



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**STATEMENT ON ADVISORY OPINION 2012-11 (FREE SPEECH)**

**Chair CAROLINE C. HUNTER and  
Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN**

This Advisory Opinion request provides the public with a rare glimpse into how Commissioners determine whether or not speech is an “independent expenditure” under the Act, particularly whether a communication contains “express advocacy.” Ordinarily, this determination is done behind the closed doors of the FEC’s confidential enforcement process, long after the speech occurs, and long after any attendant report is due. It is especially important for the public to understand how different Commissioners have applied and do apply those tests that are more sweeping than the explicit words of advocacy requirements imposed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (“*MCFL*”), particularly 11 C.F.R. § 100.22(b).

We believe that, while statutorily infirm, Section 100.22(b) could be a narrow test that focuses on the language of a communication if it were applied literally.<sup>1</sup> It captures the communication at issue in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), on which Section 100.22(b) was based. It should not, however, cause other communications that previously were deemed to not contain express advocacy to now become express

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<sup>1</sup> To come within the reach of Section 100.22(b), a communication must contain an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning,” and “[r]easonable minds could not differ” as to whether that one meaning “encourages actions to elect or defeat” a clearly identified candidate.

advocacy communications. We have in mind two specific communications already addressed by the Supreme Court: the Bill Yellowtail ad referenced in *McConnell v. FEC*, 540 U.S. 93, 193 n.78 (2003) and “Hillary – the Movie” at issue in *Citizens United v. FEC*, 130 S. Ct. 876, 889-90 (2010). Unfortunately, as our statement shows, earlier Commissions, as well as our colleagues, have greatly expanded Section 100.22(b) far beyond its textual limits and into potential contravention of court holdings. As it has been applied in practice, “Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice [in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (“*WRTL*”)] because it endorses an inherently vague ‘rough-and-tumble of factors’ approach in demarcating the line between regulated and unregulated speech.”<sup>2</sup> This insistence on exceeding the scope of the regulatory text and *Furgatch* has muddied any attempt by potential speakers to figure out what is and what is not express advocacy.<sup>3</sup>

These differences in application cause confusion among the public as to how the test will be applied to them. For that reason, a few individuals, collectively called Free Speech, sought clarity prior to speaking, and asked whether certain communications contained “express advocacy,” and thus needed to be reported as independent

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<sup>2</sup> MUR 5874 (Gun Owners of America, Inc.), Statement of Reasons of Vice Chairman David M. Mason at 3. Cf. Explanation and Justification for Final Rules on Express Advocacy (“Express Advocacy E&J”), 60 Fed. Reg. 35292, 35294-35296 (July 6, 1995) (allowing for the consideration of “context” and “external events” when “pertinent” on a “case-by-case” basis when evaluating a communication under Section 100.22(b)); see also MUR 6073 (Patriot Majority 527s), First General Counsel Report at 9 (referring to “the distillation of the meaning of ‘expenditure’ through the enforcement process”).

<sup>3</sup> Our resistance to enforcing this broad application of Section 100.22(b) does not simplify this task or obviate the threat of enforcement for future speakers. As Justice Marshall stated, the threat of enforcement “hangs over [a speaker’s] head[] like a sword of Damocles . . . . That th[e] Court will ultimately vindicate [him] if his speech is constitutionally protected is of little consequence — for the value of a sword of Damocles is that it hangs — not that it drops.” *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

expenditures and, potentially, cause them to become a political committee.<sup>4</sup> A review of closed FEC enforcement matters shows that determining whether an ad constitutes express advocacy is difficult to ascertain prospectively, although the Supreme Court has limited the reach of the pertinent portion of the Act to “express words of advocacy,” such as “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject.’”<sup>5</sup> Thus, such a request is understandable.

To be clear, the request by Free Speech does not question the underlying justification for the disclosure of certain types of communications. At least for purposes of the Commission’s consideration of this request, they do not appear to be challenging the Act’s independent expenditure reporting regime (as limited by *Buckley* and *MCFL*), the Act’s electioneering communication reporting regime (as upheld in *McConnell* and *Citizens United*), or the Act’s political committee reporting regime (as limited by *Buckley*). Thus, the question before the Commission is simply what triggers disclosure.

We ultimately supported Draft C.<sup>6</sup> Unfortunately, it did not receive majority support. Thus, the requestors are left in legal limbo. We write separately to highlight three points: (1) Section 100.22(b) has been inconsistently applied and given a sweepingly broad interpretation; (2) the conflation of express advocacy and the functional equivalent of express advocacy (by claiming that Section 100.22(b) and the appeal to vote test adopted in *WRTL* are the same test) ignores the Act, creating reporting problems; and (3) a lack of clarity with regard to expenditures in the political committee

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<sup>4</sup> Advisory Opinion Request 2012-11 (Free Speech), *available at* <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3432&START=1204965.pdf>.

<sup>5</sup> *Buckley*, 424 U.S. at 44 n.52.

<sup>6</sup> Federal Election Commission, Open Session, Apr. 26, 2012, Agenda Doc. No. 12-24-B, *available at* <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3432&START=1207876.pdf>.

context, coupled with an inconsistent application of the major purpose test, has created confusion as to whether a group is required to register and report as a political committee.

### 1. A Brief History of 100.22(b)

As we set forth in Draft C, Section 100.22(b) has had a checkered history. When first promulgated, the regulation was based upon the Ninth Circuit's decision in *Furgatch*. At the time, the FEC claimed that *Furgatch* was not a case that fundamentally changed the regulatory authority of the FEC.<sup>7</sup> Nonetheless, a number of courts subsequently held Section 100.22(b) to be beyond the Commission's statutory authority and, thus, unenforceable.<sup>8</sup> The Commission, in turn, publicly announced that it would not enforce the regulation in certain jurisdictions.<sup>9</sup>

Unfortunately, Section 100.22(b) improbably rose again in the wake of McCain-Feingold and *McConnell*. Although Congress had originally considered codifying a

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<sup>7</sup> On the contrary, the FEC told the Supreme Court that *Furgatch* "raises no significant issues of statutory construction or constitutional law that have not been dealt with by this Court before." Brief for Respondent in Opposition at 6, *Furgatch v. FEC*, 484 U.S. 850 (1987) (denying writ of certiorari).

<sup>8</sup> See *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) ("conclud[ing] that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (per curiam), *cert. denied*, 522 U.S. 810 (1997); *FEC v. Christian Action Network*, 894 F. Supp. 946, 958 (W.D. Va. 1995) (concluding that the FEC's approach to express advocacy wrongly expanded the definition beyond that enunciated by the Court in *Buckley* and was "based on a misreading of the Ninth Circuit's decision in *Furgatch*"), *aff'd*, 92 F.3d 1178 (4th Cir. 1996) (unpublished); *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) ("*VSHL*") (holding that Section 100.22(b) "violates the First Amendment"); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 253-254 (S.D.N.Y. 1998) (finding that 100.22(b) is beyond the statute). See also *Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.") (citations omitted).

<sup>9</sup> See *VSHL*, 263 F.3d at 382 ("[T]he FEC voted 6-0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has in effect been found invalid' by the Fourth Circuit.") (emphasis in the original); see also Opening Brief for the Federal Election Commission at 19, *VSHL*, 263 F.3d 379 (4th Cir. 2001) ("[T]he Commission has never threatened to bring an action against *VSHL* and has formally recognized that it is foreclosed by the [*Christian Action Network*] decision from enforcing [100.22(b)] in the Fourth Circuit."). Cf. *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091 (D.C. Cir. 1992) (explaining the "serious statutory and constitutional questions" raised by inter-circuit nonacquiescence).

standard like that articulated in *Furgatch* or Section 100.22(b) when drafting McCain-Feingold, legislative history indicates that Congress deliberately chose to not adopt such a standard, and instead adopted new “electioneering communications” provisions.<sup>10</sup> McCain-Feingold defined electioneering communications as (1) any broadcast, cable, or satellite communication, (2) which refers to a clearly identified Federal candidate, (3) made within 60 days before a general, special, or runoff election, or 30 days before a primary or preference election, convention, or caucus for the office sought by the candidate, and (4) targeted to the relevant electorate.<sup>11</sup> Corporations and unions were banned from airing such communications.<sup>12</sup>

The law was challenged by a number of plaintiffs, including Senator Mitch McConnell, who argued that the new electioneering communication provisions were unconstitutional, as they went beyond the so-called “magic words” requirement of *Buckley* and *MCFL*.<sup>13</sup> In defending the law, the FEC argued that *Buckley* was merely a case of statutory construction and did not represent a constitutional mandate for any new Congressional efforts to regulate politics.<sup>14</sup> The Supreme Court eventually agreed, and

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<sup>10</sup> Early versions of the McCain-Feingold bill “proposed to address electioneering issue advocacy by redefining ‘expenditures’ subject to FECA’s strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office.” Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (citing 143 Cong. Rec. S10107, 10108 (Sept. 29, 1997)). In response to “concern[s] about being substantially too broad and too overreaching,” Congress “became cautious and prudent in the Senate language that we included and did not include the *Furgatch* [language].” 147 Cong. Rec. S2713 (Statement of Senator Snowe) (March 22, 2001).

<sup>11</sup> See 2 U.S.C. § 434(f)(3).

<sup>12</sup> 2 U.S.C. § 441(b).

<sup>13</sup> Consolidated Brief for Plaintiffs in Support of Motion for Judgment at 47-53, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003).

<sup>14</sup> See, e.g., Brief of Defendants at 149, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003) (“What plaintiffs critically misperceive about *Buckley*’s express

made clear that *Buckley* and *MCFL* were cases that turned on statutory construction.<sup>15</sup>

The Court ultimately upheld the electioneering communication ban and reporting requirements, holding that the new provisions avoided the vagueness problems identified in *Buckley*.<sup>16</sup>

In doing so, the Court noted that, while advertisements that “do not urge the viewer to vote for or against a candidate in so many words” do not constitute express advocacy, “they are no less clearly intended to influence the election.”<sup>17</sup> To both Congress and the Court, the quintessential ad that was not express advocacy but was intended to influence the election was the so-called “Bill Yellowtail ad”:

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail’s response? He only slapped her. But “her nose was not broken.” He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.<sup>18</sup>

Critical to the Court’s analysis was the fact that this ad did not constitute express advocacy. Had it, the ad could have already been prohibited under the then-existing ban on corporate independent expenditures. Thus, according to the Court, “Congress enacted

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advocacy holding is that it arose from *statutory* interpretation made necessary by the vague language of the 1974 amendments to FECA”) (emphasis in the original).

<sup>15</sup> See *McConnell*, 540 U.S. at 126 (noting that *Buckley*’s “magic words” arose “[a]s a result of . . . [a] strict reading of the statute” and “marked a bright *statutory* line separating ‘express advocacy’ from ‘issue advocacy’”) (emphasis added).

<sup>16</sup> *Id.* at 193-94.

<sup>17</sup> *Id.* at 193.

<sup>18</sup> *Id.* at 193 n.78. The Court continued, “The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.” *Id.* See also MUR 4568 (Triad Management Services, Inc.), General Counsel’s Brief at 66 (stipulating that the Bill Yellowtail ad amongst others “did not contain express advocacy”).

[McCain-Feingold] to correct the flaws it found in the existing system.”<sup>19</sup> As noted above, though, Congress did not revise the statutory definition of independent expenditure, which the Court had already narrowed, but created a new statutory construct – electioneering communications – to “correct the flaws.”

After *McConnell*, the Commission determined that Section 100.22(b) was constitutional nationwide via a confidential enforcement matter without any prior notice or opportunity for public comment.<sup>20</sup> It was recast by some as a gap-filler which fit somewhere between express advocacy as defined by *Buckley* and *MCFL*, and the functional equivalent of express advocacy as described in *McConnell*.<sup>21</sup> Nowhere had the Supreme Court blessed the Ninth Circuit’s expansion of express advocacy in *Furgatch*. Yet, the Commission revived Section 100.22(b), despite the fact that the Court and the Commission agreed that *Buckley* and *MCFL* had construed the statutory definition of expenditure to cover only express advocacy as those cases had defined it.<sup>22</sup> We believe such a revival was improper.

After *WRTL* narrowed the scope of the electioneering communication speech prohibition, Section 100.22(b) was expanded yet again, to be equated with the FEC’s

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<sup>19</sup> *Id.* at 194.

<sup>20</sup> See MUR 5024R (Council for Responsible Government). We note that, during the pendency of litigation over the Commission’s earlier decision in MUR 5024, the Commission cursorily applied Section 100.22(b) in Advisory Opinion 2004-33 (Ripon), finding that the communication in question did not constitute express advocacy.

<sup>21</sup> See *id.*, General Counsel’s Report #2 at 7-8 (determining that section 100.22(b) was a regulation that “fills the gaps” between where *Buckley*’s “magic words” end and *McConnell*’s “functional equivalent” begins).

<sup>22</sup> See, e.g., *id.*, Statement of Reasons of Commissioner Bradley A. Smith at 5 (lamenting that the Commission chose to reconsider and reverse its dismissal of the complaint filed against the Council for Responsible Government alleging violations of section 100.22(b) following the Court’s ruling in *McConnell*, in spite of the fact that “[t]he General Counsel’s office and a majority of the Commission appear to agree that *McConnell* does not change the applicable law”).

version of the *WRTL* test (found at 11 C.F.R. § 114.15).<sup>23</sup> Thus, the definition of independent expenditure morphed from (1) express advocacy as defined by *Buckley* and *MCFL* to (2) a more expansive definition informed by *Furgatch* and codified in Section 100.22(b) to (3) a definition covering the gap between express advocacy and the functional equivalent of express advocacy after *McConnell*, and, finally, to (4) the FEC's version of functional equivalent of express advocacy itself after *WRTL*. And since the Commission did not expressly adopt the limiting principles set forth by *WRTL*'s controlling opinion,<sup>24</sup> an independent expenditure may, to some, even be broader than the functional equivalent of express advocacy as defined by *WRTL*. In any event, it is unclear how a test that limited the reach of McCain-Feingold's electioneering communication ban could be exported to the definition of independent expenditure, when the statutory definition of electioneering communication specifically excludes all independent expenditures.<sup>25</sup>

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<sup>23</sup> See MUR 5874 (Gun Owners of America, Inc.), Factual and Legal Analysis at 4 n.2 (citing the definition of the functional equivalent of express advocacy in *WRTL* in defining express advocacy under 100.22(b)). In addition, the Commission's Office of General Counsel routinely includes a footnote in its legal analysis of Section 100.22(b), observing that, although Section 100.22(b) was not at issue in *WRTL*, the Court's analysis included several factors that the Commission had used to analyze express advocacy that were later also incorporated into Section 114.15. See, e.g., MUR 5988 (American Future Fund), First General Counsel's Report at 8 n.3; MURs 5910 & 5694 (Americans for Job Security), First General Counsel's Report at 8 n.7; MUR 5854 (Lantern Project), First General Counsel's Report at 7 n.6; MUR 5831 (Softer Voices), First General Counsel's Report at 10 n.8.

<sup>24</sup> See *WRTL*, 551 U.S. at 474 n.7 ("emphasiz[ing] that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of 'contextual' factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech").

<sup>25</sup> 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"). See also 11 C.F.R. § 100.29(c)(3) (any communication that "[c]onstitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations" is not an electioneering communication).



In *Citizens United*, when the Court considered Section 114.15, described by the Court as a two-part, eleven-factor balancing test, it called that test an “unprecedented governmental intervention into the realm of speech” that gave “the FEC power analogous to licensing laws implemented in 16th- and 17th-century England” by “creat[ing] a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests” under which “Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated.”<sup>26</sup> Clearly, then, any use of that test for purposes of Section 100.22(b) was improper.

While rejecting the Commission’s regulatory application of the functional equivalent of express advocacy, the Court held that “Hillary – the Movie” was an electioneering communication that was the functional equivalent of express advocacy.<sup>27</sup> The movie began “by asking ‘could [Senator Clinton] become the first female President in the history of the United States?’ And the narrator reiterated the movie’s message in his closing line: ‘Finally, before America decides on our next president, voters should need no reminders of . . . what’s at stake -- the well being and prosperity of our nation.’”<sup>28</sup> In between, the Court observed that:

The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton’s character and her fitness for the office of the Presidency. . . . The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton’s qualifications and fitness for

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<sup>26</sup> *Citizens United*, 130 S. Ct. at 896.

<sup>27</sup> *Id.* at 890.

<sup>28</sup> *Id.* (internal citations omitted).

office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton “Machiavellian,” and asks whether she is “the most qualified to hit the ground running if elected President.” The narrator reminds viewers that “Americans have never been keen on dynasties” and that “a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House.”<sup>29</sup>

Importantly, despite the clear electoral focus of the movie and its use of “vote,” neither the majority nor the dissent considered the movie to be express advocacy. Thus, like the Bill Yellowtail ad described in *McConnell*, “Hillary – the Movie” was considered to be outside the definition of express advocacy.

## **2. 100.22(b): Improper Expansion Beyond *Furgatch* and the Regulatory Text**

Clearly, the Commission in the past has had difficulty consistently applying Section 100.22(b) once it strayed from *Furgatch* and the text of the regulation. *McConnell* and *Citizens United* instruct that Section 100.22(b) cannot be expanded to cover communications like the Bill Yellowtail ad or “Hillary – the Movie.” Yet the Commission has, at times, done just that.<sup>30</sup>

For example, in MUR 5440 (The Media Fund), the Commission determined that a mailer highlighting then-presidential candidate Senator John Kerry’s military service, combat medals, “personal courage” and bravery, and “observing, in text positioned next

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<sup>29</sup> *Id.* (internal citations omitted); see also *Citizens United v. FEC*, 530 F. Supp. 2d 274, 279-280 n.12 (D.D.C. 2008) (providing additional excerpts of the movie).

<sup>30</sup> We note, obviously, that *Citizens United* was decided after the MURs discussed in this section were completed. We compare the communications in these MURs to “Hillary – the Movie” not because we believe prior Commissioners should have been clairvoyant, but to highlight how difficult it is for prospective speakers to know what is and what is not express advocacy given the current landscape. Moreover, all of these examples in this section appear to be much less electoral than the Bill Yellowtail ad, on which the Court did opine prior to the completion of these MURs. Finally, Draft B seems to confer express advocacy status on communications that are far less electoral than either the Bill Yellowtail ad or “Hillary – the Movie.” See Federal Election Commission, Open Session, Apr. 11, 2012, Agenda Doc. No. 12-24-A, available at <http://saos.aicusa.com/saos/searchao?SUBMIT=ao&AO=3432&START=1207876.pdf>.

to pictures of George Bush and Dick Cheney that “These Men Could have Served in Vietnam, But Didn’t,” constituted express advocacy under Section 100.22(b).<sup>31</sup> The Commission determined that such an ad “extols the candidate’s character and fitness for the office of President, citing his bravery and selflessness . . .” and, thus “in context, [it] can have no other reasonable meaning than to encourage [Kerry’s] election.”<sup>32</sup>

The Commission found express advocacy under Section 100.22(b) even though the mailer did not reference the election or refer to any of the named officeholders as candidates.<sup>33</sup> The mailer also included a detailed review of issues that would be important to veterans and Senator Kerry’s stance on those issues, as well as the speakers’ views on particular failings of President Bush on veterans’ issues. Such a detailed review of the issues in this ad far exceeds that found in the Bill Yellowtail ad, in which the candidate’s character was highlighted with only a single mention of a legislative act. Surely attacking a candidate’s history of domestic abuse and attacking a candidate’s failure to serve in the military at least raises the same types of character and fitness for office questions – in fact, one could argue that the charges in the Yellowtail ad were more devastating attacks. Yet the Commission found the Kerry ad to be express advocacy, while both Congress and the Court understood the Bill Yellowtail ad not to be express advocacy.

In the Media Fund MUR, the Commission also considered the following radio ad, entitled “Good”:

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<sup>31</sup> MUR 5440 (The Media Fund), General Counsel’s Brief at 17.

<sup>32</sup> *Id.* at 17-18.

<sup>33</sup> *Id.* at 17.

Wouldn't it be good to have someone on our side? George Bush has given his biggest tax cuts to millionaires, shifting the burden to the middle class. Bush has turned a budget surplus into the largest deficit in history, leaving trillions in debt for our children while Dick Cheney's Halliburton gets billions in no-bid contracts. Bush and the Republicans have taken 40 million dollars in campaign contributions from drug companies and now George Bush's so-called Medicare reform guarantees the pharmaceutical industry 139 billion dollars in profit. And privatizing Social Security is Bush's next big priority; rewarding his friends on Wall Street and putting our retirement benefits at risk. John Kerry and John Edwards have a better idea, a plan that's fair for working families here in Hawaii and across America.<sup>34</sup>

The Commission considered this advertisement to be express advocacy under Section 100.22(b) because it "relates to the upcoming election by identifying the competing candidates, praising Kerry, while criticizing Bush. By asking listeners, 'Wouldn't it be good to have someone our side?,' the ad is encouraging them to vote for the candidate whom the ad unmistakably *implies* is on the listeners' side — in this case, Kerry."<sup>35</sup> Again, nowhere does the ad mention an election or the candidacy of either Senator Kerry or President Bush. And nowhere does the communication contain any call to action, let alone any call to vote. Yet the Commission stated that, "The only manner in which the listener can act on the message is to vote for Kerry in the upcoming election."<sup>36</sup>

It is unclear how this radio ad is more electoral than "Hillary – the Movie," which specifically linked Senator Clinton to the 2008 presidential race, reviewed her qualifications and fitness for office, and stated that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House." Even though "Good"

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<sup>34</sup> *Id.*, General Counsel's Brief, Attachment 6 at 17.

<sup>35</sup> *Id.*, General Counsel's Brief at 20 (emphasis added).

<sup>36</sup> *Id.*

contained no electoral language, while “Hillary – the Movie” did, the former was found by the Commission to be express advocacy while the latter was found later by the Court to be an electioneering communication that was the functional equivalent of express advocacy (which, statutorily, means that the communication was not express advocacy).

In other instances, the Commission has determined that advertisements challenging an incumbent officeholder’s “capacity to lead,” by asserting that “he cannot be trusted,” add “ask[ing] why citizens should be willing to ‘follow’ him as a leader... unambiguously refer[s] to Senator Kerry as Presidential candidate by discussing his character, fitness for office, and capacity to lead, and ha[s] no other reasonable meaning than to encourage actions to defeat him.”<sup>37</sup> According to the Commission, the only manner in which the reader can act on the message “Kerry cannot be trusted” is to vote against him in the upcoming election.<sup>38</sup> Thus, the Commission, without the inclusion of any words of electoral advocacy or an electoral call to action, considered communications with those words to be express advocacy under Section 100.22(b).

It is impossible to see how that conclusion can now be squared with *Citizens United*, in which the Court found “Hillary – the Movie,” which included far more direct electoral exhortations against Senator Clinton, not to be express advocacy, but to be an electioneering communication that was the functional equivalent of express advocacy. Thus, it is unclear how a speaker is supposed to know what is and what is not express advocacy when the Commission and the Court have come to such different conclusions about similar types of communications.

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<sup>37</sup> MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement at ¶ 25.

<sup>38</sup> *Id.* at ¶ 26.

Even today, Draft B illustrates the same problem, finding express advocacy where courts have found none to exist. Take, for example, “Environmental Policy.” There, Draft B highlights at least five factors that indicate the communication is express advocacy: (1) “[t]he advertisement contains an ‘electoral portion’ that expressly exhorts listeners to take action ‘[t]his November’”; (2) while it “refers to legislation, it does not describe or discuss the merits of that legislation”; (3) it “disparages” President Obama by characterizing his opposition to the referenced legislation as a “tragedy” for Wyoming ranchers; (4) it asserts that “President Obama ‘cannot be counted on’ to represent Wyoming values and voices as President”; and (5) it refers to “Obama’s environmentalist cronies.”<sup>39</sup> In doing so, Draft B rejects the explicit action urged by the communication, which is in no way electoral; the advertisement explicitly instructs the viewer to “call your neighbors” and “[c]all your friends” and “talk about ranching.” Instead, under the guise of a “reasonable person,” Draft B divines the effect on the viewer, then presumes the proposed advertisement to be campaign advocacy, reasoning that “[i]t is an obvious non sequitur” in an ad that talks about ranchers and the environment to ask viewers to call their neighbors and friends to talk about ranching, even though that is precisely what the advertisement expressly says.<sup>40</sup> That no one is identified as a candidate, and no election is referenced, is ignored.

Draft B makes much of the phrase “this November” and seems to presume that the only “reasonable” reading of that phrase is as express advocacy. But in *FEC v.*

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<sup>39</sup> Advisory Opinion 2012-11 (Free Speech), Draft B at 7-8.

<sup>40</sup> *Id.*

*Christian Coalition*, the inclusion of “November” did not convert an ad into express advocacy,<sup>41</sup> even though the speech proclaimed “victory will be ours,” and ended with:

[Victory] will be ours here in Montana. And it will be ours all across America . . . . We’re going to see Pat Williams sent bags packing back to Montana in *November* of this year. And I’m going to be here to help you.<sup>42</sup>

The court explained that, “Although the implicit message is unmistakable, in explicit terms this is prophecy rather than advocacy.”<sup>43</sup> The court continued, “Though the message is clear, it requires one inferential step too many to be unequivocally considered an explicit directive.”<sup>44</sup>

Similarly, the court also considered a letter that said:

If 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.<sup>45</sup>

Even though the court noted that certain explicit directives were present, and that it was “likely that the reader is to make his voice be heard by voting,” the court held that it was not express advocacy because the materials did not “explicitly direct the reader as to how to vote in any given election.”<sup>46</sup> Just like those ads in *Christian Coalition*, “Environmental Policy” contains no such explicit directive.

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<sup>41</sup> *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 63 (D.D.C. 1999). The court used the standard announced by the Ninth Circuit in *FEC v. Furgatch*, the case upon which 100.22(b) was originally based.

<sup>42</sup> *Id.* at 56, 57 (emphasis added).

<sup>43</sup> *Id.* at 63.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 63-64 (emphasis added).

<sup>46</sup> *Id.* at 64.

While this highlights the problem with expanding the scope of express advocacy, it also provides more evidence that Section 100.22(b) has become hopelessly amorphous through that expansion. It is unclear whether our colleagues believe *Christian Coalition* remains good law, even though it has never been overturned by any court and has been cited in enforcement matters by the Commission.<sup>47</sup> This casts doubt on whether a speaker can rely on cases like *Christian Coalition* in attempting to divine what is and what is not an independent expenditure.

Nor is it clear whether the Bill Yellowtail ad, which neither Congress nor the Court considered to be express advocacy, would, nevertheless, fall within our colleagues' broad view of Section 100.22(b).<sup>48</sup> The same goes for "Hillary – the Movie." This confusion helps no one and, given our colleagues' support for Draft B, it is unclear how speakers can get any clarity or definitive answers, other than by bringing needlessly time-consuming and expensive litigation.

### **3. Conflating the Appeal to Vote Test of *WRTL* and Section 100.22(b) Makes it Difficult for Speakers to File the Proper Report**

Many also argue that the appeal to vote test set forth in *WRTL* provides support for Section 100.22(b). In fact, some posit that the tests are the same.<sup>49</sup> This ignores the Act, however. The statute says that a communication cannot be both an independent expenditure and an electioneering communication.<sup>50</sup> But the conflation of Section 100.22(b) and *WRTL*'s appeal to vote test does just that, and can make a communication

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<sup>47</sup> See, e.g., MUR 5440 (The Media Fund), Conciliation Agreement at ¶ 4; MUR 5753 (League of Conservation Voters 527), Conciliation Agreement at ¶ 4; MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement at ¶ 4.

<sup>48</sup> See MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 3 (suggesting that an advertisement was express advocacy because it was "reminiscent of the infamous 'Bill Yellowtail' ad").



both an electioneering communication (that constitutes the functional equivalent of express advocacy) and an independent expenditure (that contains express advocacy).

This is impossible under the Act; it is either one or the other, not both.<sup>51</sup>

On a practical level, conflating express advocacy and its functional equivalent puts speakers like Free Speech in a conundrum, which is exemplified by “Hillary – the Movie.” The Court in *Citizens United* held that “Hillary – the Movie” was an electioneering communication that was the functional equivalent of express advocacy.<sup>52</sup> But if the appeal to vote test from *WRTL* is the same as Section 100.22(b), then “Hillary – the Movie” was also express advocacy. Hence, the conundrum: Should the speaker file an electioneering communication report or an independent expenditure report?

Independent expenditures are reported on Form 5 and are subject to three separate reporting requirements. First, a report is required when independent expenditures aggregate in excess of \$250 in any quarterly reporting period. In addition to the quarterly report, a 48-hour report is required when independent expenditures aggregate \$10,000 or more any time during the calendar year up to and including the 20th day before an election. Each time subsequent independent expenditures relating to the same election

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<sup>49</sup> See, e.g., Brief for the Respondent at 15, *Real Truth About Obama v. FEC*, 130 S. Ct. 2371 (2010) (“[T]he *WRTL* standard is nearly identical to the test in Section 100.22(b).”).

<sup>50</sup> *Supra* note 25.

<sup>51</sup> And if the tests are the same, then one could argue that Chief Justice Roberts overturned Section 100.22(b) *sub silentio* in *WRTL*. Under *WRTL*, the appeal to vote test is not “impermissibly vague” because, among other things, it “is only triggered if the speech meets the bright-line requirements of [the electioneering communications definition] in the first place.” *WRTL*, 551 U.S. at 474 n.7. Implicit, then, is the obverse – without those “bright-line requirements,” the appeal to vote test would be “impermissibly vague.” *Id.* And if that test is the same as Section 100.22(b), which lacks any “bright-line requirements” through which speech is first filtered, then Section 100.22(b) may also be “impermissibly vague” under Chief Justice Roberts’s rationale.

<sup>52</sup> *Citizens United*, 130 S. Ct. at 890.

aggregate \$10,000 or more, a new 48-hour report is required to be filed. Each 48-hour report is due within 48 hours of when the communication is publicly distributed or otherwise publicly disseminated. Finally, a 24-hour report is required when independent expenditures aggregate \$1,000 or more, less than 20 days but more than 24 hours before an election. Each time subsequent independent expenditures relating to the same election aggregate \$1,000 or more, a new 24-hour report is required to be filed. Each 24-hour report is due within 24 hours of when the communication is publicly distributed or otherwise publicly disseminated. For purposes of determining whether 24 and 48 hour reports are required to be filed, aggregation is based on all independent expenditures during a calendar year that are made with respect to the same election for a Federal office.<sup>53</sup> Such reports are due for practically all independent expenditure communications, regardless of the format (*i.e.*, television, radio, mail, phone calls, etc.), and regardless of when they are disseminated.

On the other hand, electioneering communications need only reference a federal candidate, and only concern television and radio advertising that can be viewed by a significant number of relevant voters. These trigger the need to file Form 9. Political committees are not required to file these reports. Others are required to file a 24-hour report when one or more electioneering communications aggregate in excess of \$10,000, 30 days before a primary election and 60 days before a general election. Each time subsequent disbursements for electioneering communications made by the same person or entity aggregate in excess of \$10,000, another report must be submitted. Each 24-hour report is due within 24 hours of when the communication is publicly distributed. For

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<sup>53</sup> 11 C.F.R. § 109.10 (b), (c) & (d).

purposes of determining whether a 24-hour report is required to be filed, aggregation is based on the total electioneering communications made by a person during the calendar year.<sup>54</sup>

One would think that disclosure should be simple: if a communication is to be reported, it is either an independent expenditure, and thus subject to that reporting regime, or it is an electioneering communication, and thus subject to that reporting regime.<sup>55</sup> Since we believe that the tests are not the same, disclosure is simple for us – “Hillary – the Movie” clearly is an electioneering communication and, thus, Form 9 is appropriate. But under Draft B’s analysis, it is anyone’s guess whether a speaker ought to file Form 5 or Form 9 if its speech meets both (1) the statutory definition of

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<sup>54</sup> 11 C.F.R. § 104.20.

<sup>55</sup> The FEC has also gone beyond the Act to create other reporting dilemmas. For example, the Act requires that “a person (including a political committee) that makes or contracts to make independent expenditures aggregating \$10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.” 2 U.S.C. § 434(g)(2)(A). The Act requires that this report include the “office sought” by the referenced candidate. 2 U.S.C. § 434(g)(3)(b) (referring to 2 U.S.C. § 434(b)(6)(B)(iii)). But with respect to presidential primaries, the FEC has muddled this fairly straightforward reporting requirement by requiring sponsors of such independent expenditures to identify the state primary to which a particular independent expenditure relates, treating each presidential primary as a separate election. See Advisory Opinion 2011-08 (Western Representation); Advisory Opinion 2003-40 (Navy Veterans). Free Speech illustrates the administrative headache this causes. Per the request, they intend to run advertisements from April through November in three media outlets based out of Cheyenne, Wyoming. Cheyenne is in the southeastern corner of the state; its designated market area reaches parts of Wyoming, Colorado, and Nebraska. As of April 1, Nebraska and Wyoming had not held their Democratic presidential nominating contest; therefore President Obama is potentially a candidate for the Democratic nomination for President of the United States in those states. Only in Colorado, which held its nominating contest on March 6, is President Obama no longer a primary candidate. In order to avoid FEC entanglements, Free Speech must figure out (1) the reach of media outlets in which it advertises, and (2) the schedule of presidential nominating contests (which includes knowing whether or not the FEC deems certain caucuses to be a primary election). Yet the Act requires none of this, and instead only requires Free Speech to identify the office sought, which in this case is President of the United States. By contrast, the FEC has read “office sought” to mean “state in which presidential primary is held.”

electioneering communication and the appeal to vote test, as well as (2) Draft B's expansive interpretation of Section 100.22(b).<sup>56</sup>

**4. Inconsistent Application of Section 100.22(b) and the Major Purpose Test Makes Determining Whether a Group is a Political Committee Difficult for Groups Who Wish to Speak and Disclose**

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."<sup>57</sup> Our discussion here of Section 100.22(b) relates to this statutory definition. But even if that definition is met (which, as noted above, can be difficult for speakers to determine), the inquiry into whether a group is a political committee is not finished.

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."<sup>58</sup> Some courts have held that the *Buckley* major purpose test was the product of statutory interpretation,<sup>59</sup> and thus would constitute the end-point of the Commission's statutory authority.<sup>60</sup>

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<sup>56</sup> We note that Draft B cites to *WRTL* in support of its expansive view of Section 100.22(b). See Advisory Opinion 2012-11 (Free Speech), Draft B at 6, 8.

<sup>57</sup> 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5.

<sup>58</sup> *Buckley*, 424 U.S. at 79.

<sup>59</sup> See *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), *cert denied*, 131 S. Ct. 1477 (2011).

<sup>60</sup> See Political Committee Status, Supplemental Explanation and Justification, 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.<sup>61</sup> The Commission's standards have evolved.<sup>62</sup> 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.<sup>63</sup> Despite the rejection of such arguments, however, the Commission continued to use such tests and other variants of the major purpose test that go beyond that articulated in *Buckley*, such as "influencing elections."<sup>64</sup>

The Commission has also, at times, claimed that *dicta* from *MCFL* – stating that if a group's "independent spending become[s] so extensive that the organization would be classified as a political committee"<sup>65</sup> – is a separate, more expansive test than was articulated in *Buckley*. In other cases, some declared that the proper test was "campaign

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<sup>61</sup> *Id.* at 5596.

<sup>62</sup> See MUR 6073 (Patriot Majority 527s), First General Counsel Report at 9 ("The Commission's approach to complaints alleging that Section 527 organizations are political committees has evolved over time.").

<sup>63</sup> See *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861 (D.D.C. 1996) ("[T]he 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.").

<sup>64</sup> See MURs 5403, 5427, 5440, & 5466 (*Americans Coming Together et al.*), First General Counsel's Report at 5 ("influence the outcome of the 2004 elections"). But see *Buckley v. Valeo*, 519 F.2d 821, 832, 869-78 (D.C. Cir. 1975) (holding that it is unconstitutional to require "any person (other than an individual)" engaged in "any act directed to the public for the purpose of influencing the outcome of an election" to "file reports with the Commission as if such person were a political committee"), *aff'd in part, rev'd in part*, 424 U.S. at 11 n.7 ("The [circuit] court held [the aforementioned provision] unconstitutionally vague and overbroad on the ground that the provision is 'susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance.' No appeal has been taken from that holding.") (quoting *Buckley*, 519 F.2d at 832).

<sup>65</sup> 479 U.S. at 262. *MCFL* can be read to impose an additional limitation on the statute, even narrower than the *Buckley* construction, since *MCFL* speaks of spending that must be "so extensive." *Id.* The word "extensive" is defined as "covering or affecting a large area;" "large in amount or scale." OxfordDictionaries.com <http://oxforddictionaries.com/definition/extensive?region=us&q=extensive>.

activity,” a significantly broader test than that one articulated in *Buckley* (i.e., nomination or election or of a federal candidate).<sup>66</sup> In fact, Draft B states that “[t]he conclusion that Free Speech has as its major purpose federal campaign activity is further supported by the fact that even its non-express advocacy spending will attack or oppose a clearly identified Federal candidate. As a result, Free Speech will engage only in activities that are *campaign related*.”<sup>67</sup> Thus, it appears that, even now, to some, merely finding “campaign activity” can be enough to turn a group into a political committee.

Even though some Commissioners have applied tests that appear to be more expansive than *Buckley*, the Commission has, outside the enforcement realm, stated that it uses the major purpose test as 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.”<sup>68</sup> More recently, the Commission has represented to Federal courts that it uses the *Buckley* formulation of the test.<sup>69</sup>

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<sup>66</sup> MUR 5365 (Club for Growth), General Counsel’s Report #2 at 3, 5 (“[T]he vast majority of CFG’s disbursements are for federal campaign activity” and concluding CFG “has the major purpose of campaign activity.”); MUR 5542 (Texans for Truth), Conciliation Agreement at ¶ 3 (“[O]nly organizations whose major purpose is campaign activity can be considered political committees under the Act” and “[i]t is well-settled that an organization can satisfy *Buckley*’s ‘major purpose’ test through sufficient spending on campaign activity.”); see also MURs 5403, 5427, 5440, & 5466 (Americans Coming Together *et al.*), First General Counsel’s Report at 7-8; MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement at ¶ 6;

<sup>67</sup> Advisory Opinion 2012-11 (Free Speech), Draft B, at 24 (emphasis added). See also *id.* (“Comronations like these – attacking or opposing a clearly identified Federal candidate but not constituting express advocacy – indicate that a group has federal campaign activity as its major purpose.”).

<sup>68</sup> *GOPAC*, 917 F. Supp. at 859 n.1 (internal citations omitted).

<sup>69</sup> See, e.g., Brief of Appellees Federal Election Commission and United States Department of Justice at 9, *Real Truth About Obama, Inc. v. FEC* (“RTAO”), No. 11-1760 (4th Cir. 2011) (“Under the statute as thus

We believe that the Commission must employ the major purpose test in a manner consistent with *Buckley*, as the Commission has set forth in its court filings. Draft C contains our view of what that test entails – review of a group’s central organizational purpose and a comparison of that group’s spending on behalf of candidates with its overall spending to determine whether a preponderance of the group’s spending was for the election or defeat of federal candidates.<sup>70</sup> Under current jurisprudence, the Commission can go no farther than that.<sup>71</sup>

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limited, an 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.”); *see also* Brief for the Respondents at 4, *RTAO*, 130 S. Ct. 2371 (2010) (No. 09-724); Brief of Appellee Federal Election Commission and United States Department of Justice at 5, *RTAO*, 2008 WL 4416282 (4th Cir. 2008) (No. 08-1977); Federal Election Commission’s Opposition to Appellant’s Motion for Injunction Pending Appeal at 11, *RTAO*, 2008 WL 4416282 (4th Cir. 2008) (No. 08-1977); Federal Election Commission’s Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 4, *RTAO*, No. 3:08-cv-00483-JRS (E.D. Va. 2008); 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 at 10, *RTAO*, No. 3:08-cv-00483-JRS (E.D. VA. 2010); Defendant Federal Election Commission’s Reply in Support of the Commission’s Motion for Summary Judgment at 20, *RTAO*, No. 3:08-cv-00483-JRS (E.D. VA. 2010).

<sup>70</sup> *See* Agenda Doc. No. 12-24-B, *supra* note 6, at 43-47 (citing *Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262; *North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008), *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2005); *GOPAC*, 917 F. Supp. at 859; Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5596-5597 (Feb. 7, 2007)).

<sup>71</sup> We also note that the Commission’s use of a case-by-case approach to ascertain major purpose has failed to give practical guidance to those who wish to comply, as it fails to address the temporal component of disclosure. Specifically, if a group is a political committee, it must file a statement of organization within ten days of becoming a political committee. 11 C.F.R. § 102.1(d). By that time, it needs to have secured a treasurer, set up a separate bank account, and undertaken the other requirements of political committee status, which the Supreme Court has already said are burdensome. *See Citizens United*, 130 S. Ct. at 897. Since the major purpose determination is done on a case-by-case basis, there is no way for a group to know when the ten day period begins to run, or when the first filing is due. Similarly, the Commission has never articulated a period within which it will make its after-the-fact, case-by-case determination, leaving those wishing to comply to guess whether the Commission will review activity only within a calendar year, fiscal year, election cycle, or some other undefined period. Such an approach makes the reach of the Act notoriously unclear, and has left speakers vulnerable to lengthy, burdensome investigations. *See Christian Coalition*, 52 F. Supp. 2d at 51 (observing that the FEC’s “administrative investigative stage can be quite lengthy in its own right” and noting that “the process was lengthened in this case by the intervening decision of our Court of Appeals,” causing resolution of the case to occur in 1999, seven years after the original speech given in 1992); *GOPAC*, 917 F. Supp. at 852-53 (noting that “[o]ver three years later, after the Commission concluded its investigation, on December 9, 1993, it notified GOPAC that there was probable cause to believe that it was a ‘political committee,’” spurring two more years of legal wrangling that culminated in the district court’s opinion, issued seven years after the FEC claimed GOPAC first became a political committee in 1989); MUR 5440 (The Media Fund) (lasting nearly four years from when

## Conclusion

The Court in *Buckley* recognized that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”<sup>72</sup> In order to avoid “serious problems of vagueness”<sup>73</sup> that might “deter those who seek to exercise protected First Amendment rights,”<sup>74</sup> the Act must be read in accordance with the construction imposed by the Court, even for disclosure-only provisions. Thus, in *Buckley*, the Court imposed the express advocacy limitation upon the definition of expenditure for both the statutory independent expenditure spending limit and the statutory independent expenditure disclosure requirement.<sup>75</sup> And more recently, in *Citizens United*, the Court was clear that:

The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People “of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.”<sup>76</sup>

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the Media Fund was formed in 2003 to its conciliation agreement in 2007). *Cf. WRTL*, 551 U.S. at 469, 474 n.7 (noting that “the proper standard . . . must entail minimal, if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation” and that “there generally should be no discovery or inquiry into the sort of ‘contextual’ factors highlighted by the FEC and intervenors”) (internal citations omitted); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1375-1376 (2012) (Alito, J. concurring) (discussing problems inherent in agency relying on informal guidance and case-by-case review in lieu of a clear formal rule).

<sup>72</sup> *Buckley*, 424 U.S. at 42.

<sup>73</sup> *Id.* at 76.

<sup>74</sup> *Id.* at 77.

<sup>75</sup> *Id.* at 44, 80. Even after narrowing the scope of the expenditure limit to express advocacy communications, the Court still struck the statutory limit. By contrast, after limiting the disclosure requirement to express advocacy communications, the Court upheld the narrowed independent expenditure disclosure regime.

<sup>76</sup> *Citizens United*, 130 S. Ct. at 889 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).



The Commission's prior history with Section 100.22(b) demonstrates that speakers like Free Speech will continue to have to seek advisory opinions to determine whether speech constitutes an independent expenditure. And our colleagues' failure to restrict themselves to the regulatory text and *Furgatch* when applying Section 100.22(b) means that many of those advisory opinion requests, like this one, will remain unanswered. Finally, the moving target of the major purpose test creates confusion as to who is or is not required to register and report as a political committee. Thus, future speakers will have to either guess whether reporting is required and, if so, what those reports should be, or seek expensive, time-consuming redress from the courts. That this is where we have arrived is regrettable.

### **Attachment A**

Below is a list of many of the factors that the General Counsel's Office has recommended that the Commission consider, and that several Commissioners have considered and relied upon, when determining whether or not a communication constitutes express advocacy under Section 100.22(b):

- If an "advertisement as a whole lacks a specific legislative focus" (MUR 5988 (American Future Fund), Statement of Reasons of Chairman Steven T. Walther and Commissioners Cynthia L. Bauerly and Ellen L. Weintraub, Attachment A at 12);
- If an advertisement "presents a collection of issues," "highlighting [the officeholder's] past stances with respect to these issues and using the [officeholder] to link the issues together" (*Id.*);
- If by referencing a wide-range of issues, an advertisement focuses on a candidate's "qualifications, accomplishments, and fitness for office" (*Id.*);
- If an advertisement is "candidate centered" (*Id.*);
- If an advertisement constitutes a request for electoral support by characterizing a public official as "an independent voice" (*Id.* at 12-13);
- If an advertisement tells the viewer to call and "thank" the official for official action (*Id.* at 13);
- If an advertisement says someone has demonstrated "leadership," or has been a "common sense voice," it is an emphasis on character, which equates to express advocacy (MURs 5910 & 5694 (Americans for Job Security), Statement of Reasons of Chairman Steven T. Walther and Commissioners Cynthia L. Bauerly and Ellen L. Weintraub, Attachment A at 9);
- If an advertisement says someone has "experience," it is somehow an emphasis on qualifications, which equates to express advocacy (*Id.*);
- If an advertisement says someone is a "small businessman for 17 years," it is somehow an emphasis on accomplishments, which equates to express advocacy (*Id.*);
- If an advertisement fails to urge some specific action to be taken by the elected official (*Id.*);
- If an advertisement asks the viewer to "ask[] [the candidate] about 'his plans to bring our children back to [the state]'" it is the same as "asking [the candidate] what his policies would be if elected to the U.S. Senate" (*Id.* at 11);

- If an advertisement fails to include a contact phone number (*Id.*);
- If an advertisement questions a public official's leadership potential (*Id.* at 12);
- How a viewer would "reasonably interpret" an advertisement (*Id.*);
- When the organization that sponsors the ads was created (MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 1);
- If the majority of funds were donated by one individual (*Id.*);
- If almost all spending occurred in the three months prior to the general election (*Id.*);
- If a communication "smears the reputation of the candidate" (*Id.* at 3);
- If a communication attacks a candidate's voting record (*Id.* at 4);
- If an advertisement fails to include a "call to action related to pending legislation or to an issue" (*Id.*);
- If an advertisement fails to urge the "listener to contact their representative regarding an issue" (*Id.*);
- If a mailer questions a candidate's "character, qualifications, and lack of accomplishments, [then it] is unambiguously electoral" (*Id.*, Attachment A at 15);
- If an advertisement touts or attacks character, qualifications and accomplishments (MUR 5831 (Softer Voices), Factual & Legal Analysis at 8);
- If an advertisement highlights a candidate's character and qualifications by calling him "tough" (*Id.*, First General Counsel's Report at 12);
- If an advertisement urges viewers "to fill the 'need' for 'leaders tough enough'" then it means vote for the candidate who is "tough enough" (*Id.*);
- If an organization "did not request an Advisory Opinion from the Commission to clarify whether its activities were permissible under the Act" (MUR 5440 (The Media Fund), General Counsel's Report #6 at 16);
- If an advertisement states "[w]e need a President who..." then it is an exhortation to vote (MUR 5440 (The Media Fund), General Counsel's Brief at 17);
- If a mailer highlights then-presidential candidate Senator John Kerry's military service, combat medals, "personal courage" and bravery, "observing, in text positioned next to pictures of George Bush and Dick Cheney that 'These Men

Could have Served in Vietnam, But Didn't," or "extols the candidate's character and fitness for the office of President, citing his bravery and selflessness . . ." then "in context, [it] can have no other reasonable meaning than to encourage [Kerry's] election" (even though the mailer did not reference the election or refer to any of the named officeholders as candidates) (*Id.* at 17-18);

- If an advertisement identifies and shows images of competing candidates while criticizing one and praising the other with the exhortation "[y]ou better wake up before you get taken out," it is express advocacy because "[i]n the context of contrasting the candidates, the exhortation to 'wake up' can only be understood to be asking voters to reject [one candidate] and instead vote for [the other]" (*Id.* at 19);
- If an "ad[] focus[es] on Kerry having 'fought and bled' in Vietnam while Bush allegedly avoided service," then it "is clearly praising Kerry's character and fitness for the office of President . . ." and "in context, can have no other reasonable meaning than to encourage his election" (*Id.*);
- If an advertisement "relates to the upcoming election by identifying the competing candidates, praising Kerry, while criticizing Bush" and "ask[s] listeners, '[w]ouldn't it be good to have someone our side?,'" then "the ad is encouraging them to vote for the candidate whom the ad unmistakably *implies* is on the listeners' side — in this case, Kerry. The only manner in which the listener can act on the message is to vote for Kerry in the upcoming election" (*Id.* at 20);
- If an advertisement references the office of president it is a reference to the election (MUR 5440 (The Media Fund), Transcript of Probable Cause Hearing at 32);
- Considering "timing or placement in terms of a geographical area" (*Id.* at 36);
- If an advertisement talks about a candidate in "strong terms" (*Id.* at 42-43);
- If one assumes that the viewer/reader/listener knows that the individual referenced in an advertisement is a candidate (*Id.* at 46);
- If an advertisement contrasts presidential tickets (*Id.* at 49);
- Whether an organization plans to be active in future election cycles (*Id.* at 52);
- If advertisements about issues are aired in battleground states as opposed to states where the key members of the House and Senate may be located (*Id.* at 60-61);
- If an advertisement challenges a candidate's "capacity to lead," by asserting that "he cannot be 'trusted,'" and "ask[ing] why citizens should be willing to 'follow' him as a leader" then it "unambiguously refer[s] to Senator Kerry as Presidential candidate by discussing his character, fitness for office, and capacity to lead, and

ha[s] no other reasonable meaning than to encourage actions to defeat him” (MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement at ¶ 25);

- If an advertisement says a candidate “cannot be trusted” and is “unfit for command” then it means that the candidate lacks an essential requirement to lead and the only manner in which the reader can act on the message “Kerry cannot be trusted” is to vote against him in the upcoming election (*Id.* at ¶ 26);
- What the “reader is to understand” (*Id.* at ¶ 27);
- If an advertisement asserts that an officeholder was “misleading the American people on issues from the Iraq war to financial security and Medicare” (MUR 5754 (MoveOn.org Voter Fund); Conciliation Agreement at ¶ 12);
- Advertisements raising issues such as “spending on the war and Iraq, prescription drugs, overtime pay and job outsourcing—each with the tag line, ‘George Bush. He’s not on our side.’ or ‘Face it. George Bush is not on our side’” were considered express advocacy (*Id.*);
- The “reasonable mind” of the viewers (MUR 5634 (Sierra Club), First General Counsel's Report at 11);
- How these factors compare “on balance” (MURs 6051 & 6052 (Wal-Mart Stores, Inc.), First General Counsel's Report at 10).