FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

In the Matter of	)	
	)	**MUR 5842**
Economic Freedom Fund; and	)	
Charles H. Bell, Jr.	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONER CAROLINE C. HUNTER

This matter was generated by a complaint filed by Democracy 21 and the Campaign Legal Center ("Complainants"), alleging that Economic Freedom Fund ("EFF") failed to register as a political committee and, therefore, failed to comply with the limits, prohibitions, and reporting requirements set forth in the Federal Election Campaign Act of 1971, as amended ("the Act"), based on its sponsorship of ads and telephone opinion polls during the 2006 election cycle.[1] After reviewing the complaint and EFF's response, along with the recommendation of the Office of General Counsel ("OGC") to find reason to believe ("RTB") that a violation of the Act occurred, we voted (i) against finding a reason to believe that EFF violated the Act[2] and (ii) to close the file. Ultimately, and as explained in greater detail below, we found that none of EFF's communications contained express advocacy and, therefore, concluded that EFF was not subject to the Act's requirements relating to political committees, nor its limitations and source prohibitions.

BACKGROUND

EFF is an unincorporated association that is registered with the Internal Revenue Service ("IRS") as a political organization under section 527 of the Internal Revenue Code ("IRC").[3] Its mission "is to educate citizens on issues of public importance related

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[1] Complainants originally filed this complaint against EFF and an additional respondent. The Commission determined that the respondents should be split into separate Matters Under Review ("MURs").

[2] Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively. The undersigned objected. MUR 5842, Certification dated April 15, 2009.

[3] Response at 1.

to public policy – specifically, the economic and related impacts of certain legislative and other official acts of elected officials – as well as influence the legislative and other official actions of public officials."[4]

Among the activities it undertook during the 2006 election cycle, EFF produced 59 advertisements, which included television ads and mailers, and sponsored telephone opinion polls. OGC makes no argument that any of EFF's television ads expressly advocate the election or defeat of a federal candidate. And out of the dozens of mailers that EFF produced and disseminated, OGC identified only two that it argues contain express advocacy.

The first such mailer references Congressman Jim Marshall of Georgia (hereinafter referred to as the "Marshall mailer"). It states:

> WHO IS JIM MARSHALL REPRESENTING ...
>
> illegal immigrants or Georgia families?
>
> **Jim Marshall** voted against prohibiting illegal immigrants from getting food stamps. (Source: HR 4766, 7/13/04)
>
> **Jim Marshall** voted against law enforcement funding that aids local police in reporting illegal immigrants to federal authorities – making it harder for law enforcement to crack down on those who are in this country illegally. (Source: Roll Call 341, 7/8/04)
>
> [pictures of Jim Marshall, Nancy Pelosi, and Cynthia McKinney]
>
> Congressman Jim Marshall gave into liberal peer pressure.
>
> In addition to voting with liberal Nancy Pelosi to **aid illegal immigrants with tax paid benefits,** Jim Marshall joined with ultra-liberal Cynthia McKinney and **voted to keep the Death Tax.** (Source HR 4766, 7/13/04, HR 8, 4/13/05)
>
> **Jim Marshall does NOT represent Georgia values!**[5]

The second mailer that OGC alleges contains express advocacy references Congressman John Barrow, also of Georgia (hereinafter referred to as the "Barrow mailer"). It states:

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4 *Id.*

5 Complaint, Attach. D.

Getting to know John Barrow has been a disappointment.

Rather than being a leader for Georgia, John Barrow is its least effective member of Congress. (Source: www.congress.org)

Rather than supporting Georgia values, John Barrow voted to make liberal San Francisco politician Nancy Pelosi the Speaker of the House. Nancy Pelosi has advocated for a "cut and run" policy in Iraq. (Source: Congressional Quarterly Records)

INEFFECTIVE LIBERAL

CONGRESSMAN JOHN BARROW

Cutting Funding for Air Travel Security

In the weeks before the London airplane bombing plot was foiled, John Barrow voted to cut funding for air travel security by over $10 million. (Source: Roll Call Vote 217, 5/25/06)

That's bad, but so is John Barrow's other vote ... Barrow voted AGAINST ending the temporary protected status for hundreds of thousands of immigrants in the United States – allowing them to work and live here without having to file for citizenship.

John Barrow Not Representing Georgia Values[6]

As noted above, EFF also conducted telephone opinion polls. One such poll, done via an automated telephonic system, ran in Indiana.[7] In it, respondents were asked a series of questions, some of which sought demographic information, and others that tested various issues. The demographic questions were:

- Are you registered to vote in Indiana?
- Do you intend to vote in the November 7th election?
- Are you 55 years of age or older?

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[6] *Id.*, Attach. E.

[7] OGC mentions another alleged poll that EFF conducted in Iowa. We do not have the script of that poll and the only information provided to us by OGC comes from an anonymous email reprinted in a blog cited by neither Complainants nor Respondent. As we have stated on prior occasions, we have serious concerns about such information being presented to us without any opportunity for the respondent to reply before an RTB determination. *See* MUR 6056 (Protect Colorado Jobs), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II (June 2, 2009). Without any other information, we do not believe that such an anonymous source can serve as the basis for an RTB finding.

- Do you agree that only marriage between one man and one woman should be legal and binding in Virginia?
- On the issue of abortion, do you consider yourself to be pro-life?
- Do you consider yourself to be a Republican?
  - [if no] Are you a Democrat?
- Do you have a favorable opinion of President George W. Bush?
- Are you male?
- Have you ever contributed to or financially supported a political campaign, church, or other religious or non-profit organization?[8]

The non-demographic questions were as follows:

- Do you want your taxes not raised and if possible cut?
  - [if yes] In America when a person dies, the IRS can take up to 55% of the inheritance left for family and friends. Do you want Congress to permanently eliminate this unfair death tax?
  - Baron Hill voted to keep the death tax in place and refused to vote to make permanent the tax cuts that have caused record economic growth since 2001. Does knowing this make you less likely to vote for Barron Hill [sic]?
- Do you believe that frivolous and abusive lawsuits cost us all too much money?
  - [if yes] Baron Hill has over $60,000 in contributions from trial lawyers and his [sic] voted repeatedly to stop reform of the medial [sic] malpractice system resulting in less doctors and higher health care costs for Indiana residents. Does knowing this make you less likely to vote for Baron Hill?
- The new Medicare prescription benefit law went into effect in January of this year. Would it surprise you to know due to that new law, over 78,000 elderly Indianans in your neighborhoods can now obtain the drugs that they need but that they could not afford before?
  - [if yes] Baron Hill voted against the Medicare prescription drug law that helps over 78,000 of his elderly constituents get drugs they could not afford before. Does knowing this make you less likely to vote for Barron Hill [sic]?

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[8] Complaint, Attach. G

- Barron Hill [sic] voted to allow the sale of a broad range of violent and sexually explicitly materials to minors. Does knowing this make you less likely to vote for Baron Hill?
- Baron Hill's votes would have terminated the Head Start program that feeds young children from low income families. Hill also voted against increased funding for more teachers and better teacher training. Does knowing this make you less likely to vote for Baron Hill?
- While in Congress Baron Hill voted 12 times to use money from the social security trust fund, your retirement account, to fund projects like the national endowment for the Art. [sic] Does knowing this make you less likely to vote for Baron Hill?[9]

At the end of the poll, EFF is disclosed as the entity that conducted the poll. OGC considered this poll to meet the regulatory definition of express advocacy.

As both Complainants and Respondent note, the pollster hired by EFF to conduct the poll in Indiana brought a federal declaratory judgment action against the State of Indiana and its Attorney General in the Southern District of Indiana, arguing that subjecting non-commercial political calls to the state prohibition on automated calling systems was preempted by federal law and unconstitutionally infringed on interstate commerce and the pollster's First Amendment rights.[10] EFF conducted no further activity in Indiana.[11]

ANALYSIS

The Act defines 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."[12] The Supreme Court has limited the scope of the term "expenditure" to "reach only funds used for communications that expressly advocate the

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9 *Id.*

10 Complaint, Attach. L (Complaint in *Freeeats.com v. Indiana ex. rel. Carter*, 1:06-cv-1403-ljm-wtl (S.D. Ind., filed Sept. 21, 2006)). The District Court dismissed this case on October 10, 2007, pursuant to the decision of the United States Court of Appeals for the Seventh Circuit that dismissal of Freeeats.com's complaint on abstention grounds was proper. *Freeeats.com, Inc. v. Indiana*, 502 F.3d 590 (7th Cir. 2007). On Sept. 18, 2006, the Indiana Attorney General had filed a state action against EFF for violating the Indiana's automated dialing machine statute. *Id.* at 593. Though irrelevant to our analysis, we are unaware of the status of that state court action. *Indiana v. Economic Freedom Fund*, No. 07C01-0609-MI-0425 (Brown Cty. (Ind.) Cir. Ct., filed Sept. 18, 2006).

11 Response at 7 n.5.

12 2 U.S.C. § 431(4)(A).

election or defeat of a clearly identified candidate."[13] Similarly, the Court narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but "earmarked for political purposes."[14] Therefore, only an entity that made expenditures or received contributions in excess of $1,000 can be considered a political committee. Conversely, if an entity does not reach those expenditure and contribution thresholds, it cannot be a political committee as a matter of law.

However, even if an entity exceeds either the contribution or expenditure thresholds, it still may not trigger political committee status, for the Court has further construed the term "political committee" to "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."[15] In other words, the Act does not reach those "engaged purely in issue discussion," but instead can only reach "that spending that is unambiguously related to the campaign of a particular federal candidate" – specifically, "communications that expressly advocate the election or defeat of a clearly identified candidate."[16] Therefore, when examining whether a group has triggered political committee status under this two-step process, the Commission must first determine whether the group has made in excess of $1,000 in expenditures or received in excess of $1,000 in contributions. Only if this inquiry is answered in the affirmative will the Commission then analyze whether the major purpose of the group is campaign activity.

For matters arising out of the 2004 election cycle, though, the Commission had concluded, erroneously in our view, that it could find RTB that an organization had triggered political committee status if the available information demonstrated that a group's objective was to influence a federal election.[17] An RTB finding would then trigger an investigation to confirm that the group's objective to influence a federal

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[13] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

[14] *Id.* at 23 n.24, 24, 78. In order to avoid the "hazards of uncertainty" regarding the meaning of "earmarked for political purposes," the United States Court of Appeals for the Second Circuit interpreted the phrase to include only donations "that *will be converted* to expenditures [*i.e.*, express advocacy] subject to regulation under FECA." *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (emphasis added).

[15] *Buckley*, 424 U.S. at 79-80.

[16] *Id.*

[17] *See, e.g.*, MURs 5487 (Progress for America Voter Fund), 5751 (The Leadership Forum), and 5541 (The November Fund). The Commission concluded in these matters that evidence that these organizations triggered the statutory threshold of $1,000 in contributions or expenditures was not necessary before finding RTB, where available information suggested that the organization had the sole or primary objective of influencing federal elections and had raised and spent "substantial" funds in furtherance of that objective.

election was its major purpose and determine whether the group in question had made expenditures or received contributions in excess of $1,000.

While discussing this matter in executive session in September 2007, the Commission decided that, for matters arising out of the 2006 election cycle and going forward, the Commission would now require that there be some information suggesting a specific expenditure was made or contribution received prior to authorizing an investigation. Though we were not on the Commission at the time this decision was made, we agree with our previous (and current) colleagues that if there is no evidence of expenditures made or contributions received, then the inquiry ends there without any probe of the group's major purpose.[18]

Therefore, consistent with the Act, the case law, and the Commission's 2007 direction to OGC, we look to EFF's own communications to determine whether it made expenditures or received contributions in excess of $1,000. As an initial matter, we agree with OGC that there is no evidence that EFF received or solicited contributions under 11 C.F.R. § 100.57. Thus, the only way that EFF could have triggered political committee status is if it made expenditures, *i.e.*, express advocacy communications.[19] As noted above, the Court has construed the term "expenditure" to reach only communications "expressly advocating" the election or defeat of a candidate. Commission regulations define "expressly advocating" as any communication that:

> (a) 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

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[18] We have already explained much of our reasoning regarding the reason to believe standard and political committee status elsewhere. *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II.

[19] This is true regardless of whether EFF, or any entity, is organized under section 527 of the IRC. Interestingly, Complainant argues that "[g]roups such as section 527 'political organizations' are formed for the principal purpose of influencing candidate elections and, as explained by the Court in *Buckley*, their expenditures 'can be assumed to fall within the core area sought to be addressed by Congress.' They are, by definition, campaign related." Complaint at 18 (quoting *Buckley*, 424 U.S. at 79). Complainant completely ignores the fact that *Buckley* was discussing disclosure by candidates or political committees as being assumed to fall within the regulable bounds of Congress, not disclosure by "groups such as 527 'political organizations.'" Only if EFF was found to be a political committee would its expenditures fall under the "core area" that *Buckley* was describing. That statement cannot be bootstrapped as support that spending by 527s is subject to regulation under the Act. To do so would assume the very proposition Complainant is attempting to prove.

> slogan(s) or individual word(s), which in context can have no other reasonable meaning than 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!"; or
>
> (b) 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.[20]

Section 100.22(b), in large part, mimics the rule set forth by the United States Court of Appeals for the Ninth Circuit in *FEC v. Furgatch*.[21] At issue in *Furgatch* was a newspaper advertisement criticizing then-President Jimmy Carter that ran one week before the 1980 presidential election. The ad was captioned "DON'T LET HIM DO IT." 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*"). The ad specifically mentioned current and former opponents of the President (*e.g.*, "[The President's] running mate outrageously suggested [former primary opponent] Ted Kennedy was unpatriotic"; "[T]he President himself accused Ronald Reagan of being unpatriotic"). The ad concluded by re-stating: "DON'T LET HIM DO IT."

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[20] 11 C.F.R. § 100.22.

[21] 807 F.2d 857 (9th Cir. 1987). In promulgating section 100.22, the Commission stated that "the *Furgatch* interpretation" of express advocacy was being incorporated into the new regulation. Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35,295 (July 6, 1995) ("Express Advocacy E&J "). Courts similarly have noted that section 100.22(b) is based on *Furgatch*. *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 384 (4th Cir. 2001) ("*VSHL*") (noting that the Commission was "[d]rawing on *Buckley*, *MCFL*, and *Furgatch* when it drafted section 100.22); *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 11 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997) ("*MRLC*") ("It is obvious that subpart (b) of the FEC regulation comes directly from" *Furgatch*.).

In analyzing this ad, the court 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."[22] 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 ...."[23]

The court then emphasized that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy."[24]

In applying this standard to the ad at issue, the court stated that the "pivotal question" raised in the ad was "not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it.... 'Don't let him' is a command. The words 'expressly advocate' action of some kind."[25] The court acknowledged that "whether the advertisement expressly advocates the defeat of Jimmy Carter is a very close call."[26] The court ultimately concluded, however, that "[r]easonable minds could not dispute that [the] advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not 'let him do it.'"[27] Though the court considered the timing of ad in reaching its conclusion, it noted that external context remains an "ancillary" consideration, "peripheral to the words themselves."[28]

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22 *Furgatch*, 807 F.2d at 864.

23 *Id.* (emphasis added).

24 *Id.*

25 *Id.*

26 *Id.* at 861.

27 *Id.* at 865.

28 *Id.* at 863. *See also Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("express advocacy must contain some explicit *words* of advocacy") (emphasis added).

Thus, the *Furgatch* express advocacy test as incorporated by section 100.22(b), though slightly broader than *Buckley*'s "magic words" standard, still sets a very high bar. Nevertheless, section 100.22(b) has trod a rocky road in the courts. In fact, it has been held unconstitutional by every federal court that has considered it on its merits.[29] However, for purposes of reaching our conclusion in this matter, we assume the constitutionality of section 100.22(b).

As mentioned above, OGC argues that two of EFF's mailers and the telephone opinion poll it conducted in Indiana contained express advocacy.[30] We disagree. Assuming *arguendo* that section 100.22 is constitutional, we conclude that neither the mailers nor the telephone opinion poll constitute express advocacy under this regulation.[31]

None of EFF's Television Ads Or Mailers Constitute Express Advocacy

While we agree with OGC that all of the TV ads and a vast majority of the mailers produced by EFF do not expressly advocate the election or defeat of a federal candidate, we diverge with respect to the two Georgia mailers that reference

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[29] *See, e.g., VSHL*, 263 F.3d at 392; *MRLC*, 914 F. Supp. at 12; *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*."). *But see Real Truth About Obama v, FEC*, 2008 WL 4416282 (E.D. Va. 2008) (denying preliminary injunction against FEC to enjoin the Commission from enforcing the Act against plaintiffs and all other entities similarly situated), appeal docketed, No. 08-1977 (4th Cir. Sept. 16, 2008). States with statutes modeled after section 100.22(b) have fared no better. *See, e.g., N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRTL II*"); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *Ctr. for Individual Freedom, Inc. v. Ireland*, 2008 WL 4642268 (S.D. W.Va.), *amended by* 2009 WL 2009 WL 749868 (S.D. W.Va.).

[30] These three communications are the only ones that OGC claimed reach the level of express advocacy. We agree with OGC's apparent determination that none of EFF's television ads or the other EFF mailers fell under the definition of express advocacy.

[31] Complainants contend that express advocacy is irrelevant when discussing 527 organizations; rather, if a 527 organization runs ads that "promote, support, attack, or oppose federal candidates," they are "clearly for the purpose of influencing a federal election." Complaint at 18. We do not agree. As ably articulated by Respondent (at 4), neither a court nor this Commission has ever held that something other than "express advocacy" can be used to define "expenditure." The Commission rejected just such an argument in 2004. *See* FEC Minutes, FEC Agenda Document 04-77 (Aug. 19, 2004) at 9. Moreover, Complainants themselves have argued in the past against just such an application – instead, Complainants stated, in comments submitted to the Commission, that "the Commission cannot, and should not, ... subject public communication ... to the campaign finance laws beyond the current rules that apply to 'express advocacy' and 'electioneering communications.' Furthermore, neither the Commission nor Congress can apply a non 'bright-line' test *such as 'promote, support, attack, or oppose' to the uncoordinated communications of non-profit groups or other corporations*." Comments of Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics, filed in response to Notice of Proposed Rulemaking 2004-6 (emphasis added).

Congressmen Marshall and Barrow, respectively. Under the Commission's regulations, neither of these two mailers can fairly be deemed to contain express advocacy.[32]

As a preliminary matter, we agree with OGC that the ads do not fall under section 100.22(a). The ads do not contain any of the regulation's enumerated "magic word" phrases. Nor do the ads constitute express advocacy under the standard set forth in *FEC v. Massachusetts Citizens for Life* ("*MCFL*").[33] Finally, there are no campaign slogans or similar individual words that only can be reasonably understood as admonitions to vote for or against a particular federal candidate. Therefore, the ads do not contain express advocacy under section 100.22(a).

However, OGC alleges that the Marshall and Barrow mailers do fall within the scope of section 100.22(b). We disagree. The plain language of subsection (b) limits its reach to speech that "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 its "electoral portion" is "unmistakable, unambiguous, and suggestive of only one meaning."[34] Even where a communication "discusses or comments on a candidate's character, qualifications, or accomplishments," as long as "reasonable minds" can interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified federal candidate, the ad will not be considered to contain express advocacy, as defined by section 100.22(b).[35]

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[32] In prior matters, we have struggled to ascertain how OGC differentiates between communications that contain express advocacy and those that do not. *See* MURs 5694 & 5910 (Americans for Job Security), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, 13-15 (April 27, 2009) (comparing ads in different MURs and similarly questioning whether any distinction could be found among them). That question exists here, as well, for we fail to see a principled distinction between the two mailers that allegedly contain express advocacy and the television ads and other mailers that do not. To us, some of the television ads and other mailers contain the same information presented in a similar manner as the two ads in question. *Compare* Complaint, Attachs. E & F (communications containing express advocacy according to OGC) *with id.*, Attachs. B, C, & D (communications not containing express advocacy). For the reasons stated below, we believe that none of EFF's ads contain express advocacy.

[33] 479 U.S. 238, 243 (1986). In *MCFL*, the Supreme Court held that a mail piece which purported to provide "everything you need to know to vote pro-life," and expressly stated "vote pro-life" accompanied by photos of candidates identified as supporting a pro-life position, constituted express advocacy.

[34] 11 C.F.R. § 100.22(b).

[35] Express Advocacy E&J, *supra* note 21, at 35,295 ("Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) *if, in context, they have no other reasonable meaning* than to encourage actions to elect or defeat the candidate in question.") (emphasis added). The E&J also states that "the revised rules in section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages." *Id.*

Under this standard, neither mailer in question expressly advocates the election or defeat of a federal candidate. The Marshall mailer (unlike the ad in *Furgatch*, for example) contains no reference to Congressman Marshall's candidacy, his opponent, or anything else relating to a federal election or the election process. Nor does the mailer contain any clear plea for action. Instead, the mailer focuses on the Congressman's legislative record, specifically his votes on the issues of immigration and the estate tax, and states that Congressman Marshall voted with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney on these issues. The mailer concludes with the statement: "Jim Marshall does NOT represent Georgia values!"

Under section 100.22(b), a communication must contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" in order for the communication to be deemed express advocacy. It is unclear how a communication can be said to contain an *electoral* portion if the communication, like the Marshall mailer, includes no references to a candidacy, an election opponent, or any other language regarding the federal election process. Moreover, the Marshall mailer's lack of any call to action—which according to the *Furgatch* court, is necessary for speech to "be termed 'advocacy'"[36]—further undermines the notion that the mailer contained an electoral portion.

The statement "Jim Marshall does NOT represent Georgia values!" could be read as an attack on the character, qualifications, or accomplishments of Congressman Marshall. But considering (i) the absence of any election references or any clear call to action in the mailer and (ii) the mailer's focus on the Congressman's votes on specific issues, we cannot conclude that this statement—either on its own or in the overall context of the mailer—can "have no other reasonable meaning than to encourage actions to elect or defeat" Congressman Marshall. One could reasonably interpret the Marshall mailer as suggesting that the reader contact Congressman Marshall and insist that he listen less to his party's leadership and more to the constituents in his district on the issues of immigration law and the estate tax.

Like the Marshall mailer, the Barrow mailer focuses on votes cast by the Congressman—one on immigration and the other on funding for air travel security. It states that Barrow is not representing what EFF believes to be "Georgia values," arguing that Barrow instead has been supportive of "liberal San Francisco politician Nancy Pelosi" and, thus, concludes that the Congressman has been "a disappointment" and Georgia's "least effective member of Congress." As with the Marshall mailer, the Barrow mailer does not reference a candidacy or an election and contains no clear call to action. Without such elements, a reasonable mind could conclude that this communication is conveying the message that the Congressman's constituents should contact Barrow to urge him to better "represent[] Georgia values" on the issues mentioned in the mailer and to be a better, more "effective" representative for the people in his district.

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[36] *Furgatch*, 857 F.2d at 864.

Regarding the absence of a call to action in either of the mailers, while such a call is not explicitly required under the language of the regulation (notwithstanding the *Furgatch* court's statement that "speech may *only* be termed 'advocacy' if it presents a *clear plea for action*"[37]), the lack of a call to action significantly expands the scope of plausible non-electoral interpretations and, thus, increases the likelihood that a reasonable person might interpret a communication as something other than expressly advocating the election or defeat of a federal candidate. And if there is an alternative interpretation that a reasonable person is capable of reaching, then the ad in question cannot, as a matter of law, be express advocacy.[38] As mentioned above, both of the mailers at issue can be read by a reasonable person as containing non-electoral messages.[39]

We do not necessarily foreclose (though it is not easy to envision) the possibility that a communication lacking any reference to a candidacy or an election could still have an electoral portion. And perhaps there are scenarios where a communication without a call to action could properly be deemed express advocacy. But when a communication (such as the Marshall or Barrow mailer) contains neither references to a candidacy or election nor a call to action, we fail to see how such a communication justifiably can be said to contain an electoral portion that "is unmistakable, unambiguous, and suggestive of only one meaning," especially where, as here, the predominant focus in each of the communications was the legislative record of the respective federal officeholders. Moreover, these ads fall well short of the ad under review in *Furgatch*, which the court in that case deemed to be a "very close call."[40] Therefore, we conclude that a reasonable person can interpret the Marshall and Barrow mailers as containing messages other than urging readers to vote for or against the federal officeholders at issue, and thus, that the mailers do not constitute express advocacy under section 100.22, regardless of whether the candidate's character, qualifications, or accomplishments are discussed in the mailers.

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37 *Id.* (emphasis added).

38 *See id.* ("We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy.").

39 An explicit call to non-electoral action is not required for an ad to fall outside the reach of section 100.22(b). To hold otherwise would turn the standard articulated by the *Furgatch* court (that "speech may only be termed 'advocacy' if it presents a clear plea for action") on its head. The regulation states that a communication contains express advocacy if it could only be understood by a reasonable person as urging the election or defeat of a federal candidate. The absence of a non-electoral call to action (*e.g.*, "Contact your Senator and tell her to support legislation that protects the environment") does not in any way prevent a reasonable person from interpreting a communication as urging something other than voting for or against a particular federal candidate.

40 *Furgatch*, 807 F.2d at 861.

The Indiana Poll that EFF Commissioned Did Not Constitute Express Advocacy

OGC also argues that the poll commissioned by EFF in Indiana contained express advocacy. Because the poll meets neither prong of section 100.22, we conclude that the poll is outside the regulatory reach of this provision.

To begin, we take exception to the characterization of the EFF poll as a "push poll." The term "push poll" is not defined in the Act and, thus, the use of this term has no legal bearing on whether the poll at issue constituted express advocacy. Presumably, the EFF poll is described as such because of its use of negative information about Baron Hill in some of its questions. However, as polling professionals readily attest, legitimate public opinion polls often test negative messages about candidates. According to respected political analyst Stuart Rothenberg, "[s]erious polls can include push questions that contain some explosive or even incorrect information, but that doesn't make them advocacy calls."[41] And professional pollster Neil Newhouse similarly notes: "Testing negatives about candidates on a public opinion poll doesn't make the instrument a push poll."[42]

In the Statement of Reasons we signed in MUR 5835 (DCCC), we set forth criteria that pollsters and political commentators from across the political spectrum use to differentiate between "push polls" and public opinion polls:

- Push polls typically ask just a question or two, whereas real surveys are almost always much longer and typically include demographic questions about the respondent (such as age, race, education, income), as well as innocuous questions such as "whether the country is headed in the right direction," Presidential job rating, and initial voting preference.

- Push pollers usually don't record the respondents' answers to the questions asked, while public opinion polls do.

- Push polls are generally very short – no longer than three or four questions, while public opinion polls can last as long as 20 or 25 minutes, or as short as five or six minutes.

- Push polls don't "sample" public opinion; they try and change it, whereas public opinion polls scientifically sample voters in a specific constituency, such as a state, county or congressional district.

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[41] Stuart Rothenberg, *For the Thousandth Time: Don't Call Them Push Polls*, Roll CALL, Mar. 8, 2007.

[42] Neil Newhouse, *Think You've Been 'Push Polled'? Maybe Not*, Politico, Nov. 19, 2007, *available at* http://www.politico.com/news/stories/1107/6977.html (accessed Apr. 7, 2009).

- Push polls generally occur very close to Election Day to make it more difficult to track down the initiator of push polls. Public opinion polls that test campaign messages are usually fielded days or weeks prior to the main media crush in a campaign (meaning, prior to when candidates are going back and forth with TV ads and mailings).[43]

Applying these criteria, the EFF poll appears to be more akin to a legitimate public opinion poll than a push poll. Here, the polls ran two months before the election. Twenty questions were asked—nearly half of which were demographic in nature. There is no evidence that data was not collected and analyzed. Nor is there any evidence that the pollster did not scientifically sample potential recipients. That there were questions regarding multiple issues provides further support that this was a traditional public opinion poll. Moreover, many of the questions that addressed whether a listener was "less likely" to vote for the candidate based on a particular message were only given to those listeners who answered a previous question in a particular way. If this truly were a "push poll," then no such allowance would likely have been made – every listener would have heard all questions. Instead, much of this poll appears to have been message testing for persons who already held a particular view about the issue that was the subject of a particular policy question.

The only factor that potentially could point in the direction of a "push poll" is that, according to the polling script, this poll only lasted forty-five seconds. Upon closer inspection, however, that fact holds less relevance given the automated technology used. Even in that forty-five seconds, the poll had the potential to ask twenty questions, which according to professional pollsters, far exceeds the number of questions that a true "push poll" would include. And the mere fact that the EFF poll was conducted using automated technology in no way suggests that it was *per se* not a valid opinion poll. Several well-respected and widely read polls, including those by Rasmussen Reports[44] and SurveyUSA,[45] are also conducted using automated technologies. Therefore, it is untenable to argue that EFF's poll is a "push poll" simply because it, too, was automated.

In sum, the EFF poll looks much more like a legitimate public opinion than a push poll. However, as we noted earlier, "push poll" is not a defined term in the Act. Thus,

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[43] MUR 5835 (DCCC), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, 9-11 (citing Mark Blumenthal, *So What Is a Push Poll?* (Aug. 22, 2006), *at* http://www/pollster.com/blogs/so_what_is_a_push_poll.php; Newhouse, *supra* note 42).

[44] Rasmussen Reports: Methodology ("Rasmussen Reports collects data for its survey research using an automated polling methodology.") *at* http://www.rasmussenreports.com/public_content/about_us/methodology (last visited April 24, 2009).

[45] *See, e.g.*, Mark Blumenthal, *A Primary Electorate is a Moving Target*, THE NATIONAL JOURNAL, May 26, 2009, *available at* http://www.nationaljournal.com/njonline/mysterypollster.php (last visited June 1, 2009) (describing the automated polling techniques of SurveyUSA and Public Policy Polling).

whether a communication is or is not a push poll is not germane for purposes of determining whether the organization sponsoring the communication is a political committee subject to the Act's limits, prohibitions, and reporting requirements. Rather, the relevant consideration is whether the EFF poll expressly advocated the election or defeat of a federal candidate. For the reasons set forth below, we conclude that the EFF poll did not constitute express advocacy under the Commission's regulations.

An analysis under section 100.22(a) focuses on the specific language within a communication to determine whether particular words or phrases convert the communication into express advocacy. OGC argues that the phrase "Does knowing this make you less likely to vote for Baron Hill?" falls under 100.22(a) because it contains the word "vote"—a so-called magic word. We disagree.

The "magic" of the "magic words" test is that these words are generally *necessary* for a communication to be considered express advocacy under section 100.22(a). Having one or more of these "magic words," however, is not *sufficient* to automatically transform speech into express advocacy. That "vote" and "Baron Hill" appear in the same sentence does not convert the poll into express advocacy. Rather, these words must be viewed in the context of the ad itself.[46] Plucking the words "vote" and "Baron Hill" out of the question and viewing them in isolation provides no context in which to assess the primary purpose of the speech.

To conclude that merely because a sentence within a communication contains both a magic word like "vote" or "defeat" and the name of candidate converts the sentence into express advocacy *per se* would mean that a sentence like the following would also fall within the ambit of section 100.22(a): "Tell your representative not to vote against President Smith's bill for protecting the environment." Even though the sentence contains "vote against President Smith," that phrase in the context of the entire sentence has a completely different meaning than when viewed in isolation. To consider this statement express advocacy simply because of a single phrase that could be considered express advocacy in a much different context would obviously be an unreasonable result. Similarly, each of the questions at issue here, in the context of a public opinion poll, do not urge the poll respondent to actually vote against Hill; instead, they ask whether the preceding statements would make the respondent less likely to vote for Baron Hill. In other words, these questions can be understood to be eliciting information, rather than conveying "a clear plea for action,"[47] and, therefore, have a reasonable meaning other than express advocacy.

OGC also argues that the demographic question—"Do you intend to vote in the November 7th election?"—also constitutes express advocacy under section 100.22(a). If

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[46] 11 C.F.R. § 100.22(a).

[47] *See Furgatch*, 807 F.2d at 863. Although discussing express advocacy outside the "magic words" test, the *Furgatch* court held that "a stray comment viewed in isolation may suggest an idea that is only peripheral to the primary purpose of speech as a whole." *Id.*

this is true, then every research poll that asks respondents whether they intend to vote on election day would fall within the regulatory reach of section 100.22(a)—a clearly unsustainable conclusion. In this instance, the word "vote" is not used in the context of a message urging the listener to vote for or against a federal candidate, but rather in a question seeking demographic information asked of all respondents.[48] Thus, this question cannot be said to contain express advocacy.

The poll also does not constitute express advocacy under section 100.22(b). As we noted in detail above, simply because some of the messages tested in a poll may be provocative and hard-hitting does not render the poll express advocacy. One such statement highlighted by OGC and some of our colleagues was: "Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors. Does knowing this make you less likely to vote for Baron Hill?" OGC does not specifically argue that this statement attacks his character. Rather, OGC argues that EFF "takes a position about Hill" and then "attempt[s] to elicit a yes response" and "attacks the accomplishments of Baron Hill by making statements about policy positions while he was in office." As we explained in our discussion about the Marshall and Barrow mailers, the mere fact that a communication questions the accomplishments of a candidate or attacks his character does not necessarily make the communication express advocacy, so long as a reasonable person could interpret it as encouraging something other than actions to elect or defeat a federal candidate. Clearly, an opinion poll can be given such an alternative interpretation. Specifically, this poll appears to be testing how certain statements about Hill, like this one, resonate with the individual providing the responses.[49]

We agree with our colleagues that the specific statement about Hill's vote on the sale of explicit materials "is reminiscent of the infamous 'Bill Yellowtail' ad, discussed in *McConnell v. FEC*."[50] This does not, however, end the analysis. Our colleagues

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[48] Since it has no electoral portion that specifically ties the question to any candidate, the question does not breach the section 100.22(b) express advocacy threshold either.

[49] Some of our colleagues appear to misunderstand the poll when they state that the pollster only asked this question to individuals "who the poll has determined [are] registered to vote and intend[] to vote." MUR 5842, Statement of Reasons, Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at unnumbered p. 3 ("Bauerly and Weintraub SOR"). Even a cursory review of the poll itself, however, shows that this question was asked of all poll respondents, regardless of whether they indicated they were registered to vote and intended to do so. Either a Yes or a No answer to the registration question takes the respondent to the intent to vote question; and either a Yes or No answer to the intent to vote question takes the respondent to the age question. Complaint, Attach. G at 1. Therefore, neither a Yes nor a No answer to the registration or intention to vote questions ended the call. Were this the sort of poll that our colleagues believe it to be, then an answer of No to either the registration or intention to vote question would have ended the call. And all respondents, regardless of their previous answers, are asked the question at issue, number 11. *Id.* at 3 Had the point of the poll been to expressly advocate the defeat of Baron Hill, the question would not have been asked of non-voters, for there would have been no need to influence their opinion.

[50] Bauerly and Weintraub SOR at unnumbered p. 3 (citing 540 U.S. 93, 193 n.78 (2003)).

appear to believe that, because the *McConnell* court "recognized" that the Bill Yellowtail ad "was not a legitimate issue ad," it and any similar ad can be regulated. This is simply not the case. Rather, one must determine if the ad contains express advocacy. And the *McConnell* court specifically noted that the Bill Yellowtail ad did not "urge the viewer to vote for or against a candidate."[51] Therefore, the Bill Yellowtail ad is not "express advocacy." After all, had that ad, and other ads like it, fallen within the regulatory definition of express advocacy, there would have been no need for Congress to institute the "electioneering communication" standard.

Both the Commission and Complainants in this matter have, in the past, understood this simple point. In its brief on the merits to the Court in *McConnell*, the Commission reviewed examples of "issue advertisements" provided by the appellants as evidence that the statutory definition of "electioneering communication" was overbroad.[52] One ad "criticized then-Senate candidate Debbie Stabinow for her past votes against repeal of the estate tax."[53] Another "criticized the targeted legislators for already having voted in June 2000 'to block federal safety standard that would help protect workers,' and culminated in a plea to voters to tell the candidates that '[their] politics cause[] pain.'"[54] A third "criticized Representatives for voting in 1995 'with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy.'"[55] The Commission never disagreed with appellants that these ads were "issue advertisements" (i.e., not express advocacy), but rather argued that "the advertisements were just as likely to influence the outcome of the candidate elections in connection with which they were run *as advertisements containing express advocacy*," and, therefore, the statutory electioneering communications provision was not overbroad.[56] And Complainants, in representing Intervenor-Defendants in *McConnell*, noted specifically that the Bill Yellowtail ad, like other similar ads, "avoids the 'magic words' of 'express advocacy,' and ... could be said to address some 'issue.'"[57]

Setting aside any discussion of electioneering communications, which are irrelevant to this analysis, all of the ads discussed in the *McConnell* litigation, including

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51 *McConnell*, 540 U.S. at 193.

52 Brief of Federal Election Commission, *FEC v. McConnell*, 540 U.S. 93 (2003) (No. 02-1674 et. al) at 106-08.

53 *Id.* at 107.

54 *Id.* (brackets in original).

55 *Id.* at 107-08.

56 *Id.* at 107 (emphasis added).

57 Brief of Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords (Redacted), *FEC v. McConnell*, 540 U.S. 93 (2003) (No. 02-1674 et. al) at 44.

the Bill Yellowtail ad, targeted candidates and criticized particular votes they made. None, however, became express advocacy on the basis of that content. Depending on the facts, some may have been electioneering communications and some may have been intended to influence. But all parties agreed that they were not express advocacy. As such, noting that a poll question is "reminiscent" of the Bill Yellowtail ad, which did not constitute express advocacy, provides support not for our colleagues' position, but our own – that, just like the Bill Yellowtail ad, this poll did not contain express advocacy.[58]

We also point out that, in analyzing whether the EFF poll meets the section 100.22 standard, we are not permitted to attempt to ascertain EFF's ultimate intent for sponsoring the poll. The Supreme Court has, on numerous occasions, stated that an intent-based test is not a constitutionally sound standard for distinguishing between speech that may be regulated and speech that may not. For instance, in *FEC v. Wisconsin Right to Life*,[59] Chief Justice Roberts noted that "an intent-based test would chill core political speech" and, quoting *Buckley*, "'blanket[] with uncertainty whatever may be said' and 'offer[] no security for free discussion.'"[60] Therefore, regardless of what EFF's motives might have been for sponsoring the poll or what its thoughts were for how to use the data gleaned from the poll, the Commission cannot, as a matter of law, conclude that this poll—which did not contain express advocacy— nevertheless fell within the ambit of section 100.22(b) because of suspicions about EFF's subjective intent regarding the poll. As the Supreme Court has made abundantly clear, we may only focus on the words contained in the communication and, to a limited extent, the context in order to discover the meaning of those words. To go beyond this limited inquiry—and instead seek to discern the intent of the speaker—runs counter to the instructions enunciated by the Supreme Court.

Finally, we note that it is irrelevant that Baron Hill was not an incumbent at the time the poll was conducted. As we stated in the Statement of Reasons in MURs 5694 & 5910 (Americans for Job Security), merely because a communication refers to a candidate who is not an officeholder does not have a unique bearing on the express advocacy analysis, provided the communication can otherwise be interpreted by a

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[58] We note that the term "express advocacy" is not found in our colleagues' Statement of Reasons; it is only found in the Factual and Legal Analysis drafted by OGC that they attached to their statement. Our colleagues do use the term "'issue' ad" to describe the poll. But this term has no regulatory meaning. Similarly, stating that the poll "attacked a federal candidate's voting record" or "smear[ed] the reputation of the candidate," as our colleagues do in their Statement, does not render the poll an expenditure under the Act. Only the presence of express advocacy can do that.

[59] 127 S. Ct. 2652, 2665-66 (2007) ("*WRTL II*").

[60] *Id.* at 2666 (quoting *Buckley*, 424 U.S. at 43). Thus, for 33 years, questioning the intent of the speaker has been off-limits for regulators and courts. Given this long history, it is troubling for us to see that some of our colleagues believe that asking the following question is appropriate when considering whether speech subjects an entity to regulation: "If its purpose were not to influence an election for federal office, why would EFF need to poll whether 'knowing this make[s the listener] less like to *vote* for' a candidate?" Bauerly and Weintraub SOR at unnumbered p. 3 (brackets and emphasis in original).

reasonable person as something other than a message urging the election or defeat of a federal candidate. Thus, that Baron Hill had not been in Congress the previous term did not limit in any way EFF's ability to poll issues important to the organization and link them to the candidate.[61]

Therefore, we conclude that the EFF poll, like the Marshall and Barrow mailers, did not contain express advocacy.[62] Consequently, we cannot agree with the Complainants' allegation that EFF made expenditures in excess of $1,000.

EFF Was Not a Political Committee

As stated above, the Act defines 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."[63] An organization that does not trigger the Act's contribution or expenditure thresholds, therefore, cannot be "a political committee." As we demonstrated above, EFF did not receive any contributions or make any expenditures. Thus, we do not need to conduct a "major purpose" analysis with respect to EFF in order to conclude that it was not a political committee.

Nonetheless, we address EFF's major purpose because 1) the complaint places most of its focus on this issue; and 2) even if we assume *arguendo* that EFF tripped the contribution or expenditure threshold, we still would conclude that EFF was not a political committee because its major purpose was not electing or defeating federal candidates. Complainants assert that an entity registering as a 527 organization by definition satisfies the major purpose test (with limited exceptions). That is simply not

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61 Nor does the fact that some of the poll questions reference Baron Hill's legislative record cause the poll to be considered express advocacy under section 100.22. As the Court reiterated in *WRTL II*, "'the distinction between discussion of issues and candidates and advocacy of election of defeat of candidates may often dissolve in practical application.'" 127 S. Ct. at 2670 (quoting *Buckley*, 424 U.S. at 42).

62 Complainants fail to provide a single example of express advocacy in any of EFF's communications. Instead, they argue that "[t]he ads run by respondents, when taken as a whole, can only be interpreted by a reasonable person as opposing the election of particular candidates for Congress, and thus meet the Commission's existing regulatory definition of 'express advocacy.'" Such an argument fails to comprehend the regulation, which examines separately each communication made by a speaker to determine whether, "as a whole," the communication constitutes express advocacy. The notion that an express advocacy determination can be based on a holistic analysis of the cumulative body of communications made by a speaker finds no basis in the Act, the Commission's rules, or the relevant case law. Therefore, we addressed above only OGC's determination that the specific Georgia mailers and the Indiana telephone opinion poll constitute express advocacy.

63 2 U.S.C. § 431(4)(A).

so. As we have explained elsewhere,[64] "political organization" status under section 527 of the IRC does not equate to "political committee" status under the Act.

Critically, the Commission has previously rejected this approach.[65] For example, in 2001, the Commission noted that the IRC "definition is on its face substantially broader than the Act's definition of 'political committee.'"[66] The Commission also noted that the IRS had already found that "activities such as circulating voting records, voter guides and 'issue advocacy' communications – those that do not expressly advocate the election or defeat of a clearly identified candidate – fall within the 'exempt function' category under IRC section 527(E)(2)."[67] And in 2004, when the Commission proposed to rewrite the definition of "political committee," it considered two alternatives by which all or nearly all "527 organizations would be considered to have the nomination or election of candidates as a major purpose ...."[68] Both proposals were rejected in favor of the current definition, which does not rely on an entity's tax status.[69]

Moreover, as the Commission itself has noted, imposing political committee status automatically on section 527 organizations would entail "a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000, and again in 2002, when it substantially transformed the nation's campaign finance laws through BCRA."[70] Though Congress is fully cognizant of the activities undertaken by 527 organizations (including sponsorship of communications critical of federal candidates), it has consciously chosen not to enact legislation that

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[64] MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II.

[65] The Fourth Circuit has rejected the concept as well. *See N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418, 430 (4th Cir. 2003) ("*NCRTL I*"), *vacated and remanded* (for further consideration in light of *McConnell v. FEC*, 540 U.S. 93 (2003)), 541 U.S. 1007 (2004) (rejecting such presumptions: "Any attempt to define statutorily the major purpose test cannot define the test according to the effect some arbitrary level of spending has on a given election.").

[66] Advanced Notice of Proposed Rulemaking, Definition of Political Committee, 66 Fed. Reg. 13,681 (Mar. 7, 2001). *See also* Political Committee Status Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5597-98 (Feb. 7, 2007) ("Political Committee Supp. E&J") ("In fact, neither FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status.").

[67] 66 Fed. Reg. at 13,687.

[68] Notice of Proposed Rulemaking, Political Committee Status, 69 Fed. Reg. 11,736, 11,748 (Mar. 11, 2004).

[69] *See* 11 C.F.R. § 100.5.

[70] Political Committee Status Explanation and Justification, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004).

would convert all such groups into political committees.[71] Instead, Congress has chosen to regulate these groups more narrowly by imposing limited reporting requirements in 2000, and then by amending those requirements in 2002.[72]

Complainants' citation of *McConnell* provides no support for equating 527 groups with political committees defined under the Act. The *McConnell* court, while quoting the IRC definition for 527 organizations under the auspices of discussing 2 U.S.C. § 441i(d)'s restrictions on soliciting funds for tax-exempt organizations, specifically stated that "parties remain free to solicit hard-money contributions to ... § 527 organizations that already qualify as federal PACs."[73] Thus, the Court, like Congress and the Commission, understood the distinction between 527 organizations that qualify for political committee status and those that do not. For if all 527 organizations were political committees, then the statutory restriction on solicitations for 527 organizations would have been superfluous. *McConnell*, therefore, merely provides more proof that Congress did not intend for all 527 organizations to be political committees by virtue of their tax status.

Finally, Complainants' reliance on old advisory opinions for the premise that "any group that chooses to register as a 'section 527 group' ... is by definition an entity" that meets the "major purpose" test is flawed. All of those advisory opinions predated *FEC v GOPAC*, which, as Complainants themselves note, "further limited the 'major purpose' test to encompass ... only 'the nomination or election of a particular candidate or candidates for federal office.'"[74] To the extent those previous opinions linked 527 status to the major purpose test, the Commission no longer equates the two.[75]

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[71] *Id.* at 68,064 ("Congress appeared to be fully aware that some groups were operating outside [the Act]'s registration and reporting requirements as well as its limitations and prohibitions... [and] consciously did not require 527 organizations to register with the Commission as political committees."); *see also* Political Committee Supp. E&J, *supra* note 66, at 5599 ("While Congress has repeatedly enacted legislation governing 527 organizations, it has specifically rejected every effort ... to classify organizations as political committees based on section 527 status."). *See generally Cottage Savings Ass'n v. Comm'r of Internal Revenue*, 499 U.S. 554, 562 (1991) (when Congress revises a statute, its decision to leave certain sections unchanged indicates acceptance of the preexisting construction and application of the unchanged terms).

[72] Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155.

[73] 540 U.S. at 177.

[74] Complaint at 15 (quoting 917 F. Supp. 851, 859 (D.D.C. 1996)).

[75] *See, e.g.*, Advisory Opinion 2006-20 (Unity 08) (determining that a 527 organization would have to register as a political committee because it planned on making expenditures in excess of $1,000 and its "self-proclaimed major purpose is the nomination and the election of a presidential and a vice-presidential candidate"; nowhere in the analysis of "major purpose" is the entity's tax status considered); *cf.* Advisory Opinion 2003-12 (Flake) (as part of facts given, 527 organization "is not a political committee"); 2003-07 (Virginia Highlands) (same).

Turning to the "major purpose" test itself, even assuming *arguendo* that EFF made "expenditures," it still would not be a political committee. EFF ran multiple ads and communications in multiple states. Some of them referenced federal candidates, some did not.[76] None of them expressly advocated the election or defeat of a candidate.[77] None of its solicitations referenced federal candidates.[78] And as OGC itself notes, there is no evidence that EFF made any public statements regarding its purpose, let alone any public statement that would specifically demonstrate that its major purpose was to influence federal elections.[79]

In *GOPAC*, even though the Court found that GOPAC's "ultimate major purpose" was to influence the election of Republican candidates for the House of Representatives, the court held that GOPAC was not a political committee, reasoning that, as a means to promote the election of Republican candidates, while GOPAC engaged in genuine issue advocacy that mentioned the name of a federal candidate (who was inextricably linked to the issues), such spending could not be regulated.[80]

Therefore, simply because EFF referenced federal candidates in its issue advocacy efforts, it does not follow that EFF's major purpose was influencing the nomination or election of particular candidates for federal office. Rather, judging by its activities, EFF appears to have focused on particular issues in particular areas where the citizenry likely would be particularly receptive to its message, especially in the context of highly publicized federal elections.[81] And in its own words, EFF's purpose "is to educate

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[76] Response at 2.

[77] *See infra* at pp. 10-20.

[78] Response at 2; Supp. Response, Ex. 1.

[79] Some have asserted that an organization's "major purpose" may be established through "public statements of purpose." *See FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (*citing GOPAC*, 917 F. Supp. at 859) (*discussing FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 392 (D.C. Cir. 1981)); *rev'd on other grounds on reconsid.*, 2005 WL 588222 (D.D.C. 2005). *But see WRTL II*, 127 S. Ct. at 2665-66 (cautioning against looking to subjective or contextual factors); *NCRTL II*, 525 F.3d at 284-85 (same), which cast serious doubt on the validity of examining anything other than the amount of express advocacy of the organization when analyzing its "major purpose."

[80] *GOPAC*, 917 F. Supp. at 858, 862-64 & n.2. *Cf. Malenick*, 310 F. Supp. 2d at 230 (entity held to be a political committee where it sent out hundreds of public communications expressly advocating the election of clearly identified federal candidates, and received and forwarded to the intended recipient approximately 230 individual checks (totaling approximately $185,000) made payable to the federal candidate or campaign committees so identified in the communications).

[81] *See Buckley*, 424 U.S. at 42 ("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."); *WRTL II*, 127 S. Ct. at 2670 ("[A] group can certainly choose to run an issue ad to coincide with public interest .... Discussion of issues cannot be

citizens on issues of public importance related to public policy – specifically, the economic and related impacts of certain legislative and other official acts of elected officials – as well as influence the legislative and other official actions of public officials."[82] Any referencing of federal candidates in its communications, therefore, appears to have been in furtherance of those objectives.

Even assuming *arguendo* that EFF was subjectively hopeful that certain candidates would be successful in the 2006 elections and even supposed that its ads might impact certain races, that is not enough to "pass" the major purpose test. As the Fourth Circuit observed in *NCRTL II*,

> [T]he Court in *Buckley* must have been using "*the* major purpose" test to identify organizations that had the election or opposition of a candidate as their only or primary goal – this ensured that the burdens facing a political committee largely fell on election-related speech, rather than on protected political speech. If organizations were regulable merely for having the support or opposition of a candidate as "*a* major purpose," political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley*'s "unambiguously campaign related" test, but it would also subject a large quantity of ordinary political speech to regulation.[83]

Finally, though an organization could theoretically satisfy "the major purpose" test through independent spending that is "so extensive" that the organization's major purpose may be regarded as campaign activity,[84] neither Congress, nor the Commission, nor the courts have established any guidance on what constitutes sufficiently extensive spending. As *GOPAC* illustrates, without any "'bright-line' rules that are easily understood and followed by those subject to them – contributors, recipients, and organizations"[85] – political committee status cannot be imposed on an entity. Because no such bright-line rule exists and, in any event, no evidence was presented to us that EFF's spending was "so extensive" with regard to any specific election or the 2006 election

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suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

82 Response at 1.

83 525 F.3d at 287-88 (emphasis in original) (internal citations omitted)

84 *See MCFL*, 479 U.S. at 262.

85 917 F. Supp. 851, 861-62.

cycle in general, we do not believe that the amount of EFF's alleged spending would trigger "major purpose" status for EFF.

Therefore, for all the reasons stated above, even assuming *arguendo* that EFF made expenditures in excess of $1,000 during a calendar year, we would conclude that EFF did not have the major purpose of electing or nominating a federal candidate and, thus, is not a political committee.

CONCLUSION

Contrary to the allegations made in the complaint and the recommendations of OGC, there is no reason to believe that EFF violated the Act or Commission regulations.[86] Consequently, EFF did not fail to register and report as a political committee under 2 U.S.C. §§ 433, 434; it did not accept prohibited and excessive

[86] The Commission is not required to create legal and constitutional issues in its administration and enforcement of the law. Indeed, the prudent and preferred course is to avoid such issues. Therefore, where the Commission has two reasonable ways of interpreting the law, its regulations, and enforcement practices, one which avoids legal and constitutional doubt and the other which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the former, safer course. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."))). *See also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt"). As a result, given the numerous legal and constitutional concerns raised above, we clearly would be within our discretion to dismiss this case and, in light of those concerns, we would exercise that discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (internal citations omitted)). *See also United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).

contributions under 2 U.S.C. § 441a(f); and it did not make prohibited expenditures on communications containing express advocacy under 2 U.S.C. § 441b. For these reasons, we voted against OGC's recommendation and, instead, voted to close the file in this matter.

6/10/2009
Date

MATTHEW S. PETERSEN
Vice Chairman

6/10/2009
Date

CAROLINE C. HUNTER
Commissioner