AGENDA DOCUMENT NO. 12-63

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2012 AUG 22 PM 5: 28

FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 22, 2012

AGENDA ITEM

MEMORANDUM

For Meeting of 8/23/12

SUBMITTED LATE

TO: The Commission

FROM: Anthony Herman AH
General Counsel

Kevin Deeley KD
Acting Associate General Counsel

Amy Rothstein AR
Assistant General Counsel

Neven Stipanovic NS
Attorney

Jessica Selinkoff JS
Attorney

Allison Steinle AS
Attorney

Subject: Draft AO 2012-27 (National Defense Committee)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for August 23, 2012.

Attachment

ADVISORY OPINION 2012-27

Benjamin T. Barr, Esq. DRAFT A
Dan Backer, Esq.
Allen Dickerson, Esq.
National Defense Committee
6022 Knights Ridge Way
Alexandria, VA 22310

Dear Messrs. Barr, Backer, and Dickerson:

We are responding to your advisory opinion request on behalf of the National Defense Committee ("NDC"), concerning the application of the Federal Election Campaign Act, as amended (the "Act"), and Commission regulations to NDC's proposed plan to finance certain advertisements and ask for donations to fund its activities.

The Commission concludes that none of NDC's seven proposed advertisements expressly advocate the election or defeat of a clearly identified Federal candidate, that the Commission will not enforce and apply 11 C.F.R. § 100.22(b) until a split between judicial circuits regarding the FEC's statutory and constitutional ability to do so is resolved, that none of NDC's four proposed donation requests are solicitations under the Act, and that none of the activities described will trigger the requirement to register and be regulated as a political committee.

Background

The facts presented in this advisory opinion are based on your letter and email received on July 26, 2012.

NDC is incorporated as a non-profit social welfare organization in the Commonwealth of Virginia. It is exempt from taxation under section 501(c)(4) of the Internal Revenue Code. 26 U.S.C. 501(c)(4). NDC focuses on issues that impact war veterans, veterans' affairs, national defense, homeland security, and national security.

NDC states that it is not under the control of any candidate. NDC also states that it will not make any contributions to Federal candidates, political parties, or political committees that make contributions to Federal candidates or political parties, and is not affiliated with any group that makes contributions. NDC states that it will not make any coordinated expenditures; its bylaws prohibit its members, officers, employees, and agents from engaging in activities that could result in coordination with a Federal candidate or political party. Bylaws, art. VI, sec. 3 NDC also states that it will not accept any contributions from foreign nationals or Federal contractors.

NDC plans to run seven advertisements, which it describes as "discuss[ing] public issues relevant to upcoming Federal elections, military voting, and policy positions of candidates for federal office that relate to National Defense's core mission." NDC will run these advertisements on a variety of online and social media platforms, including but not limited to paid video placements via a commercial vendor. The advertisements, described in the response to Question 1 below, will be in video format, and will include still photos, basic animation, and voice-overs. NDC plans to spend just over $3,000 to produce and distribute these communications, of which $2,000 will be paid to a production company, and $1,000 will be used to distribute the advertisements on the Internet. The production company will be responsible for creating the video format.

NDC also plans to ask for donations from individuals through four separate donation requests, which are described in the response to Question 3 below. NDC states that it has a larger budget to fund activities that are "dissimilar" to the activities described in its advisory opinion request, but that it is "unable to provide any details" about its overall budget or its other

activities.

Questions Presented

1. *Will any of National Defense's proposed speech constitute "express advocacy" and be subject to regulation?*
2. *Will the Commission continue to apply and enforce 11 C.F.R. § 100.22(b)?*
3. *Will any of National Defense's donation communications be deemed "solicitations" and subject to regulation?*
4. *Will any of the activities described trigger the requirement to register and be regulated as a "political committee"?*

Legal Analysis and Conclusions

Question 1: Will any of National Defense's proposed speech constitute "express advocacy" and be subject to regulation?

No, for the reasons stated below, none of NDC's proposed advertisements constitute "express advocacy."

Under Commission regulations, express advocacy is defined to encompass:

> [A]ny communication that:
>
> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in 94," "vote Pro–Life" or "vote Pro–Choice" accompanied by a listing of clearly identified candidates described as Pro–Life or Pro–Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22.

Section 100.22(a) derives from the limitations enunciated by the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley* the Court held that the Federal Election Campaign Act's ("the Act's") definition of the term expenditure "raises serious problems of vagueness, [that are] particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." *Id.* at 76-77 (citations omitted). "The[se] constitutional deficiencies [vagueness and overbreadth] can be avoided only by reading [the definition of expenditure] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 43. The Court went on to explain that expenditures for communications were limited to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[1] *Id.* at 44 n.52. This construction was codified by Congress it its 1976 amendments to the Act, which defined the term "independent expenditure" to mean communications that

[1] This limitation was imposed upon both FECA's $1,000 limit on expenditures, which the Court struck down, and FECA's requirements for reporting expenditures. *Buckley*, 424 U.S. at 44-51 (striking the expenditure limit); 78-82 (upholding the expenditure reporting requirements). Thus, even outside the context of a ban or limit on speech, the Court still narrowed the scope of "expenditure."

included express advocacy, *see* 2 U.S.C. § 431(17) (1976), in order to "reflect the Court's opinion in the *Buckley* case." Federal Election Campaign Act Amendments of 1976, Report to Accompany H.R. 12406 (Report No. 94-917), 94th Cong., 2d Session, at 82 (Minority Views).[2]

The 1976 Amendments to the Act went before the Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). In *MCFL*, the Court held that the communication at issue, which was entitled "Everything You Need to Know to Vote Pro-Life," contained a detachable voter guide "to be clipped and taken to the polls to remind voters of the name of the 'pro-life' candidates" that "identified each [candidate] as either supporting or opposing what MCFL regarded as the correct position on three issues," and included the words "Vote Pro-Life" in "large bold-faced letters on the back page" contained express advocacy, reasoning that it was only "marginally less direct than 'Vote for Smith'" and "provides in effect an explicit directive: vote for these (named) candidates." *Id.* at 243, 249. According to the Court, "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons . . . Just such an exhortation appears" in the communication at issue. *Id.* at 249. By "urg[ing] voters to vote for 'pro-life' candidates" and "also identif[ying] and provid[ing] photographs of specific candidates fitting that description," the communication "goes beyond issue discussion to express electoral advocacy." *Id.* In its analysis, the Court reaffirmed *Buckley*'s limiting construction, agreeing

[2] *See also* Federal Campaign Act Amendments of 1976, Report to Accompany S. 3065 (Report No. 94-677), 94th Cong., 2d Session (Mar. 2, 1976) at 5 (Congress "define[d] 'independent expenditure' to reflect the definition of that term in the Supreme Court's decision in *Buckley v. Valeo*."); Joint Explanatory Statement of the Committee of Conference on the Federal Election Campaign Act Amendments of 1976 at 40 (Congress changed the independent expenditure reporting requirements "to conform to the independent expenditure reporting requirement . . . to the requirements of the Constitution set forth in *Buckley v. Valeo* with respect to the express advocacy of election or defeat of clearly identified candidates");; Cong. Rec. S. 6364 (May 3, 1976) (Statement of Sen. Cannon) (the 1976 Amendments were "codifying a number of the Court's interpretations of the campaign finance laws . . . .").

with the Appellee's argument that "the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates." *Id.* at 248-249.

Following *MCFL*, the Commission revised its regulations to reflect the Supreme Court's holding, explaining that the modifications to Section 100.22(a) "reworded" the prior regulation "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates" and added "a somewhat fuller list" of the examples set forth in *Buckley*. Notice 1995-10: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures ("Express Advocacy E&J"), 60 Fed. Reg. 35292, 35293, 35295 (July 6, 1995). Thus, following *MCFL*, in order to contain express advocacy under Section 100.22(a), a communication must contain either the "magic words" as enunciated by the Court in *Buckley*, or other words that are only "marginally less direct" and "provide[] in effect an explicit directive" to vote for specific, named candidates as described in *MCFL*.

As the Commission's Explanation & Justification makes clear, the language of Section 100.22(b) was intended to be an objective standard that reflected the Ninth Circuit's decision in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). *See* Express Advocacy E&J at 35295 ("[P]lease note that the subjective intent of the speaker is not a relevant consideration because *Furgatch* focuses the inquiry on the audience's reasonable interpretation of the message."). In *Furgatch*, the court held "that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an

exhortation to vote for or against a specific candidate." *Id.* at 864. According to the court in *Furgatch*:

> This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. The court went on to emphasize that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements." *Id.*

Factually, *Furgatch* concerned anti-Carter newspaper ads that ran about a week before the 1980 election. *Id.* at 858. It made a number of specific references to the upcoming election and the election process, such as "The President of the United States continues degrading the electoral process" and "He [the President] continues to cultivate the fears, not the hopes, of the voting public," and specifically mentioned current and former opponents of the President (*e.g.*, "his running mate outrageously suggested Ted Kennedy was unpatriotic"; "the President himself accused Ronald Reagan of being unpatriotic"). *Id.* Finally, the communication concluded: "If he [Carter] succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT!" *Id.* For the Court, the words "'don't let him' . . . are simple and direct. 'Don't let him' is a command . . . . the only way not to let him do it was to give the election to someone else." *Id* at

1 864-865. According to the Ninth Circuit, this language constituted a clear plea to vote against a
2 specific candidate, and thus was express advocacy.[3]

3 As previously noted, following *MCFL*, the Commission reworded its express advocacy
4 regulations "to provide further guidance on what types of communications constitute express
5 advocacy." Express Advocacy E&J at 35293. As part of this process, the Commission adopted
6 Section 100.22(b), which was designed in part to "incorporate more of the *Furgatch*
7 interpretation [of preexisting express advocacy regulations] by emphasizing that the electoral
8 portion of the communication must be unmistakable, unambiguous and suggestive of only one
9 meaning, and reasonable minds could not differ as to whether it encourages election or defeat of
10 candidates or some other type of non-election action." *Id.* at 35295. In keeping with this
11 understanding, the Commission went on to explain that "the subjective intent of the speaker is
12 not a relevant consideration because *Furgatch* focuses the inquiry on the audience's reasonable
13 interpretation of the message." *Id.* In assessing what interpretation is reasonable, "the timing of
14 the communication would be considered on a case-by-case basis," while "commenting on a
15 candidate's character, qualifications, or accomplishments [is] considered express advocacy . . . if
16 in context, they have no other reasonable meaning than to encourage actions to elect or defeat the
17 candidate in question." *Id.* In keeping with the Court's approach in *Buckley*, *MCFL*, and
18 *Furgatch*, Section 100.22(b) "do[es] not affect pure issue advocacy, such as attempts to create
19 support for specific legislation, or purely educational messages." *Id.*

20 In a different context, the context of electioneering communications,[4] the Court cautioned
21 the Commission that the proper standard for evaluating political speech "must eschew 'the open-

[3] A clear plea for action was central to the Court's holding in *Furgatch*. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("*Furgatch* . . . presumed express advocacy must contain some explicit *words* of advocacy") (emphasis added).

ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'" *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) ("*WRTL*") (*quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)). The Court reinforced this message in *Citizens United v. FEC*, 130 S. Ct. 876, 889 (2010), cautioning that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." In order to remain faithful to the court's holding in *Furgatch*, and avoid the constitutional deficiencies identified by the Court in *WRTL* and *Citizens United*, the express advocacy test at Section 100.22(b) must be construed narrowly, in a manner that focuses on objective and unambiguous criteria and eschews subjective intent or amorphous contextual circumstances. Accordingly, "[t]o come within the reach of Section 100.22(b), a communication must contain an 'electoral portion' that is 'unmistakable, unambiguous, and suggestive of only one meaning,' and '[r]easonable minds could not differ' as to whether that one meaning 'encourages actions to elect or defeat' a clearly identified candidate." Advisory Opinion 2012-11 (Free Speech), Statement of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 1 n.1.

The courts have had several opportunities to evaluate the FEC's application of its express advocacy regulations, and their rulings are informative regarding language that is sufficient, and that which is insufficient. In *FEC v. Survival Education Fund, Inc*, 1994 WL 9658 at *2 (S.D.N.Y. 1994) (unreported), *aff'd in part, rev'd in part*, 65 F.3d 285 (2d Cir. 1995), the district

[4] An "electioneering communication" is (1) any broadcast, cable or satellite communication, (2) which refers to a clearly identified Federal candidate, (3) made within 60 days before a general, special, or runoff election, or 30 days before a primary or preference election, convention, or caucus for the office sought by the candidate, and (4) targeted to the relevant electorate. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29.

court concluded that a mailer which included a two-page letter criticizing the Reagan administration's policies in Central America, provided an "Anti-War Ballot" that listed a check-box next to the word "no" and several purported administration policies, and requested "your NO vote for President Reagan" "was undeniably hostile to President Reagan and to activities his Administration was allegedly carrying out . . . [but] did not expressly advocate voting against President Reagan." Similarly, in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 57 (D.D.C. 1999), the district court for the District of Columbia applied the Ninth Circuit's test in *Furgatch* and rejected the FEC's assertion that a mailer that stated "the 1994 elections for Congress . . . will give Americans their first opportunity to deliver their verdict on the Clinton Presidency. If America's 40 million eligible Christian voters are going to make our voices heard in the elections this November . . . we must stand together, we must get organized, and we must start now" and one that stated "America's 40 MILLION Christian voters have the potential to make sweeping changes in our government . . . IF Christians get to the ballot box and IF Christians have accurate information about how their elected representatives are voting" and that the mailer was intended to give Christians a "chance to make the politicians in Washington feel the power of the Christian vote" was express advocacy. The court in *Christian Coalition* also concluded that a "Congressional Scorecard" that listed how federal office holders voted on several issues, indicated the organization's preferred position on those issues, provided an overall score measuring that Congressman's level of agreement with the Christian Coalition, and stated that it was "designed to give Christian voters the facts they need to hold their Congressmen accountable" was not express advocacy. *Id.* at 57-58.

In addition, the Court has provided some insight into the contours of express advocacy in its electioneering communications cases. Under the Act, communications containing express advocacy are explicitly exempted from the definition of electioneering communications. 2 U.S.C. § 434(f)(3)(B)(ii) ("The term 'electioneering communication' does not include . . . a communication which constitutes an expenditure or independent expenditure under this Act."); *see also* 11 C.F.R. § 100.29(c)(3). In *McConnell v. FEC*, 540 U.S. 93, 206 (2003), the Court held that advertisements satisfying the statutory requirements of 2 U.S.C. § 434(f)(3) and containing the "functional equivalent of express advocacy" could be regulated as electioneering communications. *See also WRTL*, 551 U.S. at 469-470 (defining the "functional equivalent of express advocacy" by holding that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."). Thus, a communication containing the "functional equivalent of express advocacy" is an electioneering communication, and, per the Act, does not contain express advocacy.

In *McConnell*, the Court cited to an advertisement that claimed a candidate "took a swing at his wife," is "a convicted felon," "failed to make his own child support payments," "voted against child support enforcement," and ended with the tagline "Call Bill Yellowtail. Tell him to support family values" for the proposition that advertisements that did not constitute express advocacy could be intended to influence elections, clearly reflecting the Court's view that the so-called "Bill Yellowtail" advertisement did not contain express advocacy. *McConnell*, 540 U.S. at 193 n.78; *see also* MUR 4568 (Triad Management Services, Inc), General Counsel's Brief at 66 (stipulating that the Bill Yellowtail advertisement, among others, "did not contain express

advocacy"). Similarly, in *Citizens United*, the Court described "Hillary – The Movie" as "in essence . . . a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President" by "concentat[ing] on her alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President[,] . . . call[ing] Senator Clinton 'Machiavellian,' . . . ask[ing] whether she is 'the most qualified to hit the ground running if elected President,' . . . remind[ing] viewers that 'Americans have never been keen on dynasties' and that 'a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House," and closing with the line "[f]inally, before Americans decide on our next president, voters should need no reminders of . . . what's at stake – the well being and prosperity of our nation." *Citizens United*, 130 S. Ct. at 890. Even though "the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency," the Court found that it "qualifie[d] as the functional equivalent of express advocacy" -- not express advocacy. *Id.*

***

A. Let's Make History

> America needs a strong military capable of meeting the threats of tomorrow. But Nydia Velazquez repeatedly introduced and supported bills like HR 3638 that would cut off funding for frontline troops. Rather than standing up for America, Nydia Velazquez has been one of the least effective members of Congress. This fall, let's make history by changing that. Protect our freedom. Defend our nation. Learn about HR 3638.

"Let's Make History" does not contain express advocacy. It does not contain express advocacy under Section 100.22(a) because it does not contain words or phrases such as those

identified in *Buckley* and enumerated in the text of the regulation, nor does it contain similar words or phrases that are "marginally less direct" but nevertheless "in effect an explicit directive: vote for these (named) candidates." It also does not contain express advocacy under Section 100.22(b) because it does not contain an unambiguous electoral portion, and reasonable minds could differ as to the action urged by the communication.

"Let's Make History" does not mention voting, the election, or the candidacy of the named federal officeholder. There is no language in the proposed advertisement that would explicitly inform the listener that there is an election coming up or associate the communication's message with a federal campaign. The only temporal indicator is reference to "[t]his fall." The plain text of the regulation requires that the electoral portion of a communication be "unmistakable, unambiguous, and suggestive of only one meaning." 11 C.F.R. § 100.22(b)(1). While many listeners may be aware that there is an election coming up this fall, that alone is not an electoral exhortation. *See, e.g.*, Brief of Appellees Federal Election Commission and United States Department of Justice at 41, *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) (distinguishing Section 100.22(b) from the regulation at issue in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) by noting that "[t]he express advocacy definition at issue in *Leake* was significantly more expansive and less precise than section 100.22(b), including such 'contextual factors' as 'the timing of the communication in relation to the events of the day' and 'the cost of the communication.'"). As the court in *Furgatch* explained, "context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words." *Furgatch*, 807 F.2d at 864. Thus, "Let's Make History" does not contain an unambiguous electoral portion.

Even if the communication contained an unambiguous electoral portion, it still would not satisfy the stringent requirements of Section 100.22(b); reasonable minds can differ as to whether "Let's Make History" "encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b)(2). The operative portion of the communication calls upon the listener to take four actions:

- Change the asserted fact that Nydia Velazquez is not standing up for America and is one of the least effective members of Congress;
- Protect freedom;
- Defend the nation; and
- Learn about HR 3638.

Reasonable minds may differ as to how to "Protect our freedom" and "Defend our nation." To the extent these phrases implore the listener to take any clearly delineated action, it is to undertake the other actions identified in the communication: learn about HR 3638 and change Nydia Velazquez's legislative record. By its plain terms, "learn about HR 3638" asks the listener to become informed regarding proposed legislation. This action is pure issue advocacy, and thus, clearly beyond the reach of Section 100.22(b). The last action urged—changing Nydia Velazquez's status as "one of the least effective members of Congress"—is not unambiguous. While voting Nydia Velazquez out of office may be one way to rectify the asserted problem, it is far from the *only* way. One could also call Representative Velazquez and urge her to change her position on issues such as those presented in HR 3638, protest outside her office in the hope of changing her position, or write a letter to the editor to voice disagreement with her position and encourage her to change her mind. These alternative actions illustrate ambiguity in the communication's call to action. Where there is such ambiguity, reasonable minds can clearly

differ as to what action is being urged. Thus, "Let's Make History" is beyond the reach of Section 100.22(a) and (b) and, therefore, does not contain express advocacy.

B. Ethically Challenged

> Nydia Velazquez. Ethically challenged. A key supporter of the Troubled Asset Relief Program. Calls bailed-out Wall Street greedy one day, but takes hundreds of thousands from it the next. A leader you can believe in? Call Nydia Velazquez and let's make sure we end the bailouts that bankrupt America.

"Ethically Challenged" does not contain express advocacy. It does not contain express advocacy under Section 100.22(a) because it does not contain words or phrases identical or substantially similar to those identified in *Buckley* and enumerated in the text of the regulation, nor does it contain other words or phrases that are "marginally less direct" but nevertheless "in effect an explicit directive: vote for these (named) candidates." It also does not contain express advocacy under Section 100.22(b) because it does not contain an unambiguous electoral portion, and reasonable minds could differ as to the action urged by the communication.

"Ethically Challenged" contains no explicit reference to the election, voting, or Representative Velazquez's candidacy. Thus, the communication lacks an unambiguous and unmistakable electoral portion. Further, even if there were a clear, unmistakable electoral portion, there is not an unambiguous call to electoral action. While the advertisement is critical of Representative Velazquez, the Court previously found that neither the "Bill Yellowtail" advertisement nor "Hillary -- The Movie," which were both also highly critical of their subjects, constituted express advocacy. The same is true with respect to "Ethically Challenged." Reasonable minds could conclude that the operative portion of the communication means what the plain language says: "Call Nydia Velazquez and let's make sure we end the bailouts that

bankrupt America." Calling Nydia Velazquez is "some other kind of action" distinct from acting to elect or defeat a clearly identified candidate. Thus, "Ethically Challenged" has neither an unambiguous electoral portion nor an unambiguous call to electoral action. Therefore, like the "Bill Yellowtail" advertisement and "Hillary – The Movie," "Ethically Challenged" does not contain express advocacy under either Section 100.22(a) or (b).

C. ObamaCare

> Nancy Pelosi and ObamaCare, what a pair! Even though most Americans opposed ObamaCare, Pelosi maintained her support of socialized medicine. But we can't let ObamaCare win. Our proud, patriotic voices must stand against ObamaCare and vote socialized medicine out. Support conservative voices and public servants ready to end ObamaCare's reign.

"ObamaCare" does not contain express advocacy. Although the communication does state "Support conservative voices and public servants" and "vote socialized medicine out," it does not fall within the reach of Section 100.22(a) because the action sought is policy-driven, not electoral ("end[ing] ObamaCare's reign" and voting out "socialized medicine"). This is more like the mailer in *Christian Coalition* than the mailer in *MCFL*. Specifically, in *MCFL*, the mailer labeled certain candidates "pro-life" and then urged readers to "vote pro-life," while, here, no candidate is labeled "ObamaCare" or "socialized medicine." At most, the ad notes Pelosi's "support of socialized medicine." But nowhere is she associated with the label "socialized medicine" in a manner similar to that done in *MCFL*.

Likewise, "ObamaCare" does not contain express advocacy under Section 100.22(b). "ObamaCare" does not contain an electoral portion that is "unmistakable, unambiguous, and suggestive of only one meaning," nor would all reasonable people agree that the communication urges electoral action. As noted above, while the communication includes certain words that,

when taken in isolation, have been associated with express advocacy—*e.g.*, "vote" and "support"—the text of the communication associates these words with legislative/policy issues, such as "socialized medicine" and "ObamaCare". At no point does the communication reference the election, or Minority Leader Pelosi's status as a federal candidate. When placed in the context of the full sentence, "Our proud, patriotic voices must stand against ObamaCare and vote socialized medicine out," the word "vote" does not imbue the communication with a clear, unambiguous electoral meaning. Rather, this sentence can be reasonably read urging the audience to take actions that will encourage elected officials to vote against ObamaCare (which the communication characterizes as "socialized medicine") in Congress. Similarly, the sentence "Support conservative voices and public servants ready to end ObamaCare's reign" can reasonably be understood to encourage the audience to provide moral support for those opposed to ObamaCare in elective and unelected offices, rather than act to elect or defeat specific named candidates. For these reasons, "ObamaCare" does not contain express advocacy under Section 100.22(a) or (b).

D. Military Voting Matters

> Military voting matters. That's why Nancy Pelosi is such a disappointment for service men and women. Instead of supporting express delivery of overseas military ballots, Pelosi favored sluggish postal unions. Shouldn't military voices and votes matter? Shouldn't yours? Be heard this fall.

"Military Voting Matters" does not contain express advocacy. For the reasons set forth above, references to "this fall" are not inherently and/or unambiguously electoral. Assigning electoral significance to the phrase "this fall" requires consideration of external context, which is beyond the scope of the regulation. While the communication does use the words "vote," the

internal sentence structure ties "voting" to a legislative/policy issue—namely, voting by overseas members of the armed forces—rather than casting a ballot for or against a specific named Federal candidate. Thus, "Military Voting Matters" does not contain express advocacy as defined in Section 100.22(a), and lacks the unambiguous and unmistakable electoral portion necessary for express advocacy under Section 100.22(b).

Even if "Military Voting Matters" did contain an unambiguous electoral portion, reasonable minds could differ as to the action urged. While it is conceivable that one could read the last three sentences together to mean that one should "[b]e heard this fall" by voting against Minority Leader Pelosi and others who oppose express delivery of military overseas ballots, that is not the only, or even the most apparent, interpretation of the communication. A number of other actions that do not involve the election or defeat of specific federal candidates may be undertaken to ensure one is "heard this fall," such as contacting one's representative to urge action on express delivery of overseas military ballots or writing a letter to the editor of their local paper explaining the significance of the issue to them. This analysis is not altered by the preceding sentences, stating "Shouldn't military voices and votes matter? Shouldn't yours?" While one could conceivably read "yours" to refer to "your vote," one could also reasonably read it to mean "your voice." This ambiguity indicates that reasonable minds can differ regarding the action urged by the communication. Thus, "Military Voting Matters" does not contain express advocacy.

E. Military Voting Hindered

> Our heroes on the front lines know that Obama's assault on America's military is putting their lives, the care of wounded warriors, and the GI and Veteran's benefits they were promised at risk. Is that why Obama's Justice Department and Congressional liberals refuse to stand up for military voting rights? Shouldn't

> those who dodge bullets for our freedom be free to vote their conscience and vote out those who won't keep their promises? Take a stand with us and make sure military voting is taken seriously.

"Military Voting Hindered" does not contain express advocacy. While the communication does include forms of the word "vote," it is clear that such references are to "military voting rights"—a legislative and political issue—rather than the act of electing or defeating a specific Federal candidate. There are no references to the election, or any individual's status as a candidate for federal office. No candidate is identified as failing to "keep their promises" or as one's "conscience," as occurred with the label "pro-life" in *MCFL*. Thus, "Military Voting Hindered" does not contain express advocacy as defined in Section 100.22(a), and lacks the unambiguous and unmistakable electoral portion necessary for express advocacy under Section 100.22(b).

Even if "Military Voting Hindered" contained an unambiguous electoral portion, reasonable minds could disagree as to whether the action urged is to elect or defeat a specific federal candidate or some other action. The operative portion of the communication requests that the listener "Take a stand with us and make sure military voting is taken seriously." There are many ways one could conceivably "take a stand" that do not involve taking action to elect or defeat a specific candidate, including but not limited to engaging in grassroots lobbying or facilitating a public awareness campaign. Accordingly, reasonable minds can differ as to whether the communication urges action to elect or defeat a candidate or calls for some other form of action. Thus, "Military Voting Hindered" does not contain express advocacy.

F. Stop the Liberal Agenda

> Harry Reid: Willing to put America's service men and women at risk through his risky sequestration gamble. Willing to put politics above common sense and

> protecting the men and women who defend our nation. Stop the insanity, stop sequestrations, stop Reid's twisted liberal agenda. This fall, get educated about Harry Reid, get engaged, and get active.

"Stop the Liberal Agenda" does not contain express advocacy. It does not contain express advocacy under Section 100.22(a) because it does not contain the "magic words" identified in *Buckley* and enumerated in the text of the regulation, nor does it contain other words or phrases analogous to identifying candidates that are pro-life and then instructing the listener to vote pro-life, which though "marginally less direct," is nevertheless "in effect an explicit directive: vote for these (named) candidates." It does not contain express advocacy under Section 100.22(b) because it does not contain an unambiguous electoral portion, and reasonable minds could differ as to the action urged by the communication.

"Stop the Liberal Agenda" contains no reference to the election, voting, or any candidacy for federal office.[5] Thus, the communication lacks an unambiguous and unmistakable electoral portion. While the communication does contain reference to "this fall," for the reasons outlined above, "this fall" on its own is not unambiguously or unmistakably electoral.

Even if there were an unambiguous electoral portion of the communication, reasonable minds could differ as to whether the action urged is to elect or defeat a specific candidate or some other action. The operative portion of the communication urges the listener to do three things:

- Get educated about Harry Reid;
- Get engaged; and
- Get active.

[5] In fact, Senator Reid is not up for election in 2012.

None of these unambiguously advocate the election or defeat of Majority Leader Reid. Getting educated, engaged, and active could involve a wide range of activities which do not involve voting to elect or defeat a specific federal candidate. Like the communication in "Hillary – The Movie," this advertisement does criticize the policies and judgment of a federal officeholder. The Court, however, concluded that "Hillary – The Movie" was not express advocacy. Thus, like "Hillary – The Movie," "Stop the Liberal Agenda" does not contain express advocacy either.

G. Don't Trust Harry Reid

> What kind of leader is Harry Reid? Ineffective. Ultra-liberal. Unrepresentative of Nevada values. Harry Reid voted for increasing Tricare premiums to nickel and dime America's heroes. Veterans and service men and women know better than to trust Harry Reid. This November: support new voices, support your military, support Nevada values.

"Don't Trust Harry Reid" does not contain express advocacy. While the communication contains language similar to that referenced in Section 100.22(a) and *MCFL* (*e.g.*, identifying Harry Reid as "Unrepresentive of Nevada values" and asking the audience to "support Nevada values"), the internal structure of the communication makes it clear that it does not "provide[] in effect an explicit directive" to vote for or against a named federal candidate.

The operative portion of the communication urges three actions:

- Support new voices;
- Support your military; and
- Support Nevada values.

Unlike the phrase accompanying the word "support" in the text of Section 100.22(a), these actions are not explicitly tied to a specific candidate (*compare* "Support new voices" with "support the Democratic nominee"). While in *MCFL*, the communication identified candidates as supporting or opposing pro-life views and urged the audience to "Vote Pro-life," here, the

communication only asks the audience to "support" named institutions and viewpoints. Unlike the use of the word "vote," the word support when tied to policy views rather than a specific candidate is not unambiguously electoral. "Supporting" new voices, the military, or Nevada values could involve a wide range of activities which do not involve voting to elect or defeat a specific federal candidate.

Further, as the Court in *MCFL* makes clear, in order to be considered express advocacy, a communication must be capable of being read as stating "vote for a specific named candidate." Even if the word "support" were capable of being read as a synonym for the word "vote" in this communication, it is subject to the temporal limitation "this November." This temporal limitation deprives the operative portion of the communication of a specific named candidate.[6] Majority Leader Reid is the only named candidate referenced in the communication. He was reelected to his current Senate seat in 2010 and will not stand for reelection, should he choose to do so, until 2016. Thus, it is not plausible for the communication to say in effect "defeat Harry Reid this November" because Harry Reid is not a candidate in any federal election this November. Accordingly, the operative portion of the communication does not expressly advocate the election or defeat of a clearly identified federal candidate.[7]

2. Will the Commission continue to apply and enforce 11 C.F.R. § 100.22(b)?

[6] Considering "this November" as a temporal limitation is distinct from viewing "this November" as a reference to a federal election. The former relies entirely on the text of the communication, while the later requires reference to external events.

[7] The date of Harry Reid's reelection is not an impermissible contextual factor because it is considered to establish an objective operative fact—namely, whether the communication's call to action refers to a clearly identified candidate for federal office—rather than its effect on the listener.

No, the Commission will not apply Section 100.22(b) until the current split between judicial circuits regarding the FEC's statutory and constitutional ability to do so is resolved.

In order to fully respond to NDC's Advisory Opinion request, the Commission has thus far assumed the applicability of Section 100.22(b). As alluded to in NDC's advisory opinion request, "Section 100.22(b) has had a checkered history." Advisory Opinion 2012-11 (Free Speech), Statement of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4; *see also* Advisory Opinion Request at 6 (noting the "constitutional uncertainty surrounding Section 100.22(b)"). As previously noted, Section 100.22(b) reflected the Ninth Circuit's opinion in *Furgatch*. At the time, the Commission represented to the Supreme Court that the *Furgatch* decision "raises no significant issues of statutory construction or constitutional law that have not been dealt with by this Court before." Brief for Respondent in Opposition at 6, *Furgatch v. FEC*, 484 U.S. 850 (1987). Subsequently, several courts disagreed with this characterization and found Section 100.22(b) to be unenforceable on both constitutional and statutory grounds. *See Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) ("*MRLC*") ("conclude[ing] that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (per curiam), *cert. denied*, 522 U.S. 810 (1997); *FEC v. Christian Action Network*, 894 F. Supp. 946, 958 (W.D. Va. 1995) (concluding that the FEC's approach to express advocacy wrongly expanded the definition beyond that enunciated by the Court in *Buckley* and was "based on a misreading of the Ninth Circuit's decision in *Furgatch*"), *aff'd*, 92 F.3d 1178 (4th Cir. 1996) (unpublished); *Va. Soc. For Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) ("*VSHL*") (holding that

Section 100.22(b) "violates the First Amendment"); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 253-254 (S.D.N.Y. 1998) (finding that 100.22(b) is beyond the statute). In response to several of these rulings, the Commission publicly declared that it would not enforce Section 100.22(b) in circuits where the Court of Appeals had declared it unenforceable, specifically, in the First and Fourth Circuit. *See VSHL*, 263 F.3d at 382 ("[T]he FEC voted 6-0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has *in effect* been found invalid' by the Fourth Circuit.") (emphasis in the original).

In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002, colloquially known as McCain-Feingold. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 (Mar. 27, 2002). The first version of this legislation introduced by Senators McCain and Feingold in 1997 sought to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.'" *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997). These early versions of the legislation "proposed to address electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office," Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

Ultimately McCain-Feingold's sponsors abandoned their efforts to redefine the term "expenditure" and proposed the regulation of "electioneering communications" "in contrast to earlier provisions of the . . . bill." *See* Brief of Defendants at 50-51, *McConnell v. FEC*, 251 F.

Supp. 2d 176 (D.D.C. 2003). In part to respond to concerns raised by the bill's opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between so-called "genuine" issue advocacy and a narrowly defined category of television and radio advertisements broadcast in close proximity to a federal election "that constitute the most blatant form of [unregulated] electioneering." 144 Cong. Rec. S906, S912 (Feb. 12, 1998). According to Senator Snowe, this new provision specifically did not alter prior law regarding express advocacy and specifically did not apply a "no other reasonable meaning" test of the sort found in *Furgatch* or Section 100.22(b) because it was too ambiguous and vague:

> We are concerned about being substantially too broad and too overreaching. The concern that I have is it may have a chilling effect. The idea is that people are designing ads, and they need to know with some certainty without inviting the constitutional question that we have been discussing today as to whether or not that language would affect them as whether or not they air those ads. That is why we became cautious and prudent in the Senate language that we included and did not include the *Furgatch* for that reason because it invites ambiguity and vagueness as to whether or not these ads ultimately would be aired or whether somebody would be willing to air them because they are not sure how it would be viewed in terms of being unmistakable and unambiguous. That is the concern that I have.

147 Cong. Rec. S2711 (March 22, 2001) (Statement of Sen. Snowe). *See also* 148 Cong. Rec. S2141 (March 20, 2002) (Statement of Sen. McCain) ("With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, federal election law contribution limits and disclosure requirements should apply only if the ads contain 'express advocacy.'").

This legislative history shows that Congress did not alter the construction given the Act in *Buckley* and *MCFL*. Moreover, when Congress revises a statute, its decision to leave certain

sections unchanged (as it did in McCain-Feingold) constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *See Cottage Sav. Ass'n v. Comm'r of Internal Revenue*, 499 U.S. 554, 562 (1991).

Nevertheless, subsequent court opinions relating to McCain-Feingold have been interpreted by some to resolve doubt surrounding the constitutionality of Section 100.22(b). Shortly after its enactment, several portions of McCain-Feingold were challenged in court by a number of plaintiffs, most notably Senator McConnell, including its new "electioneering communication" provisions, which plaintiffs argued were unconstitutional because they regulated, and in some cases banned,[8] political communications that did not include express advocacy as construed by the court in *Buckley* and *MCFL*. *See* Consolidated Brief for Plaintiffs in Support of Motion for Judgment at 47-53, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003). In its initial response to Senator McConnell's challenge, the FEC stated:

> It is plain to see from [*Buckley*] that the freedom claimed by plaintiffs "to spend as much as they want to promote candidate[s] and [their] view[s]" as long as they "eschew expenditures that in express terms advocate the election or defeat" of those candidates, arose from *Buckley*'s "exacting interpretation of the statutory language" in FECA necessary to avoid unconstitutional vagueness," and not as an absolute guarantee that emanates directly from the First Amendment itself.

See Opposition Brief of Defendants at 59, *McConnell v. FEC*, 540 U.S. 93 (2003). The FEC also made clear that *MCFL* imposed the *Buckley* construction on the post-*Buckley* legislative amendments:

> [A]s the Court explained [in *MCFL*], *MCFL* merely applied the same rationale relied upon in *Buckley* – namely, curing vagueness in statutory language that

[8] Corporations and labor organizations were prohibited for making electioneering communications. 2 U.S.C. § 441(b).

> defined "expenditures" in terms of a speaker's "purpose to influence an election" – and placed a "similar" express advocacy construction on FECA § 441b.

Id. at 60. Finally, the FEC was unequivocal that the First Circuit's decision in *MRLC* turned on the reach of the statute, not on constitutional abstract:

> [T]he lower courts have repeatedly and accurately described *Buckley*'s express advocacy test as a saving construction of a potentially unconstitutional statute, not itself a standard of constitutional law. . . . In *Right to Life of Dutchess Cty., Inc. v. FEC*, and *Maine Right to Life, Inc. v. FEC*, the courts rejected the FEC's regulatory definition of express advocacy insofar as it includes communications that "[w]hen taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." They based their decision on the conclusion that this definition of express advocacy "is not authorized by FECA . . . as that statute has been interpreted" by the Supreme Court.

Id. at 61-62.

One member of the three-judge panel that heard *McConnell* at the District Court level agreed. Judge Kollar-Kotelly reviewed the cases that held Section 100.22(b) unenforceable and endorsed the result in those cases – that the FEC lacked the authority to redefine a statutory test that only Congress or the Supreme Court could redefine – noting that Section 100.22(b) was "plagued with vague terms" that place the speaker at the "mercy of the subjective intent of the listener." *McConnell v. FEC*, 251 F. Supp. 2d 176, 601 (D.D.C. 2003) (Kollar-Kotelly, J., memorandum op.).

On appeal, the Supreme Court confirmed that "[t]he narrowing construction adopted in *Buckley* limited the Act's disclosure requirement to communications expressly advocating the election or defeat of particular candidates." *McConnell v. FEC*, 540 U.S. 93, 102 (2003). Agreeing with the FEC's arguments, the Court emphasized that *Buckley* was "the product of *statutory* interpretation rather than a constitutional command." *Id.* at 191-192 (emphasis added)

(noting that the Court in *MCFL* had previously "confirmed the understanding that *Buckley*'s express advocacy category was a product of statutory construction."). The Court further described *Buckley*'s limiting construction of the otherwise vague and thus overbroad statute as "strict," and noted that "the use or omission of 'magic words' . . . marked a bright *statutory* line separating 'express advocacy' from 'issue advocacy.'" *Id.* at 126 (emphasis added). As the Court explained:

> We concluded that the vagueness deficiencies could 'be avoided only by reading [the Act] as limited to communications that include explicit words of advocacy of election or defeat of a candidate. We provided examples of words of express advocacy, such as "vote for," "elect," "support," . . . "defeat," [and] "reject," and those examples eventually gave rise to what is now known as the "magic words" requirement.

Id. at 191 (internal citations omitted). The Court further observed that "advertisers [can] easily evade the line by eschewing the use of magic words." *Id.* at 193.

Turning to the challenged electioneering communications provision, the Court noted "that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 192. The Court went on to find that the electioneering communications provisions did not suffer from the same vagueness that had plagued the definition of "expenditure" and upheld the electioneering communications ban on its face "to the extent it was the functional equivalent of express advocacy." *Id.* at 206. Thus, although it upheld the constitutionality of BCRA's electioneering communications provision, *McConnell* maintained the statutory construction of "expenditure" set forth in *Buckley* and *MCFL*.[9]

[9] The Commission's Office of General Counsel has made this point in the past. *See* MUR 5634 (Sierra Club), General Counsel's Report #2 at 10 ("*McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than it did in *Buckley*.").

While, by their plain terms, neither McCain-Feingold nor the Court's opinion in *McConnell* altered the statutory language concerning express advocacy, following *McConnell*, the FEC resumed attempting to enforce Section 100.22(b). This revival was based on the perception that "[b]y stating that the express advocacy limitation was a statutory construction rather than a constitutional imperative, the Supreme Court essentially overruled past decisions invalidating section 100.22(b) on constitutional grounds," allowing Section 100.22(b) to "fill[] the gaps left by the Supreme Court" between express advocacy in *Buckley* and *MCFL* and the functional equivalent of express advocacy in electioneering communications in *McConnell*. MUR 5024R (Council for Responsible Government), General Counsel's Report #2 at 7, 8. But a number of circuit courts have held that the express advocacy requirement was not altered by *McConnell*, and remains a viable way to cure an otherwise vague statute. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) ("*NMYO*"); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRL*"); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. denied*, *Stumbo v. Anderson*, 543 U.S. 956 (2004), *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004). In *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), the Circuit Court for the District of Columbia repeatedly equated express advocacy with a so-called "magic words" requirement, providing for example that:

> In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court, invoking constitutional avoidance, construed FECA's limitation on expenditures to apply only to funding of communications that 'express[ly] . . . advocate the election or defeat of a clearly identified candidate for federal office, *i.e.*, those that contain phrases such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'" Thus, by avoiding these "magic

> words," organizations unable to make "expenditures" – such as corporations and unions – could fund so-called "issue ads" that were "functionally identical" to campaign ads and just as effective.

(citations omitted). Similarly, in *SpeechNow.org v. FEC*, 599 F.3d 686, 689, n.1 (D.C. Cir. 2010), the court upheld the requirement that SpeechNow.org register as a political committee, but made clear that the reporting regime was triggered by *Buckley*'s "magic words" standard, stating:

> "Express advocacy" is regulated more strictly by the FEC than so-called "issue ads" or other political advocacy that is not related to a specific campaign. In order to preserve the FEC's regulations from invalidation from being too vague, the Supreme Court has defined express advocacy as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.''

(citations omitted).

However, the most recent court to directly consider Section 100.22(b) was the Fourth Circuit, which reversed course in *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551 n.2 (4th Cir. 2012) ("*RTAA*") and concluded that its earlier holding in *VSHL* invalidating Section 100.22(b) on constitutional grounds "can no longer stand, in light of *McConnell* and *Federal Election Commission v. Wisconsin Right to Life*." While *RTAA* addresses prior decisions, such as *VSHL*, that invalidated Section 100.22(b) on constitutional grounds, it does not address others, such as *MRLC*, which struck down Section 100.22(b) on statutory grounds. *See, e.g. RTAA*, 681 F. 3d at 549-555 (addressing concerns that Section 100.22(b) is facially overbroad and vague).

In *MRLC*, the First Circuit held that "11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC." *MRLC*, 914 F. Supp. at 13, *aff'd per curiam*, 98 F.3d 1 (1st

Cir. 1996) ("After a careful evaluation of the parties' briefs and the record on appeal, we affirm for substantially the reasons set forth in the district court opinion."), *cert. denied*, 522 U.S. 810 (1997); *see also Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding that Section 100.22(b)'s definition of "express advocacy" is not authorized by FECA as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley*). As already noted, the legislative history of McCain-Feingold makes clear that Congress did not alter the *Buckley* and *MCFL* statutory construction of "express advocacy." During the legislative process, McCain-Feingold's sponsors considered and explicitly rejected efforts to redefine the term "expenditure" and instead proposed the "narrow[er]" regulation of "electioneering communications." Brief of Defendants at 50-51, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003). (*quoting* 144 Cong. Rec. S906, S912 (Feb. 24, 1998)). Further, the Court's decision in *McConnell* repeatedly emphasized that the "magic words" requirement in *Buckley* was "the product of statutory interpretation rather than a constitutional command," characterizing *Buckley* and *MCFL* as drawing a "bright" line that marked "an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell*, 540 U.S. at 126, 190. Neither McCain-Feingold nor *McConnell* altered the statutory framework surrounding express advocacy.[10] Thus, the First Circuit's opinion in *MRLC* remains good law.

[10] *WRTL* confirms this reading of McConnell. There, a number of Justices made clear that express advocacy still meant express words of advocacy. For example, in his concurring opinion, Justice Scalia wrote "[i]f a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." *WRTL*, 551 U.S. at 495 (Scalia, J. concurring in part and concurring the judgment). Writing in response to Justice Scalia, Chief Justice Roberts agreed with his premise that *Buckley* established a bright line magic words test, but instead explained that his appeal to vote test is not in conflict with *Buckley*, differentiating it based on the idea that the appeal to vote test serves a different purpose than the express advocacy test, and that *Buckley*'s so-called magic words requirement was a product of statutory construction, not a constitutional limit on regulation. *Id.* at 474, n.7. Justice Souter, writing in dissent, also characterized the express advocacy test as a magic words standard, acknowledging that the Court in *MCFL*

The result is a split between judicial circuits based upon how they have analyzed Section 100.22(b). Some, such as the Fourth Circuit in its opinion in *RTAA*, have focused solely on the constitutional elements in light of *McConnell* and *WRTL* and, thus, have found Section 100.22(b) to be within the government's authority under the Constitution, while those that have analyzed the Commission's statutory power to promulgate Section 100.22(b), such as the First Circuit in *MRLC*, have found it to be beyond the Commission's statutory authority. The statutory grounds upon which cases like *MRLC* are based are unrelated to the constitutional grounds upon which *RTAA* is predicated, and serve as an independent and adequate basis for precluding the application of Section 100.22(b). In light of the split between the judicial circuits – exemplified by the differing approaches taken by the First and the Fourth Circuits – on the underlying question of the enforceability of Section 100.22(b), any attempt by the Commission to enforce Section 100.22(b) at this time would necessarily enmesh the Commission in the "serious statutory and constitutional questions" raised by intercircuit nonacquiescence. *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091 (D.C. Cir. 1992).

"held that the prohibition [on corporate and union expenditures] applied 'only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office'" and that "'express terms,' in turn, meant what had already become known as 'magic words,' such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 513 (internal citation omitted) (Souter, J. dissenting). The Colorado Supreme Court subsequently examined the effect of *McConnell* and *WRTL* on the meaning of the term "expenditure" in the Act and concluded that:

> In McConnell, the Court rejected a facial challenge to the recently enacted [BCRA] application to "electioneering communications." . . . Importantly, however, the Court recognized that speech that is the functional equivalent of express advocacy is different from express advocacy, which is narrowly defined as speech containing the "magic words."

Colorado Ethics Watch v. Senate Majority Fund, LLC, 269 P.3d 1248, 1257 (Colo. 2012).

Intercircuit nonacquiescence is the obverse of the general rule that a decision of a circuit court of appeals is not binding on a sister court. *See, e.g.*, *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002). While this rule has been applied by the Commission in the past in declining to enforce Section 100.22(b) in the First and Fourth Circuits after adverse decisions in those jurisdictions, it is not absolute. In fact, if a circuit court has found unlawful "a rule of broad applicability," the usual result "is that the rule is invalidated, not simply that the court forbids its application to a particular individual." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting, but expressing the view of all justices on this question); *see also Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed.").

It appears that the Commission has only applied the doctrine of intercircuit nonacquiescence to this regulation. By contrast, in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I*"), after the district court struck down a regulation excluding internet communications from the definition of "public communications," rather than engage in nonacquiescence the Commission revised its regulations. When the Court of Appeals for the District of Columbia struck down five Commission regulations in *EMILY's List v. FEC*, rather than engage in nonacquiescence, the Commission excised the regulations at issue. Similarly, after *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *Carey v. FEC*, 2011 WL 2322964 (D.D.C. 2011), and *Van Hollen v. FEC*, -- F.Supp. 2d --, 2012 WL

1066717 (D.D.C. 2012),[11] the Commission applied a decision regarding its regulations nationwide, rather than merely in the D.C. Circuit. It is unclear why Section 100.22(b), unlike all other Commission regulations, deserves special protection.

Moreover, the legal difficulties associated with intercircuit nonacquiescence are compounded by the practical problems inherent in grafting such an approach onto communications that utilize modern media practices. When seeking to disseminate broadcast communications, advertisers generally buy time in designated media markets, which are not determined by reference to the contours of federal judicial circuits. The prominence of national media, including paid internet communications, has accelerated this trend of communications reaching across jurisdictional boundaries. People and groups are turning to mediums such as the internet with the use of Facebook and Google advertisements, as well as national cable media buys to reach larger audiences with their messages. These media provide a low cost, effective way for groups to reach national audiences. Because of these trends, it is entirely conceivable that an advertisement aimed at voters in one jurisdiction will be viewed in another. The Court has made clear, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 130 S. Ct. at 889. Yet, these are precisely the steps a would-be speaker would need to undertake to

[11] This case remains on appeal before the Court of Appeals for the District of Columbia (D.C. Cir. Nos. 12-5117, 12-5118), although the FEC is not a party to that action. Pending the outcome of this appeal, the Commission has issued a statement indicating that it will give the District Court's opinion nationwide effect by removing limitations on donor disclosures adopted by the Commission in 2007 and struck down by the court in *Van Hollen*. *See* Statement on *Van Hollen v. FEC*, FEC, Jul. 27, 2012, *available at* http://www.fec.gov/press/press2012/20120727_VanHollen_v_FEC.shtml.

ensure compliance with the law were the Commission to advance a policy of intercircuit nonaquiescence. Applying Section 100.22(b) in some circuits but not others would subject nationally broadcast political advertisements to inconsistent regulatory standards.[12]

In *WRTL*, the Court held that the First Amendment necessitates "giv[ing] the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U.S. at 469. Based upon the divergence between courts on this issue, there is legitimate doubt regarding the validity of Section 100.22(b). Until this doubt is resolved, it is more consistent with the Court's holding to decline to enforce Section 100.22(b) in jurisdictions where it has been held valid, than to punish speakers where the court has ruled such enforcement to be beyond the FEC's authority. Therefore, the Commission will not enforce Section 100.22(b) pending resolution of this issue.

3. Will any of National Defense's donation communications be deemed "solicitations" and subject to regulation?

No, none of NDC's donation communications will be considered solicitations and subject to regulation.

[12] The problem of inconsistent regulatory standards would be exacerbated by reporting requirements. The Court in *RTAA* upheld Section 100.22(b) largely on the grounds that "[t]he language of § 100.22(b) is consistent with the test for the 'functional equivalent of express advocacy' that was adopted in *Wisconsin Right to Life*." *RTAA*, 681 F.3d at 552. The functional equivalent of express advocacy test was adopted by the Court in *WRTL* to assess electioneering communications. *See WRTL* 551 U.S. at 469-470. Thus, assuming it satisfied the other statutory requirements for an electioneering communication (*e.g.*, is a broadcast, cable, or satellite communication that references a clearly identified candidate for federal office and is aired within 60 days of a general or 30 days of a primary election, 2 U.S.C. § 434(f)(3)(A)), the same communication that is an independent expenditure in the Fourth Circuit would be an electioneering communication in the First Circuit. This result would clearly contradict the plain language of the Act in exempting independent expenditures from the definition of electioneering communications. 2 U.S.C. § 434(f)(B)(ii).

The Act defines the term "contributions" 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); *see also* 11 C.F.R. § 100.51. The Act requires "any person" who "solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising" to include a specific disclaimer in the solicitation. 2 U.S.C. § 441d(a); *see also* 11 C.F.R. § 110.11(a)(3).

In *Buckley*, the Court sought to avoid potential vagueness problems by limiting the definition of "contribution" to "contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes" in addition to "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley*, 424 U.S. at 78.

In *FEC v. Survival Education Fund, Inc*, the Second Circuit interpreted *Buckley* to mean that "disclosure is only required under § 441d(a)(3) for solicitations of contributions that are earmarked for activities or 'communications that expressly advocate the election or defeat of a clearly identified candidate.'" 65 F.3d 285, 295 (2d Cir. 1995) (*quoting Buckley*, 424 U.S. at 80). In order to avoid the "hazards of uncertainty" regarding the meaning of "earmarked for political purposes," the Second Circuit interpreted the phrase to include only donations "that will be converted to expenditures subject to regulation under FECA" so that "*Buckley*'s definition of independent expenditures that are properly within the purview of FECA provides a

limiting principle for the definition of contributions in § 431(8)(A)(i), as applied to groups acting independently of any candidate or his agents and which are not 'political committees' under FECA." *Id.* The court further clarified that a request for funds is a solicitation if it "leaves no doubt that the funds contributed would be used to advocate [a candidate's election] or defeat at the polls, not simply to criticize his policies during the election year." *Id.* Thus, "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of § 441d(a) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id.*

Survival Education Fund's holding served as the basis for a Commission regulation, no longer extant, that stated "[a] gift, subscription, loan, advance, or deposit of money or anything of value made in response to any communication is a contribution to the person making the communication if the communication indicated 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(a) (repealed 2010). This provision was struck down in *EMILY's List v. FEC*, 581 F.3d 19 (D.C. Cir. 2009). Importantly, *Survival Education Fund* was a disclosure case – it did not hold that money received from a solicitation would become contributions merely based on their receipt. Rather, the money received only becomes a contribution when it is used for expenditures. *Survival Education Fund*, 65 F.3d at 295. Therefore, while *Survival Education Fund* may be relied upon to determine whether requests for money are solicitations under the Act, its holding does not support the proposition that all money received in close proximity to a

solicitation may be deemed contributions. Thus, money received by NDC in response to or at a time proximate to the dissemination of a solicitation does not become a contribution, potentially triggering political committee statutes, unless NDC coverts the money into expenditures.

If NDC were to disseminate a solicitation indicating that a portion of the funds received in response will be used to advocate the election or defeat of a Federal candidate and if some of those funds are actually converted into expenditures, it would not necessarily mean that *all* funds raised in response to the request would be "contributions" subject to the limitations, prohibitions, reporting obligations of the Act. The Commission lacks the statutory authority to make such a presumption. *See EMILY's List*, 581 F.3d at 21 (holding that the statute does not permit the FEC to "treat as hard-money 'contributions' all funds given in response to solicitations indicating that 'any portion' of the funds received will be used to support or oppose the election of a federal candidate . . . [t]he statutory defect in the rule is that, depending on the particular solicitation at issue, it requires covered non-profits to treat as hard money certain donations that are not actually made 'for the purpose of influencing' federal elections."); *see also Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13223 (2010).[13] Again, only the funds converted into expenditures would be considered contributions.

While the Commission's reliance on *Survival Education Fund*'s holding regarding allocation was invalidated by *EMILY's List*, *Survival Education Fund* still

[13] All prior Commission matters that relied upon such a theory were invalidated by *EMILY's List*, and abandoned by the Commission when it removed Section 100.57 from its regulations, and chose to give *EMILY's List* nationwide effect.

exemplifies the type of language sufficient to qualify as a solicitation. In *Survival Education Fund*, the court found that material that included numerous electoral statements such as "Vote Peace in '84," allusions to the consequences of the 1984 presidential election such as "Americans who will be voting in November need to know the facts about how four more years of Reagan leadership will affect our nation and the world," and clearly expressed the group's intention to use the money received to "help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies *must* be stopped," *Survival Education Fund*, 65 F.3d at 288-289 (emphasis in the original), left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." *Id.* at 295. Overall, this material was overwhelmingly electoral and made it clear that funds raised in response to the donation request would be used to contact voters in order to defeat a specific named federal candidate.

***

A. Military Voices and Votes Must be Heard

> Our heroes on the front lines know that Obama's assault on America's military is putting their lives, the care of wounded warriors, and the GI and Veterans benefits they were promised at risk. Is that why Obama's Justice Department & Congressional liberals refuse to stand up for military voting rights? Help those who dodge bullets for our freedom vote their conscience. Support their right to vote out Obama – donate to National Defense so we can stand up for military voting rights this fall.

"Military Voices and Votes Must be Heard" is not a solicitation for purposes of the Act. The language in this donation request is not overwhelmingly electoral, nor is it

as direct as the language found in *Survival Education Fund*. The donation request indicates that funds received will be used to "stand up for military voting rights this fall." "Military voting rights" are legislative and policy issues. While the request does indicate that donations will be used to "Support their *right* to vote out Obama" (emphasis added), the right to do something is distinct from actually doing it. Thus, supporting the *right* to vote against President Obama is distinct from urging voters to *vote* against President Obama. On its face, "Military Voices and Votes Must be Heard" indicates that funds will be used to support NDC's preferred positions on the subject of military voting rights and does not clearly indicate that donations received will be used to advocate for the election or defeat of a clearly identified federal candidate. Accordingly, it is not a solicitation within the meaning the Act.

B. America the Proud?

> It used to be that America was a nation we could be proud of. But today, an ultra-liberal Congress repeatedly ignores the value of our military. Military voting, ignored. Protecting military benefits, disregarded. Veterans, left out in the cold. And the Commander in Chief makes sure liberals will win this fall, while crippling the military. Let's put an end to this nonsense. Donate to National Defense Committee today and let's roll back the Commander in Chief's liberal agenda.

"America the Proud" is not a solicitation for purposes of the Act. The donation request indicates that funds will be spent to "roll back the Commander in Chief's liberal agenda" and states "Let's put an end to this nonsense." Based upon the language of the communication, the "nonsense" which the request seeks funds to end is the Commander in Chief's "liberal agenda," specifically his policies on military voting and military benefits. This language is qualitatively different from that cited by the court in *Survival*

Education Fund, which included phrases such as "Vote Peace in '84" and "your special election year contribution will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped." While electoral action may be one means of rolling back a "liberal agenda," it is far from the only means of doing so. Advocacy directed specifically towards these policies is issue advocacy, and is, by definition, not express advocacy. Thus, "America the Proud" lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office" and, thus, is not a solicitation under the Act. *Survival Education Fund*, 65 F.3d at 295.

C. Strategic Stupidity

> Crippling America's military through sequestration is a strategic failure – and Senate Democrats have supported this insanity! With your donation, we can speak out against the liberal dream of ending American Exceptionalism and decimating America's military. We can stop the Democrats' madness. Help send a message to misguided Senators like Jon Tester. Support National Defense, and let's retire these failed policies.

"Strategic Stupidity" is not a solicitation for purposes of the Act. There is no inherently electoral content in this request. While Senator Tester is mentioned by name, he is not identified as a federal candidate. There is no mention of an election or voting. Rather, the donation request clearly indicates how the funds requested will be spent: "speak[ing] out against the liberal dream of ending American Exceptionalism and decimating America's military," policies that the advertisement claims Democratic Senators such as Jon Tester support. The emphasis on issue advocacy, instead of electioneering, is reinforced by the closing line of the donation request: "let's retire these

failed *policies*" (emphasis added). Like "America the Proud?," "Strategic Stupidity" is not electoral and lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Survival Education Fund*, 65 F.3d at 295. Thus, it is not a solicitation under the Act.

D. Fighting Back

> Supporters of traditional constitutional values have celebrated our courts' defense of freedom, and planned how to make the most effective use of your support this fall. Your donation to National Defense will beat back the liberal Obama agenda and bring about real change in Washington. Help America fight back in print, on the air, and against liberal deep pockets. Stand together. Get organized. Start now.

"Fighting Back" is not a solicitation for purposes of the Act. Like "Strategic Stupidity," there is no electoral content in this request–there is no reference to the election, or voting. While President Obama is mentioned by name, he is not identified as a federal candidate. Rather, the donation request indicates that funds raised will be used to "beat back the liberal Obama agenda and bring real change in Washington." Like with "America the Proud?," advocacy specifically directed towards policies the request associates with "the liberal Obama agenda" is issue advocacy and is, by definition, not express advocacy. Thus, "Fighting Back" lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office," and, consequently, is not a solicitation under the Act. *Survival Education Fund*, 65 F.3d at 295.

4. Will any of the activities described trigger the requirement to register and be regulated as a "political committee"?

No, none of the activities described in the advisory opinion request will trigger requirements for NDC to register and report as a political committee.

Under the Act, the term "political committee" means "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. The designation of "political committee" is significant because "PACs are burdensome alternatives" that are "expensive to administer and subject to extensive regulations:"

> For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organizational statement and report changes to this information within 10 days. . . . And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:
>
> "These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed over 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation."

Citizens United v. FEC, 130 S. Ct. 876, 897 (2010) (*quoting McConnell*, 540 U.S. at 331-332) (citations omitted).

In response to concerns that the broad definition of "political committee" in the Act "could be interpreted to reach groups engaged purely in issue discussion," the Court in *Buckley* held that "[t]o fulfill the purposes of the Act, [the term political committee]

need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.[14] *See also* Notice 2007-3: Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("the Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose 'major purpose' is the nomination or election of a Federal candidate can be considered 'political committees' under the Act." (*citing Buckley*, 424 U.S. at 79)). This major purpose test has not been formalized through legislation or rulemaking. *See* Notice 2007-3: Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("Congress has not materially amended the definition of 'political committee' since the enactment of section 431(4)(A) in 1971, nor has Congress at any time since required the Commission to adopt or amend its regulations in this area."); *Shays v. FEC*, 511 F. Supp. 2d 19, 23 (D.D.C. 2007) ("*Shays II*") ("This 'major purpose' test has never been codified in a regulation, but is applied by the FEC in its enforcement actions against individual organizations."). Rather, "since its enactment in 1971, the determination of political committee status has taken place on a case-by-case basis." Notice 2007-3: Political Committee Status, 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007). This has led to divergent understandings of what is sufficient to satisfy the major purpose test.

[14] Some courts have held that the *Buckley* major purpose test was the product of statutory interpretation, *see National Organization for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir. 2011), *cert. denied* (Feb. 27, 2012); *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), *cert. denied* (Feb. 22, 2011), and thus would constitute the end-point of the Commission's statutory authority. *See* Notice 2007-3: Political Committee Status, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) ("The major purpose doctrine did not supplant the statutory 'contribution' and 'expenditure' triggers for political committee status, rather it operates to *limit the reach of the statute* in certain circumstances.") (emphasis added).

In *MCFL*, the Court reaffirmed the major purpose test when it determined that a nonprofit corporation's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *MCFL*, 479 U.S. at 252 n.6. The Court noted that "[a]ll unincorporated organizations whose major purpose is not campaign activity, but who occasionally make independent expenditures on behalf of candidates, are subject only to these [independent expenditure reporting] regulations." *Id.* at 252-253.[15]

Subsequent courts, in reviewing state laws governing political committees, have set forth similar fact-based tests to determine a group's major purpose. In *NMYO*, the Tenth Circuit articulated the resulting test as follows: "There are two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *NMYO*, 611 F.3d at 678. Under this test, if either prong is satisfied, then the organization's major purpose is the election or nomination of a candidate.[16]

At the Federal level, the nature and scope of the major purpose test was further examined in *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-236 (D.D.C. 2005) and *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996). In those cases, district courts

[15] The phrase "engages in activities on behalf of political candidates" seems to have been used interchangeably with the term "independent expenditures." *Compare MCFL*, 479 at 252-253 with *id.* at 252 n.6.

[16] The political committee statuses and regulations at issue in *NMYO* required disclosure, which the court contrasted with statutes that limit or prohibit speech. Thus, the court undertook an "exacting scrutiny" analysis of those statutes and regulations. *NMYO*, 611 F.3d at 677 (*citing Buckley* and *Doe v. Reed*, 130 S. Ct. 2811 (2010)).

examined the public and non-public statements, as well as the spending and contributions, by particular groups. The Fourth Circuit similarly held in *NCRL* that:

> While '*the* major purpose' of an organization may be open to interpretation, it provides potentially regulated entities with sufficient direction to determine if they will be designated as a political committee. Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under 'fair warning' that it may fall within the ambit of *Buckley*'s test.

NCRL, 525 F.3d at 289. More recently, the court in *RTAA* cited to a narrow understanding of the major purpose test, noting that "[t]he expenditure or contribution threshold means that some groups whose 'major purpose' was *indisputably the nomination or election of federal candidates* would not be designated PACs." *RTAA*, 681 F.3d at 558 (emphasis added); *see also Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011), *aff'd*, *Real Truth About Abortion, Inc. v. FEC*, 681 F3d 541 (4th Cir. 2012) ("The Commission is not charged with deciding whether the election or defeat of a candidate is *one of* an organization's major purposes. Isolating one or two factors would, by the very nature of the inquiry, make it impossible to determine whether the organization as a whole, operated with *the* major purpose of electing or defeating a candidate.") (emphasis in the original); *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010) (limiting the definition of political committee to organizations which supported or opposed the nomination or election of a clearly identified federal candidate).

Though the Commission has been reluctant to establish a rule or a specific set of factors to be applied when making a major purpose determination, in the 2007 Political Committee Status Supplemental E&J, it did endorse reviewing the same type of

information that courts had already utilized in their own major purpose analyses. This approach was also upheld by the Fourth Circuit in *RTAA*, which concluded that "[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others." *RTAA*, 681 F.3d at 556 (emphasis in the original). While they are not the *only* factors that may be considered, assessing a group's central organizational purpose by examining an organization's public and non-public statements, like those reviewed by district courts in *Malenick* and *GOPAC*, and comparing a group's spending on campaign activities with its spending on activities unrelated to the election or defeat of a specific candidate to assess whether a group's "independent spending [has] become so extensive that the organization's major purpose may be regarded as campaign activity," *MCFL*, 479 U.S. at 262, "may be particularly relevant." *RTAA*, 681 F.3d at 557.

A. Central Organizational Purpose

To determine a group's purpose, courts have relied primarily on the materials created and utilized by that group. In *Malenick*, the court reviewed the group's announced goals, brochures, fundraising letters, and express advocacy communications sent to its members, all of which indicated that the major purpose of the group in question was the election of Federal candidates.[17] *Malenick*, 310 F. Supp. 2d at 235. In *GOPAC*, the court predominantly reviewed

[17] The court also noted that the record contained the undisputed testimony of the group's primary donor, who stated that it "was the objective of the whole ... concept to get major donors involved so that the ideally conservative candidates could be elected." *Malenick*, 310 F. Supp. 2d at 235.

both letters sent by GOPAC and undisputed discussions that GOPAC had with one of its contributors, none of which indicated that the group's major purpose was the election or nomination of Federal candidates, but rather the election of state candidates.[18] *GOPAC*, 917 F. Supp. at 862-65.

Importantly, the court in *GOPAC* rejected reliance on certain other types of proffered evidence. First, the Commission attempted to rely on an audiotape and transcript of a meeting between two unidentified individuals as evidence that support for GOPAC was also support for a particular Federal candidate. *Id.* at 862. The court determined that, without more, "such a transcript ... probably does not constitute significantly probative material evidence upon which a trier of fact could decide for the [Commission.]" *Id.* (internal citations and quotations omitted).

Second, the Commission presented a statement from a magazine article in support of its belief that GOPAC "provid[ed] a forum for candidates to appear and solicit contributions" and, thus, made in-kind contributions to those candidates. *Id.* at 864. While also disputing the article itself, the court stated that "a magazine article is not significantly probative nor is it material evidence on which a trier of fact could reasonably find that GOPAC served as a fundraising mechanism for federal candidates." *Id.*

Thus, it appears that official statements from a group, including a group's organizing documents or statement of purpose, or other materials put forth under the group's name, including fundraising documents or press releases, are to be used to determine an entity's central organizational purpose, rather than articles and other statements that do not have the imprimatur of the group in question.

[18] The court also cited to deposition testimony and GOPAC's "1989-1990 Political Strategy Campaign Plan and Budget. *GOPAC*, 917 F. Supp at 866.

B. Extensive Independent Spending on Behalf of Candidates

Reviewing an entity's organizational documents and official statements does not end the inquiry into major purpose. An examination of a group's major purpose is necessarily an after-the-fact exercise wherein the Commission must determine whether a group properly refrained from registering and reporting as a political committee. Thus, the Commission must determine whether a group's *ex ante* subjective determination of its major purpose is established *ex post* by its objectively verifiable statements and spending. Thus, in *MCFL*, the Supreme Court noted that if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." 479 U.S. at 262 (*citing Buckley*, 424 U.S. at 79).

To do so, the Commission must compare a group's spending on campaign activities—specifically, its spending on express advocacy—with its spending on activities unrelated to campaigns.[19] It is not clear the Commission can go much further and consider non-express advocacy communications run by a group that reference a candidate, regardless of time or content, to be evidence of "nomination or election of a candidate." To do so would exceed the statutory limitation imposed upon the Act in *Buckley*. *See Buckley*, 424 U.S. at 79 ("To fulfill the purposes of the Act they [the words 'political committee'] need only encompass

[19] In doing so, the time period in which the Commission looks when comparing electoral communication with the total communications of a group is also crucial. Limiting review to short time periods or time periods other than those utilized by the group in question may provide an incomplete picture of that group's major purpose. If, for example, a group is created in the middle of a calendar year or election cycle, but it intends to remain in existence after that time frame ends, refraining from looking outside that artificial time frame could cause the Commission to judge that group on a schedule other than that used by the group to determine *ex ante* its major purpose. Not surprisingly, a group concerned about federal issues would focus some of its time and spending on Federal elections in the months preceding a general Federal election. The election constitutes a point in time when many Americans are paying attention to political arguments and issues. Thus, linking issues to candidates and elections is not surprising. But if a group continues to be active past that election date, such spending is also evidence of its stated purpose.

organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.") & 80 (noting that by construing "expenditure" "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" ensures that the term only captures "spending that is unambiguously related to the campaign of a particular federal candidate.").

Congress has not altered the limitations placed upon the Act by the Court. In fact, legislative history demonstrates that electioneering communications cannot be used to determine political committee status. Senator Jeffords, one of the leading sponsors of the electioneering communication provisions, stated, that the provision "will not require such groups [such as National Right to Life Committee or the Sierra Club] to create a PAC or another separate entity." 147 Cong. Rec. S2813 (Mar. 27, 2001). [20] Thus, organizations remain free to run non-express advocacy communications without having to register and report to the FEC as a political committee.

---

[20] Sen. Jeffords explained that Congress did not intend to require groups that run electioneering communications to register as PACs:

> Now let me explain what the Snowe-Jeffords provision will not do: The Snowe-Jeffords provision will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications;
>
> It will not prohibit such groups from accepting corporate or labor funds;
>
> It will not require such groups to create a PAC or another separate entity;
>
> It will not bar or require disclosure of communications by print media, direct mail, or other non-broadcast media;
>
> It will not require the invasive disclosure of donors; and
>
> Finally, it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes.

147 Cong. Rec. S2813 (Mar. 27, 2001).

This view of the major purpose test was recently confirmed by the Tenth Circuit. As noted above, in *NMYO*, the Tenth Circuit conducted the major purpose analysis by comparing spending on express advocacy or contributions to candidates with total spending to determine whether a preponderance of the latter was spent on the former. In doing so, it relied on both *MCFL* and *Colorado Right To Life Committee, Inc .v. Coffman,* 498 F.3d 1137, 1152 (10th Cir. 2007), and held that not only was there no preponderance of spending on express advocacy; in fact, there was no indication of any spending on express advocacy at all.[21]

Likewise, the court in *GOPAC* rejected the use of a fundraising letter as evidence that the group's major purpose was the election or defeat of a candidate because, "[a]lthough [a Federal candidate] is mentioned by name, the letter does not advocate his election or defeat nor was it directed at [that candidate's] constituents. ... Instead, the letter attacks generally the Democratic Congress, of which [the candidate] was a prominent member, and the franking privilege ... and requests contributions." 917 F.Supp. at 863-64 *Malenick*, in which the court held that the major purpose test was met, only relied on express advocacy communications, rather than communications that merely mentioned a candidate. 310 F.Supp. 2d at 235 (noting the 60 fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

---

[21] Although other Circuits have articulated different versions of the major purpose test, those decisions were reviewing laws that differed significantly from the Act as construed by *Buckley*. For example, the Ninth Circuit reviewed a state statute that imposed political committee status on groups with *a* major purpose of electing or nominating a candidate. *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010). By way of comparison, the federal law looks to "the" major purpose, a distinction that the Fourth Circuit has already deemed critical. *See N.C. Right to Life v. Leake,* 525 F.3d 274 (4th Cir. 2008). *See also McKee*, 723 F. Supp.2d 245 (D. Me. 2010), *aff'd* 649 F.3d 34 (1st Cir. 2011), No. 11-599, *cert. denied* (Feb. 27, 2012) (upholding state statute, but making clear that the major purpose test of *Buckley* was a result of statutory construction). Moreover, the Commission has already publicly confirmed that major purpose is determined by a comparison of a group's campaign spending to the remainder of its spending. *See* Brief of Appellees Federal Election Commission and United States Department of Justice, *RTAO,* No. 11-1760 at 71 (4th Cir. 2011) ("As *Coffman* notes, *MCFL* 'suggested two methods to determine an organization's 'major purpose': (1) the examination of the organization's central organizational purpose; *or* (2) comparison of the organization's independent [express advocacy] spending with overall spending."). In other words, the Commission does not subdivide non-campaign spending.

Moreover, *WRTL* illustrates that merely mentioning a Federal candidate in a communication does not necessarily make them electoral in nature; in fact, the Court held that the electioneering communications at issue in *WRTL* were issue advertisements. In *WRTL*, the Court rejected the following arguments used to support the proposition that mentioning a Federal candidate in a communication running before the relevant electorate prior to an election constituted the functional equivalent of express advocacy: (1) an appeal to contact a candidate is the same as an appeal to elect or defeat that candidate; (2) mentioning a candidate in relation to an issue is a more effective type of electioneering than express advocacy; (3) the fact that the group running the communication had in the past actively opposed the candidate being referenced; (4) the group ran the advertisements at issue in close proximity to elections, rather than near actual legislative votes on issues; (5) the group ran the advertisements when the Congress was not in session; and (6) in its advertisements, the group cross-referenced a website that contained express advocacy. 551 U.S. at 470-73. Since, according to the controlling opinion in *WRTL*, none of those characteristics render a communication the functional equivalent of express advocacy, it is unclear why paying for communications containing such characteristics but no express advocacy would be relevant for determining political committee status. Otherwise, a group that runs only electioneering communications or other communications that mention a candidate but do not contain express advocacy—spending that is, by definition, not campaign related—could nevertheless become a political committee, whose spending is, as *Buckley* notes, "by definition, campaign related," merely by spending $1,001 to distribute an independent expenditure or receiving $1,001 in contributions. Thus, using such communications to determine a group's major purpose could result in the Commission doing

exactly what *Buckley* warned against – interpreting the definition of "political committee" "to reach groups engaged purely in issue discussion." *WRTL*, 424 U.S. at 79.

And while *Buckley* did not construe "expenditure" to mean "express advocacy" when a group was already a political committee, it does not follow that the "express advocacy" construction was not, or should not be, part of the major purpose test in order to determine whether a group was a political committee. In *Buckley*, the Court was concerned that a group would qualify as a political committee simply because it made $1,001 worth of expenditures or contributions. Therefore, it held that only those groups whose major purpose was the nomination or election of a Federal candidate qualified as a political committee. While the Court did state that political committees "fall within the core area sought to be addressed by Congress," it approved the "major purpose" limitation because groups engaged in issue advocacy did not fall into that same core area. *Buckley*, 424 U.S. at 79. And the "major purpose" test is designed to ensure that issue groups would not be considered political committees. Thus, in light of the reasoning underlying the narrowing of "expenditure," it does not appear the Commission may consider more than express advocacy communications when examining a group's spending as part of a major purpose analysis.

***

As the Commission has stated, "determining political committee status under FECA, as modified by the Supreme Court, requires an analysis of both (1) an organization's specific conduct – whether it received $1,000 in contributions or made $1,000 in expenditures – as well as (2) its overall conduct – whether its major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)."

Notice 2007-3: Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). Accordingly, "[t]he major purpose doctrine did not supplant the statutory 'contribution' and 'expenditure' triggers for political committee status, rather it operates to limit the reach of the statute in certain circumstances." *Id.* at 5602. In the context of the statutory definition of political committee, "[t]he Supreme Court held, when applied to communications made independently of a candidate or candidate's committee, the term 'expenditure' includes only 'expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.'" *Id.* (*quoting Buckley*, 424 U.S. at 80). Since none of NDC's proposed communications contain express advocacy, none of them will constitute expenditures within the meaning of that term under the Act. Further, since none of NDC's donation requests constitute solicitations, none have the possibility of eliciting contributions under the Act. Since the plans outlined in NDC's advisory request contemplate making no expenditures and receiving no contributions, NDC's proposed spending does not satisfy the $1,000 statutory contribution/expenditure threshold for political committee status. Thus, none of NDC's proposed activities would subject it to the regulation and reporting requirements of a political committee.

***

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that if there is a change in

any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestors may not rely on that conclusion as support for its proposed activity. Any person involve in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including but not limited to, statutes, regulations, advisory opinions, and case law.

The cited advisory opinions are available on the Commission's Web site, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at www.fec.gov/searchao.

On behalf of the Commission,

Caroline C. Hunter
Chair