



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463
2012 APR 11 PM 7:04

April 11, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

Erin R. Chlopak *ER for ERC*
Attorney

Allison T. Steinle *AT for ATS*
Attorney

Subject: AO 2012-11 (Free Speech) (Draft B)

For Meeting of 4-12-12

SUBMITTED LATE

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

Attachment

1 ADVISORY OPINION 2012-11
2
3 Benjamin T. Barr Esq.
4 Stephen R. Klein, Esq.
5 Wyoming Liberty Group
6 1740 H Dell Range Blvd. #459
7 Cheyenne, WY 82009
8

DRAFT B

9 Dear Messrs. Barr and Klein:

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

14 The Commission concludes that: (1) seven of Free Speech’s 11 proposed
15 advertisements would expressly advocate the election or defeat of a clearly identified
16 Federal candidate; (2) two of the four proposed donation requests would be solicitations
17 of “contributions”; and (3) Free Speech’s proposed activities would require it to register
18 and report with the Commission as a political committee.

19 ***Background***

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

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

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

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

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

13 **Radio Advertisements**

14 Free Speech plans to spend \$1,000 on three advertisements to be aired on local
15 radio station KGAB AM in Cheyenne, Wyoming. These advertisements, which Free
16 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.

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

3 **Newspaper Advertisements**

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

8 **Internet Advertisements**

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

14 **Television Advertisements**

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

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

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

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

6 ***Questions Presented***

7 1. *Will Free Speech’s proposed advertisements be “express advocacy”?*

8 2. *Will Free Speech’s proposed donation requests be “solicitations” of*
9 *contributions?*

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

12
13 ***Legal Analysis and Conclusions***

14
15 ***Question 1. Will Free Speech’s proposed advertisements be “express advocacy”?***

16 The Act defines an “expenditure” to include “any purchase, payment . . . or gift of
17 money or anything of value, made by any person for the purpose of influencing any
18 election for Federal office.” 2 U.S.C. 431(9)(A)(i); *see* 11 CFR 100.111(a). Funds used
19 for communications that expressly advocate the election or defeat of a clearly identified
20 Federal candidate are “expenditures.” *See McConnell v. FEC*, 540 U.S. 93, 190-92
21 (2003); *see also Buckley v. Valeo*, 424 U.S. 1, 77-80 (1976). An “independent
22 expenditure” is an expenditure for a communication “expressly advocating the election or

³ This advisory opinion is limited to addressing Free Speech’s “specific transaction[s] or activit[ies].” 2 U.S.C. 437f(a)(1). To the extent Free Speech also asks general questions of interpretation and poses hypotheticals, such questions “do not qualify as advisory opinion requests” and accordingly are not addressed in this advisory opinion. 11 CFR 112.1(b).

1 defeat of a clearly identified candidate” that is not coordinated with any candidate or
2 political party. 2 U.S.C. 431(17)(A); 11 CFR 100.16(a).

3 Under the Commission’s regulations, a communication expressly advocates the
4 election or defeat of a clearly identified Federal candidate if it uses phrases such as “*vote*
5 *for the President,*” “*support the Democratic nominee,*” ““*defeat*” accompanied by a
6 picture of one or more candidate(s),” or “*reject the incumbent,*” or uses campaign slogans
7 or individual words that, “in context, have no other reasonable meaning than to urge the
8 election or defeat of one or more clearly identified candidate(s).” 11 CFR 100.22(a)
9 (emphases added). A communication that pairs “a listing of clearly indentified
10 candidates described as” supporting a specific policy or position with a call to “vote” for
11 or against that specific policy or position likewise expressly advocates the election or
12 defeat of a clearly defined candidate. 11 CFR 100.22(a) (express advocacy includes
13 phrases such as “‘vote Pro-Life’ or ‘vote Pro-Choice’ accompanied by a listing of clearly
14 identified candidates described as Pro-Life or Pro-Choice”).

15 A communication also constitutes express advocacy if (1) it contains an “electoral
16 portion” that is “unmistakable, unambiguous, and suggestive of only one meaning,” and
17 (2) “[r]easonable minds could not differ as to whether it encourages actions to elect or
18 defeat one or more clearly identified candidate(s) or encourages some other kind of
19 action.” 11 CFR 100.22(b). A communication thus constitutes express advocacy under
20 section 100.22(b) if, “[w]hen taken as a whole and with limited reference to external
21 events, such as the proximity to the election, [it] could only be interpreted by a
22 reasonable person as containing advocacy of the election or defeat of one or more clearly
23 identified candidate(s).” 11 CFR 100.22(b). For example, “[c]ommunications discussing

1 or commenting on a candidate’s character, qualifications, or accomplishments are
2 considered express advocacy . . . if, in context, they have no other reasonable meaning
3 than to encourage actions to elect or defeat the candidate in question.” Explanation and
4 Justification for Final Rules on Express Advocacy; Independent Expenditures; Corporate
5 and Labor Organization Expenditures, 60 FR 35292, 35295 (July 6, 1995) (“Express
6 Advocacy E&J”); *cf. FEC v. Wis. Right to Life, Inc. (“WRTL”)*, 551 U.S. 449, 469-70
7 (2007) (indicia of express advocacy include “tak[ing] a position on a candidate’s
8 character, qualifications, or fitness for office”); *Citizens United v. FEC*, 558 U.S. ___, 130
9 S.Ct. 876, 889-90 (2010).

10 For the reasons set forth below, the Commission concludes that Free Speech’s
11 advertisements entitled “Environmental Policy,” “Gun Control” television advertisement,
12 “Financial Reform,” “Budget Reform,” and “Educated Voter Votes on Principle” are
13 express advocacy under 11 CFR 100.22. The Commission further concludes that Free
14 Speech’s remaining proposed advertisements – the two “Health Care Crisis”
15 advertisements, the “Gun Control” Facebook advertisement, and the “Ethics”
16 advertisement – are not express advocacy.

17 *A. The “Environmental Policy” Radio Advertisement*

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

24

1 The “Environmental Policy” radio advertisement is express advocacy under
2 11 CFR 100.22(b). The ad disparages President Obama by characterizing his opposition
3 to legislation as a “tragedy” for Wyoming ranchers, referring to “Obama’s
4 environmentalist cronies,” and stating that “Obama cannot be counted on to represent
5 Wyoming values . . . as President.” The advertisement also contains an “electoral
6 portion” that expressly exhorts listeners to take action “[t]his November.” 11 C.F.R.
7 100.22(b).

8 Although the advertisement refers to legislation, it does not describe or discuss
9 the merits of that legislation. The advertisement, when taken as a whole and with limited
10 reference to external events, can only be interpreted by a reasonable person as advocating
11 Mr. Obama’s defeat “as President” in the election “[t]his November.” 11 C.F.R. 100.22
12 (b). It “cannot be regarded as a mere discussion of public issues that by their nature
13 raises the name[]” of President Obama. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S.
14 238, 249 (1986) (“*MCFL*”). The advertisement “goes beyond issue discussion to express
15 electoral advocacy,” *id.*, asserting that President Obama “cannot be counted on to
16 represent Wyoming values and voices *as President*” and concluding with a call to action
17 “*this November.*”

18 Finally, the ending tagline, “[t]alk about ranching,” does not negate the
19 advertisement’s express electoral advocacy. *See id.* at 249 (recognizing that “disclaimer
20 of candidate endorsement cannot negate” express advocacy where text of the ad “goes
21 beyond issue discussion to express electoral advocacy”). It is an obvious non sequitur,
22 and no reasonable person could conclude that the advertisement actually encourages
23 listeners to “[t]alk about ranching” in “November” rather than advocating against

1 President Obama. In an advertisement that predominantly criticizes a candidate's
2 character, qualifications and fitness for office (*cf. WRTL*, 551 U.S. at 470), the
3 exhortation to “[t]alk about ranching” can only be understood in the context of the
4 election. Thus, the advertisement’s direction to “call your neighbors” to discuss
5 President Obama’s ranching policies “this November” encourages actions to defeat
6 President Obama. 11 CFR 100.22(b); *see* Express Advocacy E&J, 60 FR at 35295.

7 *B. The “Financial Reform” Radio and Newspaper Advertisements*

8
9 President Obama supported the financial bailout of Fannie
10 Mae and Freddie Mac, permitting himself to become a
11 puppet of the banking and bailout industries. What kind of
12 person supports bailouts at the expense of average
13 Americans? Not any kind we would vote for and neither
14 should you. Call President Obama and put his antics to an
15 end.⁴

16
17 The “Financial Reform” advertisements, which Free Speech proposes to air on the
18 radio and run in newspapers, are express advocacy under 11 CFR 100.22(a). The
19 advertisements criticize President Obama’s character, asking “[w]hat kind of person
20 supports bailouts[.]?” They then invoke this criticism as the reason that President Obama
21 is “not any kind [of person]” that “we” – the advertisement’s creators – “would vote for,”
22 and then conclude that “neither should you.” The advertisements thus expressly advocate
23 the defeat of President Obama, explicitly urging listeners and readers not to vote for him.
24 *See* 11 CFR 100.22(a) (express advocacy includes, *inter alia*, phrases such as “vote for”
25 or “vote against” a clearly identified candidate, and phrases advocating a “vote” in favor
26 or against a specific policy and expressly describing a clearly identified candidate as

⁴ 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.

1 supporting or opposing that policy); *see also* *MCFL*, 479 U.S. at 249 (communication
2 that “not only urge[d] voters to vote for ‘pro-life’ candidates, but also identifie[d] and
3 provide[d] photographs of specific candidates fitting that description” was express
4 advocacy); MUR 5887 (*Schwarz for Congress*), Conciliation Agreement ¶ 14 (May 27,
5 2009) (advertisement lauding Schwarz’s accomplishments and then stating “we know
6 him, want him, back in Congress” is express advocacy under section 100.22(a)). The tag
7 line directive – “[c]all President Obama” – does not “negate” the advertisement’s express
8 electoral advocacy. *MCFL*, 479 U.S. at 249 (recognizing that “disclaimer of candidate
9 endorsement cannot negate” express advocacy where text of the ad “goes beyond issue
10 discussion to express electoral advocacy”).

11 C. *The ““Health Care Crisis” Radio and Newspaper Advertisements*

12
13 President Obama supports socialized medicine, but
14 socialized medicine kills millions of people worldwide.
15 Even as Americans disapproved of ObamaCare, he pushed
16 ahead to make socialized medicine a reality. Put an end to
17 the brutality and say no to socialized medicine in the
18 United States.⁵

19
20 The “Health Care Crisis” advertisements, which Free Speech proposes to air on
21 the radio and run in newspapers, are not express advocacy. These advertisements
22 criticize President Obama’s health care policy, provide Free Speech’s views on the issue
23 (“socialized medicine kills millions of people worldwide”), and conclude with a policy-
24 related call to action. These ads have no “electoral portion.” 11 CFR 100.22(b)(1). A

⁵ 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.”

1 reasonable mind could conclude that the advertisements encourage actions related to
2 health care policy rather than to defeat President Obama.

3 *D. The “Gun Control” Facebook Advertisement*

4 (Picture of handgun, 110 pixels wide by 80 pixels tall)
5 (Title: Stand Against Gun Control)
6 Obama supports gun control. Don’t trust him. Support
7 Wyoming state candidates who will protect your gun rights.
8

9 The “Gun Control” Facebook advertisement, which criticizes President Obama’s
10 support of gun control and exhorts viewers to “[s]upport Wyoming state candidates” is
11 not express advocacy. The advertisement’s only “electoral portion” concerns Wyoming
12 state candidates, not federal candidates. 11 CFR 100.22(b)(1). A reasonable mind could
13 conclude that the advertisement encourages support of Wyoming state candidates “who
14 will protect . . . gun rights,” and does not encourage action to defeat President Obama.

15 *E. The “Environmental Policy” Facebook Advertisement*

16 (Picture of a Wyoming ranch, 110 pixels wide by 80 pixels
17 tall)
18 (Title: Learn About Ranching)
19 Obama’s policies are a tragedy for Wyoming ranchers, and
20 he does not represent our values. This November, learn
21 about ranching.
22

23 The “Environmental Policy” Facebook advertisement is express advocacy under
24 11 CFR 100.22(b). Like the “Environmental Policy” radio advertisement, this
25 advertisement criticizes President Obama, attacking his “policies” generically as “a
26 tragedy” for Wyoming ranchers and questioning his “values.” Also, like the similar radio
27 advertisement, this advertisement contains an “electoral portion” that expressly exhorts
28 listeners to take action “[t]his November.” 11 C.F.R. 100.22(b)(1). Taken as a whole
29 and with limited reference to external events, the advertisement can only be interpreted

1 by a reasonable person as advocating the electoral defeat of President Obama “[t]his
 2 November.” 11 C.F.R. 100.22(b). Finally, like the “talk about ranching” tagline in the
 3 similar radio advertisement, the directive to “learn about ranching” “[t]his November” is
 4 an obvious non sequitur that can only be understood as a reference to the election. No
 5 reasonable person could conclude that the advertisement actually encourages viewers to
 6 “learn about ranching” in “November.” 11 CFR 100.22(b); *see* Express Advocacy E&J,
 7 60 FR at 35295; *see also* *MCFL*, 479 U.S. at 249-50 (disclaiming candidate endorsement
 8 in communication that “goes beyond issue discussion” cannot negate conclusion of
 9 express advocacy); *Real Truth About Obama v. FEC*, 796 F. Supp. 2d 736, 749-50 (E.D.
 10 Va. 2011) (“*RTAO*”) (concluding that 11 CFR 100.22(b) may constitutionally be applied
 11 to two anti-Obama advertisements that harshly criticized then-Senator and presidential
 12 candidate Obama for his position on abortion that lacked an explicit exhortation to “vote”
 13 against him), *appeal docketed*, No. 11-1760 (4th Cir. argued Mar. 21, 2012).

14 *F. The “Gun Control” Television Advertisement*

<p>Audio:</p> <p>Guns save lives.</p> <p>That’s why all Americans should seriously doubt the qualifications of Obama, an ardent supporter of gun control.</p> <p>This fall, get enraged, get engaged, and get educated.</p>	<p>Video:</p> <p>Newspaper clippings with headlines describing self-defense with firearms fade in, piling up one atop another.</p> <p>Clippings dissolve to a picture of President Obama, and one newspaper headline below him: “President Obama defends attorney general regarding ATF tactics (LA Times, Oct. 6, 2011)”</p> <p>Dissolves to a picture of the Wyoming state flag, panning</p>
---	--

And support Wyoming state candidates who will protect your gun rights.	down to the Wyoming Capitol Building
--	--------------------------------------

1

2 The “Gun Control” advertisement that Free Speech proposes to broadcast on
3 television is express advocacy under 11 CFR 100.22(b). The advertisement exhorts “all
4 Americans” to “seriously doubt” President Obama’s “qualifications” based on his “ardent
5 support[]” of gun control, in spite of the advertisement’s assertion that “[g]uns save
6 lives.” Having urged widespread and “serious[]” doubt of the President’s
7 “qualifications,” the advertisement’s “electoral portion” then immediately exhorts
8 viewers to “get enraged, get engaged, and get educated,” and to do so “[t]his fall.” The
9 advertisement, when taken as a whole and with limited reference to external events, can
10 only be interpreted by a reasonable person as advocating that viewers express their
11 “serious[] doubt” for President Obama’s qualifications by casting a vote to defeat him
12 “this fall.” *See* 11 CFR 100.22(b); Express Advocacy E&J, 60 Fed. Reg. at 35295
13 (“Communications discussing or commenting on a candidate’s character, *qualifications*,
14 or accomplishments are considered express advocacy under . . . section 100.22(b) if, in
15 context, they have no other reasonable meaning than to encourage actions to elect or
16 defeat the candidate in question.”) (emphasis added); *see also RTAO*, 796 F. Supp. 2d at
17 749-50 (advertisements that invoke policy issue as basis for opposing then-Senator and
18 presidential candidate Obama, even without explicit call to action “this fall,” are express
19 advocacy under 11 CFR 100.22(b)). Although the advertisement has an additional
20 exhortation to “support Wyoming state candidates who will protect your gun rights,”
21 “reasonable minds could not differ as to whether it [also] encourages actions to . . .

1 defeat” President Obama. *See* 11 CFR 100.22(b) (defining express advocacy as a
2 communication “*containing* advocacy of the election or defeat of one or more clearly
3 identified candidate(s)”) (emphasis added); *cf. MCFL*, 479 U.S. at 249-50 (purported
4 disclaimer of candidate endorsement cannot negate express advocacy).

5 G. *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.

1 The “Ethics” television advertisement, which criticizes President Obama based on
2 statements about his “budget and tax priorities” and his nominees’ asserted lack of
3 compliance with their tax obligations, is not express advocacy. The advertisement
4 exhorts viewers to “[c]all President Obama and tell him you don’t approve of his taxing
5 behavior.” The advertisement contains no “electoral portion” and a reasonable mind
6 could conclude that the advertisement merely encourages actions regarding budget and
7 tax policy and President Obama’s selection of nominees. 11 C.F.R. 100.22(b). *See, e.g.*,
8 MUR 6044 (Musgrove for Senate and DSCC), Statement of Reasons of Commissioners
9 Walther, Petersen, Bauerly, Hunter and McGahn at 5; MUR 5788 (Republican Federal
10 Committee of Pennsylvania and Santorum 2006), Factual and Legal Analysis at 6-7.

11 H. *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.

12 The “Budget Reform” advertisement, which Free Speech proposes to broadcast
13 on television, is express advocacy under 11 CFR 100.22(a). This advertisement
14

1 expressly advocates for Congresswoman Lummis’s election: it tells the viewer that
2 Congresswoman Lummis “deserves your support” and exhorts the viewer to “[d]o
3 everything you can to support Congresswoman Lummis this fall and work toward fiscal
4 sanity.” See 11 CFR 100.22(a) (“support the Democratic nominee,” even without added
5 clarification of when or how, is express advocacy); MUR 5887 (*Schwarz for Congress*),
6 Conciliation Agreement ¶ 11 (“support Congressman Joe Schwarz, the Congressman
7 with a real Republican record” is express advocacy under section 100.22(a)). The
8 advertisement’s clarification of when viewers should “support” Congresswoman Lummis
9 – *this fall* – further underscores the manner in which viewers are encouraged to support
10 Congresswoman Lummis, *i.e.*, by voting for her in the election “this fall.”

11 I. *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."
---	--

1
2 The “Educated Voter Votes on Principle” advertisement, which Free Speech
3 proposes to broadcast on television, is express advocacy under 11 CFR 100.22(b). The
4 advertisement, when taken as a whole, even with no reference to external events, can
5 only be interpreted by a reasonable person as advocating the defeat of President Obama.
6 11 CFR 100.22(b). It focuses exclusively on President Obama; criticizes President
7 Obama’s character, asserting that he “palled around with Bill Ayers” and “was cozy with
8 ACORN”; and condemns President Obama’s job performance, describing him as “a
9 President destructive of our natural rights.” And after these statements about President
10 Obama’s character and job performance, the advertisement’s clear “electoral portion”
11 instructs that “[r]eal voters vote on principle” and exhorts viewers to “remember this
12 nation’s principles.” The advertisement thus is an unmistakable and unambiguous call to
13 vote against President Obama. *See* 11 CFR 100.22(b); Express Advocacy E&J, 60 FR at
14 35295 (“Communications discussing or commenting on a candidate’s character,
15 qualifications, or accomplishments are considered express advocacy under . . . section
16 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions
17 to elect or defeat the candidate in question.”); *see also RTAO*, 796 F. Supp. 2d at 749-50
18 (concluding that 11 CFR 100.22(b) may constitutionally be applied to two anti-Obama
19 advertisements that harshly criticized then-Senator and presidential candidate Obama for
20 his position on abortion even in the absence of an explicit exhortation to “vote” against
21 him). This advertisement, characterizing President Obama as “destructive of our natural

1 rights” and unprincipled and urging viewers “to vote on principle,” resembles the
2 advertisement at issue and considered express advocacy in *MCFL*, which expressly
3 advocated votes for certain candidates by defining them as “pro-life” and exhorting
4 readers to “vote ‘pro-life’.” *See MCFL*, 479 U.S. at 249-50.

5 *Question 2. Will Free Speech’s proposed donation requests be “solicitations” of*
6 *contributions?*

7 Two of Free Speech’s proposed donation requests – entitled “War Chest” and
8 “Make Them Listen” – will solicit “contributions.” The proposed donation requests
9 entitled “Strategic Speech” and “Checking Boxes” will not.

10 The Act defines the term “contribution” to include “any gift, subscription, loan,
11 advance, or deposit of money or anything of value made by any person for the purpose of
12 influencing any election for Federal office.” 2 U.S.C. 431(8)(A)(i); *see also* 11 CFR
13 100.52(a). The Act requires “any person” who “solicits any contribution through any
14 broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any
15 other type of general public political advertising” to include a specified disclaimer in the
16 solicitation. 2 U.S.C. 441d(a); *see also* 11 CFR 110.11(a)(3). Requests for funds that
17 “clearly indicate[] that the contributions will be targeted to the election or defeat of a
18 clearly identified candidate for federal office” raise “contributions” under the Act. *FEC*
19 *v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995) (analyzing communications
20 for purposes of section 441d(a)).⁶

⁶ For examples of the Commission’s application of this standard, see MUR 5754 (MoveOn), Conciliation Agreement ¶ 2; MUR 5753 (League of Conservation Voters), Conciliation Agreement ¶ 2; MUR 5511 (Swiftboat Veterans and POWs for Truth), Conciliation Agreement ¶ 2; MUR 5487 (Progress for America Voter Fund), Conciliation Agreement ¶ 2; MUR 5440 (The Media Fund), Conciliation Agreement ¶ 2; MUR 5365 (Club for Growth), General Counsel’s Report #2, at 11-13. *EMILY’s List v. FEC*, in which the

1 A. *The “War Chest” Donation Request*

2
3 Friends of freedom celebrated when the Supreme Court
4 decided *Citizens United*. Now, more than ever, we can
5 make the most effective use of your donations this coming
6 fall. Donations given to Free Speech are funds spent on
7 beating back the Obama agenda. Beating back Obama in
8 the newspapers, on the airways, and against his \$1 billion
9 war chest.

10
11 This donation request states that “[d]onations given to Free Speech are funds
12 spent on beating back the Obama agenda” and “against his \$1 billion war chest,” and that
13 Free Speech can use donations most effectively “[t]his coming fall.” These statements
14 make plain that funds received in response to the request will be used to advocate the
15 electoral defeat of President Obama “this coming fall.” The use of the term “war chest”
16 is clearly a campaign reference. Accordingly, this donation request solicits
17 “contributions” under the Act. 2 U.S.C. 431(8)(A)(i); *see Survival Education Fund*, 65
18 F.3d at 294-95; *cf.* MUR 5487 (Progress for America Voter Fund), Conciliation
19 Agreement ¶¶ 22, 26 (concluding that direct mail pieces using the phrase “help us
20 promote President Bush’s agenda in Pennsylvania with the greatest possible strength
21 between now and November 1st” solicited contributions because they “clearly indicate
22 that the funds received would be targeted to the election of President Bush”).

23 B. *The “Strategic Speech” Donation Request*

24 This fall, 23 Democrat incumbents are up for election in the
25 U.S. Senate. Seven have already decided to retire, but
26 some, like John Tester of Montana, haven’t gotten the
27 message. With your donation, we’ll strategically speak out

court struck down a former Commission regulation regarding solicitations, is not to the contrary. *See* 581 F.3d 1, 17-18, 21 (D.C. Cir. 2009). While the decision invalidated the regulation’s mandatory allocation formula, nothing in the opinion undermined the general premise that a solicitation that indicates that donated funds will be used to support or oppose the election of a clearly identified federal candidate results in “contributions.”

1 against the expansion of government-run healthcare and so-
2 called ‘clean energy’ boondoggles like Solyndra, which
3 Senators like Tester fully support. It’s time to retire failed
4 socialist policies.
5

6 This donation request states that, “with your donation,” Free Speech will
7 “strategically speak out against the expansion of government-run healthcare and so-called
8 ‘clean energy’ boondoggles,” and urges the retirement of “failed socialist policies.” The
9 donation request identifies Senator Tester as supporting these initiatives and as an
10 incumbent Senator up for re-election who has not “gotten the message” that he should
11 retire, but it does not plainly indicate that funds received in response to the request will
12 be used to advocate his defeat. Rather, the request suggests that Free Speech will use the
13 funds to “strategically speak out” against the identified government policies it opposes.
14 Accordingly, this donation request does not solicit contributions under the Act. 2 U.S.C.
15 431(8)(A)(i); *see also Survival Education Fund*, 65 F.3d at 294-95.

16 C. *The “Checking Boxes” Donation Request*
17

18 ‘Leading from behind,’ President Obama takes advice from
19 socialist staffers, usually choosing from a checklist of
20 oppressive, debt-driven policies without even considering
21 freedom-based and fiscally-conscious alternatives.
22 Checking the right box on the November ballot is
23 important, but like Obama’s memos it’s just not enough.
24 Take the lead in making the message of Free Speech heard:
25 your donation will inform real American leadership.
26

27 This donation request criticizes President Obama’s policy decisions, states that
28 “checking the right box on the November ballot is important” but “not enough,” and
29 concludes that “your donation will inform real American leadership.” Although the
30 request clearly identifies President Obama and refers to the November ballot, it does not
31 make plain that funds received in response to the request will be used to advocate his

1 defeat. The request exhorts the reader to “[t]ake the lead in making the message of Free
2 Speech heard,” indicating that Free Speech will use the funds received in response to the
3 request to promulgate its views to the public. The solicitation does not “clearly indicate[]
4 that the contributions will be targeted to the election or defeat” of the President. *Survival*
5 *Education Fund*, 65 F.3d at 294-95. Accordingly, this donation request does not solicit
6 contributions under the Act.

7 *D. The “Make Them Listen” Donation Request*

8
9 In 2010, the Tea Party movement ushered in an historic
10 number of liberty-friendly legislators. But President
11 Obama and his pals in Congress didn’t get the message:
12 Stop the bailouts. No socialized healthcare. End
13 oppressive taxes. But we won’t be silenced. Let’s win big
14 this fall. Donate to Free Speech today.

15
16 This donation request states, “Let’s win big this fall. Donate to Free Speech
17 today,” and criticizes “President Obama and his pals in Congress” who “didn’t get the
18 message” after the 2010 electoral victories of “the Tea Party movement.” These
19 statements make plain that funds received in response to the request will be used to
20 advocate the defeat of President Obama and to “win big this fall.” Accordingly, this
21 donation request solicits contributions under the Act. 2 U.S.C. 431(8)(A)(i); *see also*
22 *Survival Education Fund*, 65 F.3d at 294-95; *cf.* MUR 5511 (Swiftboat Veterans and
23 POWs for Truth), Conciliation Agreement ¶¶ 20-21 (concluding that fundraising
24 communications stating that funds would be used to keep advertisements “on the
25 airwaves in key battleground states” and “help us tell the true story of John Kerry” by
26 “impacting the public discussion surrounding Senator Kerry’s fitness for duties as
27 Commander-in-Chief” and “turning up the volume” on John Kerry’s campaign solicited

1 contributions); MUR 5487 (Progress for America Voter Fund), Conciliation Agreement
2 ¶¶ 22, 26 (concluding that solicitations using the phrase “help us promote President
3 Bush’s agenda in Pennsylvania with the greatest possible strength between now and
4 November 1st” raised contributions under the Act because they “clearly indicate that the
5 funds received would be targeted to the election of President Bush”).

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

8 Yes, the activities described in this advisory opinion request will require Free
9 Speech to register and report to the Commission as a political committee.

10 The Act and Commission regulations define a “political committee” as “any
11 committee, club, association or other group of persons which receives contributions
12 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
13 aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A); 11 CFR
14 100.5. Concerned that the term “political committee” could “reach groups engaged in
15 purely issue discussion,” the Supreme Court stated that “they need only encompass
16 organizations that are under the control of a candidate or the major purpose of which is
17 the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).
18 Accordingly, organizations that satisfy the statutory definition of “political committee”
19 and have the requisite major purpose must register as political committees.⁷

⁷ See also Supplemental Explanation and Justification for Final Rules on Political Committee Status, 72 FR 5595, 5597 (Feb. 7, 2007) (“Supplemental E&J”). Given the recent changes in the restrictions applicable to political committee status, the First Circuit has questioned whether limiting political committee status to those organizations that have a major purpose of federal campaign activity is constitutionally required. See *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) (upholding a state disclosure law as applied to groups that receive or spend over \$5,000 on a candidate’s election even if those groups do not have as their major purpose the election of a candidate).

1 A. *Statutory Definition of Political Committee*

2 As explained in response to Question 1 above, several of Free Speech’s proposed
3 advertisements contain express advocacy, and funds spent on these advertisements would
4 be expenditures under the Act and Commission regulations. Free Speech plans to spend
5 more than \$1,000 in this calendar year on these advertisements. Once it does, it will meet
6 the statutory threshold for a political committee. Similarly, as explained in response to
7 Question 2 above, two of Free Speech’s four proposed fundraising appeals – “War Chest”
8 and “Make Them Listen” – would solicit contributions “for the purpose of influencing
9 any Federal election.” If Free Speech receives more than \$1,000 in response to those
10 solicitations before making its planned expenditures over \$1,000, it would meet the
11 political committee statutory threshold at that point.⁸

12 B. *Major Purpose*

13 To determine an entity’s “major purpose,” the Commission considers a group’s
14 “overall conduct,” including: statements about its mission, the proportion of spending
15 related to Federal candidate campaigns, and the extent to which fundraising solicitations
16 indicate funds provided will be used to support or oppose specific candidates.
17 Supplemental Explanation and Justification for Final Rules on Political Committee
18 Status, 72 FR 5595, 5597, 5605 (Feb. 7, 2007) (“Supplemental E&J”). An organization
19 can satisfy the major purpose test “through sufficiently extensive spending on Federal
20 campaign activity.” *Id.* at 5601 (citing *MCFL*, 479 U.S. at 262, and quoting its
21 explanation that an organization would be deemed a political committee if its

⁸ In addition, the “War Chest” and “Checking Boxes” donation requests are express advocacy under 100.22(b) and therefore, funds spent on these requests would also trigger Free Speech’s political committee registration requirement if the expenditures on these alone or aggregated with the other expenditures are in excess of \$1,000 during a calendar year.

1 “independent spending become[s] so extensive that the organization’s major purpose
2 may be regarded as campaign activity”). In considering an organization’s major
3 purpose, among other things, the Commission thus compares how much of an
4 organization’s spending is on Federal campaign activity versus “activities that [a]re not
5 campaign related.” *Id.* at 5601, 5605.

6 Free Speech states in its advisory opinion request that “it does [not] have as its
7 major purpose the election or defeat of clearly identified candidates.” Such a statement is
8 not, however, dispositive. *See RTAO*, No. 3:08-cv-00483, 2008 WL 4416282, at 14 (E.D.
9 Va. Sept. 24, 2008) (“A declaration by the organization that they are *not* [organized] for
10 an electioneering purpose is not dispositive.”), *aff’d*, 575 F.3d 342 (4th Cir. 2009),
11 *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp.
12 2d 736. Indeed, the Commission must consider the organization’s disbursements,
13 activities, and statements to determine its major purpose. *Id.* (citing *Akins v. FEC*, 101
14 F3d 731, 743 (D.C. Cir. 1997) and *Shays v. FEC*, 511 F.Supp.2d 19, 31 (D.D.C.2007)).

15 *(1) Free Speech’s Proposed Advertisements*

16 Free Speech’s only currently planned activities are to spend \$10,000 on 11
17 advertisements between April 1 and November 3, 2012.⁹ As explained in response to
18 Question 1, seven of those advertisements – for which Free Speech will spend \$7,166.66
19 – expressly advocate the election or defeat of a clearly identified Federal candidate. Free
20 Speech will thus spend 72 percent of its budget on express advocacy communications.

⁹ The information that Free Speech presents regarding its proposed activities in its advisory opinion request focuses almost exclusively on its planned spending on communications. Accordingly, its spending on federal campaign activity is the Commission’s primary consideration in this matter. The Commission, however, ordinarily considers a group’s overall conduct when determining political committee status. *See* Supplemental E&J, 72 FR at 5601-02, 5605.

1 See Attachment A. Free Speech’s planned spending on express advocacy
2 communications demonstrates that its major purpose is the nomination or election of
3 federal candidates.

4 The conclusion that Free Speech has as its major purpose federal campaign
5 activity is further supported by the fact that even its non-express advocacy spending will
6 attack or oppose a clearly identified Federal candidate. As a result, Free Speech will
7 engage only in activities that are campaign related. For example, the “Environmental
8 Policy” advertisements attack President Obama for supporting certain legislation and
9 oppose him because “he cannot be counted on to represent Wyoming values”; the
10 “Health Care Crisis” advertisements attack President Obama for his support of
11 “socialized medicine” and oppose him because “he pushed ahead to make socialized
12 medicine a reality;” the “Gun Control” Facebook advertisement attacks President Obama
13 for supporting gun control and opposes him by saying to viewers “Don’t trust him”; and
14 the “Ethics” advertisement attacks President Obama because he “nominates political
15 elites who haven’t paid [their taxes]” and opposes him because “of his taxing behavior.”
16 Communications like these – attacking or opposing a clearly identified Federal candidate
17 but not constituting express advocacy – indicate that a group has federal campaign
18 activity as its major purpose. See, e.g., MUR 5753 (League of Conservation Voters 527)
19 Factual and Legal Analysis at 2 (including in major purpose analysis advertisements
20 supporting or opposing candidates, “some of which contained express advocacy”); MURs
21 5511 and 5525 (Swiftboat Veterans and POWs for Truth) Factual and Legal Analysis at 3
22 (same); MURs 5511 and 5525 (Swift Boat Veterans and POWs for Truth) Conciliation
23 Agreement ¶¶ 15, 25, 35 (same). Free Speech will spend \$2,833.33, or 28% of its budget

1 on such communications in addition to its spending on express advocacy

2 communications. *See* Attachment A.

3 Taking into account all of its spending, Free Speech will spend its entire budget
4 on Federal campaign activity. Accordingly, Free Speech is a political committee. *See*,
5 *e.g.*, Supplemental E&J at 5605 (summarizing the Commission’s findings regarding
6 several examples where spending activities evidenced major purpose, including one
7 example where “50-75% of the political budget . . . was intended for the Presidential
8 election”); MUR 5754 (MoveOn.org Voter Fund) Conciliation Agreement ¶¶ 11-13
9 (approximately 68 percent of total disbursements in the 2004 election cycle were spent on
10 television advertising opposing a Federal candidate “regarding his record on campaign
11 issues” and “criticiz[ing] his leadership”); MURs 5511 and 5425 (Swift Boat Veterans
12 and POWs for Truth) Conciliation Agreement ¶ 35 (91 percent of reported disbursements
13 were spent on advertisements and direct mail attacking or expressly advocating the defeat
14 of a Federal candidate).

15 All of Free Speech’s proposed advertising would occur during the 2012
16 Presidential election year, with the last advertisements scheduled to run on November 3,
17 just three days before the 2012 general election. This provides further evidence of its
18 major purpose. *Cf.* Supplemental E&J, 72 FR at 5605 (concluding evidence of major
19 purpose included that an “organization ha[d] effectively ceased active operations after the
20 November 2004 election”).

21 *(2) Free Speech’s Fundraising Solicitations*

22 Several of Free Speech’s planned fundraising appeals provide further support for
23 the conclusion that it is a political committee. As explained above, two of Free Speech’s

1 four proposed donation requests would solicit contributions “for the purpose of
2 influencing any Federal election.” Free Speech’s plans to raise money from those
3 solicitations further evidences that its major purpose is Federal campaign activity. *See*,
4 *e.g.*, Supplemental E&J at 5605 (describing solicitations by four different groups found
5 by the Commission to be political committees). Free Speech’s other two solicitations do
6 not clearly indicate that the funds raised will be used to advocate the election or defeat of
7 candidates, but each criticize a clearly identified Federal candidate and explicitly refer to
8 the election.

9 *C. Conclusion*

10 Based on the above analysis of Free Speech’s overall conduct – that is, its
11 spending on Federal campaign activity compared to its overall activity, as well as its
12 fundraising solicitations and other statements – the Commission concludes that Free
13 Speech has as its major purpose the nomination or election of a candidate. Accordingly,
14 Free Speech will have to register as a political committee if it receives contributions
15 aggregating in excess of \$1,000 or makes expenditures aggregating in excess of \$1,000
16 during a calendar year. Contributions would include funds received in response to the
17 “War Chest” and “Make Them Listen” donation requests and expenditures would include
18 funds spent on the six proposed advertisements that contain express advocacy. Free
19 Speech would have to file a Statement of Organization (FEC Form 1) within 10 days of
20 such time, and thereafter file periodic reports with the Commission. *See* 2 U.S.C. 432,
21 433, 434; 11 CFR 102.1, 102.2, 102.7, 104.¹⁰

¹⁰ Because Free Speech would make only independent expenditures and other independent political advertisements, and make no contributions or coordinated expenditures, the Act’s limits on contributions from individuals – the only type of person from whom Free Speech indicates it wishes to raise funds – are

1 This response constitutes an advisory opinion concerning the application of the
2 Act and Commission regulations to the specific transaction or activity set forth in your
3 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
4 of the facts or assumptions presented, and such facts or assumptions are material to a
5 conclusion presented in this advisory opinion, then the requestors may not rely on that
6 conclusion as support for its proposed activity. Any person involved in any specific
7 transaction or activity which is indistinguishable in all its material aspects from the
8 transaction or activity with respect to which this advisory opinion is rendered may rely on
9 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
10 conclusions in this advisory opinion may be affected by subsequent developments in the
11 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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

15
16
17
18
19
20
21
22
23

On behalf of the Commission,

Caroline C. Hunter
Chair

1

2

Attachment A

Free Speech's Planned Spending				
Radio ads budget	\$1,000			
Newspaper ads budget	\$500			
Facebook ads	\$500			
TV ads	\$8,000			
Total	\$10,000			
		<u>Spending on</u> <u>Express</u> <u>Advocacy</u> <u>Communications</u>	<u>Spending on</u> <u>Communications</u> <u>that Attack or</u> <u>Oppose</u> <u>Candidates</u>	<u>Other</u> <u>Spending</u>
<u>1. Radio Ads</u>				
Environmental policy	\$333.33	\$333.33		
Financial reform	\$333.33	\$333.33		
Health care crisis	\$333.33		\$333.33	
Total	\$1,000.00	\$666.66	\$333.33	\$0.00
<u>2. Newspaper Ads</u>				
Financial reform	\$250.00	\$250.00		
Health care crisis	\$250.00		\$250.00	
Total	\$500.00	\$250.00	\$250.00	\$0.00
<u>3. Facebook Ads</u>				
Gun control	\$250.00		\$250.00	
Environmental policy	\$250.00	\$250.00		
Total	\$500.00	\$250.00	\$250.00	\$0.00
<u>4. TV Ads</u>				
Gun control	\$2,000.00	\$2,000.00	\$0.00	
Ethics	\$2,000.00		\$2,000.00	
Budget reform	\$2,000.00	\$2,000.00		
Educated voter	\$2,000.00	\$2,000.00		
Total	\$8,000.00	\$6,000.00	\$2,000.00	\$0.00
Grand Total	\$10,000.00	\$7,166.66	\$2,833.33	\$0.00
		71.67%	28.33%	0.00%

3