No. ________

In The
# Supreme Court of the United States

FREE SPEECH,

*Petitioner,*

v.

FEDERAL ELECTION COMMISSION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Tenth Circuit err in upholding the Federal Election Commission's Vague and Overbroad Political Committee Requirements?

2. Did the Tenth Circuit err in failing to apply the Major Purpose Test?

## PARTIES TO THE PROCEEDING

Petitioner, Appellant below, is a Wyoming unincorporated nonprofit association made up of three Wyoming residents, Max Douglas Watford, Robert Brinkmann, and Charles Curley.

Respondent, Appellee below, is the Federal Election Commission ("FEC").

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## JURISDICTION

The Tenth Circuit rendered its decision on June 25, 2013, and denied Petitioner's petition for rehearing en banc on September 30, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution made applicable to the states through the Fourteenth Amendment, provides, in relevant part, that government "shall make no law . . . abridging the freedom of speech."

The relevant provision of federal election regulations, 11 C.F.R. § 100.22(b) is reproduced in the appendix. (Pet'r's App. 44-45).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reprinted in the Appendix at App. 1 and is reported at 720 F.3d 788 (10th Cir 2013). The opinion of the United States District Court for the District of Wyoming is reprinted in the Appendix at App. 5 and is unreported. The Federal Election Commission's advisory opinion is reprinted in the Appendix at App. 24 and is unreported.

## STATEMENT OF THE CASE

Complicated regulatory programs promoting disclosure of electoral spending encumber basic civic engagement by speakers. The members of Free Speech are three men from Wyoming who aspire to share their views about ranching, President Obama, and other topics with the public on a shoestring budget. Federal election law made this task impossible by requiring compliance with regulatory standards that even the FEC could not articulate and, when applied, impose a regulatory regime far too burdensome for most citizens.

Free Speech aimed to speak to the public at a time when people care about political issues the most – around the time of an election. To do so, it assembled basic scripts for use in newspaper, local television, magazine, and Internet media. It did not have funds to hire election law experts, media consultants, or accountants. It hoped to use its small budget to simply deliver its message to the public. Faced with a daunting set of regulations, policies interpreting those regulations, and enforcement actions and advisory opinions expanding their meaning even further, Free Speech filed an advisory opinion with the FEC. Its goal was simple: clarify the reach and operation of the law so it could comply with provisions of the Federal Election Campaign Act ("FECA").

Free Speech drafted an advisory opinion request asking two questions: (1) would any of its speech

consisting of fundraising appeals or public advertising constitute regulated speech and (2) would it be required to formally register and report as a political committee ("PAC")? By asking these questions, it sought to understand the boundaries of regulation so it could run its organization without the burdens of being a PAC, such as hiring a treasurer, adopting specific accounting methods, and filing numerous reports even when silent. It simply wished to speak as three men from Wyoming with a message about limited government, agricultural policy, and President Obama without being confused by regulatory red tape.

Given the opportunity to define basic elements of the law, the FEC rendered an advisory opinion without advice. Three Commissioners issued one draft advisory opinion signaling strict compliance requirements. Advisory Opinion ("AO") 2012-11 (Free Speech), Draft B (FEC 2012), *available at* http://saos.fec.gov/aodocs/1206386.pdf (hereinafter "Draft B"). Another three issued two draft advisory opinions signaling no compliance requirements. AO 2012-11, Draft A, *available at* http://saos.fec.gov/aodocs/1206385.pdf; AO 2012-11, Draft C, *available at* http://saos.fec.gov/aodocs/1207876.pdf (hereinafter "Draft C"). In similar fashion, each group of Commissioners produced competing Statements of Reason ("SOR") that contradicted one another. AO 2012-11, Statement of Chairman Caroline C. Hunter, Commissioners Donald F. McGahn and Matthew S. Petersen, *available at* http://saos.fec.gov/aodocs/1209339.pdf (hereinafter "Hunter SOR");

AO 2012-11, Concurring Opinion of Vice Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther, *available at* http://saos.fec.gov/aodocs/1209340.pdf (hereinafter "Weintraub SOR"). The end result was a non-advisory advisory opinion from the FEC indicating it could neither interpret nor apply the law entrusted to it. (Pet'r's App. 24-42). Still, citizens are expected to act in full compliance with federal election law under threat of penalties.

Without sensible guidance about how the law operates and whether it applied to Free Speech, these ordinary speakers were left in legal limbo. On the one hand, they could speak out about gun control, for example, and risk investigation, fines, or even imprisonment. On the other hand, they could submit to the onerous burdens connected to PAC status or remain silent. Ultimately, Free Speech challenged the regulations and policies but because, as the repeated refrain goes, these provisions implement only disclosure, summary dismissal was ordered and then affirmed by the Tenth Circuit.

Merely by invoking the term "disclosure," the FEC muted Free Speech during the 2012 electoral cycle. No one, not even the FEC, knows what the blurred regulatory standards found in 11 C.F.R. § 100.22(b) and lengthy PAC policies mean. "Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees," 69 Fed. Reg. 68056 (Nov. 23, 2004) (hereinafter "PAC Status 1"); "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) (hereinafter "PAC

Status 2"). As demonstrated by the record below, no coherent regulatory guidance could be found to clarify the boundaries between regulated and unregulated conduct. Without the help of a small army of election law experts, average speakers must simply self-censor.

This Court has routinely reaffirmed that no matter how benign the government's interest may be in a given area of regulation, the method selected to carry it out must have some sense of tailoring. This is especially so when important First Amendment interests are at stake. That is why this Court developed the doctrinal protections of *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC. v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), to protect ordinary speakers from the heavy-handed application of PAC rules. These protections do not exempt speakers from disclosure, but rather ensure that a minimally intrusive reporting scheme operates to further the government's interest in disclosure.

*Buckley* ensured that the FECA would not be applied in too vague or indiscriminate a fashion by developing the express advocacy test. It also ensured that the heavy burdens of complying with PAC status would only be applied to groups whose major purpose was the nomination or election of candidates for office. *MCFL* then further realized the burdens of PAC status and protected small groups from having to register and report in this manner. 479 U.S. 238, 252 (1986) (Brennan, J.) (plurality opinion). Both lines of reasoning ensure that by carefully limiting

the application of burdensome political speech regulations, First Amendment interests are preserved. But without this protection, the continued operation of the FEC's massive PAC program ensures that only those who can afford the best regulatory experts will be able to exercise their First Amendment rights to political speech.

Throughout this litigation, none of these constitutional protections were realized. By merely labeling a gargantuan regulatory system as "disclosure," courts and agencies turn a blind eye to traditional concerns about government overreach in campaign finance regimes. This is not unique to Free Speech. Speakers nationwide are caught in a tangle of puzzling and contradictory standards that prevent them from engaging the public. As for federal appellate courts, contradictory approaches concerning political committee requirements are the norm for standards of judicial review, with splits occurring between the Eighth Circuit and the Fourth and Tenth Circuits. As to the relevancy of the major purpose test, a stark split divides the Eighth Circuit and First, Fourth, Seventh and Tenth Circuits. Free Speech seeks review of these issues now before more confusion and contradiction stifle speakers nationwide.

## PROCEEDINGS BELOW

On June 14, 2012, Petitioner Free Speech filed a verified complaint in the District Court for the District of Wyoming under 28 U.S.C. § 1331 as a challenge arising under the First Amendment to the U.S. Constitution, the Federal Election Campaign Act ("FECA"), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. Petitioner filed a Motion for Preliminary Injunction on July 13, 2012. Following oral arguments regarding preliminary injunction on September 12, 2012, respondent Federal Election Commission filed a motion to dismiss on September 24. Petitioner responded on October 2.

District Judge Scott W. Skavdahl entered his Telephonic Oral Ruling on October 3, 2012, denying preliminary injunction. Free Speech timely appealed this ruling to the United States Court of Appeals for the Tenth Circuit on October 19, 2012. Following briefing of the appeal of denial of preliminary injunction at the Tenth Circuit, the district court dismissed the case with prejudice on March 21, 2013. The Tenth Circuit agreed to substitute briefing and hear appeal of dismissal. The appeals court heard oral arguments on May 7, 2013, and affirmed dismissal on June 25, 2013, adopting the district court's ruling.

Petitioner filed a petition for rehearing en banc on August 9, 2013. On September 30, 2013, the Tenth Circuit denied this petition.

## REASONS FOR GRANTING THE PETITION

Speakers ensnared in federal campaign finance law must guess whether and how to comply with PAC standards that are the legal equivalent of Rube Goldberg machines. Those who hazard an incorrect guess may be subject to fines and criminal penalties, a risk that chills the exercise of protected First Amendment freedoms. *See*, *e.g.*, 2 U.S.C. § 437g(d)(1)(A)(ii) (up to one year imprisonment); 2 U.S.C. § 437g(d)(1)(A)(i) (up to five years imprisonment); Matter Under Review ("MUR") 5487 (Progress for American Voter Fund) Conciliation Agreement at 14 (FEC 2007), *available at* http://eqs.fec.gov/eqsdocsMUR/00005AA7.pdf ($750,000 civil penalty based on alleged failures to register and report as a PAC). Even those who escape formal punishment may endure years of investigations, making the process punishment enough. *See*, *e.g.*, MUR 5831 (Softer Voices) Certification (FEC 2010), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044282476.pdf (four year enforcement process with no violation); MUR 5842 (Economic Freedom Fund) Certification (FEC 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044282476.pdf (two year enforcement process leading to no violation).

The indiscriminate imposition of PAC status suffers from two constitutional infirmities. First, FEC standards governing PAC status are indefinable and prolix; these invariably "chill a substantial amount of speech." *Federal Election Comm'n v. Wisconsin Right to Life* ("*WRTL*"), 551 U.S. 449, 469 (2007). Second,

even if individuals were able to determine that they are regulated, PAC status imposes "well-documented and onerous burdens" when exercising First Amendment rights. *Id.* at 477 n.9. It is the combination of these harms that "function as the equivalent of a prior restraint." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 335 (2010).

It has long been recognized that these sorts of complicated and burdensome regulatory programs infringe speech as effectively as a ban. *See*, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Speiser v. Randall*, 357 U.S. 513 (1958). Where procedural safeguards prove lacking, many people "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." *Citizens United*, 558 U.S. at 335-36 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). To protect against these chills, this Court has insisted on: (1) coherent regulatory requirements individuals may use to comply with the law, (2) meaningful exacting scrutiny to prevent against overbroad and arbitrary application of regulatory schemes, and (3) the application of the major purpose test. Free Speech asks for a simple re-affirmation of these doctrinal protections when speech-suppressing programs hide under the moniker of disclosure.

## I. The Tenth Circuit's Failure to Protect Grassroots Groups from Onerous Political Committee Burdens is in Conflict with the Eighth Circuit

Many proclaim, loudly, that after *Citizens United*, pervasive, around-the-clock, difficult-to-comply-with PAC regulations are nothing more than disclosure, which leads to the adoption of lax judicial review. But however loudly one proclaims it, demanding that ordinary citizens register as official PACs is different in kind from the less restrictive disclosure this Court has routinely upheld. Only the Eighth Circuit has recognized this difference, leading to the conflict before this Court.[1]

Being forced to register, report, and identify as a PAC carries consequences. PAC status requires registering with the government to speak, appointing a treasurer who is personally liable for reporting violations, maintaining a separate bank account with specific accounting requirements, filing disclosure reports even when silent, and seeking government permission to dissolve. *Citizens United*, 558 U.S. at 337-38; *Minnesota Concerned Citizens for Life v.*

[1] *Real Truth About Abortion, Inc. v. FEC* ("*RTAA*") and *Worley v. Detzner* sought certiorari because those petitioners believed strict, rather than exacting, scrutiny should be applied to systems imposing PAC status. *See* 133 S.Ct. 841 (2013); 134 S.Ct. 529 (2013) (denying certiorari). Free Speech asks that courts below perform what this Court has required, exacting scrutiny, and that the doctrinal protections of *Buckley* and *MCFL* be recognized.

*Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (*en banc*) (detailing the known burdens of ongoing reporting for political speech for organizations); *cf. Free Speech* (Pet'r's App. 2-3) (where the Tenth Circuit did not find that identical PAC burdens articulated in *MCFL* and *Citizens United* were analogous to this case). Once labeled a PAC, other legal duties attach. *See*, *e.g.*, 2 U.S.C. § 441e(a); "Statement of Policy; Safe Harbor for Misreporting Due to Embezzlement," 72 Fed. Reg. 16695 (Apr. 5, 2007).

PAC status is the same regulatory regime criticized by the *MCFL* Court because it "may create a disincentive for such organizations to engage in political speech. Detailed record keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." *MCFL*, 479 U.S. at 254-55. But in a post-*Citizens United* world, many courts simply conflate more burdensome PAC requirements with less restrictive disclosure, eliminating important constitutional safeguards.

### A. Contradictory Approaches for Analyzing Political Speech and Associational Rights Cannot Stand

On September 5, 2012, the Eighth Circuit Court of Appeals, sitting en banc, held that Minnesota's

ongoing reporting requirements for political speech (as a "political fund") were constitutionally invalid. *Swanson*, 692 F.3d at 876-77. These reporting requirements involved similar requirements as the federal system under review here. Under exacting scrutiny, the Eighth Circuit asked whether Minnesota could achieve its interest in disclosure through "less problematic measures." *Id.* at 876 (quoting *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 204-05 (1999)). Because Minnesota imposed a set of overbroad, continuing reporting obligations on groups whose major purpose was not the election or defeat of candidates, its system was not constitutionally permissible.

On June 25, 2013, the Tenth Circuit Court of Appeals held that the FEC's similar ongoing reporting requirements for political speech (as a PAC) were constitutionally valid. (Pet'r's App. 9-10). Even though Free Speech's major purpose was not the election or defeat of clearly identified candidates, the Tenth Circuit breezed over this concern. Unlike the Eighth Circuit, the Tenth Circuit never inquired about the fit between the federal government's interest in disclosure and its corresponding regulatory implements – or whether there was a "substantial relation" between the government's interest in disclosure and the imposition of PAC status. *See Swanson*, 692 F.3d at 875. But this is the stuff real constitutional analysis is made of. Reasoned by the Tenth Circuit, because "the challenged policies

implement only disclosure requirements," less serious review was triggered. (Pet'r's App. at 9-10).

A secondary cause of doctrinal schism about PAC status centers on the continuing relevance of the major purpose test. The major purpose test serves to protect small groups from the known burdens accompanying PAC status. *Buckley*, 424 U.S. at 79. In *Swanson*, Minnesota's system evaded this requirement, leading it to be constitutionally invalid. But the Tenth Circuit, rather than demanding some clear articulation of the major purpose test by the FEC, simply rubberstamped the Commission's approach, assuming that no "particular methodology" is required for the major purpose test to be valid. (Pet'r's App. 21). Of course, some "particular methodology" is required or the major purpose test would not act as a significant constitutional safeguard. *See*, *e.g.*, *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961) (the government is "not free to adopt whatever procedures it pleases . . . without regard to the possible consequences for constitutionally protected speech").

These contradictory interpretations ensure that confusion, not clarity, is the norm among federal courts when PAC status is implicated. This confusion exists among courts considering which standards to employ governing exacting scrutiny analysis, *Swanson*, 692 F.3d at 875 (applying a thorough analysis to decide whether there was a substantial relation between government interests in disclosure and chosen regulatory provisions); *Free Speech* (Pet'r's App. 9-10) (because the "challenged policies implement only

disclosure," no examination of a substantial relation provided); *RTAA*, 681 F.3d 544, 556-57 (4th Cir. 2012) (failing to examine the "substantial relation" prong); *Worley*, 717 F.3d at 1251-52 (mixing exacting and rational basis review by offering "judicial deference"). Lost in this confusion are the voices of average Americans who require bright line safeguards to protect against the suppression of speech not properly subject to regulation under PAC rules.

### B. Exacting Scrutiny Must be Exacting

Courts considering the constitutional validity of campaign finance provisions have routinely evaded an important inquiry under the exacting scrutiny analysis – whether there is a proper fit between the challenged regulation and the interest promoted by the government. When courts fail to ask this question – and this is by far the current trend – exacting scrutiny operates more like rational basis review. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-16 (1976). Rational basis review only asks for a loose fit, e.g., whether the challenged law might be rationally related to the government's interest. This is not difficult to do. Steve M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L.REV. 173, 191 (2003) ("reciting a tautology is not the same thing as examining whether a particular legislative choice is within the bounds of [the government's] constitutional authority"). Exacting scrutiny asks that there be a relevant correlation between a government interest and how it is carried out. *See*

*United States v. Alvarez*, 132 S.Ct. 2537, 2555 (2012) (Breyer, J., concurring) (inquiry for exacting scrutiny is “whether it is possible substantially to achieve the Government’s objective in less burdensome ways”). Because most courts, except for the Eighth Circuit, routinely fail to perform this second step in the exacting scrutiny analysis in campaign finance cases, constitutional safeguards protecting against burdensome PAC regulations have been eliminated.

When examining registration and reporting requirements substantially similar to those at issue in this case, the Eighth Circuit applied a meaningful version of exacting scrutiny, asking whether there was a sufficiently important government interest and whether the state’s regulatory program bore a substantial relationship to that interest. *Swanson*, 692 F.3d at 875-77. This approach follows what this Court has defined in deciding what constitutes a substantial relationship – “there must be a relevant correlation . . . between the governmental interest and the information required to be disclosed and the governmental interest must survive exacting scrutiny.” *Davis v. FEC*, 544 U.S. 724, 744 (2008). Minnesota’s ongoing, intrusive reporting requirements did not survive this substantial relationship analysis. *Swanson*, 692 F.3d at 876-77 (“Minnesota has not stated any plausible reason why *continued* reporting from nearly all associations, regardless of the association’s major purpose, is necessary to accomplish these interests”). By conducting a genuine exacting scrutiny analysis, the Eighth Circuit found that imposing

cumbersome PAC requirements bore a poor fit to the state's interest in disclosure.

Rather than engaging in exacting scrutiny, the Tenth Circuit rubberstamped the FEC's declared need to impose the full panoply of PAC regulations upon Free Speech. The court did not analyze the relevant correlation between PAC status and the government's interest in disclosure. The Tenth Circuit did not consider whether existing, less burdensome and unchallenged disclosure requirements found in federal law were sufficient to meet the government's interest in disclosure. But courts must make this inquiry for exacting scrutiny to adequately protect constitutional interests. That the Eighth Circuit stands in contradiction with the Tenth Circuit and other courts on this standard necessitates review here.

It is only by requiring a substantial relationship that *Buckley*'s major purpose test and *MCFL*'s protection against overbroad political speech regulations take hold. Ensuring that meaningful judicial review is in place effectuates the doctrinal protections against cumbersome speech regulations. In other areas of First Amendment concern, this Court has required that the government actually demonstrate "a direct causal link between the restriction imposed and the injury to be prevented." *Alvarez*, 132 S.Ct. at 2549. Here, the link between the government's interest in providing disclosure and the FEC's decision to impose ongoing, complicated reporting and registration requirements has not been established. The FEC has not shown why imposing the full panoply of PAC

requirements is necessary to achieve its interest in disclosure, especially when less cumbersome alternatives exist in the law. To date, except for the Eighth Circuit, no court seems particularly concerned about this constitutional inquiry.

Nothing in this petition challenges less restrictive reporting requirements that adequately promote the government's interest in disclosure. One-time, event driven reporting is already part of federal law. *See* 2 U.S.C. § 434(c) (reporting requirements for non-PACs that make independent expenditures); § 441d (disclaimer requirements). These provisions ensure that the government interest in disclosure is met in a manner sensitive to weighty First Amendment interests. Where around-the-clock, invasive regulatory schemes attempt to effectuate disclosure, more serious review should be had, but to date has not been afforded.

Since *Citizens United*, many courts have decided that once government alleges that challenged laws "implement only disclosure," lax judicial review is warranted. (Pet'r's App. 2-3). But doing so transforms "First Amendment jurisprudence into a legislative labeling exercise." *Minnesota Concerned Citizens for Life v. Swanson*, 640 F.3d 304, 322 (8th Cir. 2011) (Chief Judge Riley, dissenting) (opinion vacated *en banc* 692 F.3d 864 (8th Cir. 2012)). Without constitutional safeguards in place, the FEC remains free to impose a prophylactic, imprecise, and unduly burdensome set of regulations when more benign and less restrictive options exist in the law. *See Riley*

*v. National Federation of the Blind*, 487 U.S. 781, 798 (1988). Free Speech asks this Court to grant certiorari so that exacting scrutiny will be truly exacting and the doctrinal protections of *Buckley* and *MCFL* will safeguard important First Amendment interests.

## II. All Must Register and Report: Courts Routinely Misapply *Citizens United*

This Court could not have been clearer in *Citizens United* when it explained "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369. First Amendment claims must be resolved not through the "label we give the event," *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 7 (1986), but with attention to the substantive interests involved. Here, this Court must pierce the superficial label of disclosure to distinguish the true nature of PAC rules imposed by the FEC.

### A. Discernible Boundaries Protect the First Amendment

Throughout the many election law cases brought before this Court, one trend remains familiar. While government may provide for basic campaign finance provisions to protect against corruption or better inform the electorate, it may not do so in a way that unduly burdens First Amendment interests. Just as government may protect against obscenity, *Ashcroft v.*

*Free Speech Coalition*, 535 U.S. 234 (2002), or defamatory statements, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it must also give protection to the exercise of constitutionally protected liberties lest they be crushed under the weight of these government interests. The same has remained true concerning laws regulating electoral speech. *Citizens United*, 558 U.S. at 336 (expansive electoral regulatory programs represent an "unprecedented intervention into the realm of speech"). When these safeguards disintegrate, constitutional liberties suffer and speakers are silenced. Today, this is done when the government invokes but one term, disclosure.

In *WRTL*, this Court expounded on the development of electoral speech standards found in *McConnell v. FEC*. *See* 540 U.S. 93, 206-07 (2003). Specifically, Chief Justice Roberts explained that while the functional equivalent of express advocacy could be regulated, the standards for determining this sort of speech needed to be objective, non-burdensome, and easily understood. *WRTL*, 551 U.S. at 474 n.7. Were it otherwise, government agencies could expand and contract relevant standards on the fly based on "burdensome, expert-driven inquir[ies]." *Id.* at 469. Average groups of citizens could never be expected to comply with such cumbersome regulatory programs due to their burdensome nature. *Id.*

Faced with the curtailment of its regulatory authority, the FEC reshaped its standards governing the regulation of electioneering communications after *WRTL*. While the Court instructed the FEC to create

objective and easily understood standards after its loss, it invented a "two-part, 11-factor balancing test to implement *WRTL*'s ruling." *Citizens United*, 558 U.S. at 335. The Court found these standards to be the functional equivalent of a prior restraint, because most people will simply self-censor rather than challenge the FEC. *Id.* at 335-36.

Some attempt to distinguish the principles of *Citizens United* from this challenge because *Citizens United* involved an outright ban on speech while, we are told, the FEC's regulations and policies implement only disclosure. Even where government programs lack any "direct regulatory or suppressing functions," constitutional safeguards are still required. *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 n.19 (1968); *see also Riley*, 487 U.S. at 800-01. Additionally, this Court was insistent that the FEC's regulatory program in *Citizens United* was constitutionally infirm because individuals attempting to comply could not be reasonably expected to master its voluminous and indefinable requirements. 558 U.S. at 335. "If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated." *Id.* at 336.

At least the FEC could articulate its "two-part, 11-factor balancing test" in *Citizens United*. *Id.* at

335. Here, the FEC's guidance must be found in the loose regulatory language it employs, lengthy Explanation and Justification ("E&J") statements further expanding that language, and scores of enforcement actions and advisory opinions that mutate this meaning. *See* "Express Advocacy; Independent Expenditures . . . ," 60 Fed. Reg. 35291, 35293 (July 6, 1995) (hereinafter "Express Advocacy"); "PAC Status 2," 72 Fed. Reg. at 5597; MUR 5988 (American Future Fund), Statement of Reasons of Chairman Steven T. Walther and Commissioners Cynthia L. Bauerly and Ellen L. Weintraub (FEC 2009), *available at* http://eqs.fec.gov/eqsdocsMUR/29044234217.pdf; MURs 5910 & 5694 (Americans for Job Security), Statement of Reasons of Chairman Steven T. Walther and Commissioners Cynthia L. Bauerly and Ellen L. Weintraub (FEC 2009), *available at* http://eqs.fec.gov/eqsdocs MUR/29044232739.pdf; MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn (FEC 2011), *available at* http://eqs.nictusa.com/eqsdocsMUR/11044284676.pdf.[2]

Some standards certain FEC Commissioners have found to trigger regulation or penalties border on the comical, including whether an advertisement

[2] Governing regulations and policies triggering compliance obligations expand and contract on a "case-by-case" basis, "Express Advocacy," 60 Fed. Reg. at 35294-35296, and regulatory meanings may be distilled through "the enforcement process." MUR 6073 (Patriot Majority 527s), First General Counsel's Report at 9 (FEC 2009) *available at* http://eqs.fec.gov/eqsdocs MUR/10044264544.pdf.

"lacks a specific legislative focus," or if it discusses leadership since leadership emphasizes character, or asking a candidate about "his plans to bring our children back to [the state,]" or if it uses the phrase "wake up." *See* Hunter SOR at 26. Some Commissioners simply inquire what the "reader is to understand." *Id.* at 29.

Without constitutional safeguards in place, it becomes too burdensome for most to comply with the law or seek review of the FEC's operations. We should not expect grassroots groups to conduct a linguistic marathon to determine if phrases like "wake up" or "talk about ranching" trigger regulation. Nor should we expect everyday citizens to hire election law experts to avoid these traps. Standards that confuse ordinary speakers, that demand enlisting regulatory experts to exercise constitutional liberties, or that empower agencies to act arbitrarily are common evils stricken by this Court time and time again. *See*, *e.g.*, *Speiser*, 357 U.S. 513; *Freedman*, 380 U.S. 51. This trend remains true, powerfully so, when it comes to the FEC's litigation track record. *See*, *e.g.*, *WRTL*, 551 U.S. at 468 (vague, complicated political speech regulations constitutionally infirm); *Citizens United*, 558 U.S. at 335.

Providing practical guidance about how to comply with the regulatory enigma known as PAC status is especially important. Under the law, if a group is deemed to be a PAC it must file its statement of organization within ten days. 11 C.F.R. § 102.1(d). Before filing, it must secure a treasurer, set up a

separate bank account, and fulfill all the other burdensome requirements of PAC status. *See Citizens United*, 558 U.S. at 337-38. Since much of the FEC's regulatory guesswork is done on a case-by-case basis, there is no way to know in advance when the ten day period begins to run or when its first reporting filing is due. This leaves speakers subject to after-the-fact, case-by-case determinations and investigations by the FEC. *See*, *e.g.*, *FEC v. Christian Coalition*, 52 F.Supp.2d 45, 51 (D.D.C. 1999) (observing that the FEC's "administrative investigative stage can be quite lengthy in its own right" with a seven year resolution in that matter); *FEC v. GOPAC*, 917 F.Supp. 851, 852-83 (D.D.C. 1996) ("Over three years later, after the Commission concluded its investigation . . . it notified GOPAC that there was probable cause to believe it was a 'political committee' "). Like Minnesota's system deemed problematic by the Eighth Circuit in *Swanson*, federal PAC status imposes ongoing, unnecessary organizational and reporting obligations even when the group is silent.

The Tenth Circuit found none of these regulatory hurdles sufficiently problematic to warrant more serious review. Indeed, the district court expressly held that the PAC regulations deemed so burdensome in *Citizens United* were not analogous here. (Pet'r's App. 10). The Tenth Circuit, in adopting the lower court's opinion, reasoned that the FEC's host of subjective and changing regulatory standards for determining major purpose and speech requirements posed no particular constitutional problems. (Pet'r's

App. 2-3). It also concluded that Free Speech's lengthy and detailed record below illustrating the inconsistent standards applied to itself and in prior administrative operations were but conclusory in nature. (Pet'r's App. 3). In doing so, Free Speech was denied the doctrinal protections of *Buckley* and *MCFL* in attempting to secure relief for its political speech.

### B. A Nation Confused: Courts and Election Agencies Impose Political Committee Requirements on All Speakers Big and Small

As to the record below and national treatment of PAC status, the situation may be aptly described as utter confusion. Not content with less restrictive disclosure, the FEC's PAC program delivers what the Second Circuit promised it would 41 years ago, namely, that "every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with." *United States v. Nat'l Cmte. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). Absent meaningful standards in this area, it is only natural to expect the overinclusive and inconsistent application of burdensome political committee rules to all speakers, big and small.

### 1. The Record Below Amply Demonstrated the Constitutional Flaws of the FEC's Regulatory Leviathan

Two problems evident in the record below demonstrate the inherent instability and vagueness found in the FEC's approach to PAC status. First, relevant standards guiding what speech triggers PAC regulation are haphazard at best. Second, the Commission has not defined or clarified the major purpose test but instead formulates it on a case-by-case basis, usually through the enforcement process. *See* "PAC Status 2," 72 Fed. Reg. at 5596. Combined, this leaves speakers without sufficient notice to know what sort of conduct triggers regulatory compliance (with corresponding severe penalties for non-compliance) and what conduct does not. Facing the possibility of lengthy investigations, fines, or even imprisonment, speakers may only exercise their First Amendment rights at the mercy of *noblesse oblige*. *See Federal Communications Comm'n v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2318 (2012).

As Free Speech pled below, all sorts of speech common for nonprofits and advocacy organizations could trigger PAC status and require a substantial degree of compliance efforts. Free Speech First Am'd Ver. Compl. at ¶¶47-49; ¶50; ¶61; ¶¶71-79; ¶¶97-106, *available at* http://www.fec.gov/law/litigation/freespeech_fs_amend_complaint.pdf. From sending out fundraising appeals to broadcasting its message, the regulations and policies governing this conduct remain bizarrely opaque making compliance impossible for

those of average means.[3] To comply with the law, one could reference the text of the regulation itself (one page), the two operative FEC E&J statements concerning express advocacy and PAC status expanding that regulatory meaning (25 pages), and a small handful of pertinent enforcement actions detailing what may trigger regulation (635 pages). This would leave speakers digesting more than 660 pages of nuance upon nuance to determine how the system works.[4] However the FEC may characterize it, this is not less restrictive disclosure.

The FEC's operative regulation that dictates which speech is express advocacy is found at 11 C.F.R. § 100.22. Spending above $1,000 on speech the Commission deems to be express advocacy invokes the need to register and report as a PAC. *See* 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100. 11 C.F.R. § 100.22(b) attempts to define express advocacy by offering a smorgasbord of imprecise hints that could trigger such a finding. (Pet'r's App. 44-45). Speakers are left

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[3] Free Speech maintains its challenge to the indecipherable regulatory standards governing which speech constitutes express advocacy (Pet'r's App. 10-17), and which speech constitutes solicitations. (Pet'r's App. 17-19).

[4] Free Speech references the nine enforcement actions included in the Hunter SOR Appendix as illustrative in defining the meaning of the law. Tallying the First General Counsel Reports, probable cause hearings, and SORs in these matters renders 635 pages of instruction for would-be speakers. These constitute but a small subsection of the universe of regulatory guidance from the FEC.

to guess how close is too close in deciding the "proximity to the election." Likewise, deciding whether a message's "electoral portion," whatever that may be, triggers regulatory compliance is unknowable. The Express Advocacy E&J gives further meaning about how 100.22(b) operates. It explains that the Commission may reference "contextual considerations" on a "case-by-case" basis to decide if speech is regulated. Further, like the standards invalidated by this Court in *WRTL*, speech may be regulated in accord with the E&J if it weighs upon "a candidate's character, qualifications, or accomplishments."

Because of the confusion and complexity of 100.22(b) and its interpretative E&J, Free Speech asked the FEC whether any of its proposed advertisements would constitute express advocacy, likely triggering the need to register as a PAC. The best the FEC could offer in return was an administrative shrug.

The record below includes full examples of each proposed advertisement and the FEC schism that resulted. *Compare* Draft B *with* Draft C; Hunter SOR *with* Weintraub SOR. One proposed advertisement sought to engage the people of Wyoming about an important issue in that state, ranching. It read:

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

> neighbors. Call your friends. Talk about ranching.

AO 2012-11, Advisory Opinion Request at 3 (FEC 2012), *available at* http://saos.fec.gov/aodocs/1204965.pdf. Though the proposed advertisement in question did not include express words advocating the election or defeat of President Obama, half the Commissioners found the script to be subject to regulation under Section 100.22(b). Draft B at 10-11. This is telling because the proposed ad: (a) discusses a matter of legislative importance in Wyoming, (b) explains its relevance to local ranchers, (c) critiques the President's character, and (d) asks for civic engagement among community members to discuss the importance of ranching. Even with this focus, half the FEC Commissioners believed they could decipher the true meaning of this language as asking Wyoming citizens to vote against President Obama. The other half of Commissioners simply read the text, understood it was capable of many different reasonable interpretations, and deemed it unregulated. Draft C at 26.

Thankfully, the FEC never investigated Free Speech, fined it, or sent its members to prison. Of course, it never spoke. But, when posed with basic questions about federal election law, it offered two sets of contradictory interpretations to follow. The First Amendment demands, at a minimum, that the FEC be able to articulate its regulatory boundaries with sensible clarity so speakers may abide by its rules.

Just as the FCC cannot constitutionally regulate indecent communications through inconsistent, contradictory standards affording no notice to regulated parties, the FEC may not embrace this approach in an area of high-value speech. *See Fox Television Stations*, 132 S.Ct. 2307. Much like the FCC, the FEC argues in need of a flexible, case-by-case standard to regulate political speech and PAC status. But this flexibility comes with a price. The constitutional injuries inflicted by this approach are described in this petition and more thoroughly in the record below. But for the Tenth Circuit, unlike the Eighth, none of this mattered. Either the constitutional safeguards of exacting scrutiny, meaningful speech standards, and the major purpose test still protect speakers today or they do not. It is this confusion and infringement of sensitive First Amendment rights Free Speech asks this Court to settle. And it may do so through a simple affirmation of the doctrinal safeguards found in *Buckley* and *MCFL.*

**2. Unless Review is Granted, Forcing Speakers to Retain Campaign Finance Attorneys and Electoral Experts will be the Norm**

What Justice Kennedy warned against in *Citizens United* is before this Court today. Unless a given group is sufficiently funded and equipped with a band of election law experts, determining if one must comply with burdensome PAC rules proves unlikely. For those of modest means but deep convictions,

exercising one's right to participate in public debates is overshadowed by a mountain of PAC regulations never intended to be applied to average speakers. This problem is not unique to this case.

An informal discussion group that gathered in friends' homes was trapped as a PAC under Mississippi law if it spent more than $200 supporting an eminent domain initiative. *Justice v. Hosemann*, 829 F.Supp.2d 504 (N.D. Miss. 2011). There, while the court claimed to apply exacting scrutiny, it mixed this with rational basis review upholding the requirement. *Id.* at 516-17. Unlike the informal group in Mississippi, a church in Montana whose members occasionally weighed in on state initiatives could not be required to register and report as a PAC. *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). There, expending "a few moments of a pastor's time, or a marginal additional space in the Church for petitions, is so lacking in economic substance that we have already held that requiring their reporting creates fatal problems of unconstitutional vagueness." *Id.* at 1034. Still, a pro-life advocacy group in Washington had to register as a PAC under state law if it harbored an *expectation* to receive funds or make expenditures about initiative issues. *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (declining to apply the major purpose test and conducting a summary substantial relationship analysis). Absent clear standards, confusion and conflict will continue to impede basic civic engagement.

In *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), the D.C. Circuit declined to find PAC status as particularly burdensome applied to one group. However, SpeechNow admitted in oral argument that the applicable PAC requirements did not impose much of a burden to itself in particular. *Id*. at 697. This was, in part, because it already had some $121,700 in planned contributions and could not compare itself to "ad hoc groups that want to create themselves on the spur of the moment." *Id. SpeechNow* left open the question about just how burdensome PAC requirements were for groups who operated on shoestring budgets, were informal, and politically unsophisticated. Interestingly enough, in *Carey v. FEC*, the Commission sought to demand that a small, barebones veterans group register *twice* as separate PACs. 791 F.Supp.2d 121 (D.D.C. 2011). The D.C. District Court ruled against the FEC's position due to the burden that would be suffered by a small, grassroots entity.

Today, Free Speech asks that this Court grant certiorari to ensure that the usual constitutional safeguards against burdensome political speech regulation continue to apply – even when the term disclosure is invoked. Where more cumbersome regulatory programs inhibit citizens from engaging in the democratic process, this Court's doctrinal protections found in *Buckley* and *MCFL* must be reaffirmed. This requires that: (a) courts below engage in a meaningful version of the exacting scrutiny analysis, (b) comprehensible speech standards govern the operation of

any campaign finance program, and (c) the major purpose test is recognized and applied.

## III. Absent this Court's review, the Major Purpose Test is a Dead Letter

The major purpose test urgently requires review. The test is based on two foundational campaign finance decisions, *Buckley* and *MCFL*. This Court ruled in *Buckley* that "[t]o fulfill the purposes of the [FECA] [PAC requirements] need 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." *Buckley*, 424 U.S. at 79. The major purpose test serves one important constitutional consideration – that government may not impose burdensome PAC regulations in an overbroad manner. In *MCFL* this Court affirmed the major purpose consideration, noting that MCFL's "central organizational purpose is issue advocacy" and that "should MCFL's independent spending become so extensive that the major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." 479 U.S. at 252 n.6, 262. These became the two prongs of the major purpose test – central organizational purpose and the comparison of expenditures to non-expenditure spending and activities. But the FEC routinely applies an evolving and malleable version of this test. *See* Draft B at 22-26, 28; Draft C at 43-55.

A limited question about the major purpose test reached this Court once since *MCFL*, but the Court declined to address it. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 26-29 (1998). The test has thus risen and, as this case demonstrates, fallen in the midst of transformational campaign finance decisions. *See*, *e.g.*, *McConnell*, 540 U.S. 93; *Citizens United*, 558 U.S. 310. This Court should grant review to affirm the importance of the major purpose test in protecting issue advocacy organizations and reinforce its boundaries.

### A. The Major Purpose Test Should Protect Issue Advocacy Organizations

Both *Buckley* and *MCFL* ruled that issue advocacy groups – particularly smaller grassroots groups – must be able to avoid complex registration and reporting regimes such as those required of PACs. 424 U.S. at 79; 479 U.S. at 254 ("Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear"). Groups who do not have the major purpose of electoral advocacy are not exempt from disclosure, but are instead subject to less burdensome reporting requirements. *MCFL*, 479 U.S. at 252-53; *see*, *e.g.*, 2 U.S.C. § 434. This distinction has become lost in the law today.

Today, Massachusetts Citizens for Life – like Free Speech – would receive only half the protection

recognized in its 1986 decision from this Court. A small grassroots group, MCFL informed Massachusetts residents about life issues in an irregular newsletter over a number of years. *MCFL*, 479 U.S. at 242-43. In one instance, MCFL spent nearly $10,000 publishing and circulating a special edition that contained express advocacy on behalf of pro-life federal candidates, constituting an expenditure. *Id.* at 243-45. In addition to ruling in favor of MCFL in an as-applied challenge to the law's proscription of corporate expenditures, the Court ruled against requiring MCFL to register and report as a PAC simply to speak. *Id.* at 251-56. Relying on MCFL's satisfaction of the major purpose test, the Court concluded that the disclosure requirements for individual independent expenditures satisfied the government's interests in disclosure. *Id.* at 262. Concurring with Justice Brennan's opinion, Justice O'Connor distinguished disclosure from PAC status unequivocally: "the significant burden on MCFL . . . comes not from the disclosure requirements that it must satisfy, but from the additional restraints imposed upon it by the Act." *Id.* at 266 (O'Connor, J., concurring). This restraint is the "more formalized organizational form" of PAC status. *Id.* Today, while free from any corporate ban following *Citizens United*, the other half of MCFL's case would be dismissed, just like Free Speech's challenge. Decades later, the FEC's "minimize[ation of ] the impact of the legislation upon . . . First Amendment rights" has succeeded in eliminating the distinction between disclosure and the "sophisticated organizational form"

required by PAC status, making the major purpose test superfluous. *Id.* at 252, 255.

Perhaps the most troublesome – certainly baffling – portion of the ruling below is its disregard of the purpose of the major purpose test. Although acknowledging that the major purpose test exists to avoid the application of PAC status to issue organizations (Pet'r's App. 20), the courts overlooked how the FEC applied the test to Free Speech. Of particular note, when considering Free Speech's advisory opinion request, half of the FEC's commissioners cited *issue advocacy* as evidence that Free Speech's major purpose was within PAC purview. Draft B at 24 ("The conclusion that Free Speech has as its major purpose federal campaign activity is further supported by the fact that even its non-express advocacy spending will attack or oppose a clearly identified Federal candidate"). This "'heads I win, tails you lose' approach cannot be correct." *WRTL*, 551 U.S. at 471.

The FEC attorneys' arguments in this case went further still, asserting that PAC requirements are not "unduly" burdensome upon any groups, but are instead, per *Citizens United*, only burdensome as an alternative outlet when a group is banned from speaking entirely. FEC 10th Cir. Brief for Appellee at 43, *available at* http://www.fec.gov/law/litigation/freespeech_fec_brief.pdf; FEC 10th Cir. Supplemental brief at 6, *available at* http://www.fec.gov/law/litigation/freespeech_fec_suppl_brief.pdf. The courts below affirmed the unspoken argument of FEC counsel: because PAC status is "only disclosure," the

factors and scope of the major purpose test are of no concern. (Pet'r's App. 2-3, 20-22).

Given the confusion over the objective and boundaries of the major purpose test, this Court should examine and re-affirm *Citizens United*'s affirmation of the test from *Buckley* and *MCFL*. PAC status is unduly burdensome for groups seeking to speak out about political issues. *Citizens United*, 558 U.S. 310, 337-38 (quoting *McConnell*, 540 U.S. at 330-32 (quoting *MCFL*, 479 U.S. at 253-54)) ("PACs are . . . expensive to administer and subject to extensive regulations"). Groups of all stripes are subject to simple disclosure for independent expenditures or electioneering communications, but groups who do not make such activity their major purpose must not be subject to PAC status. *Citizens United*, 558 U.S. at 369 (quoting *MCFL*, 479 U.S. at 262 ("The Court has explained that disclosure *is a less restrictive alternative to more comprehensive regulations of speech*" like PAC status. (emphasis added)). In order for the major purpose test to protect issue-oriented groups like Free Speech, its standards must be objective and its continuing necessity validated.

### B. Following *Citizens United* Courts Regularly Avoid Addressing the Major Purpose Test, and the FEC Could not Apply it to Free Speech

In recent years, numerous circuit courts of appeals have diminished the major purpose test into a

rubber stamp for PAC status. One circuit maintains that the objective of the major purpose test is to identify groups that have the objective of supporting or opposing clearly identified candidates. *See Unity08 v. Federal Election Comm'n*, 596 F.3d 861, 867 (D.C. Cir. 2010) (citing *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981)). Other circuits, including the court below, maintain that the FEC has full power to formulate the test, with "no particular methodology," and refuse to scrutinize either the test's objectives or factors. *See Real Truth About Abortion v. Federal Election Comm'n*, 681 F.3d 544, 557 (4th Cir. 2012); (Pet'r's App. 21). Other circuits, when reviewing state laws that place PAC burdens on issue groups, have refused to require even a nominal major purpose test. *See Nat'l Organization for Marriage v. McKee*, 649 F.3d 34, 58-59 (1st Cir. 2011); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 486-91 (7th Cir. 2012); *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1008-12 (9th Cir. 2010). One notable exception recently re-affirmed the importance of the major purpose test and *MCFL*. *See Swanson*, 692 F.3d at 870-77. In order for the major purpose test to actually protect issue advocacy organizations, it must have clear objectives and factors, and current FEC policy and practice provide neither.

Free Speech brought both a facial and as-applied challenge to the major purpose test. The courts below dismissed both challenges, but did not address the numerous problems with the FEC's formulation of its

"case-by-case" major purpose test, most starkly illustrated by the agency's application of the test to Free Speech. Ultimately, the FEC could not answer Free Speech's question of whether or not its major purpose required it to register as a PAC. (Pet'r's App. 41). At the time of Free Speech's advisory opinion request, half of the commissioners believed petitioner had the major purpose of campaign activity, while the other half did not. *Compare* Draft B at 21-25 *with* Draft C at 43-55.[5] Although comparing Free Speech's expenditures to non-expenditure activity is a sound consideration – hindered only by the FEC's vague and overbroad definition of express advocacy – the determination of a group's central organizational purpose amounts to a game of darts without a dartboard. Wherever the FEC chooses to throw darts, it might hit a bulls eye for PAC status.[6] Sometimes it may look at the timing of an organization's formation. *See*, *e.g.*, MUR 5541 (November Fund) First General Counsel's Report ("FGCR") at 10-11 (FEC 2005), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044273275.pdf.

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[5] During this litigation, two commissioners at the FEC replaced two who considered Free Speech's advisory opinion request. *See Two New Commissioners Assume Office; Will Hold Meeting on October 31*, Federal Election Comm'n, Oct. 28, 2013 http://www.fec.gov/press/press2013/news_releases/20131028release.shtml. It is now far beyond the Free Speech's best guess as to how the FEC will apply the major purpose test.

[6] Former and present FEC commissioners have expressed these and numerous other concerns with the major purpose test. *See*, *e.g.*, MUR 5831, Statement of Reasons of Commissioner Donald F. McGahn at 36-45; Hunter SOR at 20-23.

Other times it will consider in what states a group runs ads and whether those states are battleground states. *See*, *e.g.*, MUR 5977 (American Leadership Project) FGCR at 11-12 (FEC 2008), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044264601.pdf. Occasionally, the FEC also considers the timing of messages and other activities, without articulating what constitutes too close of proximity to an election cycle. *See*, *e.g*., MUR 5842 (Economic Freedom Fund) FGCR at 13-14 (FEC 2007), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044264354.pdf. Far too rarely, the FEC may look to a group's actual stated purpose in its own organizational or other public documents. *See* Draft C at 49. The results speak for themselves: with opposing interpretations of major purpose from the FEC, and affirmation from an appellate court that this places no undue burden upon Free Speech, the lower courts' justification of the major purpose test is bitterly ironic: "'[T]he major purpose test serves as an additional *hurdle* to establishing political committee status.'" (Pet'r's App. 20-21 (quoting "PAC Status 2," 72 Fed. Reg. at 5601) (emphasis added)). The major purpose test has been worn away due to administrative overreach and lackluster oversight from lower courts. If this Court does not intervene, the test will become entirely subjective, nominal, or nonexistent.

"'[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs,' 'includ[ing] discussions of candidates.'" *Arizona Free*

*Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2828 (2011) (quoting *Buckley*, 424 U.S. at 14). To ensure federal campaign finance law respects the First Amendment, the major purpose test was meant to hinder the overbroad application of burdensome PAC requirements to issue groups. Without a re-examination and affirmation of the major purpose test's requirements, Free Speech and similarly situated groups will remain without guidance and ultimately without protection from the arbitrary application of PAC status. Absent review here, basic civic engagement and the exercise of political speech rights will be a luxury left to political professionals.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court grant this petition for *certiorari*.

Respectfully submitted,

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PUBLISH

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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|---|---|
| FREE SPEECH,<br>Plaintiff-Appellant,<br>v.<br>FEDERAL ELECTION COMMISSION,<br>Defendant-Appellee. | No. 13-8033 |

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING (D.C. NO. 2:12-CV-00127-SWS)**

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(Filed Jun. 25, 2013)

Benjamin T. Barr, Rockville, Maryland (Stephen Klein, Wyoming Liberty Group, Cheyenne, Wyoming and Jack Speight, Cheyenne, Wyoming, with him on the briefs), for Plaintiff-Appellant..

Kevin Deeley, Acting Associate General Counsel (Anthony Herman, General Counsel, Lisa J. Stevenson, Deputy General Counsel-Law, Erin Chlopak, Acting Assistant General Counsel, David Kolker, Associate General Counsel and Adav Noti, Acting

Assistant General Counsel, with him on the briefs), Federal Election Commission, Washington, D.C., for Defendant-Appellee.

Fred Wertheimer, Democracy 21, Washington, D.C.; Donald J. Simon, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, Washington, D.C.; J. Gerald Hebert, Tara Malloy and Paul S. Ryan, The Campaign Legal Center, Washington, D.C.; and Larry B. Jones, Simpson, Kepler & Edwards, LLC, The Cody, Wyoming Division of Burg Simpson Eldredge Hersh & Jardine, P.C., Cody, Wyoming, on the Briefs for Amici Curiae.

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Before **BRISCOE**, Chief Judge, **BRORBY**, and **MURPHY**, Circuit Judges.

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**MURPHY**, Circuit Judge.

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Plaintiff-Appellant, Free Speech, appeals the district court's dismissal of the complaint it filed in July 2012, alleging certain regulations and practices of Defendant-Appellee, the Federal Election Commission ("FEC"), violate its rights under the First Amendment. After careful review of the appellate filings, the district court's order, and the entire record, we **affirm** the dismissal for substantially the reasons stated by the district court.

The district court correctly concluded Free Speech's claims implicate only disclosure requirements

which are subject to exacting scrutiny, requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 366-67 (2010) (quotations omitted). Further, the district court comprehensively analyzed and correctly resolved Free Speech's constitutional challenges to the FEC's definition of express advocacy, codified at 11 C.F.R. § 100.22(b); the standard used by the FEC to determine whether a request for funds is a solicitation of contributions under 2 U.S.C. § 441d(a); and the FEC's policy of determining political committee status on a case-by-case basis.[1] Accordingly, this court **adopts** the district court's analysis as the opinion of this court and **orders** the district court's memorandum decision and order granting the FEC's Motion to Dismiss to be published.

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[1] The district court relied, *inter alia,* on the Fourth Circuit's decision in *Real Truth About Abortion, Inc. v. Federal Election Commission,* 681 F.3d 544 (4th Cir. 2010). Free Speech argues that dismissal of its complaint for failure to state a claim was improper because the record in this matter is more fully developed than the record analyzed by the Fourth Circuit, thereby providing factual support for its assertions the FEC's regulations and policies are either onerous and burdensome, inconsistent and contradictory, or somehow different from the ones it publically adopts or articulates. We have reviewed the record and conclude nothing therein provides any factual support for these conclusory assertions.

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| FREE SPEECH,<br>Plaintiff-Appellant,<br>v.<br>FEDERAL ELECTION COMMISSION,<br>Defendant-Appellee. | No. 13-8033<br>(D.C. No. 2:12-CV-00127-SWS) |

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**JUDGMENT**

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(Filed Jun. 25, 2013)

Before **BRISCOE**, Chief Judge, **BRORBY**, and **MURPHY**, Circuit Judges.

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This case originated in the District of Wyoming and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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| | |
|---|---|
| FREE SPEECH,<br>Plaintiff,<br>vs.<br>FEDERAL ELECTION COMMISSION,<br>Defendant. | Case No. 12-CV-127-S |

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**ORDER GRANTING FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS**

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This matter comes before the Court on Defendant Federal Election Commission's ("FEC" or "the Commission") Motion to Dismiss [Doc. 33]. The Court, having reviewed the parties' written submissions, being familiar with the case file by virtue of having previously heard argument and having addressed the likelihood of success on the merits of Plaintiff's claims in conjunction with Plaintiff's Motion for Preliminary Injunction (Doc. 19) and this Court's oral ruling denying same (Docs. 41, 42 and 54), and considering itself otherwise fully advised in the premises of the motion, hereby FINDS and ORDERS as follows:

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Free Speech is an unincorporated non-profit association formed on February 21, 2012 and is comprised of three Wyoming residents. Free Speech's stated mission is to promote and protect free speech, limited government, and constitutional accountability, and to advocate positions on various political issues including free speech, sensible environmental policy, gun rights, land rights, and control over personal health care. Its bylaws require that it operate independently of political candidates, committees, and political parties. (Am. Compl. ¶¶ 1 & 10; Am. Compl. Ex. A at Ex. 1.) On July 26, 2012, Plaintiff filed this lawsuit challenging certain FEC regulations that Plaintiff alleges abridge its First Amendment freedoms. Specifically, Plaintiff brings facial and as applied challenges against 11 C.F.R. § 100.22(b), alleging its definition of "express advocacy" is unconstitutionally vague and overbroad and triggers burdensome registration and reporting requirements which act as the functional equivalent of a prior restraint on political speech. Plaintiff further challenges the constitutionality of the FEC's interpretation and enforcement process regarding political committee status, solicitation tests, the "major purpose" test, and express advocacy determinations. (Am. Compl. ¶ 2.)

On July 13, 2012, Free Speech filed a Motion for Preliminary Injunction (Doc. 19) seeking to enjoin the FEC from enforcing any of the challenged regulations or policies. This matter was fully briefed by the

parties and amicus curiae and the Court heard oral argument on the motion on September 12, 2012. On October 3, 2012, this Court issued an oral ruling denying Plaintiff's motion for preliminary injunction. (Docs. 41, 42, and 54.) Plaintiff timely appealed on October 19, 2012, and Plaintiff's interlocutory appeal is currently pending before the Tenth Circuit Court of Appeals. Prior to the Court's oral ruling on Plaintiff's Motion for Preliminary Injunction, the FEC filed a motion to dismiss Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). This motion has been fully briefed and is ripe for a decision on the merits.

"Ordinarily an interlocutory injunction appeal under 1292(a)(1) does not defeat the power of the trial court to proceed further with the case." 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3921.2 (hereinafter "Wright & Miller"). "Although the filing of a notice of appeal ordinarily divests the district court of jurisdiction, in an appeal from an order granting or denying a preliminary injunction, a district court may nevertheless proceed to determine the action on the merits." *U.S. v. Price,* 688 F.2d 204, 215 (3d Cir. 1982) (internal citation omitted). "The desirability of prompt trial-court action in injunction cases justifies trial-court consideration of issues that may be open in the court of appeals. A good illustration is provided by a motion to dismiss for failure to state a claim." Wright & Miller § 3921.2. Although a court of appeals may determine whether a claim has been stated as part of the interlocutory appeal, a district court nonetheless retains jurisdiction to

dismiss for failure to state a claim pending appeal. *Id.* This power is desirable "both in the interest of expeditious disposition and in the face of uncertainty as to the extent to which the court of appeals will exercise its power." *Id.*

In addressing this matter now, this Court is mindful of the issues that have been presented on appeal as well as the current stage of the appellate litigation. This case presents purely legal questions that have been fully briefed and argued to this Court. Because this Court's substantive analysis of the constitutional issues addressed in the pending motion to dismiss is identical to that set forth in the Court's ruling denying Plaintiff's preliminary injunction motion, the Court deems it appropriate to address Plaintiff's claims on the merits. Therefore, for the reasons set forth on the record during the Court's oral ruling, and for the reasons set forth more fully below, the Court will grant Defendant's motion to dismiss for failure to state a claim.

## STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant

is liable for the misconduct alleged." *Id.* at 678 (quoting *Twombly,* 550 U.S. at 556). "In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits, and documents incorporated into the complaint by reference." *Smith v. United States,* 561 F.3d 1090, 1098 (10th Cir. 2009).

## DISCUSSION

### *A. Standard of Review – Exacting Scrutiny*

At the outset, this Court addresses Plaintiff's contention that this Court should apply strict scrutiny to the regulations and policies at issue. Plaintiff challenges, on an as-applied and facial basis, the FEC's definition of "express advocating," *see* 101 C.F.R. § 100.22(b), the FEC's policy for determining political committee status, and the FEC's policy for determining when donations given in response to solicitations will be deemed "contributions." At their core, however, these challenged rules and policies implement only disclosure requirements. *See* 2 U.S.C. § 434(c) (reporting requirements for "independent expenditures"); 2 U.S.C. § 432, 433, 434(a)(4) (political reporting and organization requirements). The question before this Court, therefore, is not whether Plaintiff can make expenditures for the speech it proposes or raise money without limitation, but simply whether it must provide disclosure of its electoral advocacy.

"Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United v. FEC,* 558 U.S. 310, 130 S.Ct. 876, 914 (2010) (internal citations and quotation marks omitted). Accordingly, the Supreme Court has subjected those requirements to "exacting scrutiny" which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.; see also Real Truth About Abortion (RTAA) v. FEC,* 681 F.3d 544, 549 (4th Cir. 2010) ("[A]n intermediate level of scrutiny known as 'exacting scrutiny' is the appropriate standard to apply in reviewing provisions that impose disclosure requirements, such as the regulation and policy."); *New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 676 (10th Cir. 2010) ("The regulations at issue here require disclosure, thus distinguishing them from regulations that limit the amount of speech a group may undertake. . . . As such, the regulations must pass 'exacting scrutiny.'"). Accordingly, the Court applies exacting scruting to determine whether the regulations and policies at issue are constitutional.

### *B. Express Advocacy – 11 C.F.R. § 100.22(b)*

Plaintiff's first challenge involves the FEC's definition of express advocacy codified at 11 C.F.R. § 100.22. This regulation is used to define what constitutes an "independent expenditure" under 2 U.S.C. § 431(17), which in turn, determines whether

disclosures are required under 2 U.S.C. § 434(c).[1] *See RTAA,* 681 F.3d at 548.

Regulation 100.22 sets forth a two-part definition of the term "expressly advocating." Subsection (a) of the regulation defines "expressly advocating" consistent with the Supreme Court's decision in *Buckley v. Valeo,* 424 U.S. 1, 44, 96 S.Ct. 612 (1976), and includes communications using words or phrases "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)". 11 C.F.R. § 100.22(a). In *Buckley,* the Supreme Court addressed the constitutionality of an expenditure limit which provided that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1000." *Buckley,* 424 U.S. at 39. Troubled by the vagueness of the phrase "relative to a clearly identified candidate," the Supreme Court construed the

[1] An "independent expenditure" is defined as "an expenditure . . . ***expressly advocating*** the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party or committee. 2 U.S.C. § 431(17) (emphasis added). A person or organization – other than a political committee – that finances ***independent expenditures*** aggregating more than $250 during a calendar year must file with the FEC a disclosure report that identifies, *inter alia,* the date and amount of each expenditure and anyone who contributed over $200 to further it. *See* 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(e) (emphasis added).

phrase "relative to" to "apply only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44 (emphasis added). The Court explained in a footnote that "[t]his construction would restrict the application of [the spending 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. Consistent with this guidance, subsection (a) of the FEC's definition of "expressly advocating" later codified these types of "magic words" to signal express advocacy.[2]

Subsection (b) of the regulation, on the other hand, "defines 'expressly advocating' more contextually, without using the 'magic words.'" *RTAA,* 681 F.3d at 550. This subsection, which is the subject of

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[2] *See* 11 C.F.R. § 100.22(a) (defining "expressly advocating" to mean any communication that "[u]ses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in 94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning 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!'").

Plaintiff 's constitutional challenge, defines "expressly advocating" to include any communication that:

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

11 C.F.R. § 100.22(b).

Plaintiff argues that part (b) of the FEC's definition of expressly advocating "goes beyond any proper construction of express advocacy and offers no clear guidelines for speakers to tailor their constitutionally protected conduct and speech," and "fail[s] to limit its application to expenditures for communications that in 'express terms' advocate the election or defeat of a clearly identified candidate for federal office." (Am. Compl. ¶¶ 74-75.) In this regard, Plaintiff appears to suggest that "express advocacy" cannot permissibly extend beyond the "magic words" acknowledged in *Buckley* and codified in subsection (a). However, this position is foreclosed by several recent Supreme

Court decisions which have upheld the FEC's approach to defining express advocacy not only in terms of *Buckley*'s "magic words" as recognized in subsection (a), but also their "functional equivalent," as provided in subsection (b). *RTAA,* 681 F.3d at 550.

In *McConnell v. FEC,* 540 U.S. 93 (2003), the Supreme Court considered a facial overbreadth challenge to Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA") which included a provision defining express advocacy for purposes of electioneering communications. In rejecting the facial challenge, the Supreme Court noted "that *Buckley's* narrow construction of the FECA to require express advocacy was a function of the vagueness of the statutory definition of "expenditure,' not an absolute First Amendment imperative." *RTAA,* 681 F.3d at 550 (citing *McConnell,* 540 U.S. at 191-92). Accordingly, the Supreme Court in *McConnell* held that "Congress could permissibly regulate not only communications containing the 'magic words' of *Buckley,* but also communications that were 'the functional equivalent' of express advocacy." *Id.* (citing *McConnell,* 540 U.S. at 193).

In *FEC v. Wisconsin Right to Life, Inc. (WRTL),* 551 U.S. 449 (2007), the Supreme Court adopted a test for the "functional equivalent of express advocacy" which is consistent with the language set forth in section 110.22(b). *See WRTL,* 551 U.S. at 474 n.7; *RTAA,* 681 F.3d at 552. The controlling opinion in *WRTL* clarified that "a court should find that an ad is the functional equivalent of express advocacy only if

the ad is *susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."* *WRTL,* 551 U.S. at 460-470 (emphasis added). This functional equivalent test closely correlates to the test set forth in subsection (b), which provides that a communication is express advocacy if it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b). Indeed, as the Fourth Circuit has noted, although the language of Section 110.22(b) does not exactly mirror *WRTL*'s functional equivalent test, the test set forth in Section 110.22(b) is "likely narrower . . . since it requires a communication to have an 'electoral portion' that is 'unmistakeable' and 'unambiguous.'" *RTAA,* 681 F.3d at 552.

Finally, the Supreme Court's recent decision in *Citizens United* reaffirmed the constitutionality of the *WRTL* test and provided further support for the FEC's use of the functional equivalent test to define express advocacy. In *Citizens United,* the Court applied the *WRTL* functional equivalent test to determine whether the communication at issue would be prohibited by the corporate funding restrictions set forth in Title II of the BCRA, ultimately concluding that "[u]nder the standard stated in *McConnell* and further elaborated in *WRTL,* the film qualifies as the functional equivalent of express advocacy." *Citizens United,* 130 S.Ct. at 890. In that opinion, the Supreme Court upheld federal disclaimer and disclosure requirements applicable to *all* "electioneering

communications." *Id.* at 914. In so holding, the Court "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 915. In other words, in addressing the permissible scope of disclosure requirements, the Supreme Court not only rejected the "magic words" standard urged by Plaintiff but also found that disclosure requirements could extend beyond speech that is the "functional equivalent of express advocacy" to address even ads that "only pertain to a commercial transaction." *Id.* at 916. Thus, "*Citizens United* . . . supports the [FEC's] use of a functional equivalent test in defining 'express advocacy.' . . . If mandatory disclosure requirements are permissible when applied to ads that merely *mention* a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible." *RTAA,* 681 F.3d at 551-52 (emphasis original). As a result, *Citizens United* directly contradicts Plaintiff's argument that the definition of express advocacy set forth in subsection (b) is overly broad with respect to disclosure requirements.

In addition to its overbreadth argument, Plaintiff urges that section 100.22(b) is impermissibly vague based on the fact that the FEC did not "issue a conclusive opinion" as to whether some of Plaintiff's proposed ads constituted express advocacy in the advisory opinion process. However, as the Fourth Circuit has noted, "cases that fall close to the line will

inevitably arise when applying § 100.22(b)." *RTAA,* 681 F.3d at 554. "This kind of difficulty is simply inherent in any kind of standards-based test." *Id.; see also National Organization for Marriage, Inc. v. Sec. of State of Fla.,* 753 F.Supp.2d 1217, 1221 (N.D. Fla. 2010) ("The fact that 'it may be difficult in some cases to determine whether these clear requirements have been met' does not mean that the statute is void for vagueness.") (quoting *United States v. Williams,* 553 U.S. 285, 306, 128 S.Ct. 1830 (2008)).

### *C. The "Solicitation" Standard*

Plaintiff also challenges the constitutionality of the "solicitation" standard used by the FEC as vague and overbroad, arguing that it lacks clarity and guidance sufficient to enable interested persons to tailor their activities in compliance with the law. The FECA defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). It further requires "any person" who "solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising" to include a specified disclaimer in the solicitation. *Id.* § 441d(a); *see* 11 C.F.R. § 110.11(a)(3). Thus, the FECA requires disclaimers for communications that "solicit[ ] any contribution," 2 U.S.C. § 441d(a), but it does not

define when a request for donations constitutes a "solicitation."

The standard applied by the FEC for determining whether a request for funds "solicits" a "contribution" under the FECA was set forth by the Second Circuit in *FEC v. Survival Education Fund, Inc.,* 65 F.3d 285, 295 (2d Cir. 1995) ("*SEF*"). Under that standard, disclosure is required "if [a communication] contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id.* This solicitation standard does not interfere with Plaintiff's ability to raise funds to support its advocacy. Plaintiff is free to spend unlimited funds on its solicitations and to solicit unlimited funds for its express advocacy. Any "solicitations" of "contributions" simply trigger disclosure requirements, and those disclosure requirements are substantially related to the government's interest in requiring disclosure. As the Second Circuit recognized in *SEF*, disclosure requirements for solicitations "serve[ ] important First Amendment values." *Id.* at 296. "Potential contributors are entitled to know that they are supporting independent critics of a candidate and not a group that may be in league with that candidate's opponent." *Id.* The disclosure requirement is thus "a reasonable and minimally restrictive method of ensuring open electoral competition that does not unduly trench upon defendants' First Amendment rights." *Id.* (internal quotation marks and citation omitted). As the Supreme Court explained in *Citizens United,* disclosures

serve important interests even in the context of electioneering communications that need not be targeted to the election or defeat of a federal candidate. Such disclaimers "insure that the voters are fully informed about the person or group who is speaking." *Citizens United,* 130 S.Ct. 915 (citations omitted). "At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party." *Id.*

Plaintiff's vagueness argument appears to be premised upon the fact that the advisory opinion issued to Plaintiff by the FEC concluded that two of Plaintiff's donation requests would not be solicitations under the Act, while the Commission could not approve a response regarding the remaining two donation requests. (Am. Compl., Ex. G.) However, as noted above, "[t]he fact that 'it may be difficult in some cases to determine whether these clear requirements have been met' does not mean that the statute is void for vagueness." *National Organization for Marriage, Inc.,* 753 F.Supp.2d at 1221 (quoting *Williams,* 553 U.S. at 306); *see also RTAA,* 681 F.3d at 554.

Plaintiff fails to establish any constitutional deficiency in the FEC's approach to determining whether a communication is a "solicitation" for "contributions." Plaintiff's claim relating to the solicitation standard is insufficient as a matter of law and must be dismissed.

### ***C*** [sic]. ***Political Committee Status – The "Major Purpose" Test***

Finally, Plaintiff challenges the FEC's policy of determining political committee status on a case-by-case basis. Under the FEC's approach, "the Commission first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, and then it evaluates an organization's 'major purpose,' as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents." *RTAA,* 681 F.3d at 555 (internal citations omitted).

A "political committee" is defined by the FECA as any "committee, club, association or other group of persons" that makes more than $1,000 in political expenditures or receives more than $1,000 in contributions during a calendar year. 2 U.S.C. § 431(4)(A). "Expenditures" and "contributions" are defined to encompass any spending or fundraising "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i). However, in *Buckley v. Valeo,* the Supreme Court concluded that defining political committees only in terms of expenditures and contributions "could be interpreted to reach groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. "Accordingly, the Court limited the applicability of FECA's PAC requirements to organizations controlled by a candidate or whose 'major purpose' is the nomination or election of candidates." *RTAA,* 681 F.3d at 555 (citing *Buckley,* 424 U.S. at 79). "Thus the major purpose test serves as an

additional hurdle to establishing political committee status. Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity." *See* Political Committee Status, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007).

As the Fourth Circuit has observed, "[a]lthough *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose. And thus the Commission was free to administer FECA political committee regulations either through categorical rules or through individualized adjudications." *RTAA,* 681 F.3d at 556. The FEC opted for the latter approach, explaining that "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." 72 Fed. Reg. at 5601. "The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others." *See RTAA,* 681 F.3d at 556 (emphasis original).

"The necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *Id.* at 556-57. This Court agrees with the assessment of the Fourth Circuit in *RTAA:*

> [T]he Commission, in its policy, adopted a sensible approach to determining whether an organization qualifies for PAC status. And more importantly, the Commission's multi-factor major-purpose test is consistent with Supreme Court precedent and does not unlawfully deter protected speech.

*Id.* at 558. Plaintiff's constitutional challenge to that policy is therefore unavailing.

## CONCLUSION

The FEC disclaimer requirements at issue are necessary to provide the electorate with information and to insure that the voters are fully informed about the person or group who is speaking. *Citizens United,* 130 S. Ct. at 915. Moreover, the disclosure requirements provide the transparency that "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 917. The FEC's functional equivalent and major purpose tests are essential components to narrowly, but effectively identifying those entities, ads and solicitations that fall within the FEC's reporting, disclaimer, and disclosure requirements. These disclaimer and disclosure requirements become even more essential and necessary to enable informed choice in the political marketplace following Citizen United's change to the political campaign landscape with the removal of the limit on corporate expenditures. For all of the reasons set forth above, and as previously set forth in this Court's oral ruling denying

Plaintiff's Motion for Preliminary Injunction, Plaintiff's Complaint fails to state a claim upon which relief may be granted. It is therefore **ORDERED** that Defendant Federal Election Commission's Motion to Dismiss [Doc. 33] is **GRANTED**. Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**. No costs and fees are awarded.

Dated this 19th day of March, 2013.

/s/ Scott W. Skavdahl
Scott W. Skavdahl
United States District Judge

[LOGO] FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 8, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-11

Benjamin T. Barr Esq.
Stephen R. Klein, Esq.
Wyoming Liberty Group
1740 H Dell Range Blvd. #459
Cheyenne, WY 82009

Dear Messrs. Barr and Klein:

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

The Commission concludes that: two of Free Speech's 11 proposed advertisements would expressly advocate the election or defeat of a clearly identified Federal candidate; four of the proposed advertisements would not expressly advocate the election or defeat of a clearly identified Federal candidate; and two of the four proposed donation requests would not be solicitations under the Act. The Commission could not approve a response by the required four affirmative votes about the remaining advertisements and donation requests, or about Free Speech's status as a

political committee. *See* 2 U.S.C. 437c(c); 11 CFR 112.4(a).

***Background***

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

Free Speech describes itself as "an independent group of individuals which promotes and protects free speech, limited government, and constitutional accountability." Bylaws, Art. II. It is an unincorporated nonprofit association formed under the Wyoming Unincorporated Nonprofit Association Act, WYO. STAT. ANN. 17-22-101 to 115 (2012), and a "political organization" under 26 U.S.C. 527 of the Internal Revenue Code.[1] It currently has three individual members.

Free Speech will not make any contributions to Federal candidates, political parties, or political committees that make contributions to Federal

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

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

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

***Radio Advertisements***

Free Speech plans to spend $1,000 on three advertisements to be aired on local radio station KGAB AM in Cheyenne, Wyoming. These advertisements, which Free Speech calls "Environmental Policy," "Financial Reform," and "Health Care Crisis," will be aired 60 times between April 1 and November 3, 2012. Free Speech currently plans to allocate its

[2] Free Speech's bylaws prohibit its members, officers, employees, and agents from engaging in activities that could result in coordination with a Federal candidate or political party. Bylaws, Art. VI. And members, officers, employees and agents have a duty to "ensure the independence of all speech by the Association about any candidate or political party . . . in order to avoid coordination." Bylaws, Art. VI, Sec. 3.

budget evenly among the three advertisements, spending $333.33 for each.

***Newspaper Advertisements***

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

***Internet Advertisements***

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

***Television Advertisements***

Free Speech plans to spend $8,000 on four advertisements that will appear on the local television network KCWY in Cheyenne, Wyoming. The advertisements will appear approximately 30 times between May 1 and November 3, 2012. Free Speech plans to spend $2,000 on each of the four advertisements. The

advertisements are entitled “Gun Control,” “Ethics,” “Budget Reform,” and “An Educated Voter Votes on Principle.”

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

Free Speech has identified one individual donor willing to give it $2,000 or more, and would like to ask other individuals to donate more than $1,000 “to help support its speech.” Free Speech would also draw upon funds from its three members to pay for advertisements costing more than $2,000. Free Speech, however, will not accept donations from individuals who are foreign nationals or Federal contractors. Free Speech plans to ask for donations from individuals through four separate donation requests, which are described in response to question 2 below.

### ***Questions Presented***

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

*2. Will Free Speech’s proposed donation requests be solicitations under the Act?*

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

***Legal Analysis and Conclusions***

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

Under the Commission's regulations, a communication expressly advocates the election or defeat of a clearly identified Federal candidate if it "[u]ses phrases such as 'vote for the President,' re-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia, 'Smith for Congress,' Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context, can have no other reasonable meaning 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!'." 11 CFR 100.22(a).

Under the Commission's regulations, a communication also constitutes express advocacy if "[w]hen 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) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one

meaning; and (2) [r]easonable 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 CFR 100.22(b).

The Commission concludes that Free Speech's two "Financial Reform" advertisements are express advocacy under 11 CFR 100.22(a). The Commission further concludes that Free Speech's two "Health Care Crisis" advertisements, the "Gun Control" Facebook advertisement, and the "Ethics" advertisement are not express advocacy under 11 CFR 100.22.

*A. The "Financial Reform" Radio and Newspaper Advertisements*

> President Obama supported the financial bailout of Fannie Mae and Freddie Mac, permitting himself to become a puppet of the banking and bailout industries. What kind of person supports bailouts at the expense of average Americans? Not any kind we would vote for and neither should you. Call President Obama and put his antics to an end.[3]

The "Financial Reform" advertisements, which Free Speech proposes to air on the radio and run in newspapers, contain express advocacy under 11 CFR

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

100.22(a). This conclusion is supported by the Supreme Court's decision in *FEC v. Massachusetts Citizens For Life ("MCFL"),* 479 U.S. 238 (1986), which involved a flyer that included the phrase "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE" and contained an exhortation to "VOTE PRO-LIFE" after identifying candidates who were pro-life. The Court held the flyer was express advocacy. Here, the "Financial Reform" advertisements state that "President Obama supported the financial bailout of Fannie Mae and Freddie Mac," and then ask "What kind of person supports bailouts at the expense of average Americans?" They answer the questions with "[n]ot any kind of person that we would vote for and neither should you." Thus, the advertisements are express advocacy: they identify a candidate (President Obama) with a position on an issue (bailouts) and then state that the viewers should vote against those who take that issue position ("What kind of person supports bailouts . . . ? Not any kind we would vote for and neither should you."). Such a formulation "provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." *MCFL,* 479 U.S. at 249.

Moreover, this conclusion is not altered by the final sentence: "Call President Obama and put his antics to an end." The advertisements contain two different statements directed at the viewer: (1) "Not any kind we would vote for and neither should you;"

and (2) "Call President Obama and put his antics to an end." These are two different statements that make two different points; however, the addition of the statement, "Call President Obama and put his antics to an end," does not negate the fact that the advertisements contain express advocacy under 11 CFR 100.22(a). This is similar to *MCFL,* where the Court held that a "disclaimer" stating "[t]his special election edition does not represent an endorsement of any particular candidate" did not "negate [the] fact" that the flyer contained express advocacy. *MCFL,* 470 U.S. at 249.

### *B. The "Health Care Crisis" Radio and Newspaper Advertisements*

> President Obama supports socialized medicine, but socialized medicine kills millions of people worldwide. Even as Americans disapproved of ObamaCare, he pushed ahead to make socialized medicine a reality. Put an end to the brutality and say no to socialized medicine in the United States.[4]

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

The "Health Care Crisis" advertisements, which Free Speech proposes to air on the radio and run in newspapers, are not express advocacy under 11 CFR 100.22. These advertisements criticize President Obama's health care policy and provide Free Speech's views on the issue ("socialized medicine kills millions of people worldwide"). The advertisements have no electoral references.

*C. The "Gun Control" Facebook Advertisement*

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

The "Gun Control" Facebook advertisement is not express advocacy under 11 CFR 100.22. The advertisement criticizes President Obama's support of gun control and exhorts viewers to "[s]upport Wyoming state candidates." The advertisement has no Federal electoral references.

*D. The "Ethics" Television Advertisement*

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

The "Ethics" television advertisement is not express advocacy under 11 CFR 100.22. The advertisement criticizes President Obama based on statements about his "budget and tax priorities" and his nominees' asserted lack of compliance with their tax obligations. The advertisement exhorts viewers to "[c]all President Obama and tell him you don't approve of his taxing behavior." The advertisement contains no electoral references.

The Commission could not approve a response regarding the following advertisements by the required four affirmative votes:

*E. The "Environmental Policy" Radio Advertisement*

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

*F. The "Environmental Policy" Facebook Advertisement*

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

*G. The Gun Control Television Advertisement*

| Audio: | Video: |
|---|---|
| Guns save lives. | Newspaper clippings with headlines describing self-defense with firearms fade in, piling up one atop another. |
| That's why all Americans should seriously doubt the qualifications of Obama, an ardent supporter of gun control. | Clippings dissolve to a picture of President Obama, and one newspaper headline below him: "President Obama defends attorney general regarding ATF tactics (LA Times, Oct. 6, 2011)" |
| This fall, get enraged, get engaged, and get educated. And support Wyoming state candidates who will protect your gun rights. | Dissolves to a picture of the Wyoming state flag, panning down to the Wyoming Capitol Building. |

*H. The Budget Reform Television Advertisement*

| AUDIO: | Video: |
|---|---|
| Congresswoman Lummis supported the Repeal Amendment, which would have restored fiscal sanity to our federal debt. | Picture of Representative Lummis, superimposed "Tea Party Pushes Amendment to Veto Congress (AOL News, Dec. 1, 2010)" |

| | |
|---|---|
| Congresswoman Lummis is brave in standing against the political elite and deserves your support. Make your voice heard. | Small videos of Representative Lummis fade in, speaking on news programs, meeting with people, etc. |
| Do everything you can to support Congresswoman Lummis this fall and work toward fiscal sanity. | Wyoming flag fades in the background, returning to original picture of Rep. Lummis. |

*I. The Educated Voter Votes on Principle Television Advertisement*

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

| Real voters vote on principle. Remember this nation's principles. | Fades to still shot of the Bill of Rights, superimposed "Remember this nation's principles." |
|---|---|

*Question 2. Will Free Speech's proposed donation requests be solicitations under the Act?*

Two of Free Speech's proposed donation requests – entitled "Strategic Speech" and "Checking Boxes" – will not be solicitations under the Act. The Commission could not approve a response regarding the remaining two proposed donation requests – entitled "War Chest" and "Make Them Listen" – by the required four affirmative votes. *See* 2 U.S.C. 437c(c); 11 CFR 112.4(a).

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

1995) (analyzing communications for purposes of 2 U.S.C. 441d(a)).

### *A. The "Strategic Speech" Donation Request*

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

The donation request clearly indicates how the funds requested will be spent: by "strategically speak[ing] out against the expansion of government-run healthcare and so-called 'clean energy' boondoggles like Solyndra." Although the donation request identifies Senator Tester as supporting these initiatives and as an incumbent Senator up for re-election who has not "gotten the message" that he should retire, it lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Survival Education Fund,* 65 F.3d at 295. Accordingly, this donation request is not a solicitation under the Act. *Survival Education Fund,* 65 F.3d at 294-95.

*B. The "Checking Boxes" Donation Request*

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

The donation request clearly indicates how the funds requested will be spent: "making the message of Free Speech heard" by "inform[ing] real American leadership." Although the request clearly identifies President Obama and refers to the November ballot, it lacks language "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Survival Education Fund,* 65 F.3d at 294-95. Accordingly, this donation request is not a solicitation under the Act.

The Commission could not approve a response regarding the following proposed donation request by the required four affirmative votes:

*C. The "Make Them Listen" Donation Request*

> In 2010, the Tea Party movement ushered in an historic number of liberty-friendly legislators. But President Obama and his pals in

> Congress didn't get the message: Stop the bailouts. No socialized healthcare. End oppressive taxes. But we won't be silenced. Let's win big this fall. Donate to Free Speech today.

*D. The "War Chest" Donation Request*

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

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

The Commission could not approve a response to Question 3 by the required four affirmative votes. *See* 2 U.S.C. 437c(c); 11 CFR 112.4(a).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in

this advisory opinion, then the requestors may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair

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**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

| | |
|---|---|
| FREE SPEECH,<br>Plaintiff-Appellant,<br>v.<br>FEDERAL ELECTION COMMISSION,<br>Defendant-Appellee. | No. 13-8033 |

**ORDER**

(Filed Sep. 30, 2013)

Before **BRISCOE**, Chief Judge, **BRORBY**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

11 CFR 100.22 – Expressly advocating (2 U.S.C. 431(17)).

*Expressly advocating* means any 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, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning 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

**(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.

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