AGENDA DOCUMENT NO. 12-24

FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 11, 2012

AGENDA ITEM

For Meeting of 4-12-12

SUBMITTED LATE

MEMORANDUM

TO: The Commission

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Subject: Draft AO 2012-11 (Free Speech)

Attached is a proposed draft of the subject advisory opinion. Additional Drafts may be forthcoming. We have been asked to have this draft placed on the Open Session agenda for April 12, 2012.

Attachment

ADVISORY OPINION 2012-11

Benjamin T. Barr Esq.
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DRAFT

Dear Messrs. Barr and Klein:

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

The Commission concludes that: none of Free Speech's eleven proposed advertisements would expressly advocate the election or defeat of a clearly identified Federal candidate; (2) none of the proposed donation requests would be solicitations of "contributions"; and (3) Free Speech's proposed activities would not require it to register and report with the Commission as a political committee.

Background

The facts presented in this advisory opinion are based on your letter received on February 29, 2012, and your email received on March 9, 2012.

Free Speech describes itself as "an independent group of individuals which promotes and protects free speech, limited government, and constitutional accountability." Bylaws, Art. II. It is an unincorporated nonprofit association formed under the Wyoming Unincorporated Nonprofit Association Act, WYO. STAT. ANN.

17-22-101 to 115 (2012), and a "political organization" under 26 U.S.C. 527 of the Internal Revenue Code.[1] It currently has three individual members.

Free Speech will not make any contributions to Federal candidates, political parties, or political committees that make contributions to Federal candidates or political parties. Nor is Free Speech affiliated with any group that makes contributions. Free Speech also will not make any coordinated expenditures.[2]

Free Speech plans to run 11 advertisements, which it describes as "discuss[ing] issues concerning limited government, public policy, the dangers of the current administration, and their connection with candidates for federal office." Free Speech will run these advertisements in various media, including radio, television, the Internet, and newspapers. Free Speech currently plans to run the following ads, which are described more fully in response to question 1 below.

Radio Advertisements

Free Speech plans to spend $1,000 on three advertisements to be aired on local radio station KGAB AM in Cheyenne, Wyoming. These advertisements, which Free Speech calls "Environmental Policy," "Financial Reform," and "Health Care Crisis," will

[1] The Internal Revenue Code defines a political organization as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for [the tax-]exempt function" of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of presidential or vice presidential electors. 26 U.S.C. 527(e).

[2] Free Speech's 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. And members, officers, employees and agents have a duty to "ensure the independence of all speech by the Association about any candidate or political party . . . in order to avoid coordination." Bylaws, Art. VI, Sec. 3.

be aired 60 times between April 1 and November 3, 2012. Free Speech currently plans to allocate its budget evenly among the three advertisements, spending $333.33 for each.

Newspaper Advertisements

Free Speech plans to spend $500 on two advertisements that will appear in the *Wyoming Tribune Eagle* on May 12 and May 27, 2012. Free Speech plans to spend $250 on each advertisement. The advertisements – "Financial Reform" and "Health Care Crisis" – will include pictures as well as text.

Internet Advertisements

Free Speech plans to spend $500 on two advertisements that will appear on Facebook. The advertisements will appear for a total of "200,000 impressions on Facebook within Wyoming network" between April 1 and April 30, 2012. Free Speech plans to spend $250 on each advertisement. The two advertisements, entitled "Gun Control" and "Environmental Policy," will include pictures as well as text.

Television Advertisements

Free Speech plans to spend $8,000 on four advertisements that will appear on the local television network KCWY in Cheyenne, Wyoming. The advertisements will appear approximately 30 times between May 1 and November 3, 2012. Free Speech plans to spend $2,000 on each of the four advertisements. The advertisements are entitled "Gun Control," "Ethics," "Budget Reform," and "An Educated Voter Votes on Principle."

In total, Free Speech plans to spend $10,000 to run the advertisements described above. Free Speech "would like to speak out in similar ways in the future."

Free Speech has identified one individual donor willing to give it $2,000 or more, and would like to ask other individuals to donate more than $1,000 "to help support its

speech." Free Speech would also draw upon funds from its three members to pay for advertisements costing more than $2,000. Free Speech, however, will not accept donations from individuals who are foreign nationals or Federal contractors. Free Speech plans to ask for donations from individuals through four separate donation requests, which are described in response to question 2 below.

Questions Presented

1. Will Free Speech's proposed advertisements be "express advocacy"?

2. Will Free Speech's proposed donation requests be solicitations of contributions?

3. Will the activities described in this advisory opinion request require Free Speech to register and report to the Commission as a political committee?

Legal Analysis and Conclusions

Question 1. Will Free Speech's proposed advertisements be "express advocacy"?

No. For the reasons stated below, none of Free Speech's proposed advertisements constitute "express advocacy."

The concept of "express advocacy" originated in *Buckley v. Valeo*, 424 U.S. 1 (1976). There, the Court held the Act's definition of expenditure to be vague and overbroad.[3] As the Court explained, "[i]n its efforts to be all-inclusive, . . . the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring those sanctions may deter those who seek to exercise protected First Amendment rights." *Id.*, 424 U.S. at 76-

[3] The Act's original disclosure provisions for independent expenditures were originally written more broadly, to cover any expenditure made "for the purpose of . . . influencing" the nomination or election of candidates for federal office.

77. To cure these defects, the Supreme Court construed "expenditure" to reach only funds used for communications that "expressly advocate the election or defeat of a clearly identified candidate." It explained that "expressly advocate" required "*explicit* words of advocacy of election or defeat of a candidate." *Id.* at 43 (emphasis added). The Court explained that this "explicit words of advocacy" construction means "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.'" *Id.* at 44, n.52.

In direct response to the Court's decision in *Buckley*, Congress amended the Act in 1976 to define "independent expenditure" as "an expenditure by a person advocating the election or defeat of a clearly identified candidate . . . ." 2 U.S.C. § 431(17) (1976). This was in turn defined to mean communications that included "express advocacy." This change "reflect[ed] the Court's opinion in the *Buckley* case,"[4] and specifically "define[d] 'independent expenditure' to reflect the definition of that term in the Supreme Court's decision in *Buckley v. Valeo*."[5]

The post-*Buckley* congressional amendments happened before the Supreme Court ruled in *FEC v. Massachusetts Citizens For Life ("MCFL")*, 479 U.S. 238 (1986). In

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[4] 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).

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

MCFL, the Court relied on *Buckley*, and explained that "in order to avoid problems of overbreadth, the Court held that the statutory language encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate,'" *Id.* at 248-49 (citing *Buckley*, 44 U.S. at 80, *id.* at 42) and reiterated footnote 52 of *Buckley*, which defined express advocacy to mean words such as "vote for," "elect," and "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 238, 248-49 (citing *Buckley*, 44 U.S. at 44, n.52). The Court then maintained the construction of the statutory language it had used in *Buckley*: "[T]he definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates." *Id.* at 248.

Factually, *MCFL* concerned a newsletter distributed by an incorporated non-profit issue group, that stated "Vote Pro Life," and next to which was a list of candidates and indications as to whether those candidates were pro-life. Specifically, in September 1978 (prior to the September primary elections), MCFL distributed a "Special Edition" newsletter. The front page of the newsletter stated "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE" followed by a statement to the reader that "[n]o pro-life candidate can win in November without your vote in September." *MCFL*, 479 U.S. at 243. "'VOTE PRO-LIFE' was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the poll to remind voters of the name of the 'pro-life' candidates." *Id.* The newsletter also included a disclaimer that stated "this special election edition does not represent an endorsement of any particular candidate." The newsletter included a listing of all the state and federal candidates that would be on the Massachusetts primary ballot, "and identified each one as either supporting or

opposing what MCFL regarded as the correct position on three issues." *Id.* Candidates with a "y" next to their names were those who supported MCFL's issues; candidates with a "n" by their names opposed MCFL's issues; and an asterisk was placed next to the names of "incumbents who had made a 'special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." *Id.* at 243-44. Thirteen candidates' pictures were included in the newsletter and all "13 had received a triple 'y' rating, or were identified either as having a 100% favorable voting record or as having stated a position consistent with that of MCFL. No candidate whose photograph was featured had even one 'n' rating." *Id.* at 244.

In holding that the newsletter contained express advocacy, the Court noted that "*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 'Special Edition.'" *Id.* at 249. The Court noted that the newsletter "urges voters to vote for 'pro-life' candidates" and "also identifies and provides photographs of specific candidates fitting that description." *Id.* The Court concluded that the newsletter "provides an explicit directive: vote for these (named) candidates. The fact that the message is marginally less direct than 'Vote for Smith' does not change its essential nature. The Edition goes beyond issues discussion to express electoral advocacy." *Id.*

Subsequent to *MCFL*, the Ninth Circuit ruled in *FEC v. Furgatch,* 807 F.2d 857 (9th Cir. 1987). There, the Court held that "[s]peech may only be termed 'advocacy' if it presents a clear plea for action, and . . . it must be clear what action is advocated [*i.e.*,] . . . a vote for or against a candidate . . ." *Id.* at 864. Factually, *Furgatch* concerned anti-

Carter newspaper ads that ran about a week before the 1980 election. The advertisement was captioned "DON'T LET HIM DO IT." It made a number of specific references to the upcoming election and the election process (*e.g.*, "The President of the United States continues to degrade the electoral process"; "He [the President] continues to cultivate the fears, not the hopes of the voting public"; "If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning"). The advertisement specifically mentioned current and former opponents of the President (*e.g.*, "[The President's] running mate outrageously suggested Ted Kennedy was unpatriotic"; "[T]he President himself accused Ronald Reagan of being unpatriotic"). After criticizing Carter for his campaign tactics, the advertisement stated: "If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT!"

In analyzing the advertisement at issue, the Ninth Circuit held that the express advocacy threshold will be met only if a communication "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Furgatch*, 807 F.2d at 864. The court further held that "[t]his standard can be broken into three main components":

- "[S]peech is 'express' . . . if its message is unmistakable and unambiguous, suggestive of only one plausible meaning";
- "[S]peech may only be termed 'advocacy' if it presents a clear plea for action"; and

- "[Speech] must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate . . . ."

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

In analyzing the advertisement, the court said that "the words we focus on are 'don't let him.' They are simple and direct. 'Don't let him' is a command . . . . the only way to not let him do it was to give the election to someone else." *Id.* at 865. The Ninth Circuit held that the action urged was thus a vote against a candidate, and the advertisement constituted express advocacy.[6] That this clear plea for action requirement was central to the holding of *Furgatch* was made clear by the Ninth Circuit in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003): "*Furgatch* ... presumed express advocacy must contain some explicit *words* of advocacy." *Id.* at 1098 (emphasis in original).

In the wake of *MCFL*, *Furgatch*, and other cases, the Commission amended its regulatory definition of "express advocacy." As the Commission explained at the time, the reworking of its regulations was done for clarity, and that the modifications simply

[6] In *Furgatch*, the court set out a three-part standard for express advocacy, the second part of which is absent from section 100.22(b). *Furgatch*, 807 F.2d at 864 ("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.") (emphasis added).

"reworded" the prior regulation "to provide further guidance on what constitutes express advocacy of clearly identified candidates," and added "a somewhat fuller list of examples" of the "examples set forth in *Buckley*." *See* Explanation and Justification for Final Rules on Express Advocacy ("Express Advocacy E&J"), 60 Fed. Reg. 35291, 352935 (July 6, 1995). Section 100.22(a) defines "expressly advocating" as any communication that:

> 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 that 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!'

The Commission also added a new section to define "express advocacy." At the time, the Commission made clear that the new section was not an expansive test, but instead was merely providing "clarity" to reflect the Ninth Circuit's decision in *FEC v. Furgatch*. The Commission did not adopt a standard that would have included "suggestions to take actions to affect the result of an election," *id.* at 35294, but instead adopted section 100.22(b), which defines "expressly advocating" as any communication that:

> 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.

The Explanation & Justification ("E&J") for the regulation does not elaborate on what sort of "external events" are to be considered, only that they ought to be "pertinent." *Id.* at 35294. The E&J does say that such contextual considerations will be done on a "case by case" basis. *Id.* at 35295. It also explains that the Commission declined to adopt a specified number of days before an election within which a communication could be deemed express advocacy. *Id.* The E&J also said that the rules of 100.22(b) "do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages." *Id.* Moreover, "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." *Id.* Finally, the E&J said that "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy . . . if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Id.* The Commission did "not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis." *Id.*

Section 100.22(b) has been deemed unenforceable by a number of courts. *See Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 392 ("*VSHL*") (holding that 100.22(b) "violates the First Amendment" because "[t]he regulation goes to far because it shifts the determination of what is 'express advocacy' away from the words 'in and of themselves' to "the unpredictability of audience interpretation" (quoting *FEC v.*

Christian Action Network, Inc.; 110 F.3d 1049, 1051, 1057 (4th Cir. 1997))); *Maine Right to Life Comm., Inc. v. FEC ("MRLC")*, 914 F. Supp. 8, 13 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1st Cir.1996), *cert. denied*, 522 U.S. 810 (1997) (section 100.22(b) held "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"); *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding "that 11 C.F.R. § 100.22(b)'s definition of 'express advocacy' is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley v. Valeo*."). Thereafter, the Commission stated publicly that it would not enforce section 100.22(b) in either the First or Fourth Circuits.[7]

Similarly, several courts rejected the FEC's view of what constituted express advocacy. For example, in *Federal Election Commission v. Survival Education Fund, Inc.*, 1994 WL 9658 (S.D.N.Y. 1994) (unreported), *aff'd in part, rev'd in part*, 65 F.3d 285 (2d Cir. 1995), the district court determined that a mailer which included a two-page letter criticizing the Reagan Administration's policies in Central America, called for protests outside of the Republican National Convention, and provided an "Anti-War Ballot" which listed a check-box next to the word "no" and several purported administration policies did not constitute express advocacy.

Likewise, in *FEC v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999), the D.C. District Court rejected the FEC's view that a number of election-related speech

[7] On September 22, 1999, the Commission decided by a vote of 6-0 to "formally confirm the Commission's position that because 11 C.F.R. 100.22(b) has been found invalid by the United States Court of Appeals for the First Circuit, and has in effect been found invalid in the United States Court of Appeals for the Fourth Circuit, it cannot and will not be enforced in those circuits, unless and until the law of those circuits changed or overruled."

contained express advocacy.[8] For example, a mailer entitled "Reclaim America" was not express advocacy. The mailer stated that "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," that "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 mailing was intended to give Christians a "chance to make the politicians in Washington feel the power of the Christian vote." *Id.* at 57.

The court also concluded that a "Congressional Scorecard" produced by the Christian Coalition which listed how federal office holders voted on several issues, indicated the organization's preferred position on those issues, and provided an overall score measuring that Congressman's level of agreement with the Christian Coalition did not constitute express advocacy where the scorecard indicated that it was "designed to give Christian voters the facts they need to hold their Congressmen accountable." *Id.* at 57-58.

Subsequently, Congress passed the Bipartisan Campaign Reform Act of 2002, colloquially called McCain-Feingold. Senators McCain and Feingold first introduced legislation in 1997 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,

[8] The court used the standard announced by the Ninth Circuit in *FEC v. Furgatch*, the case upon which 100.22(b) is based.

1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997). This early version of the McCain-Feingold bill "addressed 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." *See* 143 Cong. Rec. S10107,10108.

Eventually, McCain-Feingold's sponsors abandoned their effort to redefine "expenditure" and instead proposed the regulation of "electioneering communications," "in contrast to the earlier provisions of the . . . bill." *See McConnell*, No. 02-0582, Opposition Brief of Defendants at 50 (*quoting* 144 Cong. Rec. H3801, H3802 (June 28, 2001). 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 proximity to federal elections, "that constitute the most blatant form of [unregulated] electioneering." 144 Cong. Rec. S906, S912 (Feb. 12, 1998). The earlier provisions of the McCain-Feingold bill that sought to tinker with the meaning of "express advocacy" were dropped.[9]

Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with 'clear and narrowing wording' which strictly

[9] Congress is currently considering legislation that would, *inter alia*, modify the definition of "independent expenditure" to include both express advocacy and the functional equivalent of express advocacy. Disclose of Information on Spending on Campaigns Leads to Open and Secure Elections Act or DISCLOSE Act, H.R. 4010, 112th Cong. § 2.

limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in *Buckley* and *MCFL*. Senator Snowe explained that the provision specifically did not alter prior law regarding express advocacy, and that the bill 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 *Furgatch* [the case upon which 100.22(b) is based] 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).[10]

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 unamended (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*, 499 U.S. 554, 562 (1991).

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[10] Senator McCain, the principle sponsor of the entire bill, was of the view that both *Buckley* and *MCFL* limited the pertinent parts of the Act to express advocacy: "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.'" 148 Cong. Rec. S2141 (March 20, 2002). McCain-Feingold itself makes clear that independent expenditures and electioneering communications cannot be the same thing. *See* 2 U.S.C. § 434(f)(3)(B)(ii) ("The term 'electioneering communication' does not include—a communication which constitutes an expenditure or an independent expenditure under this Act.").

A number of plaintiffs, including Senator Mitch McConnell, challenged McCain-Feingold, and argued that the new electioneering communication provisions were unconstitutional because the statute went beyond *Buckley's* "express advocacy" limitation. In its initial response, the FEC said:

> 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]" so 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 McConnell, No. 02-0582, Opposition Brief of Defendants at 59. The FEC also made clear *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 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.

And 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 Duchess 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 candidates(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 agreed with the FEC. She reviewed the cases that held section 100.22(b) unenforceable, and endorsed the result in those cases because the FEC had no authority to redefine a statutory test that only Congress or the Supreme Court could redefine. She said 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*, Civ. No. 02-582, Kollar-Kotelly, J., memorandum op. at 377 (D.C. Cir. Filed May 1, 2003).

On appeal, the Supreme Court agreed. The 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). The Court 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). Agreeing with the FEC's arguments, the Court repeatedly emphasized that *Buckley* was "the product of statutory interpretation rather than a constitutional command." *Id.* at 191-92 (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."). 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. The Court characterized *Buckley* and *MCFL* as having drawn a "strict" line, *id.* at 126, that was "an endpoint of statutory interpretation, not a first principle of constitutional law" *Id.* at 190. In fact, the Court noted that "advertisers [can] easily evade the line by eschewing the use of magic words." *Id.* at 193. And *McConnell* made clear that the statutory endpoint remained unchanged: there are at least thirteen instances where *McConnell* equated the term "express advocacy" with the so-called "magic words" test.[11] Turning to the challenged electioneering communication 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 191. The Court found that it did not suffer from the same vagueness that had plagued the definition of "expenditure," and upheld the electioneering communication ban on its face, "to the extent it was the functional equivalent of express advocacy." *Id.* at 206.

Although it upheld the new McCain-Feingold provisions, *McConnell* did not alter the statutory "express advocacy" language; on the contrary, the Court maintained the statutory construction of *Buckley* and *MCFL*.[12] Nonetheless, the Commission began to enforce section 100.22(b) nationally, for the following reasons. First, since *McConnell* said that *Buckley's* so-called "magic word" construction did not represent "constitutionally-mandated line beyond which no regulation was possible," *McConnell* was believed to have "essentially overruled past decisions invalidating section 100.22(b)

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[11] *McConnell*, 540 U.S. at 126 (2 references), 127 (2 references), 190 (2 references), 192, 193 (2 references), 193-94, 216-17, 219. The McConnell dissenting opinion similarly used "express advocacy" to mean communications that contain the "magic words" of footnote 52 of *Buckley*. *See* 540 U.S. at 281, 322.

[12] The Commission's Office of General Counsel has in the past made this point. *See* MUR 5634 (Sierra Club), GCR #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*.)."

on constitutional grounds." Second, since the Court upheld the statutory definition of "electioneering communication" "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," the Commission determined that section 100.22(b) was a regulation that "fills the gaps" between where *Buckley's* "magic words" ends and *McConnell's* "functional equivalent" begins. MUR 5024R (Council for Responsible Government, Inc., *et al.*), General Counsel's Report #2 at 7-8.

A number of circuit courts by contrast have held that the express advocacy requirement was not altered by *McConnell*, and remained a viable way to cure an otherwise vague statute.[13] *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008); *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, 985 (9th Cir. 2004).[14]

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[13] The Commission itself acknowledged that *McConnell* did not concern the express advocacy standard announced in *Buckley*: "*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 did the Court in *Buckley* . . . ." MUR 5024R (Council for Responsible Government), Factual & Legal Analysis at 3.

[14] Likewise, in *Shays v. FEC (Shays III)*, 528 F.3d 914 (D.C. Cir. 2008) the D.C. Circuit repeatedly equated express advocacy with a so-called "magic words" requirement. For example, the court said:

> 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.

In 2004, a suit was brought by Wisconsin Right to Life, challenging McCain-Feingold's electioneering communication ban, and specifically alleging that certain ads it wished to run that concerned judicial nominations were not the functional equivalent of express advocacy. Several years later, the Court agreed that McCain-Feingold could not constitutionally prohibit the advertisements at issue regarding judicial nominations. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). According to the Court, although this statute was not vague, it was still overbroad, as it captured non-campaign advertisements. As explained by Chief Justice Roberts, *McConnell* had limited the reach of the statutory ban to the functional equivalent of express advocacy. The Chief Justice further explained that in addition to the statutory criteria defining electioneering communication, an advertisement came within the reach of the statute "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 452.

In *WRTL*, the Court rejected the Commission's reading of *McConnell*. In considering the matter, a number of Justices made clear that express advocacy still meant express words of advocacy, a standard left unchanged by *McConnell*. For example, in his concurring opinion, Justice Scalia stated this directly when describing what the Court did

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Id. (citing *Buckley*, 424 U.S. at 43-44 n.52; *McConnell*, 540 U.S. at 126; and *MCFL*, 479 U.S. at 249) (internal citations omitted) (emphasis added). *See also*, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (upholding the requirement that SpeechNow.org file as a political committee, but making 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 for 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.').

Id. at 689, n.1.

in *Buckley*, and he further added that he does not believe the Constitution allows a broader interpretation: "If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." *Id.* at 495 (Scalia, J. concurring in part and concurring the judgment). Chief Justice Roberts, in response to Justice Scalia, agreed with Justice Scalia's premise that *Buckley* established a bright line express magic words test, but instead explained that his appeal to vote test is not in conflict with *Buckley*. According to the Chief Justice, the appeal to vote test serves a different purpose than the express advocacy test, and because *Buckley's* so-called magic words requirement was a product of statutory construction, not a constitutional limit on regulation. *Id.* at 474, n.7. Even Justice Souter, writing in dissent, characterized the express advocacy test as a magic words standard by acknowledging that *MCFL* "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 "'[E]xpress 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 citations omitted) (Souter, J. dissenting).

Although *WRTL* had rejected the Commission's expansive reading of *McConnell* that had revived section 100.22(b), the Commission did not revisit its decision to enforce the regulation. Instead, the Commission promulgated section 114.15, a two-part, eleven factor balancing test that defined when an electioneering communication was permissible. *See* Explanation and Justification for Electioneering Communications ("Electioneering Communications E&J"), 72 Fed. Reg. 72899 (Dec. 26, 2007). This was

to establish a safe harbor for certain speech, while subjecting other speech to a "multi-step analysis for determining whether [electioneering communications] that do not qualify for the safe harbor nevertheless qualify for the general exemption." *Id.* at 72902. To avail oneself of the safe harbor, one's speech could not mention "any election, candidacy, political party, opposing candidate, or voting by the general public," nor could it take a position on the candidate's "character, qualifications, or fitness for office." *Id.* at 72903; *see also* 11 CFR § 114.15(b)(1)-(3). Moreover, the advertisement could only reference certain topics: "a legislative, executive, or judicial matter or issue," or propose a "commercial transaction." *Id.* at 72903. In addition to only talking about the government-approved subject matter, the advertisement had to "urge the public to take a position and contact the candidate." *Id.*

For communications outside the safe harbor, the FEC created a multi-step analysis to consider "whether the communication includes any *indicia* of express advocacy and whether the communication has an interpretation other than as an appeal-to-vote for or against a clearly identified [f]ederal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal-to-vote for or against a clearly identified [f]ederal candidate." 11 C.F.R. §114.15(c)(emphasis added).

The Commission did not revise section 100.22(b), because section 100.22(b) was "informed by" its reading of *WRTL* as codified in section 114.15. The Commission continued to treat section 100.22(b) as the same sort of multi-factor balancing test now found in section 114.15. In applying 100.22(b), the Commission considered dozens and dozens of factors, including, that an ad "lacks specific legislative focus;" that the ad is

"candidate centered;" touting or attacking a candidate's character, qualifications, and accomplishments; failing to urge a specific action be taken by the elected official; asking the viewer to "ask [the candidate] about his plans to bring our children back to [the state]; failing to include a phone number or contact information; questing a public official's leadership potential; considering how the viewer would "reasonably interpret" the advertisement; the proximity to the election; and "on balance." *See generally* MUR 5024R (Council for Responsible Government); MUR 5440 (The Media Fund); MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth); MUR 5631 (Sierra Club); MURs 5910 & 5694 (Americans for Job Security); MUR 5988 (American Future Fund); MUR 5842 (Economic Freedom Fund); MURs 5831 & 5854 (Softer Voices/Lantern Project); MUR 6346 (Cornerstone Action).

Subsequently, Citizens United, a non-profit corporation organized under section 501(c) of the Internal Revenue Code, sued the Commission. It had produced a movie, entitled "Hillary – The Movie," and wished to air the movie on pay-for-view cable television. The Commission took the position that the movie was banned under its two-part, eleven factor balancing test. The Court rejected section 114.15's two part, eleven factor balancing test, and explained that:

> "[t]his regulatory scheme may not be a prior re-straint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and

> governmental practices of the sort that the First Amendment was drawn to prohibit."

Id. at 895-96 (internal citations omitted).

The Court determined that the movie was an electioneering communication that was the functional equivalent of express advocacy, since it "referred to Senator Clinton as 'Machiavellian,' asks whether she is 'the most qualified to hit the ground running if elected President,' and the narrator reminds viewers that 'a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House.'" *Id.* at 890. Nonetheless, the Court held that the movie could not be banned. The Court turned back an as-applied challenge to the McCain-Feingold electioneering communication reporting obligations. *Id.* at 916.

Most recently, the United States District Court for the Eastern District of Virginia held that two ads were the functional equivalent of express advocacy, and thus could come within 11 CFR § 100.22(b). This case is on appeal before the United States Court of Appeals for the Fourth Circuit. *See The Real Truth About Obama, Inc., v. FEC, Real Truth About Obama v. FEC*, 796 F. Supp. 2d 736, 749-50 (E.D. Va. 2011) *appeal docketed*, No. 11-1760 (4th Cir. argued Mar. 21, 2012).

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The "Environmental Policy" Radio Advertisement

> President Obama opposes the Government Litigation Savings Act. This is a tragedy for Wyoming ranchers and a boon to Obama's environmentalist cronies. Obama cannot be counted on to represent Wyoming values and voices as President. This November, call your neighbors. Call your friends. Talk about ranching.

The "Environmental Policy" radio advertisement does not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy listed in section 100.22(a). With respect to section 100.22(b), on its face, the regulation requires that "[t]he electoral portion of the communication [be] unmistakable, unambiguous, and suggestive of only one meaning," *i.e.*, "advocacy of the election or defeat of one or more clearly identified candidate(s)." The advertisement does not contain an "electoral portion," that is "unmistakable, unambiguous, and suggestive of only one meaning."

While the communication does include a reference to November, that does not constitute an electoral portion. Although most know that there is an election this November, the regulation does not permit looking to external context and events of the day when ascertaining the electoral portion. As the Ninth Circuit 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. Instead, it must be "unmistakable, unambiguous, and suggestive of only one meaning." Also, the communication explicitly instructs the listener to "call your neighbors" and "[c]all your friends," and "[t]alk about ranching." It does not urge the listener to vote, nor is there any other language that causes "this November" to be an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning. Thus, it is beyond the reach of 100.22(b).

The Financial Reform Radio and Newspaper Advertisements

Script: President Obama supported the financial bailout of Fannie Mae and Freddie Mac, permitting himself to become a puppet of the banking and bailout industries. What kind of person supports bailouts at the expense of average

> Americans? Not any kind we would vote for and neither should you. Call President Obama and put his antics to an end.[15]

The "Financial Reform" advertisements, which Free Speech proposes to air on the radio and run in newspapers, do not constitute express advocacy under 100.22(a). The advertisement does not expressly say to vote against Obama. However, it does instruct the listener or reader that a person who "supports bailouts at the expense of average Americans" is "[n]ot any kind of person [Free Speech] would vote for and neither should you." The advertisement claims that President Obama supported some financial bailouts, which made him "a puppet of the banking and bailout industries." This sort of language is similar to what the Supreme Court in *MCFL* deemed to be express advocacy.

However, there are some differences. First, the materials in *MCFL* included language such as "EVEYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," included an exhortation to "VOTE PRO- LIFE," after identifying the candidates who were the pro-life candidates. The Free Speech ad is not quite as explicit. It lacks some of the language present in *MCFL* (such as "everything you need to know to vote pro-life"), and it contains a non-electoral call to action ("Call President Obama and put his antics to an end."). The language proposed by Free Speech is not as direct as the language considered in *MCFL*. Here, the ad certainly says that the listener or reader should not vote for anyone who "supports bailouts at the expense of average Americans." But nowhere does the advertisement say that Obama's support of bailouts was at the expense of average Americans. Instead, his support caused him to be a puppet of the

[15] The script for the radio version of the Financial Reform advertisement is the same as the text of the print version. The only difference between the two, besides the format, is the newspaper advertisement's inclusion of a full-page picture of President Obama.

banking and bailout industries. Although it can be inferred that "at the expense of average Americans" and "a puppet of the banking and bailout industries" are the same thing, 100.22(a) demands more. Per *MCFL*, it must be "in effect an explicit directive." *MCFL*, 479 U.S. at 249. The advertisement is a step beyond that which was deemed express advocacy in *MCFL*.

Assuming section 100.22(b) is enforceable, the application of that regulation presents a closer call. The phrase "What kind of person supports bailouts at the expense of average Americans? Not any kind we would vote for and neither should you" is an electoral portion that is unambiguous, unmistakable, and suggestive of only one meaning: vote against whoever supports bailouts at the expense of average Americans. Reasonable minds could not differ as to the action urged: it certainly does not encourage any sort of action other than voting. Given that Obama is the only person referenced by name in the advertisement, a reasonable mind could assume or infer that Obama is the target, despite the fact that Obama is never expressly indentified as a candidate.

However, the regulation then requires that the communication be read "as a whole" and "with limited reference to external events, such as proximity to the election," and that it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates." When read as a whole, there is language that is consistent with non-electoral issue advocacy, specifically the last sentence: "Call President Obama and put his antics to an end."

Similarly, the regulation also instructs that timing and proximity to an election are to be considered. If, for example, this same advertisement was aired last year in connection with the Virginia legislative races, no reasonable person would say that the ad

constitutes express advocacy of the defeat of President Obama. The electoral portion would be referencing state candidates only. Per the request, Free Speech intended to run the advertisement beginning April 1 through November 6 of this year. Although April 1 has passed, we assume Free Speech will begin to the proposed advertisement once this Advisory Opinion has issued, as the request says they wish to speak "as soon as possible." Certainly, given that the advertisement will run through November 6, it will air near the general election. Equally clear, though, is that it will also run well before an election, due to its expansive run in excess of six months. This expanded run supports the conclusion that the advertisement is not express advocacy; otherwise, Free Speech will endure the odd result of running an advertisement in the near future, just before the Wyoming Democratic caucus (which might make it express advocacy), continuing to run it after the caucus (which might make it not express advocacy), and through the general election (which might make it express advocacy again). Since the Commission declined to adopt any sort of bright-line timing requirement for section 100.22(b), it cannot now say this advertisement constitutes express advocacy due to timing or proximity to an election.

The ""Health Care Crisis" Radio and Newspaper Advertisements

> Script: President Obama supports socialized medicine, but socialized medicine kills millions of people worldwide. Even as Americans disapproved of ObamaCare, he pushed ahead to make socialized medicine a reality. Put an end to the brutality and say no to socialized medicine in the United States.[16]

[16] Like the script for the radio and print versions of the "Financial Reform" advertisements, the script for the two versions of the "Health Care Crisis" advertisements is the same. The only difference between the two advertisements, besides the format, is the newspaper advertisement's inclusion of a "[f]ull picture of a family picture torn in half."

The "Health Care Crisis" advertisements, which Free Speech proposes to air on the radio and run in newspapers, do not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy listed in section 100.22(a). Nor does the advertisement contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning." Instead, the advertisements criticize President Obama regarding health care policy, provide Free Speech's views on the issue ("socialized medicine kills millions of people worldwide"), and conclude with a policy-related call to action. It is beyond the reach of 100.22(b).

The "Gun Control" Facebook Advertisement

(Picture of handgun, 110 pixels wide by 80 pixels tall)
(Title: Stand Against Gun Control)
Obama supports gun control. Don't trust him. Support Wyoming state candidates who will protect your gun rights.

The "Gun Control" advertisements, which Free Speech proposes to publicize on Facebook, do not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy listed in section 100.22(a). Instead, it criticizes President Obama's support of gun control and exhorts viewers to "[s]upport Wyoming state candidates." Since this advertisement will be publicized on Facebook, it can be viewed by people in jurisdictions where 100.22(b) has been declared unenforceable. Even if the Commission were to attempt to enforce section 100.22(b) in such circumstances, this advertisement lacks an electoral portion, and thus is beyond the reach of 100.22(b).

The "Environmental Policy" Facebook Advertisement

(Picture of a Wyoming ranch, 110 pixels wide by 80 pixels tall)
(Title: Learn About Ranching)
Obama's policies are a tragedy for Wyoming ranchers, and he does not represent our values. This November, learn about ranching.

The "Environmental Policy" Facebook advertisement does not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy listed in section 100.22(a). Nor does the advertisement contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning." While the communication does include a reference to November, that does not constitute an electoral portion. Certainly, there is an election this November. But the regulation does not permit looking to external context and events of the day when ascertaining the electoral portion. Instead, it must "unmistakable, unambiguous, and suggestive of only one meaning." 11 C.F.R. §100.22(b) (emphasis added). Regardless, the communication explicitly instructs the listener to "learn about ranching." It does not urge the listener to vote. Thus, it is beyond the reach of 100.22(b).

A. The Gun Control Television Advertisement

Audio:	Video:
Guns save lives.	Newspaper clippings with headlines describing self-defense with firearms fade in, piling up one atop another.
That's why all Americans should seriously doubt the qualifications of Obama, an	Clippings dissolve to a picture of President Obama, and one newspaper headline below

ardent supporter of gun control. This fall, get enraged, get engaged, and get educated. And support Wyoming state candidates who will protect your gun rights.	him: "President Obama defends attorney general regarding ATF tactics (LA Times, Oct. 6, 2011)" Dissolves to a picture of the Wyoming state flag, panning down to the Wyoming Capitol Building

The "Gun Control" television advertisement does not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy of a federal candidate listed in section 100.22(a). Although the urges the viewer to "support Wyoming state candidates," the only person specifically named is President Obama, who is not a Wyoming state candidate. The advertisement does contain an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning: support Wyoming state candidates who will protect gun rights. That the accompanying video includes the Wyoming state flag and the Wyoming Capitol Building leaves the meaning free of doubt. But reasonable minds could differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates. Although the advertisement references President Obama, he is never identified as a candidate, but instead is criticized for his views of gun rights, and his qualifications regarding his defense of the Attorney General regarding ATF tactics. Thus, the advertisement is beyond the reach of 100.22(b).

The "Ethics" Television Advertisement

Audio:	Video:
Who is President Obama?	Picture of President Obama shaking hands with Hugo Chavez.
He preaches the importance of high taxes to balance the budget, but nominates political elites who haven't paid theirs.	Fade to another picture of Obama giving State of the Union, superimposed "Obama Aims $1.4 Trillion Tax Increase at Highest Earners (San Francisco Chronicle, Feb. 14, 2011)"
He talks about budget and tax priorities, but passes a blind eye to nominees who don't contribute their fair share.	Cut to picture on left side of screen of Secretary of Treasury Timothy Geithner giving testimony, superimposed "Geithner apologizes for not paying taxes (CBS News, Feb. 18, 2009)"
Call President Obama and tell him you don't approve of his taxing behavior.	Picture fades in on right side of screen of Tom Daschle, superimposed "Tax Woes Derail Daschle's Bid for Health Chief (NPR, Feb. 3, 2009)" Fade to picture of President Obama and Michelle Obama enjoying themselves in Hawaii.

The "Ethics" television advertisement does not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy listed in section 100.22(a). Nor does the advertisement contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning." Instead, the advertisements criticizes President Obama based on statements about his "budget and tax

priorities" and his nominees' asserted lack of compliance with their tax obligations. The advertisement then exhorts viewers to "[c]all President Obama and tell him you don't approve of his taxing behavior." It is beyond the reach of 100.22(b).

The Budget Reform Television Advertisement

AUDIO:	Video:
Congresswoman Lummis supported the Repeal Amendment, which would have restored fiscal sanity to our federal debt.	Picture of Representative Lummis, superimposed "Tea Party Pushes Amendment to Veto Congress (AOL News, Dec. 1, 2010)"
Congresswoman Lummis is brave in standing against the political elite and deserves your support. Make your voice heard.	Small videos of Representative Lummis fade in, speaking on news programs, meeting with people, etc.
Do everything you can to support Congresswoman Lummis this fall and work toward fiscal sanity.	Wyoming flag fades in the background, returning to original picture of Rep. Lummis.

The "Budget Reform" television advertisement does not constitute express advocacy. Although the advertisement does state "support Congresswoman Lummis," the advertisement does not come within the reach of section 100.22(a), since the support sought is policy-driven, not electoral (*i.e.*, support her "this fall and work toward fiscal sanity"). No election is explicitly referenced, nor is Lummis ever identified as a candidate. Similarly, the advertisement lacks an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning. Even if "supporting Congresswoman Lummis in the fall" can somehow be deemed an electoral portion (because elections

happen in the fall), reasonable minds could 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." The arguable electoral portion could also be read to encourage support for Lummis' legislative agenda. After all, the advertisement claims she supported the Repeal Amendment, which it claims "would have restored fiscal sanity to our federal debt." This ties into the final line of the advertisement, which also references financial sanity.

The Educated Voter Votes on Principle Television Advertisement

Audio:	Video:
Across America, millions of citizens remain uninformed about the truth of President Obama.	Picture of President Obama shaking hands with Hugo Chavez.
Obama, a President who palled around with Bill Ayers.	Picture of Bill Ayers in Weather Underground days, superimposed "Bill Ayers Dishes on Hosting a Fundraiser for Barack Obama (Big Government, Nov. 29, 2011)."
Obama, a President who was cozy with ACORN.	"House votes to Strip Funding for ACORN (Fox News, Sept. 17, 2009)"
Obama, a President destructive of our natural rights.	Video of an ATF raid, fade to a video of TSA scanning individuals in line for airport.
Real voters vote on principle. Remember this nation's principles.	Fades to still shot of the Bill of Rights, superimposed "Remember this nation's principles."

The "Educated Voter Votes on Principle" advertisement does not constitute express advocacy. Although the advertisement mentions "real voters," that "vote on principle," the advertisement does not expressly state which candidate such voters ought to vote for. Thus, it is beyond the reach of 100.22(a). The advertisement does have an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning: "Real voters vote on principle." But reasonable minds could differ as to whether this electoral portion "encourages actions to elect or defeat one or more clearly identified candidate(s)" or "encourages some other kind of action." On one hand, the advertisement infers that since the advertisement could be read as attacking Obama, real voters ought to vote against Obama. But this is far from clear. It is not unreasonable to think that Bill Ayers and ACORN would not see their association with President Obama as something bad. On the contrary, from that perspective, real voters might infer a message to vote for Obama. Both perspectives require inference, reference to context, and reliance on subjective intent and effect, which is not permitted by the regulation when ascertaining the clarity of the electoral portion. Thus, the advertisement is beyond the reach of 100.22(b).

Question 2. Will Free Speech's proposed donation requests be solicitations of contributions?

No. For the reasons stated below, none of the proposed donation requests will constitute solicitations of contributions.

The Act defines the term "contribution" 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 CFR 100.52(a). 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 specified disclaimer in the solicitation. 2 U.S.C. 441d(a); *see also* 11 CFR 110.11(a)(3).

In *Buckley*, the Court narrowed the statutory term "contribution" to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; (3) donations given to other persons or organizations but "earmarked for political purposes." *Buckley* at 24, nt. 24, 78. In order to avoid the "hazards of uncertainty" regarding the meaning of "earmarked for political purposes," the United States Court of Appeals for the Second Circuit interpreted the phrase to include only donations "that will be converted to expenditures subject to regulation under FECA." *FEC v. Survival Education Fund. Inc.*, 65 F.3d 285, 295 (2d Cir. 1995).

The pertinent issue in *Survival Education Fund* concerned a pre-McCain-Feingold law, which required persons, including political committees, to include certain disclaimers on (1) communications that contained express advocacy, and (2) solicitations. Although the Second Circuit rejected much of the Commission's case, it did hold that a request for funds constituted a solicitation, and thus required a disclaimer. *Id.* at 298. Specifically, the court said that a written solicitation indicating that money received in response to a solicitation will be spent to elect or defeat a Federal candidate must carry

disclaimers informing the public of whether the organization is coordinating with a candidate or his agents. *Id.* at 295. Although the court did not limit its determination to a finding of express advocacy, it stated that a solicitation "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.* In addressing Survival Education Fund's concerns that "[b]ecause [they] in some sense use all contributions 'for political purposes, they contend that they will be at a loss to know when a solicitation triggers FECA disclosure requirements and subjects them to a potential civil penalty," the court stated that "[t]he only contributions 'earmarked for political purposes' with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA. Thus, 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.* at 294-95. The court also said 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.* at 295.

The material at issue in *SEF* was overwhelmingly electoral in nature. It included numerous electoral statements (*e.g.*, "Vote for Peace in '84"); allusions to the consequences of the 1984 presidential election (*e.g.*, "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 the group's intended use of the money received in

response to the communication (*e.g.*, "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."). *Id.* at 288-89. The court held that these types of statements 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.

McCain-Feingold changed the law regarding disclaimers. No longer were they required only on solicitations and express advocacy; political committees were now required to place certain disclaimers on virtually all public communications. Thus, the significance of *SEF's* holding – which determined when a request for funds constituted a solicitation and thus required a disclaimer – ought to have diminished. But almost ten years after it was decided, the Commission elected to use *SEF* as a basis to require groups to register and report as political committees, thus limiting what such groups could raise and spend, and requiring them to undertake the reporting requirements attendant to being a political committee. The Supreme Court has described such obligations as burdensome. *See Citizens United*, 130 S. Ct. at 897 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.").

The Commission codified this view *via* rulemaking, and promulgated 11 C.F.R. § 100.57. Under that rule (which merely codified the Commission's reading of *SEF*), a covered non-profit had to treat as "contributions" (meaning funds subject to limits, prohibitions, and reporting requirements of the Act, including filing as a political committee) *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. 11

C.F.R. §§ 100.57(a)-(b)(1) (emphasis added). If the communication indicated that the funds will support or oppose both a federal and non-federal candidate, then at least 50% of those funds had to be treated as federally-regulated funds. *See id.* § 100.57(b)(2). The D.C. Circuit held that this rule was both unconstitutional and beyond the statute, as it required covered non-profits to treat certain donations as federal money subject to the Act limitations, prohibitions, and reporting requirements even if those donations are not actually made "for the purpose of influencing" federal elections. *EMILY's List v. FEC* 581 F.3d 1, 17-18 (D.C. Cir. 2009). The Commission has since repealed section 100.57, *see Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (2010), and has not announced any desire to revisit the issue. *See* Brief for the Respondents at 5, *The Real Truth About Obama, Inc., v. FEC*, 130 S. Ct. 2371 (U.S. 2010) (No. 09-724) ("On September 18, 2009, the D.C. Circuit declared that regulation [100.57] unlawful. *EMILY's List v. FEC*, 581 F.3d 1, 17-18 (D.C.Cir. 2009). The Commission has accordingly announced that the regulation 'will not be enforced.'").

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A. The "War Chest" Donation Request

> Friends of freedom celebrated when the Supreme Court decided Citizens United. Now, more than ever, we can make the most effective use of your donations this coming fall. Donations given to Free Speech are funds spent on beating back the Obama agenda. Beating back Obama in the newspapers, on the airways, and against his $1 billion war chest.

This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The donation request indicates that the funds requested will be "spent on beating back the Obama agenda. Beating back Obama in the newspapers, on the airwaves, and against his $1 billion war chest." While the request does mention "this coming fall," "[b]eating back Obama," and "his $1 billion war chest," such language does not "clearly indicat[e] that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. First, "this coming fall" is not inherently electoral. In fact, the request itself provides the meaning for this phrase: that Free Speech will use the donations raised this fall to beat back the Obama agenda. The other language appears in a sentence fragment that expands upon the previous sentence regarding "beating back the Obama agenda." Moreover, Obama is never identified as a candidate, and the phrase "his $1 billon war chest" is not inherently electoral, as it presumably includes funds raised by the Democratic Party generally, funds that can be spend in a variety of ways. Such language is a far cry from the language present in *Survival Education Fund*, such as: "Vote for Peace in '84"; "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"; "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."

Since this donation request does not solicit contributions under the Act, and Free Speech does not propose spending any funds on "expenditures" under the Act, funds

raised will not be subject to the limitations, prohibitions or reporting requirements of the Act.[17]

B. The "Strategic Speech" Donation Request

> This fall, 23 Democrat incumbents are up for election in the U.S. Senate. Seven have already decided to retire, but some, like John Tester of Montana, haven't gotten the message. With your donation, we'll strategically speak out against the expansion of government-run healthcare and so-called 'clean energy' boondoggles like Solyndra, which Senators like Tester fully support. It's time to retire failed socialist policies.

This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The donation request clearly indicates how the funds requested will be spent: by "strategically speak[ing] out against the expansion of government-run healthcare an so-called 'clean energy' boondoggles like Solyndra," which the request claims Senators like Tester support. This point is emphasized by the concluding line, which makes clear it is discussing policy: "It's time to retire failed socialist policies." The donation request lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. The language used in this donation request is not at all like that present in *Survival Education*

[17] In the past, the Commission may have considered this sort of donation request to not only require a disclaimer, but to presumptively require that all funds raised in response to the request to be subject to the limitations, prohibitions and reporting requirements of the Act. *See, e.g.*, MUR 5487 (Progress for America Voter Fund), Conciliation Agreement ¶¶ 22, 26 (concluding that direct mail pieces using the phrase "help us promote President Bush's agenda in Pennsylvania with the greatest possible strength between now and November 1st" solicited contributions because they supposedly "clearly indicate that the funds received would be targeted to the election of President Bush"). The legal theory upon which such determinations were based was rejected in *EMILY's List v. FEC*, as being unconstitutional and beyond the Commission's statutory authority. Per the holding of the D.C. Circuit, which the Commission has already accepted as having nation-wide effect, such matters are no longer good law. *See, i.e.*., MUR 5365 (Club for Growth); MUR 5403 (Americans Coming Together); MUR 5440 (The Media Fund); MUR 5487 (Progress for America Voter Fund); MUR 5511 (Swiftboat Veterans and POWs for Truth); MUR 5542 (Texans for Truth); MUR 5568 (Empower Illinois Media Fund); MUR 5753 (League of Conservation Voters 527); MUR 5754 (MoveOn.org Voter Fund).

Fund: "Vote for Peace in '84"; "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"; "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."

Since this donation request does not solicit contributions under the Act, and Free Speech does not propose spending any funds on "expenditures" under the Act, funds raised will not be subject to the limitations, prohibitions or reporting requirements of the Act.

C. The "Checking Boxes" Donation Request

> 'Leading from behind,' President Obama takes advice from
> socialist staffers, usually choosing from a checklist of
> oppressive, debt-driven policies without even considering
> freedom-based and fiscally-conscious alternatives.
> Checking the right box on the November ballot is
> important, but like Obama's memos it's just not enough.
> Take the lead in making the message of Free Speech heard:
> your donation will inform real American leadership.

This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The donation request clearly indicates how the funds requested will be spent: "making the message of Free Speech heard" by "inform[ing] real American leadership." Although the donation request includes the phrase "[c]hecking the right box on the November ballot is important," neither that phrase nor the sentence of which it is a part, solicits funds. It does not in any way indicate that funds will be used to target the election or defeat of a clearly identified candidate; on the contrary, it can be read as stating that funds will be spent on things unrelated to "checking the right box on the November ballot," such as

Free Speech's "message" to "inform real American leadership." Other language in the donation request criticizes Obama's policy choices. The donation request lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. The language used in this donation request is not at all like that present in *Survival Education Fund*: "Vote for Peace in '84"; "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"; "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."

Since this donation request does not solicit contributions under the Act, and Free Speech does not propose spending any funds on "expenditures" under the Act, funds raised will not be subject to the limitations, prohibitions or reporting requirements of the Act.

D. The "Make Them Listen" Donation Request

> In 2010, the Tea Party movement ushered in an historic number of liberty-friendly legislators. But President Obama and his pals in Congress didn't get the message: Stop the bailouts. No socialized healthcare. End oppressive taxes. But we won't be silenced. Let's win big this fall. Donate to Free Speech today.

This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The request arguably references an election, since it claims that the 2010 election elected a "number of liberty-friendly legislators." But the request does not clearly reference a future election. Although it does state, "[l]et's win big this fall," this is not clearly a

reference to an upcoming election, let alone a clear statement that any funds raised would be used to target the election or defeat of a clearly identified candidate. Even when read in the context of the rest of the donation request, winning in the fall is not "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295.

The request states that neither Obama nor "his pals" in Congress got the message the people sent in 2010: that "bailouts" need to stop, "socialized healthcare" is unacceptable, and "oppressive taxes" need to come to an end. The request can be read as then saying that although Obama and "his pals" in Congress still have not heard this message, Free Speech "will not be silenced," and they will continue to advocate in favor of these policy choices. They will continue to do so "this fall," and they hope to "win big" then – which could be read to mean legislative votes in the Congress regarding ending "bailouts," "socialized healthcare" and "oppressive taxes." Ultimately, the donation request is not sufficiently clear.[18]

But even if one were to presume that the donation request solicits contributions under the Act (*e.g.*, "win big this fall" references the fall election, and that somehow makes clear that funds raised were to be spend on "expenditures"), the donation request would, at most, require a disclaimer under 2 U.S.C. 441d. That determination would not mean that all funds raised in response to the request would be subject to the limitations, prohibitions, or reporting obligations of the Act. On the contrary, the request asks for

[18] For example, if the donation request said "let's win big this fall at the ballot box," or "let's win big this fall on election day," that would bring the request much closer to coming within the reach of the Act as it was construed by the Second Circuit in *SEF*.

funds to support Free Speech's effort to "not be silenced" and to send " a message" regarding bailouts, healthcare and taxes. In light of that non-electoral language, it cannot be simply presumed that all funds raised by the donation request would be subject to the Act's limitations, prohibitions, or reporting obligations. The Commission lacks the statutory authority to employ such a presumption, or to presume that a certain amount of the funds received would be subject to the limitations, prohibitions and reporting obligations of the Act. *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. 13,223 (2010).[19]

Similarly, even assuming that the Commission read the donation request as "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate," the Commission lacks any sort of regulation or other public guidance on how Free Speech should determine what portion of funds received would be subject to the limitations, prohibitions or reporting obligations of the Act. The Commission declines to impose a new rule by way of the advisory opinion process. *See*

[19] 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.

2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section."); *see also U.S. v. Magnesium Corp. of Am. LLC*, 616 F.3d 1129, 1139 (10th Cir. 2010) ("[E]ven if Congress repealed the [Administrative Procedures Act] tomorrow, the Due Process clause of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice . . . . And it pertains when an agency advances a novel interpretation of its own regulations in the course of a civil enforcement action. If an agency could punish a regulated party for following the agency's own interpretation of its own ambiguous regulation, after all, 'the practice of administrative law would come to resemble 'Russian Roulette.'") (internal citations omitted).

Question 3. Will the activities described in this advisory opinion request require Free Speech to register and report to the Commission as a political committee?

No, the activities described in this advisory opinion request will not require Free Speech to register and report to the Commission as a political committee.

The Act and Commission regulations define a "political committee" as "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A); 11 CFR 100.5. The Supreme Court construed the term "political committee" to encompass only

organizations that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). 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* Political Committee Status, Supplemental Explanation and Justification ("2007 Political Committee Status Supplemental E&J"), 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).

The Commission has not defined or clarified the major purpose test through rulemaking, and instead has opted to consider it on a case-by-case basis. *Id.* at 5596. In the past, the Commission has claimed that a group needed to file as a political committee if its major purpose was merely "partisan politics" or "electoral activity." Such arguments were rejected in court. *See FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861 (1996) ("the terms 'partisan electoral politics' and 'electioneering' raise virtually the same vagueness concerns as the language 'influencing any election for Federal office,' the raw application of which the *Buckley* Court determined would impermissibly impinge on First Amendment values."). Despite the rejection of such arguments, the Commission nonetheless continued to use such tests, and other variants of the major purpose test that go beyond that articulated in *Buckley*, such as "influencing elections." And the

Commission has at times claimed that *dicta* from *MCFL* is a separate, more expansive test than was articulated in *Buckley* (if a group's "independent spending become[s] so extensive that the organization would be classified as a political committee."). *MCFL*, 479 U.S. at 262.[20] *See* MUR 5753 (League of Conservation Voters), FGCR at 5 and MUR 5754 (MoveOn.org Voter Fund), FGCR at 5 ("influence the outcome of the 2004 elections"); MUR 5751 (Leadership Forum), FGCR at 4 ("a focus on influencing the 2004 presidential elections"); MUR MURs 5910 & 5694 (Americans for Job Security), FGCR at 15 ("influence a federal election"); MURs 5977 & 6005 (American Leadership Project), FGCR at 11 ("influence the election of the 2008 presidential primary election"); and MUR 6082 (Majority Action), FGCR at 13 ("influence the 2006 mid-term elections"). In other cases, some declared that the proper test was "campaign activity," a significantly broader test than that one articulated in *Buckley* (*i.e.*, nomination or election or of a federal candidate). MUR 5365 (Club for Growth), GCR #2 at 3, 5 ("the vast majority of CFG's disbursements are for federal campaign activity" and concluding CFG "has the major purpose of campaign activity."); MUR 5403 (Americans Coming Together), FGCR at 8 ("sufficient spending on campaign activity"); MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement at ¶6 ("only organizations whose major purpose is campaign activity can be considered political committees under the Act."); MUR 5753 (League of Conservation Voters 527), FGCR at 7 ("only organizations whose major purpose is campaign activity can be considered

[20] *MCFL* can be read to impose an additional limitation on the statute, ever narrower than the *Buckley* construction, since *MCFL* speaks of spending that must be "so extensive." *MCFL*, 479 U.S. at 262. The word "extensive" is defined as "covering or affecting a large area;" "large in amount or scale." *See* OxfordDictionaries.com http://oxforddictionaries.com/definition/extensive?region=us&q=extensive.

political committees under the Act,"); MUR 6082 (Majority Action), FGCR at12 ("the main purpose of MA [Majority Action] was campaign activity during 2006").

When necessary, the Commission claims it uses the test as it was formulated by the Court in *Buckley*. For example, as the *GOPAC* court observed, although the Commission argued there that sufficient major purpose could be shown merely by "partisan politics" or "electoral activity," it was "noteworthy that in its opposition to the petition for rehearing en banc in *Akins v. FEC*, the Commission supports the formulation of the *Buckley* test." *GOPAC*, 917 F. Supp. at 859 n.1. More recently, the Commission invoked *Buckley's* formulation of the test. *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5597 (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.)). Subsequent to this pronouncement, however, the Commission continued to consider the more amorphous "campaign activity" test. *See, e.g.*, MUR 5988 (American Future Fund), FGCR at 11 ("sufficient spending on campaign activity."); MURs 5910 & 5694 (Americans for Job Security), FGCR at 6 ("The Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and it interprets that test as limited to organizations whose major purpose is federal campaign activity"); MUR 5977 & 6005 (American Leadership Project), FGCR at 8 (the Commission "interprets [the political committee] test as limited to organizations whose major purpose is federal campaign activity."); MUR 5842 (Economic Freedom Fund), FGCR at 11 ("only organizations whose major purpose is campaign activity can

potentially qualify as political committees under the Act.") Nor has the Commission explained how its loss in *Unity '08 v. FEC*, 596 F.3d 861 (2010) (where the Commission's claim that Unity '08 was a political committee was rejected by the D.C. Circuit) affects its case-by-case approach.

More recently, and although the Commission continues to consider the test that was rejected in *GOPAC*, the Commission has represented to Federal courts that it uses the *Buckley* formulation of the test. *See* Brief for the Respondents at 5, *The Real Truth About Obama, Inc., v. FEC ("RTAO")*, 130 S. Ct. 2371 (U.S. 2010) (No. 09-724) ("Under the major purpose test, an organization will not be regulated as a political committee unless its 'major purpose . . . is the nomination or election of a candidate'" (citing *Buckley*, 424 U.S. at 79)); Brief of Appellees Federal Election Commission and United States Department of Justice at 9, *RTAO*, 575 F.3d 342 (4th Cir. 2011) (No. 11-1760) ("Under the statue as thus limited, as organization that is not controlled by a candidate must register as a political committee only if (1) the entity crosses the $1,000 threshold of contributions or expenditures, and (2) its 'major purpose' is the nomination or election of federal candidates."); Brief of Appellees Federal Election Commission and United States Department of Justice at 5, *RTAO*, 2008 WL 4416282 (4th Cir. 2008) (No. 08-1977) ("Under the statute as thus limited, a non-candidate-controlled entity must register as a political committee—thereby becoming subject to limits on the sources and amounts of its contributions received—only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates."); Federal Election Commission's Opposition to Appellant's Motion for Injunction Pending Appeal, *RTAO*, 2008 WL 4416282 (4th Cir. 2008) (No. 08-1977)

("Under the statute as thus limited, a non-candidate organization must register as a political committee and be subject to contribution limits only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates."); Federal Election Commission's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, *RTAO*, No. 3:08-cv-00483-JRS at 4 (E.D. Va. 2008) ("Under the statute as thus limited, a non-candidate organization must register as a political committee and be subject to contribution limits only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates."); Defendant Federal Election Commission's Memorandum in Support of Motion for Summary Judgment and Opposition to Plaintiff's Motion for Preliminary Injunction and Summary Judgment, *RTAO*, No. 3:08-cv-00483-JRS at 10 (E.D. VA. 2010) ("Under the statute as thus limited, a non-candidate-controlled entity must register as a political committee only if it crosses one of the $1,000 statutory thresholds and its 'major purpose' is the nomination or election of federal candidates."); Defendant Federal Election Commission's Reply in Support of the Commission's Motion for Summary Judgment, *RTAO*, No. 3:08-cv-00483-JRS at 25 (E.D. VA. 2010) ("In *Buckley*, the Supreme Court established the 'major purpose' test to limit the definition of 'political committee' to organizations controlled by a candidate or whose major purpose is the nomination or election of a candidate.").

In reviewing an analogous state law, the 10th Circuit articulated the major purpose test of *Buckley* 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." *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010).[21]

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Even if Free Speech's proposed advertisement "Financial Reform" constitutes express advocacy, Free Speech need not file as a political committee. According to its request, it plans on spending $250 to run "Financial Reform" as a newspaper advertisement, and $333.33 to run it as a radio advertisement, for a total of $583.33. Thus, even if the advertisement is express advocacy, Free Speech will not spend more than $1,000 on "expenditures." Since none of Free Speech's donation requests will result in contributions, it will not receive in excess of $1,000 in "contributions." Because it will

[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. *Cf*, *Brumsickle*, 624 F.3d 1011 (in dicta, explained that where one group spends 40% of its time and resources on political advocacy, 30% of its time and resources producing merchandise, and 30% of its time and resources on research whereas an otherwise identical group that spends 45% of its time and resources on political advocacy, 45% of its time and resources on producing merchandise, and 10% of its time and resources on research, "[p]olitical advocacy is 'the' major purpose for the former group (because political advocacy commands the largest share of the group's time and resources), but it is just 'a' major purpose of the latter (because the group expends equal time and resources on political activity and merchandise production.").

not make in excess of $1000 in expenditures or receive in excess of $1000 in contributions, Free Speech does not have to register and report as a political committee.

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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 involved 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 http://www.fec.gov/searchao.

On behalf of the Commission,

Caroline C. Hunter
Chair