

March 22, 2012

**By Electronic Mail**

Anthony Herman, Esq.  
General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

**Re: Comments on Advisory Opinion Request 2012-11 (Free Speech)**

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2012-11, a request submitted on behalf of Free Speech, a “political organization” under 26 U.S.C. § 527 (2012) seeking the Commission’s opinion “whether its planned activities would force it to register and report as a ‘political committee’ and whether its speech might be deemed ‘express advocacy’ under Commission regulations.” AOR 2012-11 at 1.

Free Speech states that it has identified “one contributor willing to give \$2,000 or more” to the organization and that it “would like to ask for more than \$1,000 from other individuals . . . .” AOR 2012-11 at 2. Free Speech further states that it would “like to draw upon donations from its members to pay for advertisements costing more than \$2,000 that discuss public issues relevant to the upcoming federal elections, voting, and policy positions of candidates for federal office. *Id.* Free Speech includes in its request the scripts of several ads containing express advocacy, payment for which would constitute the making of an “expenditure” under 2 U.S.C. § 431(9). *See also* 11 C.F.R. § 100.111(a). Notwithstanding Free Speech’s claims to the contrary, it is clear from the fact that every one of its proposed ads and solicitations is focused on federal candidates and elections (with many containing “magic words” express advocacy), Free Speech clearly has the “major purpose” of influencing federal elections.

Consequently, the Commission should advise Free Speech that, upon receiving contributions in excess of \$1,000 or making expenditures in excess of \$1,000, Free Speech will be a “political committee” under federal law, required to register and report as one.

**I. Free Speech’s Proposed Activities Will Make It A “Political Committee” Under FECA and Commission Regulations.**

Free Speech asks “whether its planned activities would force it to register and report as a ‘political committee’” AOR 2012-11 at 1.

The statute defines the term “political committee” to mean “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a).

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the Supreme Court 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.” 424 U.S. at 79 (emphasis added). In *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986), the Court again invoked the “major purpose” test and noted that if a group’s independent spending activities “become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.” 479 U.S. at 262 (emphasis added). In that instance, the Court said the group would become subject to the “obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.” *Id.* (emphasis added). The Court in *McConnell v. FEC*, 540 U.S. 93 (2003), restated the “major purpose” test for political committee status as first iterated in *Buckley*. 540 U.S. at 170 n.64.

Thus, Free Speech is a “political committee” if it meets both parts of a two-prong test for political committee status: (1) it has a “major purpose” to influence elections and (2) it receives \$1,000 in “contributions” or makes \$1,000 in “expenditures.”

**A. Free Speech clearly meets the threshold “major purpose” test.**

Free Speech claims that it does not “have as its major purpose the election or defeat of clearly identified candidates,” but its proposed activities belie this claim. *See* AOR 2012-11 at 1.

The Commission employs the “major purpose” doctrine through a “case-by-case analysis of an organization’s conduct.” Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) (“Supplemental E&J”). The Commission has explained that “an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity.” *Id.* at 5601 (citing *MCFL*, 479 U.S. at 262). “An analysis of public statements can also be instructive in determining an organization’s purpose.” *Id.* (citing *FEC v. Malenick*, 310 F. Supp. 2d 230, 234–36 (D.D.C. 2004)). However, “[t]he Federal courts’ interpretation of the constitutionally mandated major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements,” e.g., materials distributed to prospective donors. *Id.* (citing *Malenick*, 310 F. Supp. 2d at 234–36). Further:

The Commission may need to examine statements by the organization that characterize its activities and purposes. The Commission may also need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization. In addition, the Commission may need to examine the organization's fundraising appeals.

Because *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, any rule must permit the Commission the flexibility to apply the doctrine to a particular organization's conduct.

*Id.* at 5601–02 (emphasis added).

While the Commission may in some cases need to examine many or all of these factors in order to ascertain an organization's major purpose, this is not such a case. As the Commission's own explanation of the "major purpose" standard makes clear, the test boils down to a comparison of an organization's "spending on federal campaign activity" with the organization's "other spending" and "activities unrelated to campaigns." *See id.*

In this case, all of Free Speech's proposed spending pertains to federal candidates and elections. Every one of Free Speech's proposed ads clearly identifies a federal candidate, with nearly all of them referencing voters and elections this "fall" or "November," and with many including so-called "magic words" of express advocacy. *See* AOR 2012-14 at 2–3. Similarly, every one of Free Speech's "donation requests" clearly identifies a federal candidate, every one of them references elections or urges action this "fall" or "November" and every one of them makes clear that the funds received would be used to advocate the clearly identified federal candidate's defeat at the polls. *See* AOR 2012-14 at 3–4.<sup>1</sup>

Free Speech's proposed activities make clear the group's major purpose is to influence this year's federal elections. Every one of Free Speech's eleven proposed ads and solicitations clearly identifies a specific candidate for federal office, with only one referencing non-federal candidates as well.<sup>2</sup> Nearly all of Free Speech's proposed ads and solicitations expressly advocate the election or defeat of the clearly identified candidate for federal office.<sup>3</sup>

---

<sup>1</sup> *See also* 72 Fed. Reg. at 5602 (citing *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (mailer solicited "contributions" under FECA when it left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year"))).

<sup>2</sup> The proposed ad "Gun Control" clearly identifies a candidate for federal office—President Obama—and also references "Wyoming state candidates."

<sup>3</sup> If more were needed, this "major purpose" conclusion is buttressed by the fact that Free Speech has registered with the Internal Revenue Service (IRS) under section 527 of the Internal Revenue Code as a "political organization" that is operated "primarily" for the purpose of "accepting contributions or making expenditures" under 26 U.S.C. § 527. *See* AOR 2012-11 at

**B. Free Speech’s payment to produce and distribute its proposed ads will meet the \$1,000 expenditure test.**

An “expenditure” is defined as “any purchase, payment . . . gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9); *see also* 11 C.F.R. § 100.111(a). An “independent expenditure” is defined as “an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate.” 2 U.S.C. § 431(17); *see also* 11 C.F.R. § 100.16.

Free Speech proposes paying “more than \$2,000” to distribute seven proposed ads, includes in its request scripts for these ads, and asks “whether its speech might be deemed ‘express advocacy’ under Commission regulations.” AOR 2012-11 at 1.

In *Buckley*, with respect to individuals, the Court construed the term “expenditure” to encompass “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Buckley*, 424 U.S. at 44. And in a footnote, the Court explained: “This construction would restrict the application of [the challenged limit] to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44 n.52. This illustrative, non-exhaustive list set forth what became known as *Buckley*’s “magic words” of express advocacy.

Commission regulations define express advocacy as communication that:

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

---

1. The Supreme Court in *McConnell* recognized that section 527 groups are primarily engaged in influencing elections. It stated, “Section 527 ‘political organizations’ are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity.” 540 U.S. at 174 n.67. The Court noted that section 527 groups “by definition engage in partisan political activity.” *Id.* at 177. Thus, by definition, any entity that registers with the IRS as a “political organization” under section 527 is “organized and operated primarily” for the purpose of “influencing or attempting to influence the selection, nomination, election or appointment of” an individual to public office.

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

11 C.F.R. § 100.22 (emphasis added).

Payments to distribute communications containing express advocacy clearly meet the definition of “expenditure.” Nearly all of Free Speech’s proposed ads contain express advocacy, with many containing so-called “magic words” from *Buckley*.

The ad labeled “Gun Control” clearly identifies President Obama, calls his qualifications as president into question and urges the listener to take action “this fall.” AOR 2012-11 at 2. This ad could only be interpreted by a reasonable person as containing advocacy of President Obama’s defeat “this fall” and is express advocacy under 11 C.F.R. § 100.22(b).

The ad labeled “Environmental Policy” clearly identifies President Obama, refers to “Obama’s environmentalist cronies,” and states that “Obama cannot be counted on to represent Wyoming values and voices as President.” The script concludes with the admonition to take action “*this November*.” AOR 2012-11 at 3 (emphasis in original). This ad could only be interpreted by a reasonable person as containing advocacy of President Obama’s defeat “this November” and is express advocacy under 11 C.F.R. § 100.22(b).

In “Budget Reform,” Free Speech praises Congresswoman Lummis for her support of the “Repeal Amendment,” characterizes her as “brave in standing against the political elite,” states that she “deserves your support” and concludes by urging the listener to “Do everything you can to support Congresswoman Lummis this fall . . .” *Id.* (emphasis added). This ad clearly identifies a federal candidate and expressly advocates her election using *Buckley*’s magic word “support” twice. This ad is express advocacy under 11 C.F.R. § 100.22(a).

The ad “An Educated Voter Votes on Principal” criticizes President Obama for association with Bill Ayers and ACORN and further characterizes him as “a President destructive of our natural rights,” before concluding: “Real voters vote on principle. Remember this nation’s principles.” *Id.* (emphasis added). This ad clearly identifies a federal candidate, criticizes that candidate’s principles, and uses *Buckley*’s magic word “vote” to expressly advocate the defeat of the candidate. This ad is express advocacy under 11 C.F.R. § 100.22(a).

The ad “Financial Reform” notes President Obama’s “financial bailout of Fannie Mae and Freddie Mac,” alleges that President Obama “permit[ted] himself to become a puppet of the banking and bailout industries” and then asks “What kind of person supports bailouts at the

expense of average Americans?” before concluding: “Not any kind we would vote for and neither should you.” *Id.* (emphasis added). This ad clearly identifies a federal candidate and then uses the *Buckley* magic word “vote” to expressly advocate voting against the candidate. This ad is express advocacy under 11 C.F.R. § 100.22(a).

If and when Free Speech spends in excess of \$1,000 to produce and/or distribute these express advocacy ads, it will have met the “expenditure” prong of the “political committee” test.<sup>4</sup>

## II. Conclusion.

For all of the foregoing reasons, existing federal campaign finance statutes and regulations require the Commission to advise Free Speech that its proposed activities will require it to register with the Commission as a political committee and to meet the law’s reporting requirements.

Given Free Speech’s representation that it “will not make any in-kind or direct contributions to federal candidates, party committees, or political committees that make contributions to federal candidates or political party committees,” AOR 2012-11 at 1, Free Speech may choose to organize as an “independent expenditure-only committee” and operate free from the federal law contribution amount limits and source prohibitions of 2 U.S.C. §§ 441a and 441b.

As the D.C. Circuit Court made clear in *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), political committee registration and reporting requirements remain in full effect for such “independent expenditure-only” committees. With respect to a political committee such as Free Speech, which “intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on [Free Speech] if it were a political committee are minimal.” *Id.* at 697 (emphasis added). The *SpeechNow* court reasoned:

[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures. Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals. These are sufficiently important governmental interests to justify requiring *SpeechNow* to organize and report to the FEC as a political committee.

*Id.* at 698. The same is true for Free Speech here.

---

<sup>4</sup> We believe—and a district court found—that express advocacy is not required in order to determine whether a “major purpose” group has made an “expenditure,” for purposes of applying the political committee standard. *See Shays v. FEC*, 511 F. Supp. 2d 19, 26–27 (D.D.C. 2007). Nonetheless, the fact that Free Speech proposes spending to distribute express advocacy communications makes it unnecessary for the Commission to reach that issue here.

We appreciate the opportunity to submit these comments.

Sincerely,

*/s/ Fred Wertheimer*

Fred Wertheimer  
Democracy 21

*/s/ J. Gerald Hebert*

J. Gerald Hebert  
Paul S. Ryan  
Campaign Legal Center

Donald J. Simon  
Sonosky, Chambers, Sachse  
Endreson & Perry LLP  
1425 K Street NW – Suite 600  
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan  
The Campaign Legal Center  
215 E Street NE  
Washington, DC 20002

Counsel to the Campaign Legal Center

Copy to: Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission  
Mr. Kevin Deeley, Acting Associate General Counsel, Policy  
Ms. Amy L. Rothstein, Assistant General Counsel  
Mr. Robert M. Knop, Assistant General Counsel