "communications" are old scripts for limited distribution telephone calls that may well be drafts rather than final versions. The "express advocacy" allegations as to the remainder of the communications – from 2001 and 2002 – are obvious stretches.

The General Counsel's Brief's cites only three television advertisements from 2002. The script for the first, titled "Garrett," follows:

> *Game show graphics on screen. "In the Republican primary for Congress" stays on screen throughout, as does "Who's the Real Tax Cutter?"*
>
> Welcome to "Who's the real tax cutter."
>
> *Picture of Russo appears. Red "X" with buzzer sound comes over picture, designating a wrong answer.*
>
> Is it David Russo?
>
> *"Backed by liberal groups" on screen.*

Russo's voted for tax increases, and he's backed by liberal groups like the Sierra Club.

Picture of Cardinale appears. Red "X" with buzzer sound comes over picture, designating a wrong answer.

Is it Gerry Cardinale?

"Trenton Insider," "23 Tax Increases" on screen.

Cardinale's a 23-year Trenton insider who voted to raise taxes 23 times.

Picture of Garrett appears. Lights flash around picture, designating correct answer.

Is it Scott Garrett?

"New Jersey's leading voice for lower taxes" on screen.

Garrett has voted to cut our taxes dozens of times.

And Scott Garrett has never voted for higher taxes.

Thanks for playing "Who's the real tax cutter."

Available at http://www.clubforgrowth.org/video/garrett-script.php. Obviously, no explicit words of express advocacy exist in this ad. It is purely informational.

The script for "Courage" is as follows:

Farmer talking, walking on his farm, loading a truck, doing other farming things, with medium camera shot on him.

Congress sure could use a real Iowa conservative.

When it comes to our principles, nobody fights harder than State Senator Steve King.

In the general assembly, Steve King led the fight to eliminate the inheritance tax and cut income taxes.

Steve King helped lower our property taxes too.

I wish more congressmen were like Steve King - someone with the courage to do what's right.

> Ya know, politicians talk a lot about fighting for taxpayers -- Steve King is the real deal.

Available at http://www.clubforgrowth.org/video/king-script.php. Again, there are no explicit words that expressly call for the election of anyone. In fact, neither candidates nor elections are even mentioned. This is exactly the type of ad that *Buckley*'s bright-line test does not reach.

The last 2002 advertisement, "Daschle Democrats," follows:[25]

> This is Senate Democratic leader Tom Daschle. Tom Daschle and the Daschle Democrats like to say no.
>
> (On screen: Bobblehead dolls of Tom Daschle, Ted Kennedy, and Hillary Clinton)
>
> No to President Bush on job-creating tax cuts.
>
> (On screen, "No on Tax Cuts")
>
> No to President Bush on homeland security.
>
> (On screen, "No on Homeland Security")
>
> No to President Bush on eliminating the unfair death tax.
>
> (On screen, "No on Eliminating Death Tax")
>
> But the Daschle Democrats say yes to Ron Kirk for U.S. Senate, and that's bad for Texas.
>
> (On screen, "Ron Kirk...Bad for Texas")
>
> Call Ron Kirk. Tell him to say no to the Daschle Democrats
>
> (On screen, "Call 214-841-1001. Say NO to the Daschle Democrats")

[25] The General Counsel's Brief indicates that versions of this ad ran in Texas, Arkansas, South Dakota, New Hampshire, Colorado and Missouri.

General Counsel's Brief at App. A.[26] The phrase "the Daschle Democrats say yes to Ron Kirk for U.S. Senate, and that's bad for Texas" contains explicit words that, if used to advocate the election of Ron Kirk, might constitute express advocacy. But the words are not used that way. Instead, the ad is an attempt to pressure Ron Kirk to reject both the articulated policies in the ad and the support of officeholders who embrace them. The ad concludes not by exhorting the viewer to vote against Ron Kirk, but by asking the viewer to contact him and ask him to reject policies – and the support of the politicians who advance them – antithetical to the Club's pro-growth agenda. This ad does not expressly direct a vote for or against Mr. Kirk. It may come close to the line; but the whole point of a bright-line test is to avoid any need to steer clear.[27]

The only 2001 ad cited in General Counsel's Brief is titled "Taxes." Like the 2002 "Garrett" and "Courage" ads, "Taxes" is purely informative in nature. It identifies two candidates and informs the viewer of the candidates' positions on taxes. It contains no explicit words advocating a vote for or against either candidate.

The other 2001 communication cited in the Brief is not an advertisement, but a poll. It provides the listener with information on the positions taken by congressional candidates on tax issues. One version of the poll asks the listener whether he or she supports the positions taken by one of the candidates. The other version asks the listener to identify which of the two candidates he or she will vote for. Neither version asks the listener to vote for one of the candidates. There is no express advocacy.

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[26] In the interest of brevity, the remaining communications challenged as "express advocacy" in the General Counsel's Brief will only be summarized, but full scripts can be found at Appendix A of the General Counsel's Brief.

[27] The court in *FEC v. Christian Coalition* similarly determined that communications that are purely informational or that exhort the viewer to engage in activity other than electoral action are not express advocacy. 52 F. Supp. 2d 45, 64-65 (D.D.C. 1999).

The General Counsel's Brief cites four ads from 2000, all of which provide information about the tax and fiscal records of various candidates for Congress. None of them exhort the viewer to vote for a particular candidate. In "Flake Commercial," the narrator highlights positions taken by Jeff Flake indicating that he "is a solid fiscal conservative." It concludes that "leadership" on these issues is needed in "Washington." It does not expressly ask the viewer to vote for Jeff Flake so that he may assume such a leadership role.

"Keller and Sublette" is another in the line of ads like "Garrett," "Courage," and "Taxes" that is purely informative in nature. It contains no explicit words of advocacy. Like the other ads, it outlines candidates' positions on taxes, but ends without exhorting the viewer to vote for one of the named candidates.

The last two ads for 2000 are radio and television ads titled "Mission" which spoof the "Mission Impossible" theme. Though the mission is to find "a Reagan Republican like Ric Keller" and "a conservative Republican for Congress," neither the radio nor the television ads mention voting. Whatever the General Counsel may think is implied, the explicit words of express advocacy are not present.

Finally, there are four supposed scripts for "Ric Keller GOTV Phone Calls" and two scripts for "Jeff Flake GOTV Phone Calls." Importantly, David Keating testified in this MUR that he could not verify whether various scripts cited in the General Counsel's Brief are draft or final versions. Keating Dep. at 156-58. Given the age of the documents, his testimony is not surprising. Because the Club's policy was to avoid express advocacy, the final versions may have excised those portions to which the General Counsel's Brief objects. Perhaps if this matter

had not lain moribund for a year and a half, more information about these documents may have existed.

Nonetheless, all of the scripts inform the listener of various candidate positions. They conclude by either reminding the listener to vote or by asking the listener to consider the candidate and his policy positions when the listener goes to the polls. None of the scripts expressly exhort the listener to vote for a particular candidate.

The Commission may believe that some of the Club's early communications came close to the "express advocacy" line. But *Buckley* teaches that the standard for measuring "express advocacy" must be a bright-line so that speakers do not hedge, trim, or steer clear. 424 U.S. at 43. This is not a game of horseshoes; close does not count. Moreover, from a public policy standpoint, the emphasis should be on what the Club is doing now, rather than on early activities that now are hard to document – at least in part because the Commission sat on this Complaint for a year and a half.

Most importantly, anyone can see from the twenty Club ads – and even from the eleven communications discussed by the General Counsel – the Club sought to avoid express advocacy. Thus, no one could say that the Club's primary organizational purpose is to engage in express advocacy. Without a primary purpose to engage in "express advocacy," the Club is not a political committee, but a validly constituted membership organization. Moreover, in the absence of express advocacy, the Club has not made "expenditures." In any event, even if the

Commission determines that the Club did engage in some prohibited "express advocacy," the Club cannot lose its status as a membership organization as a result.[28]

F. The Club Has Not Received "Contributions."

In its effort to make the Club into a political committee, the General Counsel's Brief asserts that the Club's solicitations generated "contributions" sufficient to satisfy the $1,000 annual political committee threshold. *See* 2 U.S.C. § 431(4)(A). These charges do not matter because, as already discussed, the Club lacks the major purpose necessary to be a political committee. But they are also mistaken.

At the outset, it is important to be clear as to the part of the Club's activities the General Counsel is attacking. When the Club contributes to candidates, bundles candidate contributions, engages in "express advocacy," or disseminates so-called "electioneering communications," it does so through its PAC. PAC contributions are separately solicited for these political purposes from the Club's individual members. These PAC activities are not the source of the supposed contributions. Instead, the General Counsel's Brief (at 21-23) stretches an inapposite court case, *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995), to suggest that receipts from the Club's general fundraising solicitations are regulated "contributions" that trigger political committee status. However, the Club's fundraising solicitations are fundamentally different than those that were the subject of *Survival Education Fund*. Accordingly, the Club has not received "contributions" under the General Counsel's theory.

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In *Survival Education Fund*, the court held that a donation to an independent organization was a "contribution" only if the solicitation made plain that it would be used "for activities or communications that expressly advocate ...." 65 F.3d at 295 (quotation and citation omitted). The solicitation there said, among other things: "AS THE NOVEMBER PRESIDENTIAL ELECTION APPROACHES ... FOUR MORE YEARS OF [REAGAN] WILL DESTROY ALL HOPE .... MILLIONS OF AMERICANS ... BELIEVE WE *CANNOT* ALLOW THAT TO HAPPEN .... RONALD REAGAN AND HIS ANTI-PEOPLE POLICIES MUST BE STOPPED .... YOUR CHECK ... WILL HELP US REACH MORE PEOPLE, AND INCREASE THE EFFECTIVENESS OF OUR ELECTION-YEAR WORK." *Id.* at 288-89. The FEC contended that the solicitation itself was express advocacy, and the Court of Appeals did not disagree. *Id.* at 293, 295. In that context the organization solicited money to "communicate [to] the *voting public*, letting them know why Ronald Reagan and his anti-people policies *must* be stopped." *Id.* at 295. The court held that the solicitation indicated that the funds would be spent on express advocacy, so that resulting monies were contributions. *Id.*

Here by contrast, the General Counsel's Brief offers no evidence that funds solicited to support the Club's general advertising said that express advocacy was intended. In its two most prominent examples, the General Counsel's Brief (at 20 & 21) quotes solicitations to Club members[29] for funds to run issue ads. The first explains that the solicitation is for money to fund "a series of ads in South Dakota educating citizens about Daschle's economically destructive liberalism." The second states: "We intend, with the ads that you'll see at the end of this tape, to

[29] Contrary to the General Counsel's footnote 58, these communications are also protected from regulation because the Club is a duly constituted membership organization – as demonstrated throughout this Opposition – and these are protected membership communications.

defend President Bush's economic record, ..." Neither solicitation indicates that funds are to be used for "express advocacy."[30]

Moreover, Club members knew from the many issue ads on the Club's website that, in fact, the Club typically did not support express advocacy. Thus, *Survival Education Fund*'s legal holding – that a donation is not a contribution unless the solicitation clearly states that the money will be used for express advocacy – shows that monies received by the Club were not "contributions."

G. The Club Satisfies All Of The Required Criteria To Be A Properly Constituted Membership Organization.

The General Counsel's footnote 58 attacks the Club's status as a membership organization on two grounds. First, it asserts that the Club has a disqualifying primary purpose. We have shown above that this is not so. The Club's primary purpose is to advance pro-growth policies. Second, it attacks the membership status of some of the Club's members for lacking a significant attachment to the Club. This assertion is also incorrect and should be disregarded.

Forbidding the Club to treat certain persons as its "members" would sharply curtail its ability to address them on political subjects, thus precluding the free exercise of core First Amendment rights. *Chamber of Commerce v. FEC,* 69 F.3d 600, 605 (D.C. Cir. 1995). The "government must curtail speech only to the degree necessary to meet the particular problem at

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[30] The General Counsel's Brief (at 19) also excerpts language from solicitations in 2000 that it contends are solicitations for "contributions." Curiously, the Brief concedes that one of the solicitations is for "funds to counter the 'ugly propaganda by the labor unions'" and not for express advocacy. The excerpt from the second solicitation, however, is truncated and does not include the Club's explanation that member's own funds, and not those of the Club are not used to support candidates. ("The 1,500 Club for Growth members around the country have contributed $120,000 to Jeff already and we hope to raise $200,000 for him by election day.").

hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *MCFL*, 479 U.S. at 265; *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 190 (D.C. Cir. 2001). Accordingly, in addition to specifying factors that conclusively establish membership, 11 C.F.R. §§ 100.134(f); 114.1(e)(2), the Commission's regulations also classify as members all others "who do not precisely meet the requirements of the general rule, but have a relatively enduring and independently significant financial or organizational attachment." 11 C.F.R. §§ 100.134(g); 114.1(e)(3). Of course, all of these standards must be construed so as not to eliminate persons as members who do not threaten the core anti-corruption concerns that justify FECA.

The Club's members all satisfy the Commission's standards. The regulatory definition of "member" requires that he or she pay membership dues at least annually or maintain some other significant organizational attachment such as the right to participate in a binding vote on an organization policy. *See* 11 C.F.R. §§ 100.134(f)(2), (3); 114.1(e)(2)(ii), (iii). From 1999 until 2003, all Club members were required to satisfy a dues requirement.

In the latter half of 2003, the Club no longer required members to pay annual dues, but offered free memberships.

[31] To allow its new non-dues paying members to maintain their status as "members" for FEC purposes, the Club's Bylaws were amended to provide for "[v]oting in an

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[31] The General Counsel's Brief (at 5) states that the Club's requirement that members pay dues ended in 2002. It bases this conclusion on
the dues requirement existed "[f]rom approximately 1999 through 2002."

annual election on a Club policy question." In 2004, Club members voted on whether the Club should consider tort reform in connection with its pro-growth agenda.

The Club is a validly constituted membership organization with "members" who qualify as such under relevant FEC authority. Though it no longer requires its members to pay dues, it allows them to vote on a binding policy question. Accordingly, the Club has taken appropriate measures to safeguard the membership status of all of its members.[32]

IV. CONCLUSION

This matter must be dismissed because of the failure to comply with mandatory procedures for initiating a complaint-based case. Alternatively, all four of the General Counsel's alternative theories (at 32) for finding probable cause that a violation has occurred must be rejected. Theories one through three – that the Club is a political committee, or that it is the non-federal account of a political committee, and failed to abide by various requirements – are inapposite because the Club is a validly organized and operated membership organization. The fourth recommendation – that the Club engaged in prohibited express advocacy – is factually wrong.

[32] The General Counsel's Brief does not challenge the status of the Club's members based on any of the other regulatory criteria. *See* 11 C.F.R. §§ 100.134(f); 114.1(e)(2).

For all of the reasons shown above, including the fact that this matter has been proceeding contrary to statutory procedures, the Commission should find no probable cause that any violation of the Act has occurred and dismiss the case.

Respectfully submitted,

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May 31, 2005