

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **MUR 7465**

4 DATE COMPLAINT FILED: August 9, 2018

5 DATE OF NOTIFICATIONS: August 13, 2018

6 DATE OF LAST RESPONSE: November 26, 2018

7 DATE ACTIVATED: February 13, 2019

8 EXPIRATION OF SOL: May 6, 2019 (earliest)-

9 Ongoing

10 ELECTION CYCLES: 2014, 2016

11 **COMPLAINANT:**

12 Noah Bookbinder, Citizens for Responsibility and  
13 Ethics in Washington

14 **RESPONDENTS:**

15 Freedom Vote, Inc.  
16 Fighting for Ohio Fund and Christopher M. Marston  
17 in his official capacity as treasurer  
18 James S. Nathanson

19 **RELEVANT STATUTES  
20 AND REGULATIONS:**

21 52 U.S.C. § 30101(4)(A), (17)

22 52 U.S.C. § 30102

23 52 U.S.C. § 30103

24 52 U.S.C. § 30104

25 52 U.S.C. § 30116(a)(8)

26 52 U.S.C. § 30120(a), (d)

27 52 U.S.C. § 30122

28 11 C.F.R. § 100.5

29 11 C.F.R. § 100.16

30 11 C.F.R. § 100.22(b)

31 11 C.F.R. § 100.26

32 11 C.F.R. § 104.3(j)

33 11 C.F.R. § 109.10

34 11 C.F.R. § 110.4(b)

35 11 C.F.R. § 110.6

36 11 C.F.R. § 110.11

37 **INTERNAL REPORTS  
38 CHECKED:**

39 Disclosure Reports

40 **AGENCIES CHECKED:**

41 None

1       **I.       INTRODUCTION**

2               In 2010, Freedom Vote, Inc. (“FV”) established itself as a non-profit corporation whose  
3       stated mission was to educate the people of Ohio on economic policy issues. The Complaint,  
4       however, alleges that FV spent most of its funds on federal political activity and failed to register  
5       and report as a political committee in violation of the Federal Election Campaign Act of 1971, as  
6       amended (the “Act”). In addition, the Complaint alleges that FV knowingly acted as a conduit  
7       for contributions made by unknown respondents to an independent expenditure-only political  
8       committee, Fighting for Ohio Fund (“FFO PAC”), and that FFO PAC knowingly accepted  
9       contributions in the name of another and failed to report earmarked contributions.

10              Over the course of two election cycles beginning in 2014, the majority of FV’s spending,  
11       more than \$3 million of the \$4 million FV spent from 2013-2016, appears to reflect that FV had  
12       the major purpose of nominating or electing federal candidates, including \$1 million that FV  
13       spent on its 2014 advertisement entitled “Third Largest.” For the reasons set forth below, we  
14       recommend that the Commission: (1) find reason to believe that FV violated  
15       52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political  
16       committee; and (2) find reason to believe that FV violated 52 U.S.C. §§ 30104(b)(4), (b)(5)(A),  
17       (g)(2), and 30120(d)(2) by failing to report an independent expenditure and include the  
18       appropriate disclaimer. In the alternative, we recommend that the Commission find reason to  
19       believe that FV violated 52 U.S.C. § 30104(c) by failing to report “Third Largest” as an  
20       independent expenditure under the rules applicable to organizations that are not political  
21       committees. We further recommend that the Commission authorize the use of compulsory  
22       process. In addition, we recommend that the Commission take no action at this time with respect  
23       to allegations that FV, FFO PAC, and unnamed respondents engaged in a conduit contribution

1 scheme in violation of 52 U.S.C. § 30122. Finally, we recommend that the Commission find no  
2 reason to believe that FFO PAC violated 52 U.S.C. § 30104(b) by failing to properly report  
3 earmarked contributions on the basis that the relevant statutory provision is not applicable to  
4 independent expenditure-only political committees.

## 5 **II. FACTUAL BACKGROUND**

### 6 **A. Respondents**

7 FV is an Ohio non-profit social welfare organization incorporated in 2010 under section  
8 501(c)(4) of the Internal Revenue Service (“IRS”) code.<sup>1</sup> From January 2011 through at least  
9 June 2017, James S. Nathanson was FV’s executive director.<sup>2</sup>

10 In filings with the IRS, FV describes its mission as “to further the common good and  
11 general welfare of the people of Ohio.”<sup>3</sup> A 2010 article cited in the Complaint states that FV  
12 was established as an entity “with the express purpose of raising money to help pay for the type  
13 of turnout operations traditionally underwritten by the RNC.”<sup>4</sup> Tom Whatman, then-advisor to  
14 FV, was reported as stating, “I understood that the lack of resources from the RNC was going to  
15 have a severe impact on what the parties were going to be able to do.”<sup>5</sup>

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<sup>1</sup> See Freedom Vote, Inc., Ohio Initial Articles of Incorporation (July 7, 2010); Form 990, 2009 Tax Return of Freedom Vote, Inc. (Aug. 12, 2011) [*hereinafter* “FV 2010 Tax Return”].

<sup>2</sup> The Complaint also mentions James S. Nathanson, individually, but does not include any allegations that he violated the Act. Compl. (Aug. 9, 2018). Nathanson did not file a separate response.

<sup>3</sup> See, e.g., FV 2010 Tax Return.

<sup>4</sup> Compl. ¶¶ 11, 58; Jeanne Cummings, *State Parties Look Past RNC for Cash*, POLITICO, Sept. 3, 2010, <http://politi.co/2FjFJj3>.

<sup>5</sup> Cummings, *supra* n.4.

1 FFO PAC is an independent expenditure-only political committee that first registered  
2 with the Commission in February 2015.<sup>6</sup> In the 2016 election cycle, it raised \$9,874,220 and  
3 spent \$9,808,186.54, of which \$9,256,439.42 was spent on independent expenditures opposing  
4 former Ohio Governor Ted Strickland, a candidate for U.S. Senate from Ohio in 2016.<sup>7</sup> In 2018,  
5 FFO PAC raised \$25,229.28 and spent \$22,454.48, none of which was reported as independent  
6 expenditures.<sup>8</sup>

### 7 **B. Spending by FV**

8 According to FV's tax returns, which use a fiscal year beginning in October and ending  
9 the September of the following year, FV characterizes most of its spending since its formation as  
10 having been related to issue advocacy regarding economic policy issues in Ohio.<sup>9</sup> In fiscal years  
11 2010 and 2011, FV also reported spending \$461,742 on "voter registration efforts."<sup>10</sup> In fiscal

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<sup>6</sup> FEC Form 1, FFO PAC Statement of Organization (Feb. 23, 2015).

<sup>7</sup> FEC, *Fighting for Ohio Fund – Spending*, FEC.GOV, <https://www.fec.gov/data/committee/C00573014/?cycle=2016&tab=spending> (last accessed July 1, 2019).

<sup>8</sup> FEC, *Fighting for Ohio Fund – Spending*, FEC.GOV, <https://www.fec.gov/data/committee/C00573014/?tab=spending&cycle=2018> (last accessed July 1, 2019) [*hereinafter* "FFO PAC 2018 Funds Spent"]; FEC, *Fighting for Ohio Fund – Raising*, FEC.GOV, <https://www.fec.gov/data/committee/C00573014/?tab=raising&cycle=2018> (last accessed July 1, 2019). FFO PAC described its expenditures as legal services, compliance consulting, website expenses, and two contributions totaling \$9,500 to the "Fighting for Ohio Institute," a now-terminated Virginia 501(c)(4) organization of which James Nathanson was the corporate secretary. FFO PAC 2018 Funds Spent; *see* Form 990, 2016 Tax Return of Fighting for Ohio Institute (Nov. 5, 2017).

<sup>9</sup> FV 2010 Tax Return; Form 990, 2010 Tax Return of Freedom Vote, Inc. (Aug. 14, 2012) [*hereinafter* "FV 2010 Tax Return"]; Form 990, 2011 Tax Return of Freedom Vote, Inc. (July 17, 2013) [*hereinafter* "FV 2011 Tax Return"]; Form 990, 2012 Tax Return of Freedom Vote, Inc. (July 30, 2014) [*hereinafter* "FV 2012 Tax Return"]; Form 990, 2013 Tax Return of Freedom Vote, Inc., (Aug. 11, 2015) [*hereinafter* "FV 2013 Tax Return"]; Form 990-EZ, 2014 Tax Return of Freedom Vote, Inc. (Aug. 11, 2016) [*hereinafter* "FV 2014 Tax Return"]; Form 990, 2015 Tax Return of Freedom Vote, Inc. (Aug. 14, 2017) [*hereinafter* "FV 2015 Tax Return"]; Form 990-EZ, 2016 Tax Return of Freedom Vote, Inc. (Aug. 9, 2018) [*hereinafter* "FV 2016 Tax Return"].

<sup>10</sup> FV 2010 Tax Return; FV 2011 Tax Return.

1 year 2013, it stated that some of its money was also spent on “advocacy related to voting rights  
 2 under the Ohio and United States Constitutions.”<sup>11</sup>

3 In fiscal year 2014, FV spent \$174,607.55 in independent expenditures in support of  
 4 then-Speaker of the House John Boehner in the form of door hangers, canvassing, and  
 5 robocalls.<sup>12</sup> By fiscal year 2016, FV’s spending on campaign activity substantially increased in  
 6 that the organization reported spending \$1.744 million on “political expenditures,” of which \$1.7  
 7 million consisted of contributions to FFO PAC.<sup>13</sup> Additionally, in June and July 2016, FV aired  
 8 what appears to be its first television advertisement, “Third Largest,” opposing Ted Strickland.<sup>14</sup>  
 9 The advertisement was broadcast several months before the general election, but after Strickland  
 10 had won the Democratic primary.<sup>15</sup> The content of the advertisement was as follows:<sup>16</sup>

Narration	Text on Screen	Visual
While Ted Strickland was governor, Ohio lost jobs to Kentucky, Indiana, even Michigan.	OHIO LOST JOBS TO KENTUCKY INDIANA MICHIGAN	Ted Strickland, speaking, on left; map of the United States
350,000 Ohio jobs gone.	350,000 JOBS GONE	with Ohio in red on right

<sup>11</sup> FV 2013 Tax Return.

<sup>12</sup> FEC Form 5, FV Amended 2014 April Quarterly Report (Apr. 14, 2014); FEC Form 5, FV 2014 July Quarterly Report (July 15, 2014); FV 2014 Tax Return.

<sup>13</sup> FV 2016 Tax Return.

<sup>14</sup> Compl. ¶ 48, Ex. A (“Third Largest”); FV Resp. at 2 (Oct. 19, 2018). In May 2016, FFO PAC uploaded a similar advertisement to its YouTube channel, titled “Spotty,” which contains the same job-related claim as “Third Largest”: “350,000 jobs lost while Strickland was Governor. Jobs lost to Kentucky, Indiana, even to Michigan.” Fighting for Ohio, *Spotty*, YOUTUBE (May 6, 2016), [https://youtu.be/\\_4eCxmIDNYQ](https://youtu.be/_4eCxmIDNYQ).

<sup>15</sup> Compl. ¶ 48.

<sup>16</sup> *Id.* ¶ 33, Ex. A (“Third Largest”); FV Resp. at 2.

Narration	Text on Screen	Visual
How many is that? If you assembled everyone who lost their job under Strickland, you'd have Ohio's third largest city.	OHIO'S LARGEST CITIES COLUMBUS 787,033 CLEVELAND 396,815 JOBS LOST UNDER STRICKLAND 350,000 CINCINNATI 296,943 TOLEDO 287,208	Ted Strickland on right
And you could fill the OSU Horseshoe more than three times.	STRICKLAND LOST JOBS: COULD FILL THE HORSESHOE 3 TIMES	The Ohio Stadium of The Ohio State University
Now Ted Strickland wants to bring his job-killing policies to Washington.	TED STRICKLAND: BRINGING JOB-KILLING POLICIES TO WASHINGTON  PAID FOR BY FREEDOM VOTE	The United States Capitol
We can't afford more lost jobs.	WE CAN'T AFFORD MORE LOST JOBS  PAID FOR BY FREEDOM VOTE	Ted Strickland at podium

1 FV continued its spending on federal elections and made an additional \$275,000  
 2 contribution to FFO PAC on October 5, 2016, reported in FV's tax return for the fiscal year  
 3 ending in 2017; FV did not report additional political spending in that fiscal year.<sup>17</sup> The current  
 4 record does not include financial information for FV for the fiscal year ending in 2018.

5 The table below summarizes information as reported by FV in its tax returns:

<sup>17</sup> FV 2017 Tax Return; FEC Form 3X, FFO PAC 2016 Pre-General Report, sched. A at 7 (Oct. 27, 2016).

<b>Fiscal Year<sup>18</sup></b>	<b>Gross Receipts</b>	<b>Total Expenses</b>	<b>Expenses: Voter Registration</b>	<b>Expenses: Issue-Related<sup>19</sup></b>	<b>Expenses: Political</b>
2010	\$1,325,000	\$1,265,384	\$361,742	\$816,681	\$0
2011	\$1,848,061	\$1,886,457	\$100,000	\$1,548,594	\$0
2012	\$200,000	\$191,416	\$0	\$160,270	\$0
2013	\$200,000	\$150,430	\$0	\$125,347	\$0
2014	\$255,000	\$284,754	\$0	\$270,906	\$174,607
2015	\$28,000	\$58,578	\$0	\$21,839	\$0
2016	\$4,375,000	\$3,575,475	\$0	\$3,505,133	\$1,744,267
2017	\$90,000	\$721,094	\$0	\$565,056	\$275,000

1           With respect to these figures, FV appears to have counted certain expenses as both  
 2 political expenses and issue advocacy expenses because, for both fiscal years 2014 and 2016, the  
 3 combined totals for issue advocacy and political expenses exceed the total expenses reported in  
 4 FV's tax returns.

5           In addition to the foregoing expenses, FV paid \$180,000 in compensation in total to its  
 6 Executive Director, James Nathanson, between the fiscal year ending in 2010 and that ending in  
 7 2017. FV also paid organizations owned wholly or in part by Nathanson, including James S.  
 8 Nathanson & Associates, LLC, and JSN Associates, LLC, \$1,745,401 in the same time period  
 9 for "fundraising;"<sup>20</sup> "consulting and fundraising services;"<sup>21</sup> and "education and grassroots

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<sup>18</sup> Information regarding FV's spending using a calendar year framework is not publicly available.

<sup>19</sup> FV's tax returns generally describe these expenses as, *e.g.*, "provided education to the Ohio public regarding economic policy issues, including state and local government fiscal responsibility, job growth and retention, and employment." FV 2012 Tax Return at 2.

<sup>20</sup> FV 2011 Tax Return.

<sup>21</sup> *Id.*

1 advocacy.”<sup>22</sup> The total \$1,925,401 paid to Nathanson and his affiliated organizations represents  
 2 23.7% of FV's overall reported expenses between fiscal years 2010 and 2017.

3 **C. Contributions Made by FV to FFO PAC**

4 Between December 2015 and October 2016, FV reported making \$1.975 million in  
 5 contributions to FFO PAC, described below:<sup>23</sup>

<b>Date</b>	<b>Amount</b>
December 29, 2015	\$200,000
March 31, 2016	\$300,000
July 5, 2016	\$500,000
August 25, 2016	\$250,000
September 14, 2016	\$200,000
September 21, 2016	\$250,000
October 5, 2016	\$275,000
<b>Total</b>	<b>\$1,975,000</b>

6 The amounts of the contributions above also match the amounts of five of the donations  
 7 FV reported receiving in 2015 and 2016. FV's 990 form, however, does not indicate the dates on  
 8 which FV received those donations and lists a number of other donations; thus, the dates on  
 9 which it received the donations in the same amounts are not part of the current record.

10 In 2015 and 2016, FV and FFO PAC used the same fundraising consultant, MMM  
 11 Consulting.<sup>24</sup> Although FFO PAC acknowledges that it used MMM Consulting, it asserts that

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<sup>22</sup> FV 2014 Tax Return. Though the complaint does not make any allegations regarding Nathanson's receipt of FV funds, Nathanson and his affiliated companies annually received between 0.67% (2016) and 56.8% (2011) of FV's total expenditures each year from 2010 to 2017.

<sup>23</sup> FEC, *Fighting for Ohio Fund – Raising*, FEC.GOV, <https://www.fec.gov/data/committee/C00573014/?tab=raising&cycle=2016> (last accessed July 1, 2019).

<sup>24</sup> FV 2016 Tax Return; Compl. ¶ 26; *see also, e.g.*, FEC Form 3X, FFO PAC Amended 2016 October Quarterly Report, sched. B at 28 (Oct. 27, 2016).



1 FFO PAC used “multiple fundraisers during the 2016 election,” and that the “common fundraiser  
2 presumably had numerous other clients during that time period.”<sup>25</sup>

### 3 **III. LEGAL ANALYSIS**

#### 4 **A. Political Committee Status**

##### 5 1. The Test for Political Committee Status

6 The Act and Commission regulations define a “political committee” as “any committee,  
7 club, association or other group of persons which receives contributions aggregating in excess of  
8 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000  
9 during a calendar year.”<sup>26</sup> In *Buckley v. Valeo*, the Supreme Court held that defining political  
10 committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’”  
11 might be overbroad, reaching “groups engaged purely in issue discussion.”<sup>27</sup> To cure that  
12 infirmity, the Court concluded that the term “political committee” “need only encompass  
13 organizations that are under the control of a candidate or the *major purpose of which is the*  
14 *nomination or election of a candidate.*”<sup>28</sup> Accordingly, under the statute as thus construed, an  
15 organization that is not controlled by a candidate must register as a political committee only if  
16 (1) it crosses the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election  
17 of federal candidates.

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<sup>25</sup> FFO PAC Resp. at 4 (Nov, 26, 2018).

<sup>26</sup> 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

<sup>27</sup> 424 U.S. 1, 79 (1976).

<sup>28</sup> *Id.* (emphasis added).

1           Although *Buckley* established the major purpose test, it provided no guidance as to the  
2 proper approach to determine an organization's major purpose.<sup>29</sup> In *Massachusetts Citizens for*  
3 *Life v. FEC*, the Supreme Court identified an organization's independent spending as a relevant  
4 factor in determining an organization's major purpose.<sup>30</sup> The Court also recognized that an  
5 organization's federal campaign spending may "become so extensive that the organization's  
6 major purpose may be regarded as campaign activity [such that] the corporation would be  
7 classified as a political committee."<sup>31</sup>

8           In 2007, following litigation resulting from the Commission's decision not to pursue  
9 rulemaking on the subject of political committee status, the Commission issued a Supplemental  
10 Explanation and Justification to further elaborate on its 2004 decision and to provide the public  
11 with additional guidance as to its process for determining political committee status.<sup>32</sup> The  
12 Supplemental E&J explained that, in order to determine an entity's "major purpose," the  
13 Commission considers a group's "overall conduct," including public statements about its  
14 mission, organizational documents, government filings, the proportion of its spending related to  
15 "Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)," and the  
16 extent to which fundraising solicitations indicate funds raised will be used to support or oppose

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<sup>29</sup> See, e.g., *Real Truth About Abortion, Inc. v. FEC* (formerly *Real Truth About Obama v. FEC*), 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 568 U.S. 1114 (Jan. 7, 2013) (No. 12-311) ("Although *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose.").

<sup>30</sup> 479 U.S. 241, 249, 262-63 (1986).

<sup>31</sup> *Id.* at 262.

<sup>32</sup> Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (Supplemental Explanation and Justification) [*hereinafter* "Supplemental E&J"]. The Supplemental E&J was issued following a court challenge to the Commission's decision to engage in case-by-case decision-making rather than formal rulemaking. See *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006).

1 specific candidates.<sup>33</sup> The Commission stated that it compares how much of an organization's  
2 spending is for "*Federal campaign activity*" relative to "activities that [a]re not campaign  
3 related."<sup>34</sup>

4 In 2016, the United States District Court for the District of Columbia in *Citizens for*  
5 *Responsibility and Ethics in Washington v. FEC* ("*CREWI*") instructed the Commission, when  
6 examining an organization's major purpose, to look beyond express advocacy and consider  
7 whether other communications at issue indicate a "campaign-related purpose."<sup>35</sup> The Court also  
8 held that the Commission's analysis of the relevant time period for evaluating a groups' spending  
9 must retain the flexibility to account for changes in an organization's major purpose over time.<sup>36</sup>

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<sup>33</sup> Supplemental E&J at 5597, 5605.

<sup>34</sup> *Id.* at 5601, 5605 (emphasis added); *see also Shays v. FEC*, 511 F. Supp. 2d 19, 24-25, 31 (D.D.C. 2007) (upholding the Commission's case-by-case approach as an appropriate exercise of the agency's discretion); *Real Truth About Abortion, Inc.*, 681 F.3d at 556 (holding that *Buckley* "did not mandate a particular methodology for determining an organization's major purpose," and therefore the Commission was free to make that determination "either through categorical rules or through individualized adjudications").

<sup>35</sup> 209 F. Supp. 3d 77, 92-93 (D.D.C. 2016). The same District Court later held that electioneering communications "*presumptively* have an election-related purpose," but the analysis by that Court in *CREWI* and its subsequent decision refers generally to all speech that is campaign-related but does not contain express advocacy. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) [*hereinafter* "*CREWI II*"]. The Court refrained from establishing its own bright-line rule regarding which communications inherently have a campaign-related purpose, but stated that the First Amendment does not require "the agency to exclude from its consideration all non-express advocacy in the context of disclosure." *CREWI*, 209 F. Supp. 3d at 93.

<sup>36</sup> *CREWI*, 209 F. Supp. 3d at 94. In its subsequent Factual and Legal Analysis ("F&LA"), the Commission accepted the Court's remand of the enforcement matter, found that the organization's campaign-related spending exceeded 50% of its overall spending approximately one year before the 2010 election, and found reason to believe that the organization violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee. F&LA at 14-15, MUR 6538R (Americans for Job Security).

1                   2.     There is Reason to Believe that FV Became a Political Committee By  
2                             2016

3                             a.     Statutory Threshold

4                   To assess whether an organization has made an “expenditure,” the Commission analyzes  
5 whether spending on any of an organization’s communications made independently of a  
6 candidate constitute express advocacy under 11 C.F.R. § 100.22.<sup>37</sup> In calendar year 2014, FV  
7 reported that it spent \$174,607 on independent expenditures.<sup>38</sup> Thus, FV well exceeded the  
8 \$1,000 statutory threshold set forth in the Act’s political committee definition,<sup>39</sup> which FV does  
9 not dispute.<sup>40</sup>

10                            b.     Major Purpose

11                   FV’s political spending beginning in 2014 indicates that its major purpose had become  
12 the nomination or election of a federal candidate, and suggests that FV became a political  
13 committee at that time.<sup>41</sup> According to news reports published at the time of FV’s formation, FV  
14 was alleged to have been established with political committee functions in mind: then-advisor to  
15 FV Tom Whatman stated that, in assisting with FV’s creation, he “understood that the lack of  
16 resources from the RNC was going to have a severe impact on what the parties were going to be

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<sup>37</sup> See Supplemental E&J at 5606.

<sup>38</sup> Compl. ¶¶ 18-19; FEC Form 5, FV Amended April Quarterly Report, (July 15, 2014); FEC Form 5, FV July Quarterly Report (July 15, 2014); FV 2014 Tax Return, Part I, Line 18, (Aug. 11, 2015).

<sup>39</sup> 52 U.S.C. § 30101(4)(A).

<sup>40</sup> See generally Compl.

<sup>41</sup> See *Mass. Citizens for Life, Inc.*, 479 U.S. at 262 (holding that, “should [a corporation’s] independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee”) (citing *Buckley*, 424 U.S. at 79).

1 able to do.”<sup>42</sup> Over the course of its existence, FV’s reported spending appears to have followed  
2 a trajectory where it went from reporting no spending on federal campaign activity between  
3 fiscal years 2010 and 2013 to reporting that it spent more than half of its budget on such activity  
4 between fiscal years 2014 and 2016. As FV acknowledges, in 2014, FV reportedly spent  
5 \$174,607 on independent expenditures supporting John Boehner,<sup>43</sup> which constituted more than  
6 60% of FV’s total expenditures (\$284,754).<sup>44</sup>

7 In 2016, FV continued to spend millions of dollars on campaign-related activity. In the  
8 fiscal year ending in September 2016, FV reported spending \$1.744 million on “political  
9 campaign and lobbying activities.”<sup>45</sup> These expenditures included \$1.7 million in contributions  
10 to FFO PAC and \$44,267 in funds “directly expended” by FV for “section 527 exempt function  
11 activities.”<sup>46</sup> Though FV’s tax return does not elaborate on what the \$44,267 expenditures  
12 consisted of, section 527 exempt function activities “include all functions that influence or  
13 attempt to influence the selection, nomination, election, or appointment of any individual to any  
14 federal, state, or local public office or office in a political organization, or the election of

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<sup>42</sup> Cummings, *supra* n.4.

<sup>43</sup> Compl. ¶¶ 18-19; FV, FEC Form 5, FV Amended April Quarterly Report, (July 15, 2014); FEC Form 5, FV July Quarterly Report (July 15, 2014); FV 2013 Tax Return, part I, line 18.

<sup>44</sup> Compl. ¶ 59; FV Resp. at 8 (“Granted, in one year (fiscal year 2014), FV’s political spending exceeded its non-political spending.”). While the total amount at issue during this time period is comparatively less than what FV went on to spend in future years, the Commission’s major purpose analysis has always focused on the proportion of an organization’s spending that is campaign-related rather than its amount.

<sup>45</sup> FV 2016 Tax Return, Schedule C. The IRS defines “political campaign and lobbying activities” as “All activities that support or oppose candidates for elective federal, state, or local public office. It does not matter whether the candidate is elected. A candidate is one who offers himself or is proposed by others for public office. Political campaign activity does not include any activity to encourage participation in the electoral process, such as voter registration or voter education, provided that the activity does not directly or indirectly support or oppose any candidate.” IRS, *Instructions for Schedule C (Form 990 or 990-EZ) (2018)* 67, IRS.GOV, <https://www.irs.gov/pub/irs-pdf/i990.pdf> (last accessed July 1, 2019).

<sup>46</sup> FV 2016 Tax Return, sched. C.

1 Presidential or Vice-Presidential electors, whether or not such individual or electors are selected,  
2 nominated, elected, or appointed.”<sup>47</sup> FV’s reported spending as set forth in its fiscal year 2016  
3 tax return and its Response indicates that its self-reported “political campaign intervention”<sup>48</sup>  
4 expenses constituted at least 48.7% of its total spending during that year, though as noted above,  
5 FV itself appears to consider a portion of its reported programmatic spending to also constitute  
6 political spending.

7 The record, however, indicates that FV may have spent even more on federal campaign  
8 activity in 2016. First, the \$275,000 contribution which FV made to FFO PAC on October 5,  
9 2016, was not included in its 2016 tax return likely because the fiscal year ended in September  
10 2016. But because FV made the contribution the month before the general election in  
11 November, the contribution should be included as part of FV’s spending in 2016.<sup>49</sup>

12 Second, although FV did not report its television advertisement, “Third Largest,” as an  
13 independent expenditure to the Commission or a “political expenditure” in its tax return, this ad,  
14 which opposed former Governor and then-Senate candidate Ted Strickland, appears to reflect a  
15 campaign-related purpose using an analysis the Commission recently employed to evaluate  
16 certain electioneering communications in the context of evaluating political committee status.  
17 The ad, which ran during the summer following Strickland’s victory in the primary election but

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<sup>47</sup> IRS, *Instructions for Schedule C (Form 990 or 990-EZ) (2018)*, IRS.GOV, <https://www.irs.gov/instructions/i990sc> (last accessed July 1, 2019).

<sup>48</sup> This is a term FV uses in its Response, and which appears to correlate with “political campaign and lobbying activities” as defined by the IRS and reported in FV’s tax returns.

<sup>49</sup> We note that FV also reported over \$565,000 for issue advocacy expenses during the 2017 fiscal year, but we have no information as to when FV spent money on those activities. Thus, it is unclear as to whether any of those expenses were incurred before or after the 2016 election and should be included in FV’s 2016 spending. Additional fact finding could resolve those issues.

1 four to five months before the 2016 general election and was outside the electioneering  
2 communication window, refers to Strickland, who was not an officeholder when the ad was run,  
3 and describes his attempts to “bring his job killing policies to Washington.”<sup>50</sup> That statement  
4 about job-killing policies is visually accompanied by an image of the U.S. Capitol, the building  
5 in which Strickland would work as a Senator if he were to prevail in the general election.<sup>51</sup>  
6 Additionally, unless he were elected, Strickland was and would be in no position to affect federal  
7 political activities, issues, or programs referenced in the ad. Therefore, the amount FV spent on  
8 “Third Largest” may be included in determining whether FV had the major purpose of  
9 nominating or electing federal candidates. By adding the amount that FV spent on “Third  
10 Largest,” which was approximately \$1.12 million,<sup>52</sup> to FV’s other acknowledged political  
11 spending, FV appears to have dedicated \$2,865,344 of its total expenditures of \$3,575,475, or  
12 roughly 80%, to federal campaign activities in the fiscal year ending in September 2016.<sup>53</sup>

13 FV argues that the advertisement could reasonably mean that Strickland might go to  
14 Washington as a political nominee to the United Nations, or as part of a Washington think tank,  
15 as both were positions Strickland had either been nominated for or had held prior to the  
16 advertisement’s broadcast.<sup>54</sup> However, the phrasing in the advertisement belies such  
17 interpretations by stating that Strickland “now” wants to take his policies to Washington, which  
18 refers to the time when he was a candidate for federal office. Further, the United Nations is not

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<sup>50</sup> F&LA at 13, MUR 6538R (Americans for Job Security).

<sup>51</sup> Compl., Ex. A (“Third Largest”) at 0:28.

<sup>52</sup> FV 2016 Tax Return part IX, line 24(a).

<sup>53</sup> *CREWI* instructed the Commission to consider whether non-express advocacy indicates a “campaign-related purpose.” *CREWI*, 209 F. Supp. 3d at 93.

<sup>54</sup> FV Resp. at 4.

1 located in Washington, D.C., and the image of the U.S. Capitol accompanying the statement  
2 about Strickland coming to Washington indicates that the ad's reference was to Strickland's  
3 senatorial candidacy.

4        Though FV contends that the Commission should evaluate FV's spending solely over the  
5 course of its entire lifetime, in *CREWI*, the Court found that the Commission's analysis of the  
6 relevant time period for evaluating a group's spending must be flexible to account for changes in  
7 an organization's major purpose over time.<sup>55</sup> Here, using a calendar year approach to evaluate  
8 the Complaint's claim that FV was a political committee in 2014 and certainly by 2016,<sup>56</sup> in  
9 calendar year 2014, FV spent \$174,607 on independent expenditures. Although we do not have  
10 a precise figure for FV's total calendar year spending in 2014, FV reports that it spent a total of  
11 \$284,754 in fiscal year 2014, which covers most of 2014 — making its campaign-related  
12 spending in 2014 approximately 60% of its total expenditures. While FV's spending in 2014  
13 was comparatively less than its spending in certain earlier years, it was even lower in 2015 at less  
14 than \$60,000, none of which was campaign-related. But in 2016, FV's spending substantially

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<sup>55</sup> See *CREWI*, 209 F. Supp. 3d at 94 (“The Commissioners’ refusal to give any weight whatsoever to an organizations’ [sic] relative spending in the most recent calendar year — particularly in the case of a fifteen-year-old organization like AJS — indicates an arbitrary ‘fail[ure] to consider an important aspect of the [relevant] problem.’” (quoting *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 658 (2007)); see also *FEC v. Malenick*, 310 F. Supp. 2d 230, 237 (D.D.C. 2004) (“Accordingly, because Triad and then Triad Inc.’s major purpose was the nomination or election of specific candidates *in 1996*, and because Triad received contributions aggregating more than \$1,000 *in 1996*, I find that Triad and Triad, Inc. operated as a ‘political committee’ *in 1996*.”) (emphasis added); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 853 (D.D.C. 1996) (discussing major purpose only in 1989 and 1990 with respect to group formed in 1979); see also MUR 5492 (Freedom, Inc.) (analyzing admitted major purpose in 2004 of group formed in 1962); MURs 5577, 5620 (National Association of Realtors — 527 Fund) (analyzing 2004 spending of NAR-527 Fund registered with IRS in 2000); MUR 5755 (New Democrat Network) (analyzing 1996 group New Democrat Network’s 2004 spending); MUR 5753 (League of Conservation Voters) (analyzing LCV’s 2004 spending when one of LCV’s funds had registered with the IRS as early as 2000); MURs 5694, 5910 (Americans for Job Security) (analyzing activity for group founded in 1997 from 2000 through 2006 in determining group’s major purpose in 2006); MUR 5487 (Progress for America VF) (analyzing group’s major purpose based on 2004 disbursements where group had raised \$4.6 million and spent \$11.2 million through 2006).

<sup>56</sup> Compl. ¶ 51.



1 increased to \$3,575,475, of which \$2,865,344, or 80.1%, was campaign-related, as described  
2 above.<sup>57</sup> In 2015-2016, FV's campaign-related spending constituted 78.8% of its total expenses  
3 for the 2016 election cycle. Further, while FV reported spending nothing on campaign-related  
4 expenditures from its formation through fiscal year 2013, from fiscal year 2014 through fiscal  
5 year 2017, FV's campaign-related spending totaled \$3,314,951 out of \$4,639,901, or 71.4%.<sup>58</sup>

6 Based on the foregoing, FV's sustained spending indicating a major purpose of  
7 nominating or electing candidates from 2014 through 2016 is sufficient to support a reasonable  
8 inference that FV became a political committee during this period. By 2016, such spending  
9 constituted almost 50% of its expenses, with the record reflecting an additional roughly 30%  
10 spent on the "Third Largest" ad. Accordingly, we recommend that the Commission find reason  
11 to believe that FV failed to organize, register, and report with the Commission in violation of  
12 52 U.S.C. §§ 30102, 30103, and 30104.

## 13 **B. Proper Disclosure of "Third Largest" Television Advertisement**

### 14 1. FV Failed to Report "Third Largest" as an Independent Expenditure

15 The Complaint alleges that FV violated the Act by failing to disclose "Third Largest" as  
16 an independent expenditure and to include a proper disclaimer. An "independent expenditure" is  
17 an expenditure made by any person for a communication that (1) expressly advocates for the  
18 election or defeat of a clearly identified candidate, and (2) is not coordinated with the candidate,  
19 her authorized committee, her agents, or a political party committee or its agents.<sup>59</sup> Under the  
20 Commission's regulations, a communication can expressly advocate for the election or defeat of

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<sup>57</sup> See FV 2015 Tax Return; FV 2016 Tax Return.

<sup>58</sup> See FV 2014 Tax Return; FV 2015 Tax Return; FV 2016 Tax Return; FV 2017 Tax Return.

<sup>59</sup> 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

1 a clearly identified federal candidate if it uses certain “magic words,” such as “vote for” or  
 2 “elect.” A communication may also be express advocacy if it:

3 [w]hen taken as a whole and with limited reference to external events,  
 4 such as the proximity to the election, could only be interpreted by a  
 5 reasonable person as containing advocacy of the election or defeat of one  
 6 or more clearly identified candidate(s) because — (1) [t]he electoral  
 7 portion of the communication is unmistakable, unambiguous, and  
 8 suggestive of only one meaning; and (2) [r]easonable minds could not  
 9 differ as to whether it encourages actions to elect or defeat one or more  
 10 clearly identified candidate(s) or encourages some other kind of action.<sup>60</sup>

11 The Act requires both political committees and persons other than political committees to  
 12 report their independent expenditures.<sup>61</sup> Political committees other than authorized committees  
 13 must disclose their independent expenditures and itemize such expenditures with information  
 14 including the name and address of each person who receives disbursements in connection with  
 15 an independent expenditure, as well as the date, amount, purpose, and identity of the candidate in  
 16 support of or opposition to for which the independent expenditure is made.<sup>62</sup> The Act places  
 17 similar reporting requirements on non-political committee persons making independent  
 18 expenditures aggregating greater than \$250 in a calendar year,<sup>63</sup> and such persons must identify  
 19 individuals who contribute over \$200.<sup>64</sup> A person, including a political committee, also may

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<sup>60</sup> 11 C.F.R. § 100.22(b).

<sup>61</sup> *See generally* 52 U.S.C. § 30104.

<sup>62</sup> 52 U.S.C. § 30104(b)(3)(B)(iii), (g); 11 C.F.R. § 109.10.

<sup>63</sup> 52 U.S.C. § 30104(c), (g); 11 C.F.R. § 109.10.

<sup>64</sup> 52 U.S.C. § 30104(c)(1), (2)(C); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 410 (D.D.C. 2018) (holding sections 30104(c)(1) and (c)(2)(C) “unambiguously require separate and complementary requirements to identify individuals who contribute over \$200 to reporting non-political committees and mandate significantly more disclosure than that required by the challenged regulation, 11 C.F.R. § 109.10(e)(1)(vi).”) (stay pending appeal lifted Sept. 18, 2018).

Due to considerations of fairness and lack of notice, the Commission has provided guidance stating that it would exercise prosecutorial discretion for those entities that made independent expenditures before the District

1 have to file additional disclosure reports depending on the amount and timing of an independent  
2 expenditure.<sup>65</sup>

3         Apart from the above discussion regarding whether the ad could be considered to indicate  
4 FV's major purpose of nominating or electing candidates, "Third Largest" also appears to  
5 constitute an independent expenditure because it expressly advocates the defeat of Strickland  
6 under 11 C.F.R. § 100.22(b).<sup>66</sup> The advertisement criticizes a clearly identified Federal  
7 candidate, Ted Strickland, as having lost Ohio 350,000 jobs during his time as governor. The  
8 advertisement insists that "Ohio can't afford more lost jobs," and contains an unmistakable and  
9 unambiguous electoral portion by telling viewers: "Now Ted Strickland wants to bring his job-  
10 killing policies to Washington, with a visual image of the U.S. Capitol and written text stating,  
11 "Ted Strickland: Bringing Job-Killing Policies to Washington."<sup>67</sup> The advertisement aired in  
12 the period between when Strickland won the Democratic primary and the general election, and at  
13 a time when Strickland held no office. As such, and in contrast to the arguments FV has

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Court issued its decision on August 3, 2018. Press Release, FEC, FEC Provides Guidance Following U.S. District Court Decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018).

<sup>65</sup> Section 30104(g) requires reports from persons making independent expenditures over certain aggregate amounts and within certain prescribed timeframes: for expenditures aggregating greater than \$10,000 made at any time up to the 20<sup>th</sup> day before an election, persons must file a report describing those expenditures with the Commission within 48 hours of making or contracting to make the expenditure. 52 U.S.C. § 30104(g)(2).

<sup>66</sup> Two Circuit Courts, the Fourth Circuit and the Tenth Circuit, have explicitly upheld section 100.22(b) as constitutional in recent years. *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013). As the Commission noted in its Supplemental Explanation and Justification on political committee status, "a 'magic words' test [is] not constitutionally required." Supplemental E&J at 5604. Indeed, Courts have held that "[a] test requiring . . . magic words . . . for a finding of express advocacy would preserve the First Amendment . . . only at the expense of eviscerating" the Act. *FEC v. Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987).

<sup>67</sup> Compl. ¶ 33, Ex. A ("Third Largest") at 0:28.

1 asserted, discussed above, the advertisement is not reasonably susceptible to any interpretation  
2 other than encouraging the defeat of Ted Strickland.<sup>68</sup>

3 Because “Third Largest” appears to have been an independent expenditure, if the  
4 Commission finds reason to believe that FV is a political committee, then FV should have  
5 reported the advertisement as an independent expenditure under 52 U.S.C. § 30104(b). Further,  
6 since the expenditure appears to have cost over \$1 million, FV should have filed a 48-hour report  
7 as required by 52 U.S.C. § 30104(g)(2). Accordingly, we recommend that the Commission find  
8 reason to believe that FV violated 52 U.S.C. § 30104(b)(4), (b)(5)(A), (g)(2).

9 In the alternative, if Commission does not find reason to believe that FV is a political  
10 committee, then FV should have disclosed “Third Largest” in accordance with  
11 52 U.S.C. § 30104(c) and also filed a 48-hour report under 30104(g)(2). We therefore  
12 alternatively recommend that the Commission find reason to believe that FV violated  
13 52 U.S.C. § 30104(c), (g)(2). With respect to FV’s failure to report its donors in compliance  
14 with the Act, however, because the public was not on notice regarding donor disclosure  
15 requirements prior to a 2018 decision clarifying the requirements of the Commission’s  
16 regulations, we recommend that the Commission dismiss the allegation regarding violation of

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<sup>68</sup> *Mass. Citizens for Life*, 479 U.S. at 249 (holding that an exhortation to vote for “pro-life” candidates, despite containing a message “marginally less direct than ‘Vote for Smith,’” has an “essential nature” of express advocacy). The Commission’s 1995 Supplemental Explanation and Justification on express advocacy notes that a “clear call to action” is not required under the Act, and that “[c]ommunications 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.” Express Advocacy; Independent Expenditures; Corporate Labor Organization Expenditures, 60 Fed. Reg. 35,292-01, 35,295 (July 6, 1995) (Supplemental Explanation and Justification).

1 52 U.S.C. § 30104(c)(1), (c)(2)(C) as a matter of prosecutorial discretion in accordance with the  
2 Commission's expressed statement that it would do so in such circumstances.<sup>69</sup>

3 2. FV Failed to Include a Proper Disclaimer for "Third Largest"

4 The Act requires that, whenever a political committee makes a disbursement for the  
5 purpose of financing a public communication,<sup>70</sup> or whenever any person makes a disbursement  
6 for a public communication expressly advocating the election or defeat of a clearly identified  
7 candidate, such communication must include a disclaimer.<sup>71</sup> If the communication is not  
8 authorized by a candidate or an authorized committee, then the disclaimer must clearly state the  
9 name and permanent street address, telephone number, or web address of the person who paid  
10 for the communication and state that the communication was not authorized by any candidate or  
11 candidate's committee.<sup>72</sup>

12 Regardless of whether FV is a political committee, the "Third Largest" television  
13 advertisement is a public communication, and the Act's disclaimer requirements apply to the  
14 ad.<sup>73</sup> Although "Third Largest" contains the written statement, "Paid for by Freedom Vote," this  
15 disclaimer does not fully comply with the provisions of the Act. It includes no permanent street  
16 address, telephone number, or web address for Freedom Vote; it does not state whether the  
17 advertisement was authorized by any candidate or candidate's committee; and it does not include

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<sup>69</sup> See Press Release, *supra* n.64.

<sup>70</sup> A "public communication" includes any broadcast, cable, or satellite communication, including television advertisements. 11 C.F.R. § 100.26.

<sup>71</sup> 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a).

<sup>72</sup> 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3).

<sup>73</sup> See 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1)-(2). Even if the Commission does not find that FV is a political committee, because "Third Largest" appears to expressly advocate the defeat of a clearly identified federal candidate, the ad still requires a disclaimer. *Id.*

1 a spoken statement that Freedom Vote is responsible for the content of the advertisement.  
2 Accordingly, we recommend that the Commission find reason to believe that FV violated  
3 52 U.S.C. § 30120(a), (d) and 11 C.F.R. § 110.11.

4 **C. Contributions in the Name of Another**

5 The Act prohibits a person from making a contribution in the name of another, knowingly  
6 permitting one's name to be used to effect such a contribution, and knowingly accepting such  
7 contributions.<sup>74</sup> The Commission has included in its regulations illustrations of activities that  
8 constitute making a contribution in the name of another:

- 9 (i) Giving money or anything of value, all or part of which was  
10 provided to the contributor by another person (the true contributor)  
11 without disclosing the source of money or the thing of value to the  
12 recipient candidate or committee at the time the contribution is  
13 made; or
- 14 (ii) Making a contribution of money or anything of value and  
15 attributing as the source of the money or thing of value another  
16 person when in fact the contributor is the source.<sup>75</sup>

17 The requirement that a contribution be made in the name of its true source promotes Congress's  
18 objective of ensuring the complete and accurate disclosure by candidates and committees of the  
19 political contributions they receive.<sup>76</sup> Both the Act and the Commission's implementing  
20 regulations provide that a person who furnishes another person with funds for the purpose of

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<sup>74</sup> 52 U.S.C. § 30122; 11 C.F.R. § 110.4(b).

<sup>75</sup> 11 C.F.R. § 110.4(b)(2)(i)–(ii).

<sup>76</sup> *United States v. O'Donnell*, 608 F.3d 546, 553 (9th Cir. 2010) (“[T]he congressional purpose behind [section 30122] — to ensure the complete and accurate disclosure of the contributors who finance federal elections — is plain.”); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (rejecting constitutional challenge to section 30122 in light of compelling governmental interest in disclosure).

1 contributing to a candidate or committee “makes” the resulting contribution.<sup>77</sup> This is true  
2 whether funds are advanced to another person to make a contribution in that person’s name or  
3 promised as reimbursement of a solicited contribution.<sup>78</sup> Because the concern of the law is the  
4 true source from which a contribution to a candidate or committee originates, we look to the  
5 structure of the transaction itself and the arrangement between the parties to determine who, in  
6 fact, “made” a given contribution.

7       The Complaint relies on three facts to support its allegation that FV acted as a conduit for  
8 contributions to FFO PAC. *First*, FV and FFO PAC used the same fundraising consultant,  
9 MMM Consulting, during 2015 and 2016.<sup>79</sup> *Second*, MMM Consulting raised more than enough  
10 money for FV to cover FV’s subsequent contributions to FFO PAC.<sup>80</sup> *Third*, five of six  
11 contributions made to FFO PAC by FV in 2016 matched in amount donations that had been  
12 made to FV by others.<sup>81</sup> Although these facts could be considered to be suggestive, there is no  
13 additional information indicating that any donor sought to funnel funds through FV for the  
14 purpose of making contributions to FFO PAC. Further, the five donations to FV which the

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<sup>77</sup> See *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011) (holding that to determine who made a contribution “we consider the giver to be the source of the gift, not any intermediary who simply conveys the gift from the donor to the donee.”); *O’Donnell*, 608 F.3d at 550; *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) (“The Act prohibits the use of ‘conduits’ to circumvent . . . [the Act’s reporting] restrictions.” (quoting then-section 441f)).

<sup>78</sup> *O’Donnell*, 608 F.3d at 555. Moreover, the “key issue . . . is the *source* of the funds” and, therefore, the legal status of the funds when conveyed from a conduit to the ultimate recipient is “irrelevant to a determination of who ‘made’ the contribution for the purposes of [section 30122].” *United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015) (holding that defendant’s “unconditional gifts” to relatives and employees, along with suggestion they contribute the funds to a specific political committee, violated section 30122 because the source of the funds remained the individual who provided them to the putative contributors).

<sup>79</sup> Compl. ¶¶ 26, 70.

<sup>80</sup> *Id.* ¶¶ 27, 70.

<sup>81</sup> *Id.* ¶¶ 28, 70.

1 Complaint singles out as suspicious are round numbers that match certain of seventeen donations  
2 FV received throughout 2016, and the record does not include dates for when FV received these  
3 donations given that the IRS 990 form did not require such information.<sup>82</sup> On balance, this  
4 information does not raise a reasonable inference that FV made contributions to FFO PAC in the  
5 name of others.

6 However, because we recommend commencing an investigation into other aspects of  
7 FV's financial activities in Parts III.A and III.B, *supra*, we recommend that the Commission take  
8 no action at this time with respect to the allegations that FV permitted its name to be used in  
9 making contributions by another; that unknown respondents made such contributions; and that  
10 FFO PAC accepted contributions made in the name of another, in violation of  
11 52 U.S.C. § 30122, pending the findings of that investigation.

12 With respect to the allegations that FFO PAC failed to properly report earmarked  
13 contributions, the applicable Commission regulation regarding such contributions applies only to  
14 candidates and their authorized committees rather than to all political committees: "All  
15 contributions by a person made *on behalf of or to a candidate*, including contributions which are  
16 in any way earmarked or otherwise directed to the candidate through an intermediary or conduit,  
17 are contributions from the person to the candidate."<sup>83</sup> Because FFO PAC is neither a candidate  
18 nor a candidate committee, the facts as alleged would not support a finding of reason to believe  
19 that the Act or Commission regulations were violated in this respect.<sup>84</sup> Accordingly, we

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<sup>82</sup> FV 2016 Tax Return.

<sup>83</sup> 11 C.F.R. § 110.6 (emphasis added); *see also id.* § 104.3(j).

<sup>84</sup> While, as the Complaint notes, the instructions for FEC Form 3X and Related Schedules indicate that non-authorized committees must report earmarked contributions, this is not supported by 11 C.F.R. §§ 104.3(j), 110.6.



1 recommend that the Commission find no reason to believe that FFO PAC accepted and failed to  
2 report earmarked contributions in violation of 52 U.S.C. § 30116(a)(8).

#### 3 **IV. PROPOSED INVESTIGATION**

4 We plan to seek information (1) to establish the extent, nature, and cost of FV's federal  
5 campaign activity and whether FV received funds that would have constituted contributions  
6 triggering reporting requirements under the Act, and (2) to identify witnesses who may have  
7 relevant knowledge of these facts. We also request that the Commission authorize the use of  
8 compulsory process, including the issuance of appropriate interrogatories, document subpoenas,  
9 and deposition subpoenas, as necessary. The information sought through any discovery would  
10 be focused on ascertaining FV's political committee status, as well as the scope of FV's  
11 reporting obligations, and would be consistent with the type of information that the Commission  
12 seeks in its analysis of a group's requirements as a political committee.

#### 13 **V. RECOMMENDATIONS**

- 14 1. Find reason to believe that Freedom Vote, Inc. violated 52 U.S.C. §§ 30102, 30103,  
15 30104(a), (b), (g)(2) by failing to organize, register and report as a political  
16 committee and report its independent expenditure as a political committee; in the  
17 alternative, find reason to believe that Freedom Vote, Inc. violated  
18 52 U.S.C. § 30104(c), (g)(2) by failing to properly report its independent expenditure  
19 but dismiss as a matter of prosecutorial discretion allegations that Freedom Vote, Inc.  
20 violated 52 U.S.C. § 30104(c)(1), (c)(2)(C) by failing to disclose its donors;
- 21 2. Find reason to believe that Freedom Vote, Inc. violated 52 U.S.C. § 30120(a), (d) by  
22 failing to include a disclaimer on "Third Largest";
- 23 3. Take no action at this time with respect to allegations that Freedom Vote, Inc.,  
24 Fighting for Ohio Fund and Christopher M. Marston in his official capacity as  
25 treasurer, and unnamed respondents violated 52 U.S.C. § 30122 by making and  
26 accepting contributions in the name of another;
- 27 4. Find no reason to believe that Fighting for Ohio Fund and Christopher M. Marston in  
28 his official capacity as treasurer violated 52 U.S.C. § 30104(b), 30116(a)(8) and 11  
29 C.F.R. § 110.6(c)(2) by accepting and failing to report earmarked contributions;

- 1 5. Approve the attached Factual and Legal Analyses;
- 2 6. Authorize the use of compulsory process; and
- 3 7. Approve the appropriate letters.

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Lisa J. Stevenson  
Acting General Counsel

July 1, 2019  

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DATE

*Charles Kitcher*  

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Charles Kitcher  
Acting Associate General Counsel for  
Enforcement

*Jin Lee*  

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Jin Lee  
Acting Assistant General Counsel

*Justine A. di Giovanni*  

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Justine A. di Giovanni  
Attorney

- 24 Attachment:
- 25 1. Factual and Legal Analysis

MSP 7.21  
ELW Edits  
R edits 7.25

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Freedom Vote, Inc. and James S. Nathanson individually **MUR:** 7465  
4 and in his capacity as executive director of Freedom  
5 Vote, Inc.

6 **I. INTRODUCTION**

7 In 2010, Freedom Vote, Inc. (“FV”) established itself as a non-profit corporation whose  
8 stated mission was to educate the people of Ohio on economic policy issues. The Complaint in  
9 this matter, however, alleges that FV failed to register and report as a political committee in  
10 violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). Further, the  
11 Complaint alleges that FV failed to report an independent expenditure to the Commission and  
12 include the appropriate disclaimer in that advertisement. In addition, the Complaint alleges that  
13 FV knowingly acted as a conduit for contributions made by unknown respondents to an  
14 independent expenditure-only political committee, Fighting for Ohio Fund (“FFO PAC”), and  
15 that FFO PAC knowingly accepted contributions in the name of another and failed to report  
16 earmarked contributions.

17 For the reasons set forth below, the Commission finds reason to believe that FV violated  
18 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political  
19 committee and, as a result, violated 52 U.S.C. § 30120(d)(2) by failing to include an appropriate  
20 disclaimer on a public communication.

21 **II. FACTUAL BACKGROUND**

22 **A. Respondents**

23 FV was an Ohio non-profit corporation that incorporated in 2010, and which was  
24 recognized by the IRS in 2010 as tax-exempt under section 501(c)(4) of the Internal Revenue

1 Code.<sup>1</sup> From January 2011 through at least June 2017, James S. Nathanson was FV’s executive  
2 director.<sup>2</sup> In its annual tax returns filed with the IRS, FV described its mission as “to further the  
3 common good and general welfare of the people of Ohio.”<sup>3</sup>

4 A 2010 article cited in the Complaint states that FV was established as an entity “with the  
5 express purpose of raising money to help pay for the type of turnout operations traditionally  
6 underwritten by the RNC.”<sup>4</sup> Tom Whatman, then-advisor to FV, was reported as stating, “I  
7 understood that the lack of resources from the RNC was going to have a severe impact on what  
8 the parties were going to be able to do.”<sup>5</sup> FFO PAC is an independent expenditure-only political  
9 committee that registered with the Commission in February 2015.<sup>6</sup> In the 2016 election cycle, it  
10 raised \$9,874,220 and spent \$9,808,186.54, of which \$9,256,439.42 was spent on independent  
11 expenditures opposing former Ohio Governor Ted Strickland, a candidate for U.S. Senate from

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<sup>1</sup> See Freedom Vote, Inc., Ohio Initial Articles of Incorporation (July 7, 2010); Form 990, 2009 Tax Return of Freedom Vote, Inc. (Aug. 12, 2011) [*hereinafter* “FV 2010 Tax Return”].

<sup>2</sup> The Complaint also mentions James S. Nathanson, individually, but does not include any allegations that he violated the Act. Compl. (Aug. 9, 2018). Nathanson did not file a separate response.

<sup>3</sup> See, e.g., FV 2010 Tax Return. Freedom Vote references and relies on its tax returns from 2010 through 2017 in its response. See Freedom Vote Resp. at 7-9.

<sup>4</sup> Compl. ¶¶ 11, 58 (citing Jeanne Cummings, *State Parties Look Past RNC for Cash*, POLITICO, Sept. 3, 2010, <http://politi.co/2FjFJj3>).

<sup>5</sup> *Id.*

<sup>6</sup> FEC Form 1, FFO PAC Statement of Organization (Feb. 23, 2015).

1 Ohio in 2016.<sup>7</sup> In 2018, FFO PAC raised \$25,229.28 and spent \$22,454.48, none of which was  
 2 reported as independent expenditures.<sup>8</sup>

### 3 **B. Spending by FV**

4 According to FV's tax returns, which use a fiscal year beginning in October and ending  
 5 the September of the following year, FV states that most of its spending since its formation has  
 6 been for "education to [the] Ohio public regarding economic policy issues, including state and  
 7 local government fiscal responsibility, job growth, and retention, and employment."<sup>9</sup> FV also  
 8 reported on its fiscal years 2010 and 2011 tax returns spending \$461,742 on "voter registration  
 9 efforts."<sup>10</sup> Its fiscal year 2013 tax return stated that some of its money was also spent on  
 10 "advocacy related to voting rights under the Ohio and United States Constitutions."<sup>11</sup>

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<sup>7</sup> FEC, *Fighting for Ohio Fund – Spending*, FEC.GOV, <https://www.fec.gov/data/committee/C00573014/?cycle=2016&tab=spending> (last accessed July 1, 2019).

<sup>8</sup> FEC, *Fighting for Ohio Fund – Spending*, FEC.GOV, <https://www.fec.gov/data/committee/C00573014/?tab=spending&cycle=2018> (last accessed July 1, 2019) [*hereinafter* "FFO PAC 2018 Funds Spent"]; FEC, *Fighting for Ohio Fund – Raising*, FEC.GOV, <https://www.fec.gov/data/committee/C00573014/?tab=raising&cycle=2018> (last accessed July 1, 2019). FFO PAC described its expenditures as legal services, compliance consulting, website expenses, and two contributions totaling \$9,500 to the "Fighting for Ohio Institute," a now-terminated Virginia 501(c)(4) organization of which James Nathanson was the corporate secretary. FFO PAC 2018 Funds Spent; *see* Form 990, 2016 Tax Return of Fighting for Ohio Institute (Nov. 5, 2017).

<sup>9</sup> FV 2010 Tax Return (reporting July 6, 2010 – Sept. 30, 2010); Form 990, 2010 Tax Return of Freedom Vote, Inc. (Aug. 14, 2012) (reporting Oct. 1, 2010 – Sept. 30, 2011) [*hereinafter* "FV 2011 Tax Return"]; Form 990, 2011 Tax Return of Freedom Vote, Inc. (July 17, 2013) (reporting Oct. 1, 2011 – Sept. 30, 2012) [*hereinafter* "FV 2012 Tax Return"]; Form 990, 2012 Tax Return of Freedom Vote, Inc. (July 30, 2014) (reporting Oct. 1, 2012 – Sept. 30, 2013) [*hereinafter* "FV 2013 Tax Return"]; Form 990-EZ, 2014 Tax Return of Freedom Vote, Inc. (Aug. 11, 2016) (reporting Oct. 1, 2014 – Sept. 30, 2015) [*hereinafter* "FV 2015 Tax Return"]; Form 990, 2015 Tax Return of Freedom Vote, Inc. (Aug. 14, 2017) (reporting Oct. 1, 2015 – Sept. 30, 2016) [*hereinafter* "FV 2016 Tax Return"]; Form 990-EZ, 2016 Tax Return of Freedom Vote, Inc. (Aug. 9, 2018) (reporting Oct. 1, 2016 – Sept. 30, 2017) [*hereinafter* "FV 2017 Tax Return"]. In its 2014 Return, FV described itself as having "[p]rovided education to the Ohio public on economic policy issues including Obamacare and the federal budget." *See* Form 990, 2013 Tax Return of Freedom Vote, Inc., (Aug. 11, 2015) (reporting Oct. 1, 2013 – Sept. 30, 2014) [*hereinafter* "FV 2014 Tax Return"] (collectively, "Tax Returns").

<sup>10</sup> FV 2010 Tax Return; FV 2011 Tax Return.

<sup>11</sup> FV 2013 Tax Return.

1           According to FV’s fiscal year 2014 tax returns, FV spent \$174,607.55 in independent  
2 expenditures in support of then-Speaker of the House John Boehner in the form of door hangers,  
3 canvassing, and robocalls.<sup>12</sup> FV reported on its fiscal year 2016 tax return spending \$1.744  
4 million on “political expenditures,”<sup>13</sup> of which \$1.7 million consisted of contributions to FFO  
5 PAC.<sup>14</sup> Additionally, in June and July 2016, FV aired what appears to be its first television  
6 advertisement, “Third Largest,” criticizing Ted Strickland.<sup>15</sup> The advertisement was broadcast  
7 several months before the general election, but after Strickland had won the Democratic  
8 primary.<sup>16</sup> On its tax return for the 2017 fiscal year, FV reported that it made an additional  
9 \$275,000 contribution to FFO PAC.<sup>17</sup> FFO PAC disclosed that FV’s contribution was made on  
10 October 5, 2016, five days after the close of FV’s 2016 fiscal year.<sup>18</sup> The current record does not  
11 include FV’s tax return for the fiscal year ending in 2018.

12           The table below summarizes information as reported by FV in its tax returns and included  
13 in its response to the complaint:

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<sup>12</sup> FEC Form 5, FV Amended 2014 April Quarterly Report (Apr. 14, 2014); FEC Form 5, FV 2014 July Quarterly Report (July 15, 2014); FV 2014 Tax Return. These independent expenditures were also reported on FV’s 2014 Tax Return. *See* 2014 Tax Return (disclosing \$174,607 for “grassroots advocacy effort independently supporting or opposing candidates.”).

<sup>13</sup> FV 2016 Tax Return, sched. C, part I-A, line 2. The IRS defines “political expenditures” as “any expenditures made for political campaign activities.” *See* 2018 Instructions for Schedule C, Political Campaign and Lobbying Activities, <https://www.irs.gov/pub/irs-pdf/i990sc.pdf>. This is a broader standard than the definition of “expenditure” under the Act and the definition of “federal campaign activity” articulated in the 2007 Supplemental E&J.

<sup>14</sup> *See id.* Part I-C, line 2 (reporting “the amount of the filing organization’s funds contributed to other organizations for section 527 exempt function activity”); FEC Form 3X, FFO PAC 2016 Pre-General Report, sched. A at 7 (Oct. 27, 2016).

<sup>16</sup> Compl. ¶ 48; *see also id.* ¶ 33, Ex. A (providing copy of “Third Largest”).

<sup>17</sup> 2017 Tax Return.

<sup>18</sup> FEC Form 3X, FFO PAC 2016 Pre-General Report, sched. A at 7 (Oct. 27, 2016).

<b>Fiscal Year<sup>19</sup></b>	<b>Gross Receipts</b>	<b>Total Expenses</b>	<b>Expenses: Program Services<sup>20</sup></b>	<b>Expenses: Political Campaign Activity<sup>21</sup></b>
2010	\$1,325,000	\$1,265,384	\$1,178,423	\$0
2011	\$1,848,061	\$1,886,457	\$1,648,594	\$0
2012	\$200,000	\$191,416	\$160,270	\$0
2013	\$200,000	\$150,430	\$125,347	\$0
2014	\$255,000	\$284,754	\$270,906	\$174,607
2015	\$28,000	\$58,578	\$21,839	\$0
2016	\$4,375,000	\$3,575,475	\$3,505,133	\$1,744,267
2017	\$90,000	\$721,094	\$565,056	\$275,000

- 1 With respect to these figures, FV appears to have counted certain expenses as expenses for both
- 2 “program services” and “political campaign activity”. For instance, the combined totals
- 3 reported on FV’s tax returns for fiscal years 2014 and 2016 for “program services” and “political
- 4 campaign activity” exceed FV’s total reported expenses.

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Information regarding FV’s spending using a calendar year framework is not publicly available.

<sup>20</sup> “A program service is an activity of an organization that accomplishes its exempt purpose.” 2016 Instructions for Form 990 Return of Organization Exempt from Income Tax at 10, <https://www.irs.gov/pub/irs-prior/i990--2016.pdf>. For example, the promotion of social welfare has been interpreted to include educational activities. *See, e.g.* Rev. Rul. 76-81, 1976-1 C.B. 156 (“[A]n organization that informs the public on controversial subjects and attempts to influence legislation which is germane to its program may qualify for exemption under section 501(c)(4).”); Rev. Rul. 68-656, 1968-2 C.B. 216 (“The education of the public on such a subject is deemed beneficial to the community because society benefits from an informed citizenry. The seeking of legislation germane to the organization’s programs is recognized by the regulations cited above as a permissible means of attaining social welfare purposes.”).

<sup>21</sup> “The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns . . . .” 26 C.F.R. 1.501(c)(4)-1(a)(2)(ii).

1 **III. LEGAL ANALYSIS**

2 **A. Political Committee Status**

3 1. The Test for Political Committee Status

4 The Act and Commission regulations define a “political committee” as “any committee,  
5 club, association or other group of persons which receives contributions aggregating in excess of  
6 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000  
7 during a calendar year.”<sup>22</sup> In *Buckley v. Valeo*,<sup>23</sup> the Supreme Court held that defining political  
8 committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’” was  
9 overbroad, reaching “groups engaged purely in issue discussion.”<sup>24</sup> To cure that infirmity, the  
10 Court concluded that the term “political committee” “need only encompass organizations that are  
11 under the control of a candidate or *the major purpose of which is the nomination or election of a*  
12 *candidate.*”<sup>25</sup> Accordingly, under the statute as thus construed, an organization that is not  
13 controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000  
14 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

15 Although *Buckley* established the major purpose test, it provided no guidance as to the  
16 proper approach to determine an organization’s major purpose.<sup>26</sup>

17 After *Buckley*, the Commission adopted a policy of determining on a case-by-case basis  
18 whether an organization is a political committee, including whether its major purpose is the

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<sup>22</sup> 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

<sup>23</sup> 424 U.S. 1 (1976).

<sup>24</sup> *Id.* at 79.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> See, e.g., *Real Truth About Abortion, Inc. v. FEC* (formerly *Real Truth About Obama v. FEC*), 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 568 U.S. 1114 (Jan. 7, 2013) (No. 12-311).



1 nomination or election of federal candidates. Though it has periodically considered crafting a  
2 bright-line rule through rulemaking, the Commission consistently has declined to do so.<sup>27</sup>  
3 Instead, the Commission determined that determining an organization’s major purpose “requires  
4 the flexibility of a case-by-case analysis of an organization’s conduct that is incompatible with a  
5 one-size fits-all rule,” and that “any list of factors developed by the Commission would not likely  
6 be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the  
7 Commission’s enforcement actions considering the political committee status of various  
8 entities.”<sup>28</sup>

9  
10 To determine an entity’s “major purpose,” the Commission considers a group’s “overall  
11 conduct,” including public statements about its mission, organizational documents, government  
12 filings (e.g., IRS notices), and the proportion of spending related to “Federal campaign activity  
13 (i.e., the nomination or election of a Federal candidate).<sup>29</sup> The Commission has stated that it  
14 compares how much of an organization’s spending is for “*federal campaign activity*” relative to  
15 “activities that [a]re not campaign related.”<sup>30</sup>

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<sup>28</sup> Political Committee Status, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) (Supplemental Explanation and Justification) [*hereinafter* “Supplemental E&J”].

<sup>29</sup> *Id.* at 5597, 5605.

<sup>30</sup> *Id.* at 5597, 5605-06. This approach was subsequently challenged and upheld in federal district court. *See Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007) (“*Shays II*”). In 2012, in *Real Truth About Abortion, Inc. v. FEC*, the Fourth Circuit upheld the Commission’s case-by-case approach in the face a constitutional challenge. *See* 681 F.3d 544 (“*RTAA*”); *see also Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (quoting *RTAA* and upholding Commission’s case-by-case method of determining political committee status), *cert. denied*, 572 U.S. \_\_\_ (2014).

1 Political committees must comply with certain organizational and reporting requirements  
2 set forth in the Act. They must register with the Commission, file periodic reports for disclosure  
3 to the public, appoint a treasurer who maintains its records, and identify themselves through  
4 “disclaimers” on all of their political advertising, on their websites, and in mass e-mails.<sup>31</sup>

5 2. There is Reason to Believe that FV is a Political Committee

6

7 a. Statutory Threshold

8 To assess whether an organization has made an “expenditure,” the Commission analyzes  
9 whether spending on any of an organization’s communications made independently of a  
10 candidate constitute express advocacy under 11 C.F.R. § 100.22.<sup>32</sup> In calendar year 2014, FV  
11 reported that it spent \$174,607 on independent expenditures.<sup>33</sup> Thus, in 2014 FV well exceeded  
12 the \$1,000 statutory threshold set forth in the Act’s political committee definition,<sup>34</sup> which FV  
13 does not dispute.<sup>35</sup>

14 b. Major Purpose

15 The available record of FV’s activities indicates that FV’s major purpose may be the  
16 nomination or election of Federal candidates.<sup>36</sup> Under the Commission’s case-by-case approach,

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<sup>31</sup> See 52 U.S.C. §§ 30102-30104; 11 C.F.R. §110.11(a)(1).

<sup>32</sup> See Supplemental E&J at 5606.

<sup>33</sup> Compl. ¶¶ 18-19; FEC Form 5, FV Amended April Quarterly Report, (July 15, 2014); FEC Form 5, FV July Quarterly Report (July 15, 2014); FV 2014 Tax Return, Part I, Line 18, (Aug. 11, 2015).

<sup>34</sup> 52 U.S.C. § 30101(4)(A).

<sup>35</sup> See generally Compl.

<sup>36</sup> See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. at 262 (“[s]hould [a corporation’s] independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee”) (citing *Buckley*, 424 U.S. at 79).

1 the Commission considers the organization’s “overall conduct,” including public statements  
2 about its mission, organizational documents, government filings (*e.g.*, IRS notices), and the  
3 proportion of spending related to “Federal campaign activity.”<sup>37</sup> In this case, FV’s proportion of  
4 spending related to Federal campaign activity compared to its total spending in 2014 indicates  
5 that its major purpose may be the nomination or election of federal candidates.<sup>38</sup> As FV  
6 acknowledges in its response, FV reported on its 2014 fiscal year tax returns spending \$174,607  
7 on independent expenditures supporting John Boehner,<sup>39</sup> which constituted more than 61% of  
8 FV’s total reported expenses (\$284,754).<sup>40</sup>

9 Further, during FV’s 2016 and 2017 fiscal years (which covers October 2015 through  
10 September 2017), FV made approximately \$2 million in contributions,<sup>41</sup> which appear to account  
11 for nearly 47% of its total spending in that timespan.<sup>42</sup> And while FV asserts that its federal  
12 campaign activity never again crossed the 50% threshold after its 2014 fiscal year, there appears  
13 to be an irregularity in the figures that FV provided in its response: the combined spending

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<sup>37</sup> Supplemental E&J at 5597.

<sup>38</sup> Because information regarding FV’s spending using a calendar year framework is not publicly available, the analysis conducted here is based on the fiscal year data as reported in FV’s tax returns.

<sup>39</sup> Compl. ¶¶ 18-19; FV, FEC Form 5, FV Amended April Quarterly Report, (July 15, 2014); FEC Form 5, FV July Quarterly Report (July 15, 2014); FV 2013 Tax Return, part I, line 18.

<sup>40</sup> Compl. ¶ 59; FV Resp. at 8 (“Granted, in one year (fiscal year 2014), FV’s political spending exceeded its non-political spending.”). While the total amount at issue during this time period is comparatively less than what FV spent in certain earlier years and what FV went on to spend in future years, the Commission’s major purpose analysis has always focused on the proportion of its spending related to “Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate),” Supplemental E&J at 5597, 5605, rather than its amount.

<sup>41</sup> FV reported making \$1.7 million in contributions to FFO PAC. *Id.*, sched. C. FV also made a \$275,000 contribution to FFO PAC on October 5, 2016, which was not reported on its FV 2016 Tax Return because it took place after the end of its 2016 fiscal year. FV 2017 Tax Return, sched. C.

<sup>42</sup> Information regarding FV’s spending using a calendar year framework is not publicly available, the analysis conducted here is based on the fiscal year data as reported in FV’s tax returns.

1 reported by FV on its tax returns for its self-described “program services” and “political  
2 campaign activities,” which are mutually exclusive categories, appears to exceed its *total*  
3 expenses for those fiscal years.

4 Based on the foregoing, the available record indicates that FV met the Act’s statutory  
5 definition of “political committee” and also may have the major purpose of nominating or  
6 electing federal candidates. Accordingly, the Commission finds reason to believe that FV failed  
7 to organize, register, and report with the Commission in violation of 52 U.S.C. §§ 30102, 30103,  
8 and 30104.

9 **B. Proper Disclaimer of “Third Largest” Television Advertisement**

10 The Act requires that, whenever a political committee makes a disbursement for the  
11 purpose of financing a public communication, such communication must include a disclaimer.<sup>43</sup>  
12 If the communication is not authorized by a candidate or an authorized committee, then the  
13 disclaimer must clearly state the name and permanent street address, telephone number, or web  
14 address of the person who paid for the communication and state that the communication was not  
15 authorized by any candidate or candidate’s committee.<sup>44</sup> Furthermore, a television  
16 advertisement must also include both audio and clearly readable written statements that the  
17 political committee “is responsible for the content of this advertising.”<sup>45</sup>

18 In June and July 2016, FV aired a television advertisement, title “Third Largest.”<sup>46</sup> The  
19 advertisement was broadcast several months before the general election, but after Strickland had

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<sup>43</sup> 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a). A “public communication” includes any broadcast, cable, or satellite communication, including television advertisements. 11 C.F.R. § 100.26.

<sup>44</sup> 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3).

<sup>45</sup> 52 U.S.C. § 30102(d)(2); 11 C.F.R. § 110.11(c)(4).

<sup>46</sup> Compl. ¶ 48, Ex. A (“Third Largest”); FV Resp. at 2 (Oct. 19, 2018).

1 won the Democratic primary.<sup>47</sup> Because there is reason to believe that FV is a political  
2 committee and the “Third Largest” television advertisement is a public communication, there is  
3 reason to believe that the Act’s disclaimer requirements apply to the ad. Although “Third  
4 Largest” contains the written statement, “Paid for by Freedom Vote,” this disclaimer does not  
5 fully comply with the provisions of the Act. It includes no permanent street address, telephone  
6 number, or web address for Freedom Vote; it does not state whether the advertisement was  
7 authorized by any candidate or candidate’s committee; and it does not include a spoken  
8 statement that Freedom Vote is responsible for the content of the advertisement. Accordingly,  
9 the Commission finds reason to believe that FV violated 52 U.S.C. § 30120(a), (d) and 11 C.F.R.  
10 § 110.11.

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<sup>47</sup> Compl. ¶ 48.