FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Freedom Vote, *et al.*	)	MUR 7465

CONCURRING STATEMENT OF COMMISSIONER CAROLINE C. HUNTER[†]

The Commission's test for political committee status consists of two elements. First, a group must exceed the contribution or expenditure threshold under the Federal Election Campaign Act of 1971, as amended (the "Act"). Second, the "major purpose" of the group must be the nomination or election of federal candidates. Freedom Vote met the statutory expenditure threshold in 2014 when it reported spending $174,607 on independent expenditures. As described in the Factual and Legal Analysis ("F&LA"), the Commission determined that Freedom Vote also may have had the major purpose of nominating or electing federal candidates.[1] I submit this statement to highlight several important aspects of the Commission's decision.

First, under federal tax law a 501(c) group's spending on what is commonly called "political campaign activity" or "political campaign intervention" by definition cannot simultaneously be categorized for "program services." In other words, money spent on "political campaign activity" cannot also be "program services," and vice versa. But Freedom Vote's reported spending on "program services," combined with its reported pending on "political campaign activities" exceeded its total reported expenses for its 2014, 2016, and 2017 fiscal years. Clearly, something was not right. Thus, it was impossible for the Commission to credit the assertion that Freedom Vote's SuperPAC contributions during its 2016-2017 fiscal years — already admitted to be just under 50% of total expenses — never *exceeded* 50% for those fiscal years. That fact, *when combined* with Freedom Vote's admitted spending on independent

[†] Because of my impending departure from the Commission, I believe it necessary to articulate my views on this matter now despite the fact that the Commission's investigation remains ongoing.

[1] The complainant CREW also alleged that an advertisement titled "Third Largest" constituted an unreported independent expenditure because it expressly advocated for the defeat of a candidate under Commission regulation 11 C.F.R. § 100.22(b). MUR 7465, Complaint at ¶¶ 44, 48. The Commission's Office of General Counsel ("OGC") agreed. MUR 7465 (Freedom Vote, *et al.*), FGCR at 19-20. But in a June 8, 2018 complaint to the IRS, CREW took the opposite position, stating that the same ad was *not* express advocacy. *See* Letter from Noah Bookbinder, Exec. Director, Citizens for Responsibility and Ethics in Washington, to Hon. David J. Kautter, Acting Commissioner of Internal Revenue Service at 5 (June 8, 2018), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/06/12194741/Freedom-Vote-IRS-complaint-6-8-18.pdf (arguing "Third Largest" "likely" could be defined as "political activity" under the IRS's "facts and circumstances" test even though it "stop[s] short of expressly advocating"). Having made contradictory claims to different federal agencies on the same day, CREW itself demonstrates that "Third Largest" cannot be interpreted *only* as advocating for the electoral defeat of a clearly identified candidate. I agree that the ad is not express advocacy.

expenditures in fiscal year 2014 (comprising 64.4% of expenses), persuaded me to find reason to believe in this matter.

Second, the Commission correctly employed a multi-*fiscal year* analysis of Freedom Vote's spending. Thus, the F&LA is yet another example of the Commission avoiding an arbitrary single calendar year as the only timeframe for determining a group's major purpose.[2] Instead, the Commission's reason to believe determination properly hinged on Freedom Vote's campaign activity over a multi-fiscal year timespan: 2014 through 2017.

Third, unlike several recent enforcement recommendations,[3] the Commission (by a 4-0 vote) applied a properly tailored major purpose analysis to include only Freedom Vote's payments for express advocacy communications and contributions to groups that only make express advocacy communications. These payments fall squarely within the bright-line category of "campaign-related" spending the Supreme Court described in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.* Thus, the Commission's categorization of Freedom Vote's independent expenditures (by definition express advocacy communications) and contributions to SuperPACs (*i.e.*, independent expenditure-only committees) as being indicative of having the major purpose of nominating or electing federal candidates was entirely consistent with *Buckley*, *MCFL*, and appellate court interpretations of the major purpose test.[4] The F&LA does not adopt

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[2] *See, e.g.*, MUR 5751 (The Leadership Forum) (2002 through 2006); MUR 5365 (Club for Growth, Inc.) (2000 to 2004); MUR 3669 (Christian Coalition) (1990 through 1994); MUR 2804 (AIPAC) (1983 to 1992); *see also CREW v. FEC*, 209 F. Supp. 3d 77,94 (D.D.C. 2016) (reasonable for the Commission to consider organization's "full spending history"); *Akins v. FEC*, 736 F. Supp. 2d 9, 20 (D.D.C. 2010) (considering organization's "focus on lobbying for more than forty years"); *FEC v. Malenick*, 310 F. Supp. 2d 230, 233 (D.D.C. 2004); *FEC v. GOPAC*, 917 F. Supp. 851, 862-66 (D.D.C. 1996).

[3] *See, e.g.*, MUR 7513 (Community Issues Project), First Gen. Counsel's Rpt. ("FGCR") at 9, 14; MUR 7479 (KAIRC PAC), FGCR at 14 n.57; MUR 7465 (Fighting for Ohio Fund, *et al.*), FGCR at 11 n.35.

[4] MUR 7465 (Freedom Vote, Inc.), F&LA at 9-10. *See, e.g., Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 811 (7th Cir. 2014) ("campaign-finance regulation must be precise, clear, and may only extend to speech that is "unambiguously related to the campaign of a particular federal candidate.") (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)); *id.* at 839 ("*Buckley* held that independent groups not engaged in express election advocacy as their major purpose cannot be subjected to the complex and extensive regulatory requirements that accompany the PAC designation."); *Real Truth About Abortion v. FEC*, 681 F.3d 544, 557 (4th Cir. 2012) (Commission's assessment of relevant *spending* not foreclosed from including only those communications that expressly advocate as weighing in favor of political committee status); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 n.4 (10th Cir. 2010) (defendant-appellant "argued that the Supreme Court in its recent decision in [*Citizens United*] abandoned this 'unambiguously campaign related' standard. Although that opinion left many issues unresolved, we believe that requirement—that for a regulation of campaign related speech to be constitutional it must be unambiguously campaign related standard—as it pertains to this case [involving construction of New Mexico's political committee statute] has not been changed."); *North Carolina Right to Life v. Leake*, 525 F.3d 274, 281-82 (4th Cir. 2008) ("To date, the Court has only recognized two categories of activity that fit within *Buckley*'s unambiguously campaign related standard"); *id.* at 280-90 (4th Cir. 2008) (statute defining "political committee" to require having the "major purpose" to "support or oppose" the nomination or election of candidates was unconstitutional because it "extends beyond both 'express advocacy' and its 'functional equivalent'"); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 708, 712 (1999) (interpreting *Buckley's* formulation of nominating, electing, or defeating specific candidates as being synonymous with express advocacy). Recently however, one district court held that spending on "electioneering communications" is presumptively campaign related, and articulated a new multifactor test for

a facts-and-circumstances-like test for counting spending indicative of being for the purpose of nominating or electing federal candidates. Nor does the F&LA approve of sweeping all "political" spending as determined by the IRS[5] into the Commission's jurisdiction via analysis of a group's "major purpose."[6]

Fourth, the F&LA correctly points out that "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) . . . rather than its amount."[7] The F&LA's analysis of Freedom Vote's campaign spending makes clear that the requisite proportion must exceed fifty percent in order to be considered the group's major purpose.[8] That analysis is consistent with multiple federal court decisions interpreting *Buckley's* major purpose test.[9]

assessing the "rare exception" when "under *Buckley*" such spending is not "election-related." *See CREW v. FEC*, 299 F. Supp. 3d 83, 97 (D.D.C. 2018). When the Commission found reason to believe in this matter, however, the record did not involve electioneering communications, and in any event I have already articulated the reasons why I believe the district court's decision — which has not yet had the chance for appellate review— was in error. *See* Statement of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen on *CREW v. FEC*, No. 16-CV-02255, https://www.fec.gov/resources/cms-content/documents/3117_001_v2.pdf.

[5] The IRS utilizes a non-exhaustive multifactor test for determining what counts as "political campaign intervention." *See* Rev. Rul. 2007-41; Rev. Rul. 2004-6.

[6] Over and over again, the Commission has been prohibited from using vague facts and circumstances-like tests to regulate individuals and groups engaged in political speech. *Compare Citizens United v. FEC*, 558 U.S. 310, 334-336 (2010) (citing *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) ("First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal.")(internal quotations omitted)), *with* Rev. Rul. 2007-41; Rev. Rul. 2004-6 ("All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function [political campaign activity] under § 527(e)(2)."); *see also* Political Committee Status, 72 Fed. Reg. 5595, 5598 (Feb. 7, 2007) ("[t]he IRS 'facts and circumstances' test, if applied to FECA, clearly would violate the Supreme Court's Constitutional parameters established in *Buckley*, and reiterated in *MCFL* and *McConnell*, that campaign finance rules must avoid vagueness"). *See generally* Laura W. Murphy, Director, and Marvin J. Johnson, Legislative Counsel, *ACLU Letter to the IRS Expressing Concerns About Revenue Ruling 2004-6 with Regard to Political Speech and the Definition of What Is or Is Not an "Exempt Function"*, https://www.aclu.org/letter/aclu-letter-irs-expressing-concerns-about-revenue-ruling-2004-6-regard-political-speech-and (last visited June 25, 2020) ("[T]he 'facts and circumstances' test . . . is neither easily understood nor objectively determinable. . . . [a]s an 'easily understood and objectively determinable' alternative, we urge the IRS to use the 'express advocacy' test").

[7] F&LA at 9 (emphasis added).

[8] *See id.* (Commission could not credit FV's assertions "that it never again crossed the 50% threshold").

[9] *See Leake*, 525 F.3d at 303 (4th Cir. 2008) (rejecting major purpose standard that could impose political committee burdens when the "majority of [a group's] activity is not election related"); *CREW v. FEC*, 209 F. Supp. 3d 77, 95 (D.D.C. 2016) (upholding application 50%-plus rule for determining group's major purpose).

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Because the F&LA in this matter applies an appropriately limited test for determining political committee status, I voted to support it.

Caroline C. Hunter
Commissioner

July 2, 2020
Date