FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

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| In the Matter of | ) | |
| Softer Voices, *et al.* | ) | MUR 5831 |

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**STATEMENT OF REASONS of COMMISSIONER DONALD F. McGAHN**

I supported the Office of General Counsel's recommendation to take no further action and close the file in this matter. However, I write separately to emphasize that my agreement with the ultimate recommendation to take no further action in the matter should not be read as agreement with the General Counsel's various legal theories presented in support of the assertion that the Respondent was required to register and report with the Commission as a "political committee" under the Act.[1]

The legal theories put forward by the General Counsel in this matter employ the same sort of multi-factor balancing and intent-and-effect tests rejected by the Supreme Court, most recently in *Citizens United v. FEC*.[2] First, section 100.22(b) of the Commission's regulations, which purports to define "express advocacy," is nothing more than the same kind of test the Commission created to define the functional equivalent of express advocacy after *Wisconsin Right to Life, Inc. v. FEC* ("*WRTL*").[3] That test, however, was unequivocally rejected by the Court in *Citizens United*. In addition, the Commission's case-by-case approach to deciding a group's political committee status is also deeply flawed. Although this case-by-case approach was most recently reaffirmed by the Commission in early 2007,[4] since then, the Supreme Court has decided *WRTL*,[5] *Davis v. FEC*,[6] and *Citizens United*,[7] and the D.C. Circuit has decided *EMILY's List v. FEC*,[8] *SpeechNow.org v. FEC*,[9] and *Unity '08 v. FEC*.[10] Yet the FEC has not modified its policy, even though the policy relies upon several regulations that have been struck or called into question by these cases, and

[1] "Political committee" is defined by the Act, *see* 2 U.S.C. § 431(4), and has been further limited by the Supreme Court. *See Buckley v. Valeo*, 540 U.S. 1, 79-80 (1976).
[2] 130 S. Ct. 876 (2010).
[3] 551 U.S. 449 (2007).
[4] Political Committee Status, Supplemental Explanation and Justification ("2007 Political Committee Status Supplemental E&J"), 72 Fed. Reg. 5595 (Feb. 7, 2007).
[5] 551 U.S. 449.
[6] 128 S. Ct. 2759 (2008).
[7] 130 S. Ct. 876 (2010).
[8] 581 F.3d 1 (D.C. Cir. 2009).
[9] 599 F.3d 686 (D.C. Cir. 2010).
[10] 596 F.3d 861 (D.C. Cir. 2010).

moreover, several of the enforcement matters which purportedly provide guidance regarding the case-by-case approach turned on these same invalid approaches.

As explained more fully below, I urge the Commission to revisit section 100.22 of its regulations, and its 2007 policy on political committee status.

## I. BACKGROUND

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MUR 5831 (Softer Voices) arose from a complaint alleging that Softer Voices, an entity organized under section 527 of the Internal Revenue Code, failed to register and report as a political committee during the 2006 election cycle in violation of the Federal Election Campaign Act of 1971, as amended ("the Act").[11] The Commission found reason to believe that Softer Voices violated the Act, and authorized the Office of General Counsel ("OGC") to conduct an investigation. OGC ultimately recommended that the Commission admonish Softer Voices for failing to register and report as a political committee, but take no further action.[12] I supported taking no further action, but rejected OGC's conclusion that Softer Voices was required to file with the Commission as a "political committee."

The complaint cited television advertisements run by Softer Voices, and argued that Softer Voices failed to register and report as a political committee because: (1) the costs of the advertisements were "expenditures" under the Act because they were "unquestionably for the purpose of influencing the United States Senate election in Pennsylvania;"[13] (2) Softer Voices spent more than $1,000 on these advertisements; and (3) Softer Voices is a section 527 "political organization."[14] Contrary to the complainant's assertions, however, neither advertisement constituted an "expenditure" under the Act. But OGC located two other advertisements on Softer Voices' website which they believed were expenditures under the Act, and recommended that the Commission find reason to believe that Softer Voices ought to have reported as a political committee.[15]

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[11] The complaint also alleged that Softer Voices impermissibly coordinated its activities with Santorum 2006 (the principle campaign committee of Rick Santorum), and that Softer Voices accepted contributions from a foreign national. On February 11, 2009, the Commission voted to find no reason to believe that any of the respondents violated the law with respect to these allegations. MUR 5831 (Softer Voices), Certification dated Feb. 13, 2009.

[12] MUR 5831 (Softer Voices), General Counsel's Report ("GCR") #2.

[13] MUR 5831 (Softer Voices), Complaint at 4.

[14] This argument has already been refuted elsewhere. *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chair Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 13-14.

[15] As OGC notes, these two advertisements were "not discussed in the complaint." MUR 5831 (Softer Voices), First General Counsel's Report ("FGCR") at 5. Instead, OGC found them in what has been called a "pre-RTB investigation." The statute, however, does not authorize OGC to investigate a matter until after the Commission finds that there is a reason to believe ("RTB") that a violation of the Act occurred. *See* 2 U.S.C. § 437g(a)(2) (only after finding reason to believe that a violation has occurred shall the Commission make an investigation of such violation) (emphasis added). *See also* MUR 5835 (Quest Communications, Inc. / DCCC), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 1-2, 13-14 (discussing the concerns that arise when respondents in enforcement matters are not provided an opportunity to respond to allegations raised by OGC before the Commission votes on whether to find reason to believe); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-388 (D.C. Cir.

Those ads, "Tough Enough" and "We the People," stated:

"Tough Enough" -

| *[Narrator] Our enemies crash planes into buildings...* | *[On screen: Image of people chanting (subtitled translation of chant, 'Death to America'). Image of airplane crashing into World Trade Center.]* |
|---|---|
| *... they cut off heads...* | *[On screen: Image of terrorists preparing to behead hostage Eugene Armstrong (text identifies footage as described above).]* |
| *And if they get nuclear weapons, they will use them on us.* | *[On screen: Image of a person building a bomb.]* |
| *Right here.* | *[On screen: Image of city (Pittsburg/Philadelphia) undergoing nuclear attack. Image of terrorists chanting (subtitled translation of chant, 'Bomb. Bomb. USA').]* |
| *[Senator Santorum] When leaders say they are prepared to kill millions of people...we must take them at their word.* | *[On screen: Footage of Santorum delivering speech, over image of terrorists (from previous frame).]* |
| *[Narrator] Senator Santorum is leading the effort to prevent a nuclear Iran.* | *[On screen: 'Iran TV' cartoon image of Statute of Liberty with a hollowed out skull. Text reads, 'America is the enemy of God's unity and an affront to God.']* |
| *Don't we need leaders tough enough to face such threats?* | *As above.* |
| *Softer Voices is responsible for this message.* | *[On screen: Photograph of Santorum. Text states, 'Senator Rick Santorum.' Softer Voices disclaimer at bottom of screen].* |

"We the People" -

| *[Child's Voice] We the people of the United States...* | *[On screen: image of Declaration of Independence]* |
|---|---|
| *[Narrator] Who live in a world of danger ...* | *[On screen: Still photographs, presented in succession, of Osama Bin Laden and other terrorists].* |
| *...danger from fanatics sworn to kill Americans... danger from tyrants seeking nuclear weapons.* | *[On screen: Still photographs, presented in succession, of Iranian President Mahmoud Ahmadinejad, North Korean leader Kim Jong-il, missiles being launched and acts of terror].* |
| *Bob Casey recently showed he is still trying to learn the names of these tyrants.* | *[On screen: Photo of Casey, offset with image of missile being launched, followed by text from news article published in the Allentown Morning Call, reading, "asking [Casey] to name the former Iranian president... Casey couldn't answer."].* |
| *Senator Santorum understands these threats.* | *[On screen: Photo of Santorum].* |
| *[Senator Santorum] When leaders say they are prepared to kill millions of people... we must take them at their word.* | *[On screen: Footage of Santorum delivering a speech].* |
| *[Narrator] Can we really risk Bob Casey learning on the job?* | *[On screen: Footage of protesters/terrorists burning an American flag. Text states: "Can we risk Bob Casey learning on the job?"].* |

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1981) (in comparing the FEC's investigative statutory authority to other agencies such as the SEC and FTC, the court stated "the FEC has no such roving statutory functions").

| *Softer Voices is responsible for the content of this advertising.* | *[On screen: Photograph of Santorum, next to text stating: 'Rick Santorum - Real. Experienced. Leadership.' Softer Voices disclaimer at bottom of screen].* |
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OGC concluded that both "Tough Enough" and "We the People" constituted express advocacy under section 100.22(a) because both advertisements "use individual words and slogans that in context can have no reasonable meaning other than to urge the election of Santorum or defeat of Casey."[16] Regarding "Tough Enough," OGC argued it was express advocacy because it "praises Santorum in the context of describing national security threats and prominently features images of him, casting him in a positive light," and the slogan 'Don't we need leaders tough enough to face such a threat' "references the office of Senator when it refers to 'leaders' and urges action when it references a 'need.'"[17] OGC further argued that "the communication's reference to the 'need' for a particular kind of candidate (*i.e.*, one who is 'tough enough'), preceded by the identification of Rick Santorum as that type of candidate, is express advocacy of Santorum's candidacy."[18]

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Regarding the second advertisement, "We the People," OGC argued it contained express advocacy because:

> [T]he ad depicts photographs of Santorum and his electoral opponent Casey, attacks Casey's qualifications and praises Santorum's, and concludes 'Can we really risk Bob Casey learning on the job?' This ad is express advocacy because it identifies a candidate and references the office of Senator when it refers to a 'job.' The only way a viewer could 'risk Bob Casey learning on the job' would be by voting for him for the 'job' of Senator. Thus, the ad exhorts viewers to defeat Casey and not take the 'risk.' Moreover, the use of 'risk' as a verb in this sentence is equivalent to the use of verbs such as 'vote for' or 'elect.' The ad also states: 'Rick Santorum. Real. Experienced. Leadership.' This statement is centered on the candidate and references personal characteristics unrelated to any issue. Further, the use of the word 'leadership' is a reference to his election to the office of Senator, where he would be a leader. The ad does not direct the reader to take action to express a view on a public policy issue or urge the reader to take some action other than to vote for Santorum.[19]

OGC also argued that both advertisements contained express advocacy under 11 C.F.R. 100.22(b) because:

> [T]he ads tout Santorum's accomplishments, character, and qualifications, and in proximity to the upcoming election, these ads only make sense if they are read as advocating the election of the clearly identified candidate.[20]

[16] MUR 5831 (Softer Voices), FGCR at 10.
[17] *Id.*
[18] *Id.* at 10-11 (citing 11 C.F.R. § 100.22(a)).
[19] MUR 5831 (Softer Voices), Factual & Legal Analysis at 8.
[20] MUR 5831 (Softer Voices), FGCR at 12.

> For instance, the ad 'We the People' attacks Casey's qualifications and praises Santorum's leadership and qualifications. The ad 'Tough Enough' praises Santorum and highlights his character and qualifications by stressing his 'tough' leadership. Further, the ads only make sense if they are understood to advocate Santorum's election. Thus, 'We the People' viewers are urged 'not to risk Bob Casey learning on the job' by voting for him for Senator. Similarly, viewers of 'Tough Enough' are urged to fill the 'need' for 'leaders tough enough' by voting for Santorum for Senator.[21]

After much discussion, the Commission found a reason to believe that Softer Voices failed to register and report as a political committee. Based upon those discussions, my impression was that the "We the People" advertisement may have contained some language that was sufficiently similar to that used by the Santorum campaign as a slogan. Under section 100.22(a), the use of a campaign's slogans can constitute express advocacy. Since there was a reason to believe that the advertisement constituted express advocacy under section 100.22(a), there was also a reason to believe that the advertisement was express advocacy under the broader definition of express advocacy found at section 100.22(b). Also based upon those discussions, my impression was that "We the People" was broadcast on television. Given the expense of such advertising, there was a reason to believe that Softer Voices was required to register and report as a political committee.[22]

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Contrary to my belief at the time of the reason to believe vote, OGC's investigation did not support a finding that the Santorum campaign used a slogan that was then used by Softer Voices in "We the People." And contrary to the assumption that "We the People" was an expensive television advertisement, the investigation confirmed that it only appeared on Softer Voices' website. Thus, I supported OGC's recommendation to take no further action, but could not support requiring Softer Voices to register and report as a political committee.

## II. ANALYSIS

The Softer Voices matter is but one example of a number of cases where the FEC has employed a variety of multi-factor balancing tests to ascertain whether a group is a "political committee" under the Act. Political committee is a defined term: "Any committee, club, association, or other group of persons that receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess

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[21] *Id.* OGC also notes that "the ad does not direct the reader to take action to express a view on a public policy issue or urge the reader to take some action other than to vote for Santorum." *Id.* at 12 n.10.

[22] OGC had advanced other theories in support of its conclusion with which I did not agree. For example, it relied on section 11 C.F.R. § 100.57, which purported to define "contribution" and was read in a manner that I felt was much too broad. *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chair Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 8-12. That the regulation went too far was later confirmed by the D.C. Circuit Court of Appeals, first in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), then in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

of $1,000 during a calendar year."[23] In *Buckley*, the Supreme Court limited the reach of this provision in two pertinent ways. First, it construed the Act's disclosure requirements, reporting requirements, and expenditure limitations "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[24] Second, it further limited the statute to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[25] This second limitation is commonly called the "major purpose" test.

As this matter (and countless others) demonstrates, the FEC routinely deviates from such jurisdictional limitations, and instead employs a variety of *ad hoc* balancing tests and subjective intent-and-effect based inquiries in its never-ending quest to regulate political speech.[26] Certainly, the Commission and its counsel invoke the proper standards in the abstract; every attempt is made to portray its various approaches as paradigms of moderation and objectivity.[27] But behind the closed doors of the FEC's confidential enforcement process, the standards are ever-changing and unpredictable, and expand or contract depending on the conclusion sought. The two most egregious examples are the FEC's resuscitation of section 100.22(b), which purports to define express advocacy, and its application of a case-by-case approach to ascertaining whether a group is a political committee.[28]

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### A. The Checkered History of Section 100.22(b)

Promulgated in 1995, section 100.22(b) purports to define "express advocacy." Originally, the FEC claimed it was the codification of the Ninth Circuit's decision in *FEC v.*

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[23] 2 U.S.C. § 431(4)(A).
[24] *Buckley*, 540 U.S. at 80.
[25] *Id.* at 79.
[26] "Because the FEC's 'business is to censor, there inheres the danger that [it] may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression.'" *Citizens United*, 130 S. Ct. at 896 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965)). Similarly:

> If speakers are not granted wide latitude to disseminate information without government interference, they will 'steer far wider of the unlawful zone.' This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a political 'evil' to be tamed, muzzled, or sterilized. . . . The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees. *Buckley* imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression.

*FEC v. Central Long Island Tax Reform Immediately*, 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, J., concurring).
[27] *See, e.g.*, MUR 5024R (Council for Responsible Government, Inc., *et al.*), Factual & Legal Analysis at 5 ("By its very terms, section 100.22 is a carefully tailored provision."). *See also* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5604 ("The Commission was able to apply the alternative test set forth in 11 C.F.R. 100.22(b) free of constitutional doubt based on *McConnell*'s statement that a 'magic words' test was not constitutionally required, as certain Federal courts had previously held.").
[28] The case-by-case approach was most recently reaffirmed by the FEC in 2007. *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5595.

*Furgatch*, as well as *Buckley* and *FEC v. Massachusetts Citizens For Life* ("*MCFL*").[29] But then the regulation was held unconstitutional by several circuit courts, rejecting such arguments.[30] The Commission subsequently adopted a policy that it would not enforce 100.22(b) in the First or Fourth Circuits (where the regulation was held unconstitutional), which, as a practical matter, resulted in the non-enforcement of 100.22(b) nationwide.[31]

Then, in the wake of *McConnell v. FEC*, and without any prior notice, the FEC revived the regulation in the context of a confidential enforcement matter.[32] First, the FEC asserted that because the Court in *McConnell* said that *Buckley's* so-called "magic words" did not represent "a constitutionally-mandated line beyond which no regulation was possible," the FEC believed that "the Supreme Court essentially overruled past decisions invalidating section 100.22(b) on constitutional grounds."[33] Second, relying on the fact that *McConnell*

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[29] *See* Explanation and Justification for Final Rules on Express Advocacy ("Express Advocacy E&J"), 60 Fed. Reg. 35291, 35293-95 (July 6, 1995).

[30] *See Maine Right to Life Committee v. FEC*, 914 F. Supp. 8, 12-13 (D. Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (per curiam), *cert. denied*, 118 S. Ct. 52 (1997) (Under 100.22(b), "what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must constantly re-evaluate his or her words as the election approaches."); *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (4th Cir. 1997) (unpublished) and *FEC v. Christian Action Network* ("*CAN II*"), 110 F.3d 1049, 1052-54 (4th Cir. 1997) (concluding that "the entire premise of the court's analysis [in *Furgatch*] was that words of advocacy such as those recited in footnote 52 were required to support Commission jurisdiction," and that "[i]t is plain that the FEC has simply selected certain words and phrases from *Furgatch* that give the FEC the broadest possible authority to regulate political speech (*i.e.* 'unmistakable,' 'unambiguous,' 'suggestive of only one meaning,' 'encourage[ment]'), and ignored those portions of *Furgatch*...which focus on the words and text of the message." The court also imposed fees and costs on the Commission for its enforcement efforts.). *See also Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) (finding 100.22(b) unconstitutional); *Right to Life of Duchess Co., Inc. v. FEC*, 6 F.Supp. 2d 248 (S.D.N.Y. 1998) (finding that 100.22(b)'s definition of 'express advocacy' is not authorized by FECA as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley*).

[31] *See* Paul S. Ryan, *Wisconsin Right to Life and the Resurrection of Furgatch*, 19 Stan. L. & Pol'y Rev. 130, 131 (2008) ("the FEC had stopped enforcing its *Furgatch*-like definition of 'express advocacy' [100.22(b)]"). *See also* MUR 5024 (Council for Responsible Government, Inc., *et al.*), Statement of Reasons of Chairman Bradley Smith and Commissioners David Mason and Michael Toner at 2 n.5 (declining to apply 100.22(b) to communications made in 2000 on the grounds that it "has been held unconstitutional") (internal citations omitted).

[32] *See* MURs 5024 and 5024R (Council for Responsible Government, Inc., *et al.*). The FEC originally dismissed the matter. MUR 5024 (Council for Responsible Government, Inc., *et al.*), Statement of Reasons of Chairman Bradley Smith and Commissioners David Mason and Michael Toner. After the complainant sued under 2 U.S.C. § 437g(a)(8), the district court remanded the matter to the FEC for reconsideration of its decision in light of *McConnell*. On remand, the Commission applied
11 C.F.R. § 100.22(b). *See* MUR 5024R (Council for Responsible Government, Inc., *et al.*), GCR #2.

[33] MUR 5024R (Council for Responsible Government, Inc., *et al.*), GCR #2 at 7. The Commission made much of the hyperbolic language used by Justice Thomas, speaking in dissent, that "[t]he Court, in upholding most of [BCRA's] provisions by concluding that the 'express advocacy' limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, for one)... *FEC v. Furgatch*." *McConnell v. FEC*, 540 U.S. 93, 278 n.11 (2003) (Thomas, J., dissenting). Aside from the obvious problem with this position (dissents are not law), the majority in *McConnell* specifically addressed Jusice Thomas' claim by making it explicitly clear that it was not overruling *Buckley*. Subsequent cases make this clear. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007); *Anderson v.*

upheld the statutory definition of "electioneering communication" "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," the Commission recast section 100.22(b) as a regulation that "fills the gaps" between where *Buckley's* so-called "magic words" ends and *McConnell's* "functional equivalent" begins.[34] The FEC imposed a civil penalty in the matter.[35]

In *WRTL*, the Supreme Court rejected the FEC's over-reading of *McConnell*. There, the Court made clear that *McConnell* did not uphold the electioneering communication ban because it <u>was</u> the functional equivalent of express advocacy (as was suggested in MUR 5024R, the matter that resuscitated section 100.22(b)); rather it was upheld only <u>to the extent</u> that it was the functional equivalent of express advocacy.[36] Thus, the FEC's assumption that *McConnell* had significantly expanded its jurisdiction was wrong.

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*Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. denied, Stumbo v. Anderson*, 543 U.S. 956 (2004); *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004). Even if Justice Thomas was correct, it would not have any impact on *Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), as that case turned on the limited reach of the underlying statute, not the constitutionality of the regulation.

[34] MUR 5024R (Council for Responsible Government, Inc., *et al.*), GCR #2 at 7-8 (making clear that section 100.22(b) is broader than *Buckley*). *See also* MUR 5024R, Statement of Reasons of Commissioner Bradley Smith (explaining why the Commission was wrong to revive section 100.22(b)). Moreover, although the Commission's revival of section 100.22(b) was not made public until 2005, it was nonetheless retroactively applied by the Commission to activity that occurred prior to the 2004 election. *See* MURs 5511 & 5525 (Swift Boat Veterans); MUR 5753 (League of Conservation Voters); MUR 5754 (MoveOn.org Voter Fund).

[35] But can an agency really abandon a prior interpretation of its own ambiguous regulation without first going through notice and comment? *See LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.) ("[w]here, as here, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.... The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication."); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (agencies must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored") (internal citations omitted); *id.* at 1125 ("An agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'"); *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.")); *cf. United States v. Magnesium Corp. of Am. LLC*, 616 F.3d 1129, 1139 (10th Cir. 2010) ("The issue of whether an agency may alter its interpretation of its own regulation without notice and comment is the subject of a circuit split, with the Third, Fifth, and Sixth Circuits apparently adopting the D.C. Circuit's view, and the First and Ninth Circuits seemingly taking the contrary position."). The problem is exacerbated when the agency relies on a reinterpretation of the regulation to impose a civil penalty. *See* MURs 5511 & 5525 (Swift Boat Veterans) (applying 100.22(b) retroactively after its resurrection by the FEC, resulting in the payment of a civil penalty). *Cf. Magnesium Corp. of Am. LLC*, 616 F.3d at 1144 ("[E]ven if Congress repealed the [Administrative Procedures Act] tomorrow, the Due Process Clauses of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice.... And it pertains when an agency advances a novel interpretation of its own regulations in the course of a civil enforcement action. If an agency could punish a regulated party for following the agency's own interpretation of its own ambiguous regulation, after all, 'the practice of administrative law would come to resemble 'Russian Roulette.''") (internal citations omitted).

[36] *WRTL*, 551 U.S. at 453.

Nonetheless, section 100.22(b) lived on. In the wake of *WRTL*, the FEC promulgated a rule that purported to define "permissible" electioneering communications, and essentially relegated the First Amendment to a regulatory exception to the Act.[37] This rule was then used to "inform" the FEC's use of section 100.22(b), and keep it viable, since section 100.22(b) had some superficial similarity to the test articulated by Chief Justice Roberts in *WRTL*. But in *Citizens United*, the Supreme Court once again made clear that the FEC was wrong, and struck as unconstitutional the Commission's *WRTL* rule and its two-part, 11-factor balancing test for determining what speech is banned.[38] Perhaps sensing that its beloved section 100.22(b) had the same flaws,[39] the FEC's lawyers recycled yet another rationale, this time appealing not to the statute upon which it was originally based, but instead to the FEC's supposed general power to make policy.[40]

**B. Problems With the Current Incarnation of Section 100.22(b)**

On its face, section 100.22(b) is vague and goes beyond the construction of express advocacy announced in *Buckley*; in application, it is nothing more than the same sort of *ad hoc*, multi-factored balancing test rejected by the Supreme Court in *Citizens United*. Similarly, when the vagaries of section 100.22(b) are combined with the FEC's creative interpretations of *Buckley's* major purpose test (particularly efforts that appear designed to expand, not limit the reach of the statute), it is anyone's guess what comes within the FEC's self-proclaimed regulatory jurisdiction.

Today, the fluid application of section 100.22(b) is rationalized in three ways:

[37] *See* 11 C.F.R. § 114.15 (defining so-called "permissible electioneering communications").
[38] *Citizens United*, 130 S. Ct at 895-96.
[39] Tellingly, the regulation is often paraphrased. *See, e.g., The Real Truth About Obama, Inc. v. FEC*, No. 09-724, Brief for the Respondents in Opposition to Petition for a Writ of Certiorari at 14 (when purporting to quote section 100.22(b), the regulation's inclusion of context is omitted, and replaced by an ellipses; similarly, the regulation is essentially rewritten to make it seem as if it is not an internally inconsistent, two-part test, that demands the regulator view a communication "taken as a whole," but then focus on its "electoral portion").
[40] *See The Real Truth About Obama, Inc. v. FEC*, No. 09-724, Brief for the Respondents in Opposition to Petition for a Writ of Certiorari at 2; *see also* MUR 5634 (Sierra Club), Factual & Legal Analysis at 9 n. 8 ("Accordingly, the Commission possesses broad authority to interpret the term, to 'formulate policy' on it, and to 'make, amend, and repeal such rules . . . as are necessary' regarding it.")(internal citations omitted). *But see Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir. 1991) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("Ordinarily, when a statute is silent or ambiguous, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it [has been entrusted] to administer.' That rule of construction no longer applies, however, once the Supreme Court has spoken on the issue. . . . It is not the role of the FEC to second-guess the wisdom of the Supreme Court.")). *See also EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) (holding that the regulations at issue in that case exceeded the Commission's statutory authority); *id.* at 26 ("By the plain language of the Federal Election Campaign Act (FECA), the FEC lacks the power it now asserts.") (Brown, J., concurring); *Shays v. FEC* ("*Shays I*"), 414 F.3d 76, 109 (D.C. Cir. 2005) (noting that the Commission's regulation at issue in that case "runs roughshod over express limitations on the Commission's power"); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (rejecting the Commission's attempt to impermissibly assert jurisdiction into an unprecedented area).



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- Section 100.22(b) is enforceable, because it is the same as/consistent with/informed by Chief Justice Roberts' description of the "functional equivalent of express advocacy" found in *WRTL*;

- Although section 100.22(b) was declared unenforceable, the FEC may nonetheless continue to enforce it because of *McConnell* and *WRTL*; and

- Section 100.22(b) only triggers disclosure requirements, and no longer functions as a restraint on speech; thus, its contours need not be as precise.

Unfortunately, all of these assumptions are flawed, and can be debunked.

1. **Flawed Assumption #1: Section 100.22(b) is enforceable because it is the same as/consistent with/informed by Chief Justice Roberts' description of the "functional equivalent of express advocacy" found in *WRTL***

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Although a number of courts have struck section 100.22(b) due to, *inter alia*, vagueness and over-breadth concerns, some nonetheless support its continued enforceability on the basis of some perceived superficial similarities between its language and the opinion authored by Chief Justice Roberts in *WRTL*. In fact, OGC applied this reasoning in the Softer Voices matter.[41] But a more careful review reveals that the *WRTL* "functional equivalent of express advocacy" test and section 100.22(b) are not the same. On the contrary, both the language of the regulation itself and the FEC's application of it (which goes well beyond its language) is nothing more than the same sort of multi-part, multi-factor balancing test the FEC concocted after *WRTL* to define the separate but related concept of the functional equivalent of express advocacy, which the Court struck in *Citizens United*.

***a. The FEC and the functional equivalent of express advocacy***

*WRTL* concerned the reach of the "electioneering communication" ban of McCain-Feingold. The statute banned electioneering communications, defined as: (1) any broadcast, cable, or satellite communication, (2) which refers to a clearly identified Federal candidate, (3) paid for with corporate or union general treasury funds, (4) 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 (5) targeted to the relevant electorate.[42]

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[41] *See* MUR 5831 (Softer Voices), FGCR at 12 n.10 ("Although the Commission's express advocacy regulation was not at issue in *WRTL*, the Court's consideration of what could be regulated as an electioneering communication set forth a test that included elements similar to those used in 11 C.F.R. § 100.22(b).") (internal citations omitted). *See also* MURs 5910 & 5694 (Americans for Job Security), FGCR at 11 n.12 (same); MUR 5991 (U.S. Term Limits, Inc.), FGCR at 6 (same); MUR 5874 (Gun Owners of America Inc.), Factual and Legal Analysis at 4 n.2.

[42] *See* 2 U.S.C. § 434(f)(3) (defining "electioneering communication").

The Court agreed that McCain-Feingold could not constitutionally prohibit the advertisements at issue regarding judicial nominations. According to the Court, although this statute was not vague, it was still overbroad, as it captured non-campaign advertisements. As explained by Chief Justice Roberts, *McConnell* had limited the reach of the statutory ban to the functional equivalent of express advocacy. The Chief Justice further explained that in addition to the statutory criteria defining electioneering communication, an advertisement came within the reach of the statute "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[43] In other words, in this context, to constitute the "functional equivalent of express advocacy," a communication must satisfy all six criteria (five from the statute, and the "appeal-to-vote" test).

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In the wake of *WRTL*, the Commission commenced a rulemaking to instruct speakers about what the FEC termed "permissible" speech.[44] In passing a final rule, the FEC developed its own interpretations that contradicted Chief Justice Roberts' repeated admonitions to favor speech over censorship and to give speakers clear guidance about the line between regulated and non-regulated speech. The FEC purported to establish a safe harbor for certain speech, while subjecting other speech to a "multi-step analysis for determining whether [electioneering communications] that do not qualify for the safe harbor nevertheless qualify for the general exemption."[45]

To avail oneself of the safe harbor, one's speech could not mention "any election, candidacy, political party, opposing candidate, or voting by the general public," nor could it take a position on the candidate's "character, qualifications, or fitness for office."[46] Moreover, the advertisement could only reference certain topics: "a legislative, executive, or judicial matter or issue," or propose a "commercial transaction."[47] In addition to only talking about the government-approved subject matter, the advertisement had to "urge the public to take a position and contact the candidate."[48]

For communications outside the safe harbor, the FEC created a multi-step analysis to consider "whether the communication includes any *indicia* of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate in order to determine whether, <u>on balance</u>, the communication is susceptible of no reasonable interpretation other than as an appeal

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[43] *WRTL*, 551 U.S. at 452.
[44] Notice of Proposed Rulemaking on Electioneering Communications, 72 Fed. Reg. 50261, 50264 (August 31, 2007); *see also* Explanation and Justification for Electioneering Communications ("Electioneering Communications E&J"), 72 Fed. Reg. 72899 (Dec. 26, 2007).
[45] Electioneering Communications E&J at 72902.
[46] *Id.* at 72903; *see also* 11 CFR § 114.15(b)(1)-(3).
[47] Electioneering Communications E&J at 72903.
[48] *Id.*

to vote for or against a clearly identified [f]ederal candidate."[49] This is the now-infamous "two-part, 11-factor balancing test" openly mocked by the Court in *Citizens United*.[50]

### *b. Section 100.22(b) on its face is vague, asking more than it answers*

Section 100.22(b) purports to define express advocacy as communications that:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[51]

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The Explanation & Justification ("E&J") that accompanied section 100.22(b) notes that "communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no reasonable meaning other than to encourage actions to elect or defeat the candidate in question."[52] That the regulation allows for the consideration of unspecified "context" is undisputed: "The Commission recognized the necessity of considering context when it promulgated section 100.22, adding a context element to both 100.22(a) and (b)."[53]

Even a superficial reading of this regulation reveals a number of vague, unspecified terms. For example, what is a "limited reference" to "external events"? The regulation points to "proximity to the election," but the inclusion of "such as" hints that there are other factors, described as "external events," that can be referenced. And the reference can only be "limited" – limited to what, it does not say. Likewise, how close to the election satisfies "proximity to the election"? A few days, weeks, or maybe months? The face of the regulation offers no guidance.[54]

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[49] 11 C.F.R. § 114.15(c) (emphasis added).
[50] *Citizens United*, 130 S. Ct. at 895 ("In fact, after this Court in *WRTL* adopted an objective 'appeal-to-vote' test for determining whether a communication was the functional equivalent of express advocacy, the FEC adopted a two-part, 11-factor balancing test to implement *WRTL*'s ruling.").
[51] 11 C.F.R. § 100.22(b).
[52] Express Advocacy E&J, 60 Fed. Reg. at 35295.
[53] MUR 5024R (Council for Responsible Government, Inc.), GCR #2 at 8 (citing Express Advocacy E&J, 60 Fed. Reg. at 35295).
[54] The Commission considered but declined to adopt a proposal specifying an express advocacy timeframe (*i.e.*, a specific number of days before an election), opting instead for a "case-by-case" approach. Express Advocacy E&J, 60 Fed. Reg. at 35295 ("... the timing of the communication would be considered on a case-by-case basis."). *But see Leake*, 525 F.3d at 284 (In a similar context, the Fourth Circuit noted: "Furthermore, these same open-ended terms provide little *ex ante* notice to political speakers as to whether a regulator,

Then there is the internal inconsistency that seems to create a two-part test. First, read the communication "taken as a whole" (which includes not only the whole of the communication's content, but unspecified "external" factors); and if (presumably) that is not enough to justify regulation of the communication, move on to step two, and focus on the "electoral portion." But which is the focus? The whole communication, or just the "electoral portion"? And what precisely is the "electoral portion" of the communication? The E&J appears to say that the "electoral portion" need not be electoral at all, but instead can merely concern "character, qualifications or accomplishments." And one need not raise such matters in any sort of pointed or adversarial manner. "Discussing" or "commenting" on one's "accomplishments" is enough, so long as it "encourages actions" to elect or defeat. What sort of actions does the regulation have in mind? How does one go about "encouraging" such unspecified actions? Is not divining a communication's "electoral portion" a self-fulfilling prophecy – after all, once a regulator declares part of a communication to be the "electoral portion," how could that portion be read any way other than as "electoral" and thus sufficiently election-related to constitute express advocacy under the regulation?

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The vagaries found in section 100.22(b) are easily illustrated by example. To borrow from a hypothetical raised during oral argument in *Citizens United*, assume a 500-page book spends 499 pages explaining in intricate detail, and without much in the way of charged rhetoric, all the legislative proposals of an elected official. But then, on the last page of the book, it concludes "vote for" the official who was the subject of the book.[55] Does

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applying supple and flexible criteria, will make a *post hoc* determination that their speech is regulable as electoral advocacy. This approach simply guarantees that ordinary political speech will be chilled, the very speech that people use to express themselves on all sides of those issues about which they care most deeply.").

[55] Transcript of Oral Argument at 29-30, *Citizens United v. FEC*, No. 08-205 (S. Ct. argued Mar. 24, 2009):

> CHIEF JUSTICE ROBERTS: It's a 500-page book, and at the end it says, and so vote for X, the government could ban that?
>
> MR. STEWART: Well, if it says vote for X, it would be express advocacy and it would be covered by the pre-existing Federal Election Campaign Act provision.
>
> ...
>
> MR. STEWART: Yes, our position would be that the corporation could be required to use PAC funds rather than general treasury funds.
>
> CHIEF JUSTICE ROBERTS: And if they didn't, you could ban it?
>
> MR. STEWART: If they didn't, we could prohibit the publication of the book using the corporate treasury funds.

Contrary to the assertion made by the Solicitor General in the subsequent *Citizens United* re-argument, that the FEC has never pursued a book, *see* Transcript of Oral Argument at 65-67, *Citizens United v. FEC*, No. 08-205 (S. Ct. reargued Sept. 9, 2009) ("although [the Act] does cover full-length books," "the FEC has never applied [it] in that context," "there has never been an enforcement action for books," and there has been "no administrative practice of ever applying it to books"), the FEC has pursued books. *See* MUR 5642 (George Soros) (investigating a book by Soros that was critical of President George W. Bush); *see also FEC v. Forbes*, 98 Civ. 6140 (S.D.N.Y. Aug. 21, 1998) (the Commission asked the court to find that bi-weekly columns authored by the candidate in Forbes Magazine resulted in knowing violations of the Act by the candidate, the magazine, and his campaign committee); *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981) (plaintiff sought to block the Commission from investigating a video-taped re-enactment of Senator Edward Kennedy's automobile accident at Chappaquiddick, which was produced in connection with the publication of a

that convert the entire book to express advocacy, which in turn could generate a reporting obligation?[56]

What if the last sentence is something less direct: "because of all his accomplishments, we need to do everything we can to keep [the elected official] in office." Is that express advocacy? It talks about his accomplishments, and seems to encourage actions to elect the official. Is the fact that he is a candidate enough of an "external" event to presumably move to step two, an analysis of the electoral portion? What if the official has not yet declared his intent to seek re-election? What if he has announced his retirement? Are these the sorts of "external" factors contemplated by the regulation?

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Or because it is a book, do we read it as a whole? Is that the sort of external factor that cuts against finding it to be express advocacy? What if the last sentence was even less direct: "we need to do everything we can to help him"? A reasonable mind could read that as encouraging actions to keep the official in office. Could anyone really disagree that the sentence could not be read that way? If the book were released in the fall of an election year, does that make it proximate to the election? What if it were written by a political science professor, who published it in time for his fall semester (in an election year)? Is that an external event that cuts against finding express advocacy, and trumps the other external event, namely proximity to the election? And does the book cease to be express advocacy the day after the election? What if the book did not advocate any sort of action? Since, in the words of the regulation, it does not "encourag[e] some other kind of action," does that mean the book's discussion of the public official's accomplishments is enough to constitute express advocacy?[57]

### *c. Section 100.22(b) on its face differs from WRTL*

In addition to the facial vagueness, section 100.22(b) differs from Chief Justice Roberts' approach in a number of critical ways. First, the regulation lacks the very clear criteria found in the statutory definition of "electioneering communication" that was at issue in *WRTL*. In other words, the appeal-to-vote test as articulated by the Chief Justice is not a free-floating test;[58] instead, it is a judicial limitation on a statute that had very clear and very objective triggers: (1) a television or radio advertisement that (2) referenced a federal candidate; (3) paid for with corporate or union general treasury funds; (4) aired within 30 days of the primary election or 60 days of the general election; and (5) targeted to a significant part of the electorate.

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February 1988 *Reader's Digest* article about Senator Kennedy, who was a candidate for President at the time of publication).

[56] And assuming that it did trigger a reporting obligation, when would that obligation occur? Each time a copy of the book was sold?

[57] For example, *Hillary the Movie* "referred to Senator Clinton as 'Machiavellian,' asks whether she is 'the most qualified to hit the ground running if elected President,' and the narrator reminds viewers that 'a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House.'" *Citizens United*, 130 S. Ct. at 890. Yet the film was <u>not</u> express advocacy, but merely its functional equivalent.

[58] *WRTL*, 551 U.S. at 474 n.7 ("And keep in mind this test is only triggered if the speech meets the brightline requirements of BCRA § 203 in the first place.").

Whereas *WRTL* concerned certain communications within clearly defined time periods before an election (30 days pre-primary, 60 days pre-general), section 100.22(b) can be applied year-round.[59] Although "proximity to the election" is a factor to be considered, it is only one of other nebulous factors. Does "proximate" mean mere days before the election? Weeks or months? 61 days before a general, or 31 days before a primary? Likewise, the application of section 100.22(b) is not limited to only some speakers (unlike in *WRTL*, which only applied to corporate, union, or concerned individuals, and only after the government, relying on *Austin v. Mich. Chamber of Commerce*, established its need to do so in *McConnell*).

Nor is the regulation's application limited to a significant part of the relevant electorate. Thus, even if a communication is never distributed to actual voters, that still does not preclude the application of section 100.22(b). *WRTL*, on the other hand, only applied to communications that could be received by a significant part of the electorate. Likewise, *WRTL* only concerned itself with television and radio ads (again, after the government had presented evidence that justified treating such communications differently); whereas section 100.22(b) applies not only to television and radio, but to direct mail, telephone calls, and even fundraising solicitations. Thus, contrary to any assertion that section 100.22(b) is narrower than *WRTL*,[60] the importation of the appeal-to-vote test into the definition of expenditure (absent the other limiting criteria), creates a significantly <u>broader</u> regulatory regime.

Second, although both *WRTL* and section 100.22(b) invoke a notion of "reasonable," the use of the word differs radically between the two. On the one hand, *WRTL* invokes "reasonable" in the context of the appeal-to-vote test: that the language of the ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[61] In formulating this test, Chief Justice Roberts explained that this appeal-to-vote test was both simple and speech-protective.[62] In the very same area of the opinion, the Chief Justice explained the importance of the objectiveness of the test. He reasoned that under the appeal-to-vote test:

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[59] The *McConnell/WRTL* functional equivalent of express advocacy test is a judicial limitation on a statutory provision that covers only communications run within 30 or 60 days of an election. In other words, it has no bearing on communications outside the electioneering communications window. Express advocacy, on the other hand, is a standard that applies to communications year around. Thus, redefining "express advocacy" beyond the construction of *Buckley* by including one part of the test for its functional equivalent (*i.e.*, the more amorphous appeal-to-vote test) ignores a clear line drawn by Congress. For example, an advertisement run 61 days before an election cannot, as a matter of law, be an electioneering communication, and whether or not it can be read as containing an appeal-to-vote ought to be irrelevant. Stated differently, even though prior to *Citizens United* corporations were banned from engaging in express advocacy, they could nonetheless pay for communications that came within the appeal-to-vote test so long as such communications were not broadcast within 30 days of the primary election or 60 days of the general election. Re-defining express advocacy to include the appeal-to-vote test impermissibly removed this statutory distinction.

[60] *See The Real Truth About Obama, Inc. v. FEC*, No. 09-724, Brief for the Respondents in Opposition to Petition for a Writ of Certiorari at 15 ("Section 100.22(b) is narrower than the *WRTL* test.").

[61] *WRTL*, 551 U.S. at 451.

[62] *Id.* at 468-73.



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(1) There can be no free-ranging intent-and-effect inquiry.
(2) There generally should be no discovery or inquiry into contextual factors.
(3) Discussion of issues cannot be banned merely because the issues might be relevant to an election.
(4) In a debatable case, the tie is resolved in favor of protecting speech.[63]

The Court went to great lengths in *WRTL* to explain the constitutional significance of its test by referencing the fact that it must ignore contextual references, "eschew the open-ended rough-and-tumble of factors," which invite burdensome discovery and lengthy litigation, and give the "benefit of the doubt to speech, not censorship."[64] Under *WRTL*, once one reasonable construction of a communication is found (other than as an appeal to vote), the analysis ends; there is no balancing of reasonable interpretations of speech.[65]

On the other hand, under section 100.22(b) the FEC gives the tie to the regulator, not the speaker. It balances reasonable constructions, and in the close call, mandates regulation. This is accomplished by invoking both a "reasonable person" and a "reasonable mind" test.[66] The regulation can be read as asking if the undefined "electoral portion" of a communication can be read as encouraging actions to elect or defeat candidates, and if so, whether reasonable minds could differ that the communication could be so read. This does not protect issue advocacy or discussion. Instead, it essentially removes from consideration discussion of an elected official's accomplishments, by characterizing such discussion as "electoral." By drawing the line in the wrong place, section 100.22(b) fails to acknowledge that candidates, "especially incumbents, are intimately tied to public issues

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[63] *Id.* at 474 n.7.

[64] *Id.* at 482. *See also Leake*, 525 F.3d at 283 ("*WRTL* specifically counseled against the use of factor-based standards to define the boundaries of regulable speech, since such standards typically lead to disputes over their meaning and therefore litigation.").

[65] The notion of a reasonable construction of speech was not invented out of whole cloth by the Chief Justice. On the contrary, it is used in other First Amendment contexts, including libel. In Illinois, for example, courts apply the innocent construction test in analyzing libel claims. In those situations, an "article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law." *John v. Tribune Co.*, 24 Ill.2d 437, 442, 181 N.E.2d 105, 108 (Ill. 1962). Stated differently, a "statement 'reasonably' capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions." *Solaia Technology, LLC v. Specialty Pub. Co.*, 852 N.E.2d 825, 859 (Ill. 2006).

[66] The FEC has rationalized its use of a reasonable person test by looking to other non-First Amendment areas of the law. Sometimes, it looks to the use of a reasonable person test to define common law duties (under negligence, for example). Other times, it looks to "reasonableness" as that term is used in Fourth and Fifth Amendment jurisprudence. *See Terry v. Ohio*, 392 U.S. 1 (1968) (explaining "reasonable suspicion"); *Florida v. Jimeno*, 500 U.S. 248 (1991) (reasonable consent). But in both instances, the question is not whether a private citizen can speak, but whether the conduct of government law enforcement officers or others was reasonable under the circumstances. In other words, in both areas it is used to determine whether there is a breach of the applicable standard of care. Such use is improper in the First Amendment context, where citizens have no duty to "steer clear" of certain speech, and failure to do so cannot in turn be judged by a reasonable person standard. On the contrary, First Amendment case law enjoys a long-standing history of striking down laws that operate in a fashion directing citizens to "steer clear" of constitutionally protected expression. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("The Government cannot ban speech fit for adults simply because it may fall into the hands of children.").

involving legislative proposals and governmental actions."[67] But by declaring discussion of such issues "electoral," section 100.22(b) makes almost any discussion of candidates off limits, and favors regulation as the norm, leaving liberty as the exception.[68]

### *d. The FEC continues to use the same test that was struck in Citizens United*

A review of the FEC's numerous enforcement and other matters demonstrates that the vagaries found in section 100.22(b) are not merely academic. In fact, the application of section 100.22(b) is not limited to its already-vague regulatory text.[69] Indeed, the Commission's current version of the express advocacy test is essentially the same multi-factor balancing test that it had employed to define the functional equivalent of express advocacy, prior to its rejection by the Court in *Citizens United*. Despite this rejection, the test lives on under the guise of section 100.22(b).

The result of exporting the FEC's erroneous reading of Chief Justice Roberts' opinion in *WRTL* is the continued use of the same sort of multi-factor balancing test that the FEC had erroneously used to define the functional equivalent of express advocacy.[70] Under this test, reference to context of the sort rejected by the Court is routinely considered. The application of the test looks not to the language of the communication itself, but to the subjective intent of the speaker, or how the speech is perceived by the so-called "reasonable person." Oftentimes, the burden is shifted to the speaker to prove that the advertisement is not express advocacy,[71] in a remarkably similar manner (and even using the same sort of language) as in the failed efforts to define the functional equivalent of express advocacy. In other words, it presumes the government can regulate a particular communication merely because it references someone who is running for office, and then it is up to the speaker to prove that its speech is a "genuine" issue advertisement.

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[67] *Buckley*, 424 U.S. at 42.

[68] This inverts the proper analysis. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981) ("*Buckley* identified only a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate.") (emphasis in original).

[69] The FEC has made clear that its reading of section 100.22(b) is not limited to its regulatory text. *See* MUR 6073 (Patriot Majority 527s), FGCR at 9 (referring to the "distillation of the meaning of 'expenditure' through the enforcement process").

[70] I am not the first to come to this conclusion. *See, e.g.*, MUR 5874 (Gun Owners of America, Inc.), Statement of Reasons of Commissioner David Mason at 4 ("Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice [in *WRTL*] because it endorses an inherently vague 'rough-and-tumble of factors' approach in demarcating the line between regulated and unregulated speech.").

[71] *But see Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 162-63 (1971) (upholding a rule that "lends itself to a construction that could raise substantial constitutional questions, both as to the burden of proof permissible in such a context under the Due Process Clause of the Fourteenth Amendment, and as to the permissible scope of inquiry into an applicant's political beliefs under the First and Fourteenth Amendments," on the grounds that the administering agency's construction of the rule "is both extremely narrow and fully cognizant of protected constitutional freedoms," including that the rule "places upon applicants no burden of proof.").



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The Commission's own enforcement matters illustrate the test in action. For example, in the Softer Voices matter, the FEC's lawyers counseled the Commission to look to the following factors to establish that a communication referencing Senator Rick Santorum contained express advocacy because it:

- "praises Santorum;"
- "in the context of describing national security threats;"
- "prominently features images of him;"
- "casting him in a positive light;"
- depicts photographs of Santorum and his electoral opponent Casey;
- "attacks Casey's qualifications and praises Santorum's;"
- includes a phrase ('Rick Santorum. Real. Experienced. Leadership.') which is "centered" on the candidate and references "personal characteristics" somehow unrelated to any issue;
- uses the word 'leadership,' which is somehow a reference to his election to the office of Senator; and
- "The ad does not direct the reader to take action to express a view on a public policy issue or urge the reader to take some action other than to vote for Santorum."[72]

In another matter, MUR 5988 (American Future Fund), the Commission's General Counsel concluded that the following advertisement, which did not reference an election or otherwise encourage the viewer to vote, constituted express advocacy:

> When the unthinkable happened, Senator Norm Coleman teamed with Amy Klobuchar to secure $250 million to rebuild the 35W bridge. Coleman has worked with Republicans and Democrats to make college more affordable, expand opportunities for our soldiers and National Guard returning home, and crack down on predatory lenders. An independent voice for Minnesota: Norm Coleman. Call Norm Coleman and thank him for his agenda for Minnesota.
>
> The telephone number for Senator Coleman's district office in St. Paul, Minnesota appeared on the screen at the end of the advertisement. Also at the end of the advertisement was the written disclaimer, "Paid for by the American Future Fund."

[72] MUR 5831 (Softer Voices), FGCR at 10-12; *id.*, Factual & Legal Analysis at 6-8.



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Even though the advertisement praised a U.S. Senator's bipartisan legislative accomplishments, it was nonetheless express advocacy in the eyes of the Commission's lawyers because the advertisement supposedly "lack[ed] a specific legislative focus,"[73] "[was] candidate centered," and "request[ed] electoral support by characterizing Coleman as An Independent Voice for Minnesota."[74] That the action urged by the advertisement was to call the Senator at his official office number regarding the legislative accomplishments did not, in the eyes of the Commission's lawyers, change their conclusion.[75]

In another matter, the Commission's lawyers concluded an advertisement that did not contain express words of advocacy "may" nonetheless contain express advocacy because a "viewer would reasonably interpret this ad as urging a vote against" the public official referenced in the advertisement.[76] This sort of approach could not be more at odds with the numerous judicial pronouncements that make clear that the Commission may not look to the subjective impression of the viewer in determining whether or not a communication constitutes express advocacy.[77] That the General Counsel could only say that it "may" constitute express advocacy in the eyes of a reasonable viewer[78] illustrates that this determination is not viewed as a bright-line question of law, but instead is a muddy, fact-intensive inquiry. Again, this flies in the face of every judicial decision on the subject, and shows that the tie goes to the FEC, not the speaker.

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These are but a few examples of dozens and dozens of communications that have been deemed "express advocacy" by the Commission's lawyers, using a multitude of vague factors (none of which are based on the Commission's regulatory language, but yet are eerily familiar as the same totality-of-the-circumstances, multi-factor approach the FEC tried to use in defining the functional equivalent of express advocacy), such as:

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[73] *See* MUR 5988 (American Future Fund), FGCR at 8-9 (because an advertisement "lack[ed] legislative focus," it would constitute express advocacy). *But see* MURs 5474 & 5539 (Dog Eat Dog Films, Inc.), FGCR at 17 (OGC concluded that a film and related marketing materials did not contain express advocacy even though: (1) "the film's criticism is wide-ranging," targeting the President, Members of Congress from both parties, and touching upon military recruitment policies, the budget process, the Patriot Act, the Iraq War, and the response to 9/11; and (2) the film refers to the incumbent president by name, and makes a statement concerning his re-election).

[74] MUR 5988 (American Future Fund), FGCR at 8-9.

[75] *Id.* But in other cases, urging a call to thank "can... be construed as an effort to encourage [the public official] to maintain his position on the specific legislative issues identified in the ads." MURs 5910 & 5694 (Americans for Job Security), FGCR at 13 n.14.

[76] *Id.* at 13. Yet in the context of a challenge to the FEC's coordination rules, the D.C. Circuit cited these advertisements by Americans for Job Security, and stated that they "did not contain the 'magic words' of express advocacy," and therefore could have been coordinated with candidates under the Commission's rule which covered only advertisements containing express advocacy outside the so-called time windows. *Shays v. FEC* ("*Shays III*"), 528 F.3d 914, 924 (D.C. Cir. 2008). But in a subsequent enforcement matter against Americans for Job Security (MURs 5910 & 5694), the FEC's lawyers argued that these same advertisements contained express advocacy (and did so without any mention of the *Shays III* decision).

[77] *Citizens United*, 130 S. Ct. at 889 ("the functional-equivalent test is objective"); *WRTL*, 551 U.S. at 467 (declining to adopt a test turning on "the speaker's intent to affect an election").

[78] MURs 5910 & 5694 (Americans for Job Security), FGCR at 13.

- "lacks specific legislative focus;"[79]
- "candidate centered;"[80]
- characterizing a public official as "an independent voice," or telling the viewer to call and "thank" the official for official action;[81]
- saying someone has demonstrated "leadership," or has been a "common sense voice" is somehow an emphasis on character, which equates to express advocacy;[82]
- saying someone has "experience" is somehow an emphasis on qualifications, which equates to express advocacy;[83]
- saying someone is a "small businessman for 17 years" is somehow an emphasis on accomplishments, which equates to express advocacy (even though the advertisement focused on the need to protect jobs);[84]
- failing to urge some specific action to be taken by the elected official;[85]
- asking the viewer to "ask [the candidate] about his plans to bring our children back to [the state];"[86]
- failing to include a contact phone number;[87]
- questioning a pubic official's leadership potential;[88]
- how a viewer would "reasonably interpret" an advertisement;[89]
- touting or attacking character, qualifications and accomplishments;[90]
- "proximity to the upcoming election;"[91] and

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[79] MUR 5988 (American Future Fund), FGCR at 8.
[80] *Id.*
[81] *Id.*
[82] MURs 5910 & 5694 (Americans for Job Security), FGCR at 11.
[83] *Id.* at 10.
[84] *Id.* at 10-11.
[85] *Id.*
[86] *Id.* at 13.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] MURs 5831 & 5854 (Lantern Project/Softer Voices), Factual & Legal Analysis at 8.
[91] MUR 5831 (Softer Voices), FGCR at 12. Of course, how "proximate" has never been defined. *See* MURs 5755 & 5440 (New Democratic Network), FGCR at 11 ("the Advertisement's 'proximity to the election' (less than four weeks) might be comparable to the publication in *Furgatch* (one week).") (emphasis added).

- "on balance."[92]

Such a "loose mélange of factors do not elucidate *WRTL's* objective test; instead, they present the very infirmity identified by *WRTL*, namely, that of supplying regulators with nearly endless possibilities for discovering whether a communication can 'only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.'"[93]

The use of such factors has not been limited to just a few cases. On the contrary, they are used in case after case, including when examining other types of communications, such as voter guides and polls. For example, in MUR 5634 (Sierra Club), the FEC claimed that a voter guide that did not contain any of the so-called "magic words" of *Buckley* nonetheless was express advocacy. The voter guide stated "Let your conscience be your guide" and "let your vote be your voice," urged the recipient to "Find out more about the candidates before you vote," and included the Sierra Club's website.[94]

The FEC identified two "factors" relevant to its analysis in MUR 5634 (but which, in the context of a voter guide, are unremarkable): (1) that the guide was distributed before the general election; and (2) that it identified the two leading candidates for President and U.S. Senate in Florida. With "limited reference" to these "factors," as well as yet another unremarkable "factor," *i.e.*, "the Sierra Club's well-known stance promoting environmental regulation," the FEC found that "Let your conscience be your guide and let your vote be your voice" to be "unmistakable, unambiguous, and suggestive of only one meaning," specifically vote for Senator Kerry and Betty Castor.[95] That the voter guide also said, "Find out more about the candidates before you vote. Visit www.sierraclubvotes.org," was of no consequence, since that factor did not "convert the pamphlet into a mere starting point for further information."[96] Remarkably, the FEC acknowledged that "the 'reasonable mind' of a voter favoring relaxed or loose environmental regulation could regard [the guide] as encouragement to vote for President Bush and Mel Martinez."[97] But this did not matter, said the FEC, because "[w]e think the 'reasonable mind' viewing [the voter guide] 'could only []interpret[]' this pamphlet 'as containing advocacy of the election' of Senator Kerry and Berry Castor."[98]

The approach taken by the Commission in the Sierra Club matter had obvious flaws: First, it shows that the "reasonable mind" test of section 100.22(b) is not the objective

[92] *See* MURs 6051 & 6052 (Wal-Mart, Stores, Inc.), FGCR at 10 ("However, on balance, the presentation, when taken as a whole, could reasonably be construed as two-fold....Thus, the Guide, taken as a whole, cannot only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates, and accordingly does not constitute express advocacy under section 100.22(b).") (emphasis added).
[93] *Leake*, 525 F.3d at 298 ("*WRTL* emphatically rejects the resort to a multi-factored, totality of the circumstances approach for defining regulable electoral advocacy.").
[94] MUR 5634 (Sierra Club), FGCR at 2.
[95] *Id.* at 5.
[96] *Id.* at 11.
[97] *Id.*
[98] *Id.* at 12.



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question of law envisioned by Chief Justice Roberts. On the contrary, it proves that test is being read to require the regulators to guess what an imaginary third person might think a communication means. In other words, it is precisely the sort of "free ranging intent-and-effect" test forbidden by the Court. Second, it shows the balancing of factors at work. Three factors that are utterly unremarkable and by definition are contained in every voter guide (*i.e.*, distributed before an election, identified candidates, by a group that had well-known policy preferences) outweighed the explicit action urged ("find out more about the candidates before you vote"), when combined with "pictures of gushing water, picturesque skies, abundant timber, and people enjoying nature."[99]

In addition to voter guides, polls have been described as constituting express advocacy. In one such matter, the General Counsel, ignoring the statute and the real-life differences between survey polls and telephone banks, argued that legitimate survey polls require the same disclaimers that are required on candidate advocacy. Behind closed doors, the General Counsel was attempting to recast obvious language that is contained in every political poll (asking whether certain information would make a registered voter more likely to vote for a certain candidate) as express advocacy by bootstrapping together a number of factors.[100]

Because the Commission's enforcement process is confidential during the pendency of a matter, and Commission deliberation regarding a matter remains confidential even after the matter closes, how these factors are balanced is unknown. Only on the rarest occasions does the public see the Commissioners verbalize how they approach this issue, what factors (if any) they use, and assuming factors are used, what weight is given to them.

One such occasion concerned an advisory opinion request submitted by the National Right to Life Committee in the midst of the 2008 election season. There, the requestor asked whether certain proposed advertisements were prohibited either because they were an electioneering communication that contained the functional equivalent of express advocacy, or an expenditure because they contained express advocacy. The transcript of the Commission's deliberations provides a window into the operating principles of various Commissioners and demonstrates the use of context and an intent-and-effect test.[101] As summarized by the *amici* brief filed by, *inter alia*, the Wyoming Liberty Group in *Citizens United*:

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[99] *Id.* at 9.

[100] *See also* MUR 5842 (Economic Freedom Fund) (the General Counsel argued that a poll question "[a]ttack[ing] the accomplishments of [a former elected official] by making statements about policy positions while he was in office and asking the listener whether they are 'less likely' to vote for [the former official]" was express advocacy). I joined with my colleagues in rejecting this approach. *See* MUR 5835 (Quest Communications, Inc. / DCCC), Statement of Reasons of Vice Chair Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn.

[101] The transcript of this meeting is not available at the Commission, as the FEC does not generally transcribe its meetings (but instead makes audio recordings available on its website). Nonetheless, a transcript is attached to an *amicus* brief filed with the Court in *Citizens United*. *See Citizens United v. FEC*, No. 08-205, Brief of *Amici Curiae*, The Wyoming Liberty Group and the Goldwater Institute Scharf-Norton Center for Constitutional Litigation in Support of Appellant at 28 n. 3.



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One commissioner began to run through the two-prong, 11-factor Heads You Speak, Tails You Don't Approach and admitted that the ad focuses on a legislative issue related to abortion. The commissioner continued by noting that the ad takes a position on the issue, but did not "exhort the public to adopt that position or urge the public to contact public officials with respect to the matter." She concluded by expressing her doubt that the ad might not be a genuine issue ad since not all four factors were present. The second ad included a tag line of "Barack Obama, a candidate whose word you can't believe in." After explaining in some detail the nature of recent litigation faced by the Commission, the commissioner asked, "What would any normal person do with that information? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in." Crucial to this commissioner's analytical approach was an examination of audience reaction and the effect of the speech. Going further, the same commissioner explained that the ad attacked the character of Obama because it stated that a person's word cannot be believed in. After a lengthy discussion of the importance of character in raising children, the commissioner reasoned that mentioning a person's dishonesty is a "very direct attack" on character. Significantly, the commissioner then exclaims that the citizens requesting the advisory opinion "wouldn't need a 20-day AO [advisory opinion] if it was just an issue ad, and he wasn't seeking to affect the election."[102]

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This is precisely the sort of cacophony of factor-balancing that the Supreme Court has said is impermissible:

- A multitude of factors (such as taking a position on an issue, not exhorting the public to adopt that position, not asking the public to contact the public official).

- Shifting the burden to the speaker to prove its speech was a "genuine" issue advertisement.

- Employing an intent-and-effects test, by invoking the intent of the speaker, and asking how the viewer would perceive the advertisement.

The Court has made clear that speech cannot be regulated or prohibited based on "the speaker's intent to affect an election,"[103] that any such efforts afford "no security for free discussion,"[104] and leave speakers "wholly at the mercy of the varied understanding of his hearers."[105] As the Fourth Circuit said in *North Carolina Right to Life v. Leake,* "This sort of ad hoc, totality of the circumstances-based approach provides neither fair warning to

[102] *Citizens United v. FEC,* No. 08-205, Brief of *Amici Curiae,* The Wyoming Liberty Group and the Goldwater Institute Scharf-Norton Center for Constitutional Litigation in Support of Appellant at 30-31 (internal citations omitted).
[103] *WRTL,* 551 U.S. at 467.
[104] *Id.* (quoting *Buckley,* 424 U.S. at 43).
[105] *Id.* at 469 (quoting *Buckley,* 424 U.S. at 43).

speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech."[106]

The discussion in AO 2008-15 was not an isolated incident. On the contrary, it represents the norm, and captures the conventional wisdom of many at the Commission.[107] For example, in a subsequent enforcement matter, this time against a group called the Economic Freedom Fund,[108] the same sort of *ad hoc*, totality of circumstances approach was employed. This matter provides one of the clearer examples of the effort to export the Commission's multi-factored electioneering communication definition to give life to section 100.22(b). Two of the three Commissioners who supported pursuing the group[109] make clear that the FEC's *WRTL* rule "included elements similar to those used in section 100.22(b)," and the same sort of factors are used in both analyses.[110]

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In determining whether the FEC could regulate the group, the following were considered:

- That the group was created three months before the 2006 general election;
- Almost all its funds were donated by one contributor;
- That contributor was also a major contributor to Swift Boat Veterans during a previous election cycle;
- Almost all of the group's spending occurred in the three months prior to the 2006 general election; and
- The "vast majority" of its television, radio and mail communications "attacked" eight Democratic House candidates (in the same analysis, the claim is later reduced to five candidates).[111]

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[106] 525 F.3d at 283.
[107] Another of my colleagues suggested that while *WRTL* protects against protracted litigation, "there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly." As the Wyoming Center observed: "Apparently, under this third approach, speakers enjoy an ample remedy found in litigating their rights if they can do so in a speedy, non-protracted fashion." *Citizens United v. FEC*, No. 08-205, Brief of *Amici Curiae*, The Wyoming Liberty Group and the Goldwater Institute Scharf-Norton Center for Constitutional Litigation in Support of Appellant at 31.
[108] I recused from deliberations on this matter, as prior to joining the FEC I represented the group.
[109] MUR 5842 (Economic Freedom Fund), Certification dated Apr. 16, 2009 (By a vote of 3-2, the Commission declined to approve OGC's recommendation to find reason to believe that Economic Freedom Fund violated the Act by failing to register and report as a political committee. Commissioners Bauerly, Walther, and Weintraub voted affirmatively. Commissioners Hunter and Petersen dissented. Commissioner McGahn recused himself).
[110] MUR 5842 (Economic Freedom Fund), Factual & Legal Analysis at 8 n.8, 9 n.10 (attached as Attachment A to Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub).
[111] MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 1.

The Commissioners made much of a poll taken by the group, which they characterized as a "push poll."[112] They characterized the poll as "written in an inflammatory and leading manner" and claimed that it was "not designed to illicit a genuine response regarding an issue," but was designed to "dissuade the listener . . . from voting for" the referenced politician.[113] How they know the intent of the poll, they do not say. They pointed to yet another factor: the poll did "not ask the listener to discuss their 'mood and view[ ] . . . regarding issues of public importance' . . . ."[114] They then asserted that the poll was "reminiscent of the infamous 'Bill Yellowtail' ad,"[115] that was cited in *McConnell* (which all parties to the litigation agreed was not express advocacy; the advertisement was offered to the Court as an example of an advertisement that was beyond the reach of the Act as construed by *Buckley*, but that Congress wished to ban under its new electioneering communication definition found in McCain-Feingold[116]). They also claimed that the introductory questions of the poll and phrasing of other questions provide an "electoral nexus and indicate that the purpose of the poll was to influence a federal election."[117]

As for the actual content of the communications, the Commissioners concluded that two mail pieces "warrant[ed] examination" (despite not calling the pieces express advocacy, the Commissioners still wanted to investigate, even though no violation of the law was established), because:

- The first piece called an incumbent Member of Congress the "least effective member of Congress." In their view, even though the piece included a discussion of the politician's voting record, and did not reference an election, there "simply is no other reasonable interpretation of that statement" other than as an "attack on his qualifications or fitness for office."

- The other piece declared that the referenced politician "does NOT represent Georgia values!" The piece did include a discussion of some legislative votes; but since it did not include "any call to action related to pending legislation or to an issue," and it did not "encourag[e] the listener to contact their representative regarding an issue," the mail piece "warranted investigation" because the group "may be a political committee."[118]

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[112] *Id.* at 3.
[113] *Id.*
[114] *Id.* at 2-3.
[115] *Id.* at 3.
[116] *See* MUR 5842 (Economic Freedom Fund), Statement of Vice Chairman Matthew Petersen and Commissioner Caroline Hunter at 18-19 ("[A]ll of the ads discussed in the *McConnell* litigation, including the Bill Yellowtail ad, targeted candidates and criticized particular votes they made. None, however, became express advocacy on the basis of that content. Depending on the facts, some may have been electioneering communications and some may have been intended to influence. But all parties agreed that they were not express advocacy.").
[117] MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 4.
[118] MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 3. On the contrary, the statements can be read as a statement of fact or opinion, as opposed to advocacy. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 63 (in considering whether a speech



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Once again, in the application of section 100.22(b), speech is analyzed using an ever-changing multitude of factors under the rubric of improper or wholly made up standards (*i.e.*, intent to influence a federal election, "electoral nexus"). Speculation as to the intent of the speaker and the effect it has on the listener or reader is critical. The timing of the spending, that the group discussed the voting records of incumbents who were candidates, leading questions in polls, "attacking" supposed "fitness for office" – such factors were employed by the Commission in its since-struck *WRTL* rule. That the group's major donor also gave to another group in a prior cycle is seen as significant. But nowhere is *Buckley* ever referenced; that the Court warned that the "distinction between discussion of issues and candidates may often dissolve in practical application"[119] is of no consequence; and the Chief Justice's "tie goes to speaker" admonition is ignored.

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### 2. Flawed Assumption #2: Although Section 100.22(b) was declared unenforceable, the FEC may nonetheless continue to enforce it because of *McConnell* and *WRTL*

The fundamental problem with this assertion is that it applies a judicial limitation of one statutory provision (the "electioneering communication" ban) to another entirely different statutory provision (the definition of "expenditure"). In other words, it assumes that the appeal-to-vote test articulated by the Chief Justice is a free-floating test that somehow empowers the FEC to re-construe another part of the statute that has already been construed by the Court, simply to breathe new life back into a regulation that had been declared unenforceable.

The appeal-to-vote test articulated by Chief Justice Roberts in *WRTL* is not a free-floating test.[120] Instead, it is a judicial limitation on a statute that has very clear and very objective triggers. Although the statutory "electioneering communication" ban was not vague, it was still overbroad, as it captured non-campaign ads. Hence the Court, first in *McConnell* and then with more detail in *WRTL*, limited the reach of this statute to only those ads that constituted the functional equivalent of express advocacy. As was explained by Chief Justice Roberts in *WRTL*, in addition to the statutory criteria, an advertisement came within the reach of the statute only if it could not be reasonably read as something other than an appeal to vote for or against the referenced candidate. In other words, to

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that included language such as the description of "a typical national pro-family strategy when it came to *knocking off* somebody like Pat Williams [an incumbent Democratic U.S. Senator]," and concluding that "[w]e're going to see Pat Williams sent bags packing back to Montana in November of this year," the court concluded that it was not express advocacy because the language was "descriptive rather than prescriptive" and "prophecy rather than advocacy"). Similarly, the communication at issue in MUR 5842 (Economic Freedom Fund) could be read to persuade the elected official himself to change his ways, and start representing the conservative values and needs of his constituents, and not the liberal values and priorities of the liberal elected leadership of his political party in Washington, DC.

[119] *Buckley*, 424 U.S. at 42.

[120] *WRTL*, 551 U.S. at 474 n.7 ("And keep in mind this test is only triggered if the speech meets the brightline requirements of BCRA § 203 in the first place.") (emphasis added).

constitute the "functional equivalent of express advocacy," a communication must satisfy all six criteria (five from the statute, plus the appeal-to-vote test).[121]

Thus, asserting that section 100.22(b) is the same as the Chief Justice's appeal-to-vote test answers the wrong question. After all, the appeal-to-vote test concerned the electioneering communication provision of McCain-Feingold; it did not in any way purport to inform the definition of "expenditure." The proper question, therefore, is whether the FEC can broaden the term "expenditure" beyond the limitation imposed by the Court in *Buckley*. The short answer is it cannot rewrite statutory language that has already been construed by the Court.[122]

Under *Buckley*, only communications that in express terms advocate the election or defeat of a clearly identified candidate or group of candidates are considered "expenditures" subject to regulation under the Act by the Commission.[123] This construction of the statutory "expenditure intended to influence a federal election" language found at section 441b of the Act (the supposed basis for section 100.22(b)) has been repeatedly reaffirmed by the Court. For example, in *MCFL*, the Court reaffirmed the *Buckley* express advocacy standard for determining whether a communication constitutes an "expenditure" under the Act, and moreover, reaffirmed *Buckley's* command that an organization must engage in so-called "magic words" express advocacy for purposes of determining whether or not its satisfies the definition of "political committee."[124]

Similarly, the Court in *McConnell* made clear that it was not changing the "express advocacy" construction of the term "expenditure." In fact, *McConnell* characterized *Buckley* as a statutory construction case. The Court described *Buckley's* reading of the statute as "strict," and noted that "the use or omission of 'magic words' ... marked a bright <u>statutory</u> line separating 'express advocacy' from 'issue advocacy.'"[125] The Court could not have been

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[121] In *Leake*, the Fourth Circuit made clear that the appeal-to-vote test is but one part of a larger test for the functional equivalent of express advocacy. 525 F.3d at 299-300 ("BCRA § 203 only regulates communications that refer to specific individuals ('clearly identified candidates') at specific times (thirty days before a primary and sixty days before a general election) and reach at least a specific number of people (50,000 in the district or state the candidate seeks to represent).").

[122] Nor does the FEC have some sort of free-ranging power to regulate, despite occasional claims to the contrary. *See* MUR 5634 (Sierra Club) Factual & Legal Analysis at 9 n.8 ("... the Commission possesses broad authority to interpret the term [express advocacy], to 'formulate policy' on it, and to 'make, amend, and repeal such rules ... as are necessary' regarding it."); MUR 5024R, FGCR at 5 n.6 (same). *See also The Real Truth About Obama, Inc. v. FEC*, No. 09-724, Brief for the Respondents in Opposition to Petition for a Writ of Certiorari at 2 ("The Commission is empowered to 'formulate policy' with respect to FECA," and 'to make, amend, and repeal such rules as are necessary to carry out the provisions of FECA'") (internal citations omitted). On the contrary, the FEC's authority is quite limited. As the D.C. Circuit has made clear: "In this delicate first amendment area, there is no imperative to stretch the statutory language ...." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981). *See also EMILY's List v. FEC*, 581 F.3d 1, 19 (D.C. Cir. 2009) (finding "a significant mismatch between these challenged provisions and the FEC's authority under FECA").

[123] *Buckley*, 424 U.S. at 44.

[124] *MCFL*, 479 U.S. 238, 249 (1986) (citing *Buckley*, 424 U.S. at 44 n.52); *see also SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

[125] *McConnell*, 540 U.S. at 126 (emphasis added).

clearer when it explained that *Buckley's* "express advocacy limitation . . . was the product of statutory interpretation . . . ,"[126] and that "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law."[127] In fact, subsequent to *McConnell*, the FEC itself acknowledged that *McConnell* did not concern the express advocacy standard announced in *Buckley*: "*McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than did the Court in *Buckley* . . . ."[128]

That *Buckley's* construction of express advocacy remains the only permissible construction of the Act, and that subsequent cases did not redefine "expenditure," has been made clear by a number of Circuit Courts, decided both before and after *McConnell*.[129] As the First Circuit has already held in *Faucher v. FEC*, "an interpretation given a statute by the Supreme Court becomes the law and must be given effect. It is not the role of the FEC to second-guess the wisdom of the Supreme Court."[130]

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Even the Ninth Circuit's decision in *FEC v. Furgatch* does not support the FEC's current approach.[131] First, despite the FEC's suggestions to the contrary,[132] section 100.22(b) and *Furgatch* are not the same. *Furgatch* said, "[s]peech may only be termed 'advocacy' if it presents a clear plea for action, and . . . it must be clear what action is advocated [*i.e.*,] . . . a vote for or against a candidate . . ."[133] Factually, *Furgatch* concerned anti-Carter newspaper ads that ran days before the 1980 election. After taking Carter to task for some of his campaign tactics, the advertisement stated: "If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning." The advertisement then urged the reader to "DON'T LET HIM DO IT!" Because the only way to not "let him do it" was to vote against Carter, the Ninth Circuit held that the action urged was thus a vote against a candidate, and the advertisement constituted express advocacy. But section 100.22(b) contains no such clear plea for action requirement of the sort mandated by the Ninth Circuit.[134] That this clear

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[126] *Id.* at 191-92 (emphasis added).
[127] *Id.* at 190 (emphasis added).
[128] MUR 5024R (Council for Responsible Government), Factual & Legal Analysis at 3. *See also* MUR 5024R, Statement of Reasons of Commissioner Bradley Smith at 5 ("The General Counsel's office and a majority of the Commission appear to agree that *McConnell* does not change the applicable law.").
[129] In fact, the Commission has agreed with this. *See* 2007 Political Committee Status Supplemental E&J at 5597 ("However, the Court made it clear that FECA continued to contain the express advocacy limitation as to expenditures on communications made independently of a candidate, because Congress, in enacting BCRA, modified the limitation only insofar as it applied to 'electioneering communications.'").
[130] 928 F.2d 468, 471 (1st Cir. 1991).
[131] 807 F.2d 857 (9th Cir. 1987).
[132] *See* Express Advocacy E&J, 60 Fed. Reg. 35292 (explaining that the definition contained at 100.22(b) was drawn from *MCFL* and *Furgatch*.).
[133] *Furgatch*, 807 F.2d at 864.
[134] In *Furgatch*, the court set out a three-part standard for express advocacy, the second part of which is absent from section 100.22(b). *Furgatch*, 807 F.2d at 864 ("First, even if it is not presented in the clearest, most explicit language, speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a

plea for action requirement was central to the holding of *Furgatch* was made clear by the court in *California Pro-Life Council, Inc. v. Getman*: "Furgatch... presumed express advocacy must contain some explicit *words* of advocacy."[135]

Similarly, several courts post-*McConnell* have held that the "express advocacy" requirement survived *McConnell* intact in cases striking or limiting state statutes (which bore a similarity to section 100.22(b)). For example, in *Anderson v. Spear*, the Sixth Circuit stated that *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest."[136]

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The Fifth Circuit, in *Center for Individual Freedom v. Carmouche*, was even more pointed in addressing *McConnell's* lack of effect on *Buckley*.[137] The court said: "*McConnell* does not obviate the applicability of *Buckley's* line-drawing exercise where, as in this case, we are confronted with a vague statute."[138] The court also made clear that:

> We are aware of the *McConnell* Court's assertions that "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad," that "*Buckley's* magic-word requirement is functionally meaningless," and that "*Buckley's* express advocacy line has not aided the legislative effort to combat real or apparent corruption." Those statements, however, were made in the context of the Court's determination that a distinction between express advocacy and issue advocacy is not constitutionally mandated. The Court said nothing about the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation. In light of this, we must assume that *Buckley* remains good law in such circumstances.[139]

At best, then, *McConnell* stands for the proposition that Congress is not necessarily stuck with the Court's statutory construction in *Buckley*; instead, it made clear that "Congress had leeway to create other, non-vague standards to address perceived problems."[140] This is the context in which the Court described the express advocacy

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clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.") (emphasis added).

[135] 328 F.3d 1088, 1098 (9th Cir. 2003) (emphasis in original). *See also FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1054 (4th Cir. 1997) ("Contrary to its assertions, the Commission's regulatory definition of 'express advocacy' does not parallel [the *Furgatch*] test.").

[136] 356 F.3d 651, 664 (6th Cir. 2004), *cert. denied, Stumbo v. Anderson*, 543 U.S. 956 (2004). *See also Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004) (citing favorably *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. denied, Stumbo v. Anderson*, 543 U.S. 956 (2004)).

[137] 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007).

[138] *Id.* at 665.

[139] *Id.* at 666 n.7 (internal citations omitted).

[140] MUR 5024R (Council for Responsible Government), Statement of Reasons of Commissioner Bradley Smith at 5.

construction as "functionally meaningless" – meaningless for Congress, making clear that they were allowed to try again.[141] After all, that is what Congress had done, in the form of McCain-Feingold's electioneering communication ban and related disclosure requirements. But what Congress did <u>not</u> do is revisit the construction of the statute imposed by *Buckley*.[142] On the contrary, Congress left it alone, and later chose to pass an additional statute, targeting television and radio ads paid for by corporations and unions aired within certain pre-election time periods to relevant voters.[143]

Much of the FEC's more recent justifications for its revival of section 100.22(b) are geared toward making express advocacy synonymous with one criteria of its functional equivalent (*i.e.*, using the appeal-to-vote test as a free-floating standard). But this purports to answer a question the FEC cannot ask let alone answer: could Congress try yet again and pass something like section 100.22(b)? Regardless of whether Congress could do so, it does <u>not</u> mean the FEC can do so on its own.

In fact, the statute was drafted in such a manner so as to make conflating *Buckley's* express advocacy construction with McCain-Feingold's new electioneering communication definition impossible. The statute itself expressly states that the definition of electioneering communication does not include communications that constitute "expenditures."[144] Presumably, such language was included to make the electioneering communication ban more palatable in the eyes of the Court; not revisiting *Buckley's* construction of the Act was central to that effort.[145] Additionally, by limiting the reach of

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[141] *McConnell*, 540 U.S. at 193-94 ("Any claim that a restriction on independent express advocacy serves a strong Governmental interest is belied by the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is, for Congress' purposes, functionally meaningless."). *See also* MUR 5024R (Council for Responsible Government), Statement of Reasons of Commissioner Bradley Smith at 3 n.14 ("The Court did not hold that the term was 'functionally meaningless' for narrowing an otherwise unconstitutionally vague statute. Thus, 'express advocacy' would remain the required narrowing construction applicable to FECA's terms.").
[142] The FEC has claimed that it agrees. *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5601 ("[W]hen Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms.") (quoting *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561-62 (1991); *Asarco Inc. v. Kadish*, 480 U.S. 605, 632 (1989)).
[143] *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5601 (discussing comments received by the FEC from 130 House Members and 19 Senators, stating that "Congress, of course, did not amend in BCRA the definition of 'expenditure' or, for that matter, the definition of 'political committee.'").
[144] 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.").
[145] *See* Brief of *Amici Curiae* Bipartisan Former Members of the United States Congress in Support of Appellees, *McConnell v. FEC*, No. 02-1674 at 17 ("the so-called 'express advocacy' test to determine whether a campaign advertisement comes within the scope of FECA is so easily avoided as to render meaningless the ban on companies and unions using treasury funds to pay for advertisements designed to influence federal elections."); Brief for Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords, *McConnell v. FEC*, No. 02-1674 at 42-43 ("'Express advocacy' as a standard for electioneering became worse than irrelevant: it became an object of public derision.... The record shows that beginning in earnest with the 1996 election, corporations and unions found that under the 'express advocacy' test they could easily design

the electioneering communication ban only to corporations and unions,[146] the government could justify the imposition of a different, broader standard (as the Court had already sanctioned different treatment of the independent speech of corporations in *Austin v. Michigan Chamber of Commerce*[147]). Likewise, by leaving the narrowing construction of *Buckley* in place, it became much easier to argue that communications that Congress wished to be regulated were not being regulated.[148]

In other words, a communication can be express advocacy, or its functional equivalent, but not both. If a communication contains "express advocacy" as set forth in *Buckley*, then it cannot be an electioneering communication.[149] Justice Stevens, speaking in dissent in *Citizens United*, made this distinction: "If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley v. Valeo*."[150]

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broadcast campaign ads that focused on candidates and swayed elections, while avoiding FECA's source and disclosure rules.").

[146] The *McConnell* Court highlighted a 1998 report of the Senate Committee on Governmental Affairs that found issue ads to be "highly problematic" because they enabled prohibited sources (*i.e.*, corporations and unions) to circumvent the Act. *McConnell*, 540 U.S. at 131. *See also* Brief of *Amici Curiae* Representatives Castle and Price, and Representatives Allen, Andrews, Baird, Bass, Boehlert, Cardin, Eshoo, Frank, Gilchrest, Greenwood, Holt, Houghton, Nancy L. Johnson, Leach, John Lewis, Kenneth Lucas, Maloney, Petri, Platts, Ramstad, Schiff, Simmons, and Tom Udall in Support of Respondents, *McConnell v. FEC*, No. 02-1674, at 22 ("Congress' definition of electioneering communications is clear, objective, and narrowly drawn to achieve the goals of assuring the disclosure of those communications most likely to have an impact on a federal election and of excluding corporate and union war chests from federal elections.").

[147] 494 U.S. 652 (1990) (upholding a prohibition on express advocacy by corporations, but leaving intact *Buckley's* holding that limits on an individual's express advocacy are unconstitutional).

[148] If "express advocacy" could simply be expanded to reach such ads, then there would have been no need for an additional ban. *McConnell*, 540 U.S. at 193-94, 194 n.78 ("Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley's* express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system. One striking example is [the Bill Yellowtail ad]."); Brief for Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords, *McConnell v. FEC*, No. 02-1674 at 44 (explaining that the Yellowtail advertisement "avoids the 'magic words' of 'express advocacy,' addresses some 'issue,' "yet was also clearly intended to influence a federal election."). Similarly, included in a provision of BCRA that never took effect (the back-up definition of "electioneering communication") was language making clear that that the non-enforcement of section 100.22(b) was not affected by McCain-Feingold. "Nothing in this subparagraph shall be construed to affect the interpretation or *application* of section 100.22(b) of title 11, Code of Federal Regulations." 2 U.S.C. § 434(f)(3)(A)(ii)(emphasis added). At the time McCain-Feingold was passed and became law, "the FEC had stopped enforcing its *Furgatch*-like definition of 'express advocacy' [100.22(b)]." Paul S. Ryan, *Wisconsin Right to Life and the Resurrection of Furgatch*, 19 Stan. L. & Pol'y Rev. 130, 131 (2008). *See also* MUR 5024 (Council for Responsible Government, Inc., *et al.*), Statement of Reasons of Chairman Bradley Smith and Commissioners David Mason and Michael Toner.

[149] *See* MUR 5874 (Gun Owners of America, Inc.), Statement of Reasons of Commissioner Mason at 4 ("Express advocacy and its 'functional equivalent' cannot be identical.").

[150] *Citizens United*, 130 S. Ct. at 935 n.8 (Stevens, J., dissenting).

### 3. Flawed Assumption #3: Section 100.22(b) only triggers disclosure requirements, and no longer functions as a direct restraint on speech; thus, its contours need not be as precise

This final rationalization is nothing more than a clever sleight of hand: because disclosure is subject to mere "exacting" scrutiny (whereas direct bans on speech are subject to strict scrutiny), it becomes much easier to justify section 100.22(b). But this conclusion does not flow from the premise; simply declaring that section 100.22(b) is "close enough for government work," since it is "just" disclosure does not cure its flaws. This is particularly true in the context of determining political committee status; when combined with the rough-and-tumble factors of section 100.22(b), the FEC's version of the major purpose test creates a regime that will chill more protected speech than any speech ban ever did.

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#### *a. Section 100.22(b) can still function as a direct restraint on speech*

Any assertion that section 100.22(b) no longer functions as a direct restraint on speech is not entirely true. Certainly, prior to *Citizens United*, certain corporations were prohibited from engaging in express advocacy; thus, section 100.22(b) is no longer the obvious speech ban that it once was. But in certain contexts – specifically, coordinated communications, so-called corporate facilitation, and related contexts–it still can be used by the FEC to ban speech.

Any person who is otherwise prohibited by the Act from making a contribution is also prohibited from paying for a so-called "coordinated communication."[151] The regulatory definition of a "coordinated communication" incorporates the regulatory definition of express advocacy (which includes section 100.22(b)). Thus, section 100.22(b) sets forth a basis upon which the FEC can ban speech.[152]

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[151] 11 C.F.R. § 109.21(b).

[152] Although I leave to the judicial branch which level of constitutional scrutiny applies to such communications (as I must), communications deemed "coordinated" under Commission regulations ought not be presumed to be the same as "contributions" for such review. *See Buckley*, 424 U.S. at 21-22 (drawing a distinction between contributions that may be subject to limits, and spending that cannot). Take the case where the FEC chooses to investigate alleged "coordination" of speech because it comes within its multi-factored version of express advocacy, but then learns that the speech in question was not coordinated. Since it has guessed wrong, thanks to the imprecision of its regulatory definitions, the FEC would have subjected the speaker's independent speech to precisely the sort of intrusive investigation, based upon rough-and-tumble factors, that the Supreme Court has expressly chastised. *See Citizens United*, 130 S. Ct. at 896 ("*WRTL* said that First Amendment standards 'must eschew the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.' Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests.") (internal citations omitted). Unfortunately, that a large-scale investigation would not produce evidence to support a finding of impermissible coordination is not a mere hypothetical. *See* MUR 4624 (The Coalition) (following a four-year investigation of more than 60 committees, organizations, and individuals, with two rounds of discovery that included nine depositions, the collection of thousands of pages of documents, and numerous witness interviews, the Commission failed to find impermissible coordination); MUR 4291 (American Federation of Labor and Congress of Industrial Organizations, *et al.*) (following an

Second, the definition of express advocacy can function as a ban in the so-called "corporate facilitation" context.[153] One way to become subject to these corporate facilitation rules is to engage in express advocacy as defined by FEC regulation; once that occurs, certain speech is banned under the current regulations.[154] These activities are banned, regardless of whether done in coordination with a candidate or political party.[155]

***b. Even in the context of disclosure, section 100.22(b) can chill speech***

Next, in addition to minimizing the effect section 100.22(b) has with respect to banning speech, the FEC also minimizes the chilling effect section 100.22(b) has on speech. This is accomplished by conflating the two different harms caused by disclosure, each of which has been treated differently by the courts. The first harm is that which is caused by forcing a speaker to disclose his identity in some form or another.[156] Subjecting such disclosure to exacting scrutiny, courts have held that the government has a sufficiently important interest in mandating some disclosure of campaign advocacy, *i.e.*, "'provid[ing] the electorate with information' about the sources of election-related spending."[157]

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investigation that lasted nearly four years, the Commission found insufficient evidence of impermissible coordination).

[153] Corporate facilitation is yet another example of the FEC unbridling itself from the confines of *Buckley's* contribution/spending dichotomy, where FEC rules purport to ban activity that does not constitute a "contribution," either under its own precedents or the teachings of *Buckley* and its progeny. *Buckley* classified speech as being either one of two sorts: contributions, which can be limited, and essentially everything else, which cannot. Choosing to go it alone, the FEC created a third category under the rubric of corporate facilitation, which appears to be another way for the FEC to regulate independent activity beyond *Buckley's* view of contributions.

[154] Similarly, under the Commission's current regulations, voter guides that contain express advocacy are banned under 11 C.F.R. § 114.4(c)(5). *See* MUR 5874 (Gun Owners of America, Inc.), Statement of Reasons of David Mason at 2 (in a matter decided prior to *Citizens United*, explained that under the FEC's currently operative regulations, voter guides prepared "without any communication with a candidate" cannot contain express advocacy); MUR 5634 (Sierra Club) (finding that an organization's voter guide contained express advocacy). *See also* 11 C.F.R. § 114.4(c)(4) (banning corporations from preparing and distributing to the general public voting records of Members of Congress that contain express advocacy).

[155] Of course, *Citizens United* held that the government cannot ban such independent speech. 130 S. Ct. at 876. Yet over one year after the decision in that case, the corporate facilitation and other related regulations remain on the books, and at least in the minds of some, remain enforceable. *But see* MUR 6211 (Krikorian for Congress, *et al.*); *Id.*, Statement of Reasons of Vice Chair Caroline Hunter and Commissioners Matthew Petersen and Donald McGahn (rejecting that view).

[156] *Buckley*, 424 U.S. at 64 (discussing disclosure requirements for political committees, the Court noted that such disclosure requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment").

[157] *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 66). However, the government does not have the unfettered ability to mandate disclosure. As the Court observed in *NAACP v. Alabama*:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association [as other types of burdens]. . . .This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. 449, 462 (1958). Even Public Citizen recently observed that "[t]he First Amendment protects the right to engage in anonymous speech, especially political speech." Posting of Tom Zeller, Jr. to New York

But there is a second harm present, and that is the chilling of speech through vague regulation. Critically, such regulation need not amount to a ban on speech for it to be problematic; instead, courts have made clear that it is the chilling effect of mere regulation, the application of which is vague or otherwise unpredictable, that can be problematic.[158] Certainly, *Citizens United* upheld the electioneering communication disclosure requirements, and because that only required, *inter alia*, reference to a candidate (as opposed to advocacy), such requirements will result in more disclosure in some instances that would be imposed by section 100.22(b). But simply because the Court upheld a supposedly broader disclosure regime does not justify a disclosure regime predicated on subjective balancing tests. On the contrary, the disclosure at issue in *Citizens United* was triggered by clear criteria found in the statute, and was not in any way tied to any sort of

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Times Green blog, http://green.blogs.nytimes.com/, (Jan. 27, 2011, 13:54 EST) (discussing the case and the reaction of Public Citizen) (citing Press Release, Public Citizen, Environmentalists Who Spoofed Koch Industries Did Not Break Law, Should Not Be Identified, Public Citizen Tells Court (Jan. 27, 2011) (*available at* http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3269)). Public Citizen also made the same point in court:

> The right to engage in anonymous speech "is a well-established constitutional right. In fact, anonymous political speech is an especially valued right in this nation." [citations omitted] From the literary efforts of Mark Twain to the authors of the Federalist Papers, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). As the Supreme Court wrote in *McIntyre v. Ohio Elections Comm'n*: [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

Motion to Quash Subpoenas, Issue Protective Order, and Dismiss Complaint at 1, *Koch Indus., Inc. v. Does*, No. 1:10-cv-01275 DAK (C.D. Utah Jan. 26, 2011). Similarly, "[i]n *McConnell*, the Court recognized that [BCRA's disclosure requirements] would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 130 S. Ct. at 915. The Court also recognized the burdens of having to register and report as a political committee. *Id.* at 897 ("For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. And that is just the beginning."). *See also Leake*, 525 F.3d at 304 ("political committees face a significant regulatory burden" (discussing the "burdens attendant to designation as a political committee" as being "precisely the sort of burden that discourages potential speakers from engaging in political debate")). Moreover, the reporting requirements attendant to political committee status are, in some respects, a redundant regime (because, for example, all independent expenditures and electioneering communications are subject to one-time reporting requirements irrespective of whether the speaker is a political committee). *See Davis v. FEC*, 128 S. Ct. 2759 (2008) (striking a duplicative reporting requirement where the underlying statutory provision was unconstitutional).

[158] *See Leake*, 525 F.3d at 300 ("Speakers are going to have to contend with this same definition and its same infirmities for both expenditures and contributions, regardless of whether the regulatory context is one of disclosure, reporting, or limitation")(emphasis added). *See also Laird v. Tatum*, 408 U.S. 1, 13 (1972) ("governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights").



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analysis of how a reasonable person might view the speech. In other words, even if section 100.22(b) did serve as only a disclosure trigger, *Citizens United* does not alleviate the need for clarity in its application. *Citizens United* makes clear objective standards are needed, or else speech will be chilled: "As additional rules are created for regulating political speech, any speech arguably within their reach is chilled."[159]

### *c. Rules that trigger disclosure cannot be vague*

Time and time again, courts have made clear that speakers ought not have to guess at the application of the government's various rules and regulations regarding speech, including related disclosure rules. After all, the Court made clear that its limiting construction of the Act in *Buckley* applied not only to direct spending, but also to the Act's <u>disclosure</u> and <u>reporting</u> requirements. And the Court further limited the reach of the Act by mandating the so-called major purpose test. Lower courts – both before and after *McConnell* and before and after *Citizens United* – have repeatedly used *Buckley's* limiting constructions to ensure clarity in disclosure laws (even when such limitations result in less disclosure than was upheld in *Citizens United*).

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One example is *SpeechNow.org v. FEC*.[160] SpeechNow.org is a group of individuals who wished to pool their resources and make expenditures advocating the elect or defeat of federal candidates. It challenged, *inter alia*, the need to file as a political committee (although it conceded that its major purpose is candidate advocacy). The D.C. Circuit Court of Appeals upheld the requirement that SpeechNow.org file as a political committee. But in so doing, it made clear that such a reporting regime was triggered by *Buckley's* so-called "magic words" standard, and not the more amorphous FEC definitions of express advocacy. The court said:

> 'Express advocacy' is regulated more strictly by the FEC than so-called 'issue ads' or other political advocacy that is not related to a specific campaign. In order to preserve the FEC's regulations from invalidation for being too vague, the Supreme Court has defined express advocacy as communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'[161]

The Fifth Circuit has also insisted on *Buckley's* bright-line trigger for registration as a political committee. In *Center for Individual Freedom v. Carmouche*, the plaintiff wished to "run television and radio advertisements that, while not advocating the election or defeat of any candidate, would refer to the positions of the candidate on issues of importance" to

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[159] *Citizens United*, 130 S. Ct. at 895. And in the absence of clear rules, political speech may be chilled. *See id.* at 893 (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("'First Amendment freedoms need breathing space to survive.'"); *id.* at 895 (quoting *WRTL*, 551 U.S. at 468-69 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

[160] 599 F.3d 686 (D.C. Cir. 2010).

[161] *Id.* at 689 n.1.

the plaintiff.[162] The plaintiff feared that it would have to file as a political committee under Louisiana law; the trigger for such filing is remarkably similar to the FEC's reasonable person reading of section 100.22(b).[163] Although the Fifth Circuit ultimately upheld the reporting regime, it rejected the state's definition that triggered disclosure. Instead, the court imposed the same limiting construction on the law that the Supreme Court employed in *Buckley*. The Fifth Circuit made clear it was *Buckley*, and not *McConnell*, that provided the proper limiting construction

> The Board contends that *McConnell* eliminates completely the express advocacy/issue advocacy delineation and in its place provides a more holistic, "practical" approach to determining whether expenditures have been made for the purpose of influencing an election and therefore, consistent with the First Amendment, can be subject to regulation. That reading of *McConnell* is incorrect. . . .*McConnell* does not obviate the applicability of *Buckley's* line-drawing exercise where, as in this case, we are confronted with a vague statute. The flaw in the [statute] is that it might be read to cover issue advocacy. Following *McConnell*, that uncertainty presents a problem not because regulating such communications is per se unconstitutional, but because it renders the scope of the statute uncertain. To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley's* limiting principle to the [statute] and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate. In limiting the scope of the [statute] to express advocacy, we adopt *Buckley's* definition for what qualifies as such advocacy.[164]

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### *d. Section 100.22(b) and the major purpose test*

In addition to construing the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" the Supreme Court has construed the term "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[165] Certainly, at least in public, the FEC claims to adhere to this test as set forth by the Court in *Buckley*,[166] but behind the closed doors of its confidential enforcement process, the FEC sings a different tune.

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[162] *Carmouche*, 449 F.3d at 658.

[163] As explained by the Fifth Circuit, Louisiana had read its statute in an administrative enforcement case to cover an advertisement where "'any viewer of the advertisement would understand, *even without explicit word[s] of advocacy*, that when taken as a whole and in its factual context, the unmistakable intent of the advertisement was to oppose or otherwise influence [a particular candidate's] election.'" *Carmouche*, 449 F.3d at 661 (quoting La. Bd. of Ethics, Campaign Finance Ruling No. 2003-746 (Jan. 13. 2005) (emphasis added by Fifth Circuit). The Fifth Circuit also noted that the challenged state law was "similar to what the *Buckley* Court confronted" (*i.e.*, an intent to influence statutory standard). *Id.* at 663.

[164] *Id.* at 665.

[165] *Buckley*, 424 U.S. at 79-80.

[166] *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5597 (citing *Buckley*, 424 U.S. at 79). *But see FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("the Commission argues here for a

In 2004, the FEC issued a notice of proposed rulemaking proposing changes to the definition of "political committee," including whether the definition should include a test to determine an organization's "major purpose," and if so, what that test should be.[167] Ultimately, however, the Commission decided not to adopt any of these proposals.[168] Following a court challenge,[169] the FEC in 2007 issued a more detailed explanation of its decision not to revise the definition of "political committee." But even there, although the Commission reiterated the *Buckley* major purpose test,[170] it simply explained that the Commission chose to not promulgate a rule, and instead intended to ascertain major purpose by way of a case-by-case approach.[171] The Commission claimed that *Buckley* and *MCFL* "make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns."[172]

The Commission also set forth what was purported to be guidance to the public, including in the guise of "several recently resolved administrative matters."[173] However, the files for the cases that appear on the public record are heavily redacted, and do not adequately explain the Commission's rationale.[174] Likewise, in several instances, the

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broader-and troubling-interpretation of the Act... an organization need not support the 'nomination or election of a candidate,' but need only engage in 'partisan politics' or 'electoral activity'"). The *GOPAC* court also pointed out that it is "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." *Id.* at 859 n.1 (internal citations omitted).

[167] Notice of Proposed Rulemaking on Political Committee Status, 69 Fed. Reg. 11736 (Mar. 11, 2004).

[168] Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056, 68065 (Nov. 23, 2004) (explaining that "no change through regulation of the definition of 'political committee' is mandated by BCRA or the Supreme Court's decision in *McConnell*. The 'major purpose test' is a judicial construction that limits the reach of the statutory triggers in the FECA for political committee status. The Commission has been applying this construct for many years without additional regulatory definitions, and it will continue to do so in the future.").

[169] *Shays v. FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006).

[170] *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5597 ("whether [an organization's] major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate")) (emphasis added).

[171] *Id.*

[172] *Id.* at 5601.

[173] *Id.* at 5603-06. Some of these same matters had been previously highlighted in a 2006 press release, which also purported to provide "guidance" to the public. Press Release, Federal Election Commission, FEC Collects $630,000 in Civil Penalties From Three 527 Organizations (Dec. 13, 2006), *available at*: http://www.fec.gov/press/press2006/20061213murs.html ("These unanimous decisions provide important guidance as to when organizations must register and report as political committees.").

[174] Compounding the difficulty in ascertaining the contours of the FEC's view of the major purpose test is the Commission's prior decision to not release to the public at the close of an enforcement matter the First General Counsel's Report ("FGCR"), which is the document that tends to have the most complete discussion of the applicable law and basis for the Commission's actions. The FGCR sets forth the General Counsel's recommendation to the Commission on whether to find reason to believe that a violation of law has occurred, along with the legal basis thereof. For approximately the first 25 years of its existence, the Commission generally placed on the public record, at the close of an enforcement matter, all materials considered by the Commissioners in their disposition of a case (except for those materials prohibited from disclosure by the Act's confidentiality requirements). Then, in 2006, the Commission reconsidered its practice of placing FGCRs on the public record, and from January 2007 forward, all FGCRs were withheld from the public record in new enforcement matters. There is no public record of how or why the Commission made this decision. However, after joining the Commission, I learned that the decision to withhold this critical category of

theories of these matters have since been rejected by the courts, and regulations relied upon by the Commission repealed.[175]

Nevertheless, even when the Commission does elaborate on its version of the major purpose test, what becomes clear is that the FEC does not use the test to limit the reach of the statute, as *Buckley* intended. *Buckley* limited the reach of the statute to only those groups who have as its major purpose "the nomination or election of a candidate."[176] By contrast, in its enforcement matters, the FEC merely looks for the purpose of the much more amorphous "influencing elections":

- "influence the outcome of the 2004 elections;"[177]
- "a focus on influencing the 2004 presidential election;"[178]
- "influence a federal election;"[179]
- "influence the election of the 2008 presidential primary election;"[180] and
- "influence the 2006 mid-term elections."[181]

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documents from the public was made on the fly, in an enforcement matter behind closed doors, arising out of the 2004 election cycle, dealing directly with the issue of political committee status (the Commission adopted a recommendation offered by OGC in a General Counsel's Report, but rejected one of the several underlying rationales for the recommendation). *See* MURs 5511 & 5525 (Swift Boat Veterans). *Cf. Magnesium Corp. of Am. LLC*, 616 F.3d at 1144 ("[E]ven if Congress repealed the [Administrative Procedures Act] tomorrow, the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice.... And it pertains when an agency advances a novel interpretation of its own regulations in the course of a civil enforcement action. If an agency could punish a regulated party for following the agency's own interpretation of its own ambiguous regulation, after all, 'the practice of administrative law would come to resemble 'Russian Roulette.''") (internal citations omitted). With my colleagues Commissioners Hunter and Petersen, we proposed a change to this policy. *See* Agenda Document No. 09-72A (Nov. 5, 2009) (providing that the Commission will place all First General Counsel's Reports on the public record in closed enforcement matters, prospectively and retroactively). The Commission adopted a new policy on November 5, 2009. An audio recording of the Commission's deliberations is available at: http://www.fec.gov/agenda/2009/agenda20091105.shtml.

[175] *See, e.g.*, MURs 5753 (League of Conservation Voters) and 5754 (MoveOn.org Political Fund) (relying on the theory that funds received in response to solicitations purportedly "clearly indicating" that the funds would be used to elect or defeat a clearly identified federal candidate were contributions, a definition of "contribution" that was subsequently struck down in *EMILY's List v. FEC*, 581 F.3d 19 (D.C. Cir. 2009)). Similarly, the 2007 Supplemental Explanation & Justification relied upon new "anti-circumvention measures" (including new allocation regulations designed to "significantly shift political committees towards a greater use of federal funds") to justify its case-by-case approach. *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5603. These regulations too were struck down in *EMILY's List*. 581 F.3d at 19.

[176] *Buckley*, 424 U.S. at 79-80.

[177] MUR 5753 (League of Conservation Voters), FGCR at 5; MUR 5754 (MoveOn.org Voter Fund), FGCR at 5.

[178] MUR 5751 (Leadership Forum), FGCR at 4.

[179] MURs 5910 & 5694 (Americans for Job Security), FGCR at 15.

[180] MURs 5977 & 6005 (American Leadership Project), FGCR at 11.

[181] MUR 5842 (Majority Action), FGCR at 13.

In other matters, the FEC appears to have articulated two "major purposes" (whereas *Buckley* talked of the major purpose), neither of which were limited to the nomination or election or defeat of a candidate:

- "influence the election of the 2008 presidential primary election" and "federal election activity;"[182] and
- "federal campaign activity" and "influence federal elections."[183]

Remarkably, the FEC's broader versions of the test have already been rejected in court, most notably in *FEC v. GOPAC*.[184] There, the FEC argued that an organization need not support the "nomination or election of a candidate," but need only engage in "partisan politics" or "electoral activity."[185] An *amici* to the case (Common Cause) claimed "electioneering" was sufficient. The *GOPAC* court began by reviewing *Buckley*:

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> In *Buckley v. Valeo*, the Supreme Court cautioned that the broad statutory definition of 'political committee,' which turns on the terms 'contribution' and 'expenditure,' and on the phrase 'for the purpose of influencing any election,' had 'the potential for encompassing both issue discussion and advocacy of a political result' and thus might encroach upon First Amendment values.[186]

The court, however, rejected the FEC's efforts to stray from *Buckley*. First, the court found that such terminology "raise[s] virtually the same vagueness concerns as the language "influencing any election to Federal office," the raw application of which the *Buckley* Court determined would impermissibly impinge on First Amendment values."[187] Second, the court reiterated that the D.C. Circuit has "cautioned that in the 'delicate first amendment area, there is no imperative to stretch the statutory language.... Achieving a reasonable, constitutionally sound conclusion in this case requires just the opposite. 'It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.'"[188] Finally, the court explained that:

> [I]in this sensitive political area where core First Amendment values are at stake, our Court of Appeals has shown a strong preference for 'bright-line' rules that are easily understood and followed by those subject to them – contributors, recipients, and organizations. As the Court of Appeals has explained, 'an objective test is required to coordinate the liabilities of donors and donees. The bright-line test is also necessary to enable donees and donors to easily conform to the law and to enable the FEC to take the rapid,

[182] MUR 5977 & 6005 (American Leadership Project) at 11.
[183] MUR 5988 (American Future Fund), FGCR at 11.
[184] 917 F. Supp. 851 (D.D.C. 1996).
[185] *GOPAC*, 917 F.Supp. at 859.
[186] *Id.* at 858-59 (citing *Buckley*, 424 U.S. at 79).
[187] *Id.* at 861.
[188] *Id.* (quoting *Machinists*, 655 F.2d at 394) (citations omitted in original).

> decisive enforcement action that is called for in the highly-charged political arena.' Confining the definition of 'political committee' to an organization whose major purpose is the election of a particular federal candidate or candidates provides an appropriate 'bright-line' rule; attempting to determine what is an 'issue advocacy' group versus an 'electoral politics' group – as the Commission proposes – does not.[189]

The distinction between the language used by the Court in *Buckley* and the language used by the FEC in its enforcement documents is not merely semantics. It is a significant substantive change that has allowed the FEC to consider all sorts of non-campaign activity as evidence of a campaign purpose (regardless of whether it is a group's major purpose).[190] As with section 100.22(b), a review of past enforcement matters reveals the "constellation of factors" used by the Commission to analyze an organization's major purpose.[191] Some examples of these factors include:

- the timing of an organization's formation;[192]
- whether communications identified someone who was a candidate (when the communications did not contain any words of election advocacy, let alone reference to an election);[193]
- where (geographically) advertisements were run;[194]
- the portion of the advertising budget allocated to television, radio and print ads that reference someone who was a candidate;[195]
- the timing of the ads (supposed proximity to the election);[196]
- the proportion of amount of funds raised that was spent on ads in states with supposed hotly contested races, regardless of the content of the advertisement;[197]

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[189] *Id.* (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986) (citing *Buckley*, 424 U.S. at 42)).
[190] For example, although Softer Voices: (1) was established in 2004 (two years before producing the advertisements at issue in MUR 5831), (2) spent $1,266,000 during the 2006 election cycle, and (3) "[t]he amount of the disbursement for [the advertisement that purportedly triggered political committee status] was relatively small in both absolute terms (less than $10,000) and as a part of the group's 2006 activity (less than 1%), the General Counsel claimed that Softer Voices had triggered political committee status. MUR 5831 (Softer Voices), FGCR at 9.
[191] MUR 5024R (Council for Responsible Government, Inc., *et al.*), FGCR at 12-13.
[192] MUR 5541 (November Fund), FGCR at 10-11; MURs 5977 & 6005 (American Leadership Project), FGCR at 11; MURs 5842 (Economic Freedom Fund) & 6082 (Majority Action), FGCR at 13.
[193] MURs 5910 & 5694 (Americans for Job Security), FGCR at 15; MURs 5842 (Economic Freedom Fund) & 6082 (Majority Action), FGCR at 13.
[194] MUR 5694 (Americans for Job Security), FGCR at 16; MURs 5842 (Economic Freedom Fund) & 6082 (Majority Action), FGCR at 13-14.
[195] MUR 5694 (Americans for Job Security), FGCR at 15.
[196] *Id.* at 16; MURs 5842 (Economic Freedom Fund) & 6082 (Majority Action), FGCR at 13, 14.
[197] MURs 5977 & 6005 (American Leadership Project), FGCR at 11-12.

- the timing of contributions received;[198]

- the number of donors to the organization;[199] and

- statements reflecting the subjective intent of donors or the group, usually in the form of a generic desire to influence elections.[200]

Of course, "declining to follow the Supreme Court is not an option,"[201] and none of this sort of activity ought to weigh in favor of finding that a group must register and report as a political committee.[202] On the contrary, it is either (1) wholly irrelevant; or (2) precisely the sort of activity that ought to preclude such a finding. But instead, the FEC uses the major purpose to expand its jurisdiction, looking not just for "the" major purpose, but for any political purpose, thus allowing it to regulate activity well-beyond that which is focused on candidate advocacy.[203]

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Although the FEC invokes *Buckley* when referencing the major purpose test,[204] this masks the true problem. In striking the same sort of case-by-case, electoral influence-based major purpose test, the Fourth Circuit said:

> Conversely, North Carolina's test 'leaves the line between innocent and condemned conduct . . . a matter of guesswork. This is particularly true because [such tests] provide[] absolutely no [regulatory] direction as to when a 'purpose' becomes 'a major purpose' in a multi-faceted organization like NCRL. Is it based on the number of purposes? The money spent on each? The frequency of electoral participation? The statute does not provide notice as to which of these standards apply; this, of course, means that regulators will once again be empowered to make these judgments to the maximum conceivable extent.[205]

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[198] MURs 5842 (Economic Freedom Fund) & 6082 (Majority Action), FGCR at 13-14.
[199] *Id.*
[200] MUR 5541 (November Fund), FGCR at 10.
[201] *Leake*, 525 F.3d at 302.
[202] *Id.* at 284-85 (casting serious doubt on the validity of examining anything other than the amount of an organization's express advocacy when analyzing its major purpose).
[203] For example, in *Unity '08 v. FEC*, a group formed to facilitate an online nominating process to choose a mixed ticket of one Republican and one Democrat for president and vice president of the United States (and to seek state ballot access as a party), challenged the FEC's determination that it was subject to regulation as a political party because the costs incurred in gathering signatures to qualify for a ballot for Federal office are "expenditures" and its major purpose was the nomination or election of a candidate. 596 F.3d 861 (D.C. Cir. 2010). The court rejected the FEC's expansive view because Unity '08 had never supported a clearly identified candidate. *Id. See also Machinists*, 655 F.2d at 392 (holding that "draft" groups are not "political committees" under the Act).
[204] *See* 2007 Political Committee Status Supplemental E&J, 72 Fed. Reg. at 5597.
[205] *Leake*, 525 F.3d at 303 (quoting Laurence H. Tribe, American Constitutional Law, § 12-31 at 1033 (2d ed. 1988)).

Ultimately, the FEC's version of the major purpose test has allowed the FEC to conduct a profoundly burdensome inquiry into every aspect of a group's activities – at times even prior to any sort of determination, let alone evidence of any expenditures or contributions.[206]

There are three major flaws with this:

- First, the FEC routinely shifts the burden to those wishing to speak, and forces them to demonstrate that they have not spent too much money on regulable speech.

- Second, it makes it far more likely that smaller grassroots groups that make independent expenditures that expressly advocate the election or defeat of a candidate will have to register and report as political committees (versus larger groups, such as mega-corporations).[207]

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[206] For section 527 organizations operating during the 2004 election cycle, the Commission inverted the proper political committee status analysis. Specifically, "the Commission did not require evidence that the 527 organization triggered the statutory threshold of $1,000 in contributions or expenditures before finding reason to believe, provided available information suggested that the organization ha[d] the sole or primary objective of influencing federal elections and had raised and spent substantial funds in furtherance of that objective." MUR 5854 (Lantern Project), FGCR at 5. *See, e.g.*, MURs 5487 (Progress for America Voter Fund), 5741 (The Leadership Forum), 5511 & 5525 (Swift Boat Vets and POWs for Truth), 5403, 5427, 5440, and 5466 (The Media Fund, *et al.*). The FEC subsequently changed this policy, and announced that going forward it would not investigate major purpose until it had found that a group crossed the political committee statutory threshold regarding contributions and expenditures. MUR 6073 (Patriot Majority 527s), FGCR at 9 (at the September 11, 2007 non-public Executive Session, the Commission decided to henceforward require that there be some information suggesting a specific expenditure was made or a contribution received prior to authorizing an investigation). However, not all have adhered to this approach. *See* MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub (supporting an investigation, including the issuance of subpoenas, into whether the group was a political committee because of "electoral nexus," and not because of sufficient contributions or expenditures). *See also* MURs 5910 & 5694 (Americans for Job Security), Statement of Reasons of Chairman Steven Walther and Commissioners Cynthia Bauerly and Ellen L. Weintraub at 2 (supporting an investigation not because any public communications contained express advocacy, but simply because it was "reasonable to infer" that the respondent "may have" exceeded the $1,000 threshold, and because of the general spending by the respondent). *Cf. Leake*, 525 F.3d at 301 ("The danger in this area – when dealing with a broadly empowered bureaucracy – is not that speakers may disguise electoral messages as issue advocacy, but rather that simple issue advocacy will be suppressed by some regulator who fears it may bear conceivably on some campaign.").

[207] For example, General Motors, General Electric, Exxon Mobil could spend millions of dollars on independent expenditures without even coming close to having as its major purpose the election of a candidate. Whereas smaller grassroots groups with modest resources will cross the major purpose line with only a fraction of the spending. The perverse result is a *de facto* burden based on the identity of the speaker, with the various balancing of factors employed by the FEC having a disproportionate impact on smaller groups. In other words, the smaller the group, the more likely it will be a political committee, and the tougher a time it will have proving that it is not such a entity. Compare this with *Citizens United*: "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on a speaker's identity." 130 S. Ct. at 907-08 (noting that the prohibition on corporate speech fell the hardest on small corporations). *See also Davis*, 128 S. Ct. at 2773-74; *Buckley*, 424 U.S. at 49.

- Third, the FEC's approach to major purpose allows for precisely the sort of "intricate case-by-case determinations" that the Court refused to allow in *WRTL* and *Citizens United*.[208] As the FEC has already made clear, it will conduct a "fact intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns," which will go "well beyond publicly available advertisements."[209] Despite my ability to glean a list of factors by reviewing a large number of enforcement matters (which given the time involved in conducting that exercise, is burdensome enough), the FEC has refused to adopt any sort of defined "list of factors," claiming it would be inappropriate to do so since it would not be "exhaustive" enough.[210]

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This is precisely what the Court in *Citizens United* said the FEC could not do. As the Court explained, to avoid the various traps enacted by the FEC, one must "either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question."[211] But if the FEC's track record regarding advisory opinions on the subject is any indication, even that approach does not provide clarity.[212] And as the Court recognized, "onerous restrictions [can] function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws."[213] The FEC's approach to political committee status gives the agency precisely that power. As the Fourth Circuit explained:

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[208] *See Citizens United*, 130 S. Ct. at 892; *WRTL*, 551 U.S. at 482. Some claim that the case-by-case approach has been upheld, and cite to *Shays v. FEC* ("*Shays II*"), 511 F. Supp. 2d 19 (D.D.C. 2007). However, the court in *Shays II* made clear that it was only reviewing the FEC's action pursuant to the Administrative Procedure Act ("APA"), *id.* at 25, and concluded that "the FEC's revised explanation is sufficient under the APA and its decision not to employ rulemaking is not arbitrary and capricious," *id.* at 31. But as my colleagues, Commissioners Matthew Petersen and Caroline Hunter, explained in the context of an enforcement matter, "[a]s *GOPAC* illustrates, without any 'bright line' rules that are easily understood and followed by those subject to them – contributors, recipients, and organizations – political committee status cannot be imposed on an entity." MUR 5842 (Economic Freedom Fund), Statement of Reasons of Vice Chair Matthew Petersen and Commissioner Caroline Hunter at 24 (citing *GOPAC*, 917 F. Supp. at 861-62).

[209] 72 Fed. Reg. at 5601. The FEC's over-the-top discovery was singled out in the *GOPAC* matter: "[d]uring several months of unlimited discovery, the Commission collected data for 315 items consuming 100 pages of material facts not in dispute based on 6,000 pages of exhibits without firmly establishing its claim based on the *Buckley* major purpose test." *GOPAC*, 917 F. Supp. at 866. Adding to the current confusion is that the FEC also claimed that it will look to "fundraising solicitations," but the rule defining such solicitations has been struck. *See EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); Funds Received in Response to Solicitations; Allocations of Expenses by Separated Segregated Funds and Non-Connected Committees (Final Rule), 75 Fed. Reg. 13223 (Mar. 19, 2010).

[210] 72 Fed. Reg. at 5602. With the sort of benevolence that could only be shown by a federal agency, the FEC has suggested that if one wishes to know what sort of factors might be considered, one can "look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as Advisory Opinions and filings in civil enforcement cases." *Id.* But as discussed above, the public files are not reliably complete or informative.

[211] *Citizens United*, 130 S. Ct. at 896.

[212] *See* AOs 2010-25 (RG Entertainment, Ltd.) (the Commission was unable to render an opinion regarding the application of the Act's media exemption to the costs of producing, disseminating, and marketing a film); 2010-20 (National Defense PAC) (the Commission was unable to render an opinion regarding a non-connected PAC's fundraising and record keeping requirements in the wake of *Citizens United*); 2008-15 (National Right to Life Committee, Inc.) (the Commission was unable to render an opinion regarding the application of the Act to a proposal to fund a radio advertisement).

[213] *Citizens United*, 130 S. Ct. at 895-96.

If the First Amendment protects anything, it is the right of political speakers to express their beliefs without having to fear subsequent civil and criminal reprisals from regulators authorized to employ broad and vague definitions as they see fit.[214]

A recent Tenth Circuit Court of Appeals decision provides a path to eliminate at least some of the problems caused by the FEC's free-wheeling approach to the major purpose test. In *New Mexico Youth Organized v. Herrera*, the Tenth Circuit considered a state political committee disclosure law, which required all organizations "operated primarily" for the purpose of "influencing or attempting to influence an election" to register as a political committee.[215] In holding the law unconstitutional, the Tenth Circuit explained: "There are two methods to determine an organization's "major purpose": (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates."[216] A related issue, alluded to by *Herrera*, relates to the relevant time period for the analysis of a group's major purpose. The Tenth Circuit repeatedly found fault with an approach that mandates political committee registration simply because a certain low monetary threshold was crossed: "The court [in *CRLC*] held that the $200 trigger was unconstitutional as applied to the Colorado Right to Life Committee because it was an unacceptable proxy for the major purpose test."[217]

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By failing to specify any sort of timing, the FEC's version of the major purpose test operates in the same improper manner. For example, whereas the Internal Revenue Service looks to an entire year of fiscal activity when considering the legitimacy of a non-profit tax status, the FEC employs no such fixed temporal approach. In the Softer Voices enforcement matter, for example, the FEC's counsel claimed that Softer Voices "became a political committee when it admittedly made over $1,000 in expenditures for the 'We the People' express advocacy advertisement [in 2006],"[218] and under that view was required to register with the Commission ten days after it became a political committee. That Softer Voices had been active since July 2004 and had broadcast a number of non-express advocacy television advertisements did not appear to matter; nor did the fact that Softer Voices spent $1,266,000 during 2006 alone, with over $1,000,000 for such issue advertisements. In other words, in the eyes of the FEC's counsel and several Commissioners, once a group crosses the statutory threshold, it appears that it becomes a

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[214] *Leake*, 525 F.3d at 302 (citing *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945))).
[215] 611 F.3d 669 (10th Cir. 2010).
[216] *Id.* at 678 (citing *Colo. Right to Life Comm., Inc. v. Coffman* ("*CRLC*"), 498 F.3d 1137, 1152 (10th Cir. 2007)). Even this formulation may prove in time to be over-regulatory, due to the trend toward using the internet, automated phone calls, and other low cost methods as the primary source of political communication. The cost of such advocacy is negligible, particularly when compared to the astronomical costs of more traditional political advertising *via* television, radio, and direct mail.
[217] *Herrera*, 611 F.3d at 678. Another court, instead of applying *Buckley's* major purpose limiting construction, struck a state statute entirely because it lacked the major purpose limitation. *S.C. Citizens for Life v. Krawcheck*, 2010 WL 3582377, No. 4:06-CV-2773-TLW (D.S.C. Sept. 2010).
[218] MUR 5831 (Softer Voices), GCB #2 at 8-9.

political committee, regardless of what other non-candidate activities it has undertaken.[219] Such an approach ignores the limiting construction of *Buckley* entirely.

## III. <u>CONCLUSION</u>

The practical effect of what the FEC has created is this: because the standards vary from enforcement case to enforcement case, those who wish to speak are left to guess whether or not certain activity triggers the application of myriad mandatory and sometimes redundant reporting obligations, which impose different burdens depending on who is speaking. If past Commission action is any indication, a failure to correctly guess when such disclosure is mandated will result in a significant monetary penalty. As the FEC trumpeted in its December 2006 press release, one group paid $299,500, another paid $180,000, and a third paid $150,000.

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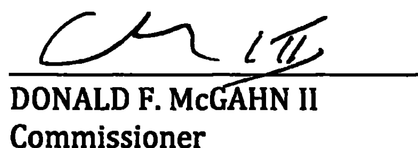
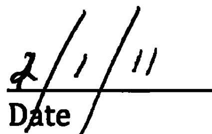
As if the continued use of the same sort of multi-factor test that the Court struck down in *Citizens United* under the guise of section 100.22(b) is not problematic enough, when combined with the FEC's version of the major purpose test, it is a wonder that anyone remains beyond the reach of the Commission's self-proclaimed regulatory reach. The paramount problem with these complex multi-factor tests is that people are forced to "hedge and trim."[220] "Faced with such prospects, many speakers, 'rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech -- harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.'"[221]

To avoid the continued infliction of these harms, I urge the Commission to revisit section 100.22(b) of its regulations, and its 2007 policy on political committee status.





DONALD F. McGAHN II
Commissioner

Date

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[219] Softer Voices is not an isolated case; there are several others where other non-candidate advocacy spending was ignored in the quest to declare that a group should have registered and reported as a political committee. *See, e.g.*, MUR 5492 (Cleaver for Congress); MUR 5842 (Economic Freedom Fund). *Cf. Leake*, 525 F.3d at 288 ("[R]egulation as a political committee is only proper if an organization primarily engages in election-related speech" because an alternative rule would "threaten[] the regulation of too much ordinary political speech to be constitutional.").

[220] *Buckley*, 424 U.S. at 43 (internal citation omitted).

[221] *Leake*, 525 F.3d at 300 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965))).