

In the Matter of	)	
	)	
	)	MUR 5842
Economic Freedom Fund	)	
	)	

**STATEMENT OF REASONS OF  
COMMISSIONER CYNTHIA L. BAUERLY AND  
COMMISSIONER ELLEN L. WEINTRAUB**

On April 14, 2009 the Commission failed by a vote of 3-2 to approve the Office of General Counsel's recommendations to find reason to believe that Economic Freedom Fund ("EFF") violated 2 U.S.C. §§ 433, 434, and 441a(f) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, and by knowingly accepting prohibited contributions and contributions in excess of \$5,000.<sup>1</sup>

The Federal Election Campaign Act of 1971, as amended ("the Act") requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a predicate to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). "Reason to believe" is a threshold determination that by itself does not establish that the law has been violated. In fact, "reason to believe" determinations indicate only that the Commission found sufficient legal justification to open an investigation to determine whether there is probable cause that a violation of the Act has occurred.<sup>2</sup>

EFF was created three months before the 2006 election. In its filings with the IRS, EFF reported raising \$5,050,450 between August 1, 2006 and December 31, 2006. Almost all of the funds, \$5,000,000, were donated by one contributor, Bob J. Perry, who also was a major contributor to Swift Boat Veterans during the 2004 election cycle. EFF received the remaining funds, \$50,450, from approximately six individuals between September and October of 2006, and raised no funds after the November 2006 election. EFF reported to the IRS spending \$4,835,805 between August 1, 2006 and December 31, 2006. Almost all of that spending, \$4.8 million, occurred in the three months prior to the 2006 elections. EFF's website shows that it produced 59 advertisements, which included television and radio advertisements and mailers. The vast majority of these advertisements attacked eight Democratic House candidates in West Virginia, Georgia, Iowa, and Oregon, five of which the National Republican Congressional Committee ("NRCC") had publicly designated as vulnerable, labeling them "sitting ducks."

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<sup>1</sup> Chairman Walther, Commissioners Bauerly and Weintraub voted to approve the recommendations while Vice-Chairman Petersen and Commissioner Hunter dissented. The Commission subsequently voted to close the file.

<sup>2</sup> See 72 Fed. Reg. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007).

29044241153

MUR 5842  
Statement of Reasons

EFF also funded automated calls to voters in Indiana, Iowa, West Virginia, and Georgia. For example, in Indiana, EFF conducted push polls targeting Democratic candidate Baron Hill in the 9th District congressional race:

Caller: This is survey 2006 with a 45-second public survey. Are you registered to vote in Indiana?

Caller: Do you intend to vote in the November 7th Election?

...

Caller: Baron Hill voted to keep the death tax in place and refused to vote to make permanent the tax cuts that have caused record economic growth since 2001. Does knowing this make you less likely to vote for Barron Hill?

...

Caller: Baron Hill has over \$60,000 in contributions from trial lawyers and his [sic] voted repeatedly to stop reform of the medical malpractice system resulting in less [sic] doctors and higher health care costs for Indiana residents. Does knowing this make you less likely to vote for Baron Hill?

...

Caller: Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors. Does knowing this make you less likely to vote for Baron Hill?

...

Caller: Thank you for your time and views. This survey was conducted by the Economic Freedom Fund. Goodbye.

In its response, EFF claims that with respect to the Indiana poll, "EFF intended to conduct research regarding the mood and views of citizens of that state regarding issues of public importance, including the legislative record of public officials." EFF Response at 7. The plain text of the poll belies this claim. It begins by asking whether the listener is registered to vote and intends to vote in the November 7<sup>th</sup> Election. If the poll were truly conducted to research "the mood and views of citizens . . . regarding issues" there would be no need to ask whether the individual was a voter or intends to vote in the election. These introductory questions and the phrasing of the remaining questions ("less likely to vote for") provide an electoral nexus and indicate that the purpose of the poll was to influence a federal election.

The poll only discusses "issues" in a most superficial and misleading manner. The only common thread between the litany of "issues" addressed in the poll is the voting record of Baron Hill, a candidate in the November 7<sup>th</sup> election. Moreover, each "question" regarding an "issue" asks: "Does knowing this make you less likely to vote for Barron Hill?" The question does not ask the listener to discuss their "mood and view[ ] . . . regarding issues of public importance,"

29044241154

MUR 5842  
Statement of Reasons

but ties Barron Hill's legislative record directly to the upcoming election and the listener's intended vote.

Respondent is not a candidate or party conducting "message testing" to determine which issues resonate with voters. In fact, EFF specifically denies being a political committee, and instead claims to be an issues group. Political committee status is triggered when a group spends more than \$1,000 in a calendar year "for the purpose of influencing any election for federal office." 2 U.S.C. §§ 431(4) and (9)(A). If its purpose were not to influence an election for federal office, why would EFF need to poll whether "knowing this make[s the listener] less likely to vote for" a candidate?

Furthermore, the question regarding Baron Hill's vote "to allow the sale of sexually explicit materials to minors" and asking "Does knowing this make you less likely to vote for Baron Hill?" is written in an inflammatory and leading manner, not designed to illicit a genuine response regarding an issue, but to dissuade the listener – who the poll has determined is registered to vote and intends to vote – from voting for Baron Hill. This ad is reminiscent of the infamous "Bill Yellowtail" ad, discussed in *McConnell v. FEC*, 540 U.S. 93, 193 n.78 (2003), which the Court recognized was not a legitimate issue ad.<sup>3</sup> This poll question, like the Bill Yellowtail ad, does not discuss any issue, it merely smears the reputation of the candidate.

A sample of *Economic Freedom Fund's* solicitations state that its purpose is to "educate Americans . . . on economic issues that affect their daily lives" and to "take steps forward and continue on a path of effective economic development" rather than "turn back the clock to higher taxes and burdensome government regulation." EFF Supplement Response, Exh. 1 at 1. It is hard to imagine why an organization that is genuinely interested in economic issues would concern itself with sexually explicit materials and minors.

EFF also reportedly conducted at least one push poll targeting Congressman Leonard Boswell, who was seeking re-election in 2006 in the Third Congressional District of Iowa. According to publicly available information, the poll or polls asked listeners questions such as, "Do you want liberal female California Nancy Pelosi and her supporters to take total control over the US house [sic] of Representatives? Does knowing that Boswell voted for liberal Pelosi (either two or four) times make you less likely to vote for him?" Even more than the Baron Hill ad, it is patently clear that this is not an "issue" ad; in fact, there's not a single issue discussed in the ad aside from Boswell's voting record with regard to Nancy Pelosi.

In addition to the advertisements and push polls, EFF also financed 43 mailers targeting many of the same candidates. While we believe some of the mailers in this matter present close calls, there are two mailers in particular that warrant examination. In Georgia, EFF distributed a mailer that begins by stating, "Getting to know John Barrow has been a disappointment. Rather than being a leader for Georgia, John Barrow is its least effective member of Congress. . . .

<sup>3</sup> The text of the "Bill Yellowtail" ad stated: "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

MUR 5842  
Statement of Reasons

INEFFECTIVE. LIBERAL. CONGRESSMAN JOHN BARROW." The mailer then attacks Barrow's voting record in Congress by contending that Barrow did not support "Georgia values" by voting to make "liberal San Francisco politician Nancy Pelosi the Speaker of the House" and voting to cut funding for air travel security. The mailer concludes with the tag line, "John Barrow/Not Representing Georgia Values." Similarly, EFF distributed mailers attacking Congressman Jim Marshall, one of which begins by asking, "Who is Jim Marshall representing . . . illegal immigrants or Georgia families?" The mailer then states that Marshall voted against prohibiting illegal immigrants from getting food stamps and against law enforcement funding that aids local police in reporting illegal immigrants to federal authorities. The mailer goes on to align Marshall with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney and concludes, in a much larger font size: "Jim Marshall does NOT represent Georgia values!"

With respect to the John Barrow ad, calling a candidate the "least effective member of Congress" could only be interpreted as an attack on his qualifications or fitness for office. There simply is no other reasonable interpretation of that statement. The Jim Marshall ad questions who Marshall is representing and unambiguously concludes: "Jim Marshall does NOT represent Georgia values!" Neither of these two ads includes any call to action related to pending legislation or to an issue. Neither ad encourages the listener to contact their representative regarding an issue.

Based upon the reality that EFF raised more than \$5 million, spent more than \$4.8 million in the three months prior to the election attacking federal candidates the NRCC had determined were "sitting ducks," and paid for so-called polls that contained a clear electoral nexus and attacked a federal candidate's voting record, we agreed with the Office of General Counsel in finding reason to believe that EFF may be a political committee. Because our analysis relied in major part upon the General Counsel's Factual and Legal Analysis, we believe it is important to place this analysis on the public record.

5/21/09  
Date

5/21/09  
Date

Cynthia L. Bauerly 57 KB  
Cynthia L. Bauerly  
Commissioner

Ellen L. Weintraub  
Ellen L. Weintraub  
Commissioner

29044241156

MUR 5842  
Statement of Reasons

ATTACHMENT A

29044241157

## **FEDERAL ELECTION COMMISSION**

### **FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Economic Freedom Fund

MUR: 5842

#### **INTRODUCTION**

This matter concerns allegations that the Economic Freedom Fund ("EFF"), an entity organized under Section 527 of the Internal Revenue Code, has violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The complaint alleges that EFF is a federal political committee that has failed to register and report with the Federal Election Commission ("Commission") and failed to comply with the Act's contribution limits and source prohibitions during the 2006 cycle. In its Response, EFF denies its activities triggered political committee status. Based on available information discussed below, there is reason to believe that EFF violated 2 U.S.C. §§ 433, 434, and 441a(f) by failing to register as a political committee with the Commission, failing to report contributions and expenditures, and knowingly accepting contributions in excess of \$5,000.

#### **FACTUAL BACKGROUND**

According to its IRS Form 8871, EFF was formed on August 1, 2006 and is based in Sacramento, California. EFF states that its purpose is to "promote policies and issues favoring economic freedom, growth and prosperity of the economy, to the benefit of the people of the United States." EFF IRS Form 8871. Based on a review of publicly available information, we have found that representatives of EFF did not make any public statements regarding EFF's purpose to the press.

29044241158

MUR 5842  
Statement of Reasons

EFF reports raising \$5,050,450 between August 1, 2006 and December 31, 2006. See EFF IRS 8872 Forms. Almost all of the funds, \$5,000,000, were donated by one contributor, Bob J. Perry, who also was a major contributor to Swift Boat Veterans during the 2004 election cycle. EFF received the remaining funds, \$50,450, from approximately six individuals between September and October of 2006, and raised no funds after the November 2006 election. Although EFF asserts that none of its solicitations referenced federal candidates and the available written solicitations confirm this statement, the Commission has no information as to whether EFF sought to raise funds in any other manner, and the Commission has no information regarding EFF's fundraising communications with Perry.

EFF reports spending \$4,835,805 between August 1, 2006 and December 31, 2006. See EFF IRS 8872 Forms. However, much of the spending (\$4.8 million) occurred in the three months prior to the 2006 elections.

EFF's website shows that it produced 59 advertisements, which included television and radio advertisements and mailers.<sup>1</sup> The vast majority of these advertisements attacked certain Democratic House candidates in West Virginia, Georgia, Iowa, and Oregon. In particular, EFF targeted Democratic incumbents that were considered to be vulnerable. Of the eight "vulnerable" Democratic incumbents designated as "sitting ducks" by the National Republican Congressional Committee ("NRCC"), five of these candidates, Darlene Hooley of Oregon, Jim Marshall of Georgia,

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<sup>1</sup> See Economic Freedom Fund webpage, <http://www.economicfreedomfund.com>.

MUR 5842  
Statement of Reasons

John Barrow of Georgia, Alan Mollohan of West Virginia, and Leonard Boswell of Iowa, were the focus of EFF's media campaign.<sup>2</sup>

Of the 59 advertisements, EFF spent approximately \$1.9 million to finance 16 television and radio advertisements, most of which referred to numerous clearly identified federal candidates in West Virginia, Georgia, and Iowa. EFF targeted many of the same candidates in 43 mailers.

In Georgia, EFF distributed seven mailers attacking Congressman John Barrow, who was running for re-election in 2006 in Georgia's 12th Congressional District. One mailer begins by stating, "Getting to know John Barrow has been a disappointment. Rather than being a leader for Georgia, John Barrow is its least effective member of Congress. . . . INEFFECTIVE. LIBERAL. CONGRESSMAN JOHN BARROW." The mailer then attacks Barrow's voting record in Congress by contending that Barrow did not support "Georgia values" by voting to make "liberal San Francisco politician Nancy Pelosi the Speaker of the House" and voting to cut funding for air travel security. The mailer concludes with the tag line, "John Barrow/Not Representing Georgia Values."

Similarly, EFF distributed six mailers attacking Congressman Jim Marshall, who was up for re-election in Georgia's 8th Congressional District. One mailer begins by asking, "Who is Jim Marshall representing . . . illegal immigrants or Georgia families?" The mailer then states that Marshall voted against

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<sup>2</sup> See Bree Hocking, *In Marginal District, Hooley Leads Wealthy Challenger*, ROLL CALL, October 19, 2006; see also, Shaila Dewan, *Two Democrats Struggle as Georgia Bucks a Trend*, NEW YORK TIMES, November 13, 2006 (reporting that Marshall and Barrow were on Republican Party's "short list of beatable incumbents" and that the NRCC spent more than a half-million dollars on each race while EFF bought advertising for these races as well). In addition, according to a news report, Republican candidate Mike Erickson, who ran in the 5th Congressional District in Oregon, received "large donations from the Republican-leaning Economic Freedom Fund, which has been active against Democratic House members in West Virginia, Iowa, Georgia and Oregon." Joseph B. Frazier, *Pelosi Says Democrats Must 'Drain the Swamp' to Get Health Reform*, ASSOCIATED PRESS, October 13, 2006. Both Commission and IRS disclosure reports, however, do not indicate that EFF gave any contributions to Erickson's campaign.

29044241160

MUR 5842  
Statement of Reasons

prohibiting illegal immigrants from getting food stamps and against law enforcement funding that aids local police in reporting illegal immigrants to federal authorities. The mailer goes on to align Marshall with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney and concludes, "Jim Marshall does NOT represent Georgia values!"

EFF also appears to have funded automated calls to voters in Indiana, Iowa, West Virginia, and Georgia.<sup>3</sup> For example, in Indiana, EFF conducted push polls targeting Democratic challenger Baron Hill, who was first elected to represent the 9th Congressional District in Indiana in 1998 but lost his bid for re-election in 2004.<sup>4</sup>

Caller: This is survey 2006 with a 45-second public survey. Are you registered to vote in Indiana?

Caller: Do you intend to vote in the November 7th Election?

...

Caller: Baron Hill voted to keep the death tax in place and refused to vote to make permanent the tax cuts that have caused record economic growth since 2001. Does knowing this make you less likely to vote for Barron Hill?

...

Caller: Baron Hill has over \$60,000 in contributions from trial lawyers and his [sic] voted repeatedly to stop reform of the medical malpractice system resulting in less doctors and higher health care costs for Indiana residents. Does knowing this make you less likely to vote for Baron Hill?

...

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<sup>3</sup> See, e.g., Paul J. Nyden, *GOP Leaders Blasts 527s*, THE CHARLESTON GAZETTE, Sept. 22, 2006; Ben Evans, *Former Swift Boat Attack-Ad Backer Takes on House Democrats*, ASSOCIATED PRESS, Sept. 14, 2006; Georgia Women Vote!: An Open Letter to Bob "Swift Boat" Perry, at <http://georgiawomenvote.blogspot.com/2006/09/open-letter-to-bob-swift-boat-perry.html>.

<sup>4</sup> *Indiana Sues California Group Over Automated Calls*, ASSOCIATED PRESS, Sept. 18, 2006.

29044241161

MUR 5842  
Statement of Reasons

Caller: Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors. Does knowing this make you less likely to vote for Baron Hill?

...

Caller: Thank you for your time and views. This survey was conducted by the Economic Freedom Fund. Goodbye.<sup>5</sup>

In addition, EFF apparently conducted at least one push poll targeting Congressman Leonard Boswell, who was seeking re-election in 2006 in the Third Congressional District of Iowa.<sup>6</sup> According to publicly available information, the poll or polls asked listeners questions such as, "Do you want liberal female California Nancy Pelosi and her supporters to take total control over the US house [sic] of Representatives? Does knowing that Boswell voted for liberal Pelosi (either two or four) times make you less likely to vote for him?"<sup>7</sup>

### III. LEGAL ANALYSIS

EFF may be a "political committee" subject to the contribution limitations, source prohibitions, and reporting requirements of the Act. See 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To address

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<sup>5</sup> See Indiana Media Market Issues ID Survey. The Indiana Attorney General apparently has sued EFF over the automated calls for violating Indiana's telemarketing law. See *Indiana v. Economic Freedom Fund*, Cause No. 07C01-0609-MI-0425 (Brown Circuit Court, Ind.); see also, *Indiana Sues California Group Over Automated Calls*, ASSOCIATED PRESS, September 18, 2006. The parties, however, entered into an agreement whereby EFF agreed to refrain from making the automated calls. See Agreed Entry, *Indiana v. Economic Freedom Fund*, Cause No. 07C01-0609-MI-0425 (Brown Circuit Court, Ind.).

<sup>6</sup> See <http://klsnow.blogspot.com/2006/09/more-unethical-practices-one-maybe-two.html>.

<sup>7</sup> *Id.*

MUR 5842  
Statement of Reasons

overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("MCFL"). The Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and it interprets that test as limited to organizations whose major purpose is federal campaign activity. See Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (2007); see also FEC's Mem. in Support of Its Second Mot. for Summ. J., *Emily's List v. FEC*, Civ. No. 05-0049 at 21 (D.D.C. Oct. 9, 2007).

The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal Office." 2 U.S.C. § 431(9)(A)(i). The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Further, Commission regulations provide that funds received in response to any communication are contributions to the person making the communication "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57.

29044241163

**A. Economic Freedom Fund May Have Exceeded the Statutory Threshold for Expenditures by Spending Over \$1,000 For Communications Expressly Advocating the Election or Defeat of a Clearly Identified Candidate**

In determining whether an organization makes an expenditure, the Commission “analyzes whether expenditures for any of an organization’s communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b).” Supplemental Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007). Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” See 11 C.F.R. § 100.22(a); see also *MCFL*, 479 U.S. at 249 (“[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than “Vote for Smith” does not change its essential nature.”). Courts have held that “express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.” *FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424 U.S. at 44, n.52, included the word “support,” in addition to “vote for” or “elect,” on its list of examples of express advocacy communication).

The Commission’s regulations further provide that express advocacy includes communications containing an “electoral portion” that is “unmistakable, unambiguous,

29044241164

MUR 5842  
Statement of Reasons

and suggestive of only one meaning” and about which “reasonable minds could not differ as to whether it encourages actions to elect or defeat” a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. See 11 C.F.R. § 100.22(b). In its discussion of then-newly promulgated section 100.22, the Commission stated that “communications discussing or commenting on a candidate’s character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.” See 60 Fed. Reg. 35292, 35295 (July 6, 1995).<sup>8</sup>

While the Commission has many of EFF’s communications, it does not have access to all of the scripts for the push polls reportedly funded in Georgia, Iowa, and West Virginia. Nevertheless, the information available at this time suggests a reasonable likelihood that EFF made expenditures over \$1,000. For example, the push poll apparently funded by EFF in Indiana, *see supra* Section II, contains express advocacy under 11 C.F.R. § 100.22(a). It uses phrases or “magic words,” such as “vote” accompanied by a clearly identified candidate, Baron Hill, as set forth in section

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<sup>8</sup> In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. \_\_\_, 127 S.Ct. 2652 (2007) (*WRTL*), the U.S. Supreme Court held that “an ad is the functional equivalent of express advocacy,” and thus subject to the ban against corporate funding of electioneering communications, “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.*, 127 S.Ct. at 2667. Although 11 C.F.R. § 100.22 was not at issue in the matter, the Court’s analysis included examining whether the electioneering communication had “indicia of express advocacy” such as the “mention [of] an election, candidacy, political party, or challenger” or whether it “take[s] a position on a candidate’s character, qualifications, or fitness for office.” *Id.* The Commission subsequently incorporated the principles set forth in the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R § 114.15. See Final Rule on Electioneering Communications, 72 Fed. Reg. 72899, 72914 (Dec. 26, 2007).

MUR 5842  
Statement of Reasons

100.22(a).<sup>9</sup> It explicitly asks listeners if they are registered voters in Indiana and asks if they "intend to vote in the November 7th Election." Furthermore, it proceeds to take a position about Hill such as "Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors." The poll then asks the listener, "Does knowing this make you *less likely* to vote for Baron Hill?" (emphasis added), leading the listener and attempting to elicit a yes response. Stating the magic words in a question form does not make them any less direct. Furthermore, as Hill is the challenger in this race, there is no reason to attack his policy positions in a poll targeting registered Indiana voters other than to urge them not to vote for him.<sup>10</sup>

The push poll also appears to contain express advocacy under section 100.22(b) as it is unmistakably electoral, and reasonable minds could not differ as to whether it

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<sup>9</sup> EFF's push poll is similar to the push poll funded by Club for Growth ("CFG") in MUR 5365. In MUR 5365, the Commission determined that CFG's push poll concerning Gunner Delay contained express advocacy under 11 C.F.R. § 100.22(a). CFG's poll contained magic words such as "vote" and "election" and referred to a specific federal candidate, Gunner Delay. In addition, the poll took clear positions as to Delay, such as "Conservative Gunner Delay voted to cut taxes in four straight session of the Arkansas General Assembly" and "He is the only candidate who will oppose all tax increases," and sought to urge support for him by stating, "If you strongly support Gunner Delay's record, please say yes now." In contrast, in MUR 5860 (Friends of Conrad Burns-2006), the Commission determined that the push poll did not contain express advocacy under either sections 100.22(a) or 100.22(b). In MUR 5860, the poll asked the listener about his or her own preferences about the candidates and certain policy issues by posing questions such as "Do you intend to vote for Sen. Conrad Burns? Do you intend to vote for Jon Tester? Do you think parents should have the right to choose their child's school?" The poll then presented a hypothetical question by asking, "If you knew the following information about Jon Tester – the information implied that Jon Tester would raise taxes, including references to Tester's record that have appeared in Sen. Burns' commercials – and that Sen. Burns has never voted to increase taxes, would that change your opinion about Sen. Burns?" Unlike the polls funded by EFF and CFG, this poll compared both candidates' positions on an issue, did not take a clear position as to either candidate, and did not tell listeners which candidate to vote for or against.

<sup>10</sup> Although the Commission's express advocacy regulation was not at issue in *WRTL*, the Court's consideration of what could be regulated as an electioneering communication set forth a test that included elements similar to those used in 11 C.F.R. § 100.22(b). While the *WRTL* test is not applicable here, the push poll at issue would meet the Court's test, if the other qualifying factors were met, for regulable electioneering communications. The push poll contains, to varying degrees, the "indicia of express advocacy" discussed in *WRTL*, such as the discussion of "a candidate's character, qualifications, or fitness for office." *WRTL*, 127 S.Ct. at 2667. Further, the push poll does not direct the reader to take action to express a view on a public policy issue or urge the reader to contact public officials with respect to the issue. In sum, the push poll is susceptible of no reasonable interpretation other than as an appeal to vote for or against a particular candidate.

MUR 5842  
Statement of Reasons

encourages actions to defeat a clearly identified candidate. By explicitly asking the listener whether they are registered voters in Indiana and intend to vote in the November 7 election, the poll's electoral portion is unambiguous. In addition, the poll attacks the accomplishments of Baron Hill by making statements about policy positions while he was in office and asking the listener whether they are "less likely" to vote for Hill. Most of all, because Hill was a challenger in 2006, reasonable minds could not differ as to whether the poll urges the listener to vote against Hill as attacking the policy positions of a challenger in a poll targeting registered Indiana voters otherwise makes no sense.

Some of the mailers that EFF distributed appear to contain express advocacy under 11 C.F.R. § 100.22(b) as well. For example, one mailer attacks the leadership capabilities of Congressman John Barrow by stating that he "has been a disappointment" and is Georgia's "least effective member of Congress." The mailer further describes Barrow as being "liberal" and "not representing Georgia values" by voting for "liberal San Francisco politician Nancy Pelosi" as Speaker of the House and voting to cut funding for air travel security. Thus, the mailer, which question Barrow's character, qualifications, and lack of accomplishments, is unambiguously electoral. Further, as the mailer does not limit its content to positions that Barrow has taken on specific legislative issues but generally addresses Barrow's ineffectiveness as a Congressman and weakness as a leader, a reasonable mind could only conclude that the mailer encourages the defeat of Barrow.

The mailer attacking Jim Marshall similarly contains express advocacy under section 100.22(b). The mailer questions the character, qualifications, or

29044241167

MUR 5842  
Statement of Reasons

accomplishments of Marshall by attacking his votes on illegal immigration, aligning him with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney and declaring that he "does NOT represent Georgia values!" By attacking Marshall's fitness to represent Georgians, the mailer is candidate centered and unambiguously electoral. While the mailer discusses Marshall's votes on illegal immigration, because the mailer also proceeds to describe Marshall as "liberal" and assert that he does not represent Georgia values, a reasonable mind could only conclude that pamphlet urges the defeat of Marshall.<sup>11</sup>

Based on the content of the communications available at this time, we believe it is appropriate to investigate the extent to which EFF made expenditures over \$1,000. While the Commission has many of EFF's communications, it does not have access to scripts for the push polls reportedly funded in Georgia, Iowa, and West Virginia and does not know if the advertisements and mailers on EFF's website represent the entire universe of its communications.

B. Economic Freedom Fund's Major Purpose Appears to Have Been Federal Campaign Activity

Publicly available information suggests that the objective of EFF was to influence the 2006 federal mid-term elections. As discussed *supra* section II, EFF was formed in August 2006, only three months before the elections. It appears that EFF raised all of its funds, approximately \$5 million, and spent most of its funds, approximately \$4.8 million, during this three month period. Almost all of EFF's activities, which included broadcast advertisements, mailers, and automated telephone calls, appear to be

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<sup>11</sup> These mailers also appear to exhibit the indicia of express advocacy described in *WRTL*. Both mailers attack the leadership capabilities and question the qualifications and fitness for office of the candidates in each of the above-referenced mailers by describing John Barrow as the "least qualified member of Congress" and declaring that Jim Marshall "does NOT represent Georgia values."

MUR 5842  
Statement of Reasons

negative attack advertisements targeted at vulnerable Democratic incumbents, as reported in the press. *See supra* section II. Although EFF's response claims that it engaged in significant non-federal activities, only five of its 16 broadcast advertisements and 43 mailers concerned non-federal candidates. Since the 2006 elections, EFF has engaged in no fundraising, and its disbursements also substantially decreased.

**IV. CONCLUSION**

For all the foregoing reasons, the Commission finds reason to believe that Economic Freedom Fund violated 2 U.S.C. §§ 433, 434 and 441a(f) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, and by knowingly accepting contributions in excess of \$5,000.

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