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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH	)	
7765 Aztec Dr.	)	
Cheyenne, WY 82009	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Case No.
	)	
FEDERAL ELECTION COMMISSION	)	
999 E Street NW	)	
Washington, DC 20463	)	
	)	
Defendant.	)	

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Free Speech brings this action for declaratory and injunctive relief, and complains as follows:

INTRODUCTION

1. Free Speech – a Wyoming organization comprised of three Wyoming residents – cannot exercise its First Amendment freedoms due to the Federal Election Commission's ("FEC") maintenance of unconstitutional regulations, policies, and practices. Under the challenged regulations and practices, groups must register and report to the government just to speak out about public issues without clearly defined guidelines and uniform standards. This is hardly new. The FEC has a long history of failing to comply with controlling precedent of the federal courts guarding First Amendment freedoms, leading to the challenge before this Court today.

2. This is a challenge to regulations adopted, interpreted, and enforced by the FEC that abridge Free Speech's First Amendment freedoms. This challenge is brought facially and as applied against 11 C.F.R. §§ 100.22(b). In addition, this suit also challenges the constitutionality of the Commission's interpretation and enforcement process regarding political committee status, solicitation tests, the "major purpose" test, and express advocacy determinations. *See* 2 U.S.C. §§ 431(4), 431(8), 441d; 11 C.F.R. §§ 100.5(a), 100.52(a), 110.11(a)(3); Express Advocacy, Independent Expenditures, Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292 (Jul. 6, 1995); Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056 (Nov. 23, 2004) (hereinafter "Political Committee I"); Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (hereinafter "Political Committee II").

3. The main focus of this challenge is against 11 C.F.R. § 100.22(b) because it acts as a trigger for a panoply of other regulatory burdens against would-be speakers. First, it attempts to define what constitutes express advocacy speech in unclear terms leaving those who guess wrong subject to criminal or civil penalties. Second, when any group's "expenditures" aggregate more than $1,000 in a calendar year, the Commission imposes burdensome political committee registration and reporting requirements. *See* 2 U.S.C. § 431; 11 C.F.R. § 100.5 (defining a political committee). Third, for expenditures deemed "independent expenditures," disclaimers must be included and independent expenditure reports must be filed. *See* 2 U.S.C. § 434; 11 C.F.R. § 104.4.

4. Even the agency charged with the interpretation and enforcement of the Federal Election Campaign Act ("FECA") cannot tell Free Speech how to comply with the regulations and practices in question. On February 29, 2012, Free Speech sought an advisory opinion from the FEC in order to verify that its planned constitutionally protected conduct would be consistent with the law. *See* EXHIBIT A. After more than two months, the FEC could not muster the necessary support among its commissioners to give sensible guidance. Instead, the Commission provided three contradictory draft advisory opinions, two contradictory statements of reasons, and one elusive advisory opinion purporting to interpret the law while avoiding any substantive discussion of it. *See* EXHIBITS B–I.

5. The members of Free Speech have demonstrated a good faith desire to comply with the FEC's regulatory regime. They simply want to know with some degree of certainty what that regime requires so they can follow it. The First Amendment demands nothing less.

6. Free Speech, and its members, suffer irreparable injuries to their First Amendment rights because the regulations, policies, and practices in question prohibit Free Speech from engaging in protected issue advocacy without complying with burdensome registration, reporting and disclaimer requirements reserved for political committees – organizations

who are under the control of a candidate or whose major purpose is to expressly advocate for the election or defeat of federal candidates.

7. Free Speech asks that this court find the challenged regulations, policies, and practices unconstitutionally vague, overbroad, contrary to law and settled precedent, and violative of the First Amendment, both on their face and as applied, and that the FEC be enjoined from enforcing them.

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 as a challenge arising under the First Amendment to the Constitution of the United States, FECA, and the Declaratory Judgment Act, 28 U.S.C. § 2201–02.

9. Venue is proper in this Court under 28 U.S.C. § 1391(e) because Defendant is an entity of the United States Government, a substantial part of the events or omissions giving rise to this claim occurred in the District of Wyoming, and the Plaintiff resides in the District of Wyoming.

PARTIES

10. Free Speech is an unincorporated nonprofit association in Wyoming, registered as a 527 political group with the IRS. Its bylaws require that it operate independently of political candidates, committees, and political parties. *See* EXHIBIT A at Exhibit 1. Free Speech does not coordinate any of its activities with candidates or national, state, district, or local political party committees or their agents as defined in 2 U.S.C. § 441a(a)(7)(B) and (C) and 11 C.F.R. § 109. Free Speech does not coordinate any of its activities with political committees.

11. The FEC is the federal agency charged with enforcement of FECA and is located in Washington, D.C.

STATEMENT OF FACTS

12. Free Speech is standing alone against no ordinary federal agency. The FEC has regularly lost challenges in the federal courts due to its tendency to ignore constitutional liberties in favor of its own authority. *See, e.g.*, *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011) (Commission violated the constitutional liberties of a military and veterans' group); *Carey*, 2012 WL 1853869, *4–*5 (EAJA Memorandum Opinion, May 22, 2012) (violation was so extensive that attorneys' fees were awarded); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (invalidating unconstitutional regulations applied to independent groups); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) (FEC regulations violated First Amendment rights of nonprofit). The Supreme Court and lower courts have frequently chastised the FEC for its tendency to emphasize the expansion of its own power over the First Amendment rights of those it seeks to regulate. *See Citizens United v. FEC*, 130 S.Ct. 876, 896 (2010) (describing the dangers of the FEC and its predisposition to censor); *Carey*, 2012 WL 1853869, *5 ("The FEC ignores the fact that NDPAC should not have had to file this suit at all" and the Commission "should know the current status of election law, especially Supreme Court and Circuit law").

13. Free Speech formed on February 21, 2012. Its bylaws are attached as EXHIBIT A at Exhibit 1. It is an organization comprised of three Wyoming residents formed with a common commitment to limited government, the rule of law, and constitutional accountability. To engage and educate the public, it wishes to pay for advertisements in various media outlets that will bring light to a variety of public issues such as gun rights, land rights, environmental policy, health care, and free speech, including their connection with public servants and candidates for public office. These advertisements would run from the present to November. Free Speech plans to speak about related issues as they arise beyond November as well. *See* EXHIBIT A (Free Speech Advisory Opinion Request) at 2 ("Members of Free Speech plan to save their money to budget for additional advertisements beyond those described herein"). Free Speech also intends to

raise funds to run these additional advertisements in the future well beyond the 2012 electoral cycle.

14. Free Speech is not under the control of any federal candidate, nor does it have as its major purpose the election or defeat of clearly identified candidates for federal office. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Instead, it is a grassroots organization interested in engaging the public about issues of the day, but is prohibited from doing so by the regulations and practices in question.

15. One prohibited issue advocacy communication Free Speech would like to publish is listed as script "B" in the Advisory Opinion Request ("AOR") – "Environmental Policy." It reads: "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." EXHIBIT A at 3. Free Speech plans to spend approximately $1,000 on this communication through approximately 60 radio advertisements from June 25 to November 3, 2012. *See* EXHIBIT M.

16. Another prohibited issue advocacy communication Free Speech would like to publish is listed as script "A" in the AOR – "Gun Control." It reads: "Guns save lives. That's why all Americans should seriously doubt the qualifications of Obama, an ardent supporter of gun control. This fall, get enraged, get engaged, and get educated. And support Wyoming state candidates who will protect your gun rights." EXHIBIT A at 2. A variant of this is included as a Facebook advertisement in Exhibit 2 of the AOR. It reads: "Stand Against Gun Control. Obama supports gun control. Don't trust him. Support Wyoming state candidates who will protect your gun rights." Free Speech plans to spend approximately $700 on this communication through Facebook advertisements in

campaigns from July 6 to August 1, 2012 and October 1 to November 2, 2012. *See* EXHIBIT M.

17. A third prohibited issue advocacy communication Free Speech would like to publish is listed as script "F" in the AOR – "Financial Reform." It reads: "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." EXHIBIT A at 3. Free Speech plans to spend approximately $500 on this communication through newspaper advertisements on June 23 and July 22, 2012. *See* EXHIBIT M.

18. Free Speech is not a political committee under the law and controlling precedent because none of its communications would constitute an "expenditure" or a "solicitation" for "contributions" aggregating more than $1,000 in a calendar year – the respective requirements to impose political committee status on an organization. *See* 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5.

19. Free speech is not a political committee under the law and controlling precedent because even if any of its proposed conduct would trigger the relevant $1,000 statutory trigger, the organization does not meet the constitutionally required major purpose test. Free Speech is not under the control of a candidate and it does not hold as its major purpose the nomination, election, or defeat of any candidate for federal office. *See Buckley*, 424 U.S. at 79 (political committee regulations may only be imposed on organizations "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate"); *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238, 253 (1986).

20. Pursuant to its bylaws, Free Speech will not make any contributions to federal candidates, political parties, or political committees that make contributions to federal candidates or

political parties. EXHIBIT A at Exhibit 1. Its members, officers, employees and agents are prohibited from coordinating activities with any federal candidate or political party. Free Speech will also not make communications expressly advocating the election or defeat of clearly identified federal candidates. *Id.* It does, however, wish to vigorously express its views on public issues, often connected with public servants and candidates for public office, as issue advocacy. Under the present regulatory regime maintained by the Defendant, it cannot.

21. To the extent government may demand speakers "'hedge and trim'" their speech to avoid regulatory sanction, civil fines, or criminal enforcement, individuals must be able to understand clearly demarcated regulatory lines. *Buckley*, 424 U.S. at 42–43 (citing *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). By purposefully aiming to limit itself to issue advocacy communications, Free Speech should be able to easily avoid the cumbersome regulations and requirements of registering with the FEC as a political committee. *See MCFL,* 479 U.S. at 256, 262 (1986) (imposing political committee status would make "engaging in protected speech a severely demanding task" and any government interest in disclosure can be met in a manner "less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act").

22. By speaking out only on issue advocacy communications, Free Speech's activities should not be subject to the burdens imposed on regulable speech deemed express advocacy. But this is not the case. Like the Amazing Kreskin, three commissioners determined that the "true" intent of these three gentlemen from Wyoming is express advocacy for or against federal candidates, respectively. *See* EXHIBIT H (Concurring Opinion of Vice Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther in Advisory Opinion 2012-11 (Free Speech), May 8, 2012 (hereinafter "Free Speech Statement I")). Absent clear guidance in this area, Free Speech is silenced, for it must choose between 1) speaking bluntly about issues under the risk of federal civil or criminal

penalties, 2) tailoring its message, without any guidance, to be "safe" in accord with FEC proper speaking standards, again under risk of prosecution, or 3) being muted due to the burdens attached to registering and reporting as a political committee with the Commission.

23. The simple action of Free Speech asking for support for its issue advocacy might require it to register as a political committee, whether or not Free Speech uses any funds received in response to its fundraising for express advocacy. The same hazy framework used to determine express advocacy is also applied to donation requests or fundraising, and prevents Free Speech from raising money to disseminate its message.

24. Here stand three gentlemen before this Court wishing to discuss the most salient political issues of our day, but they are unable to do so due to the complicated and contradictory regulatory regime imposed by the Commission. *See Citizens United v. FEC*, 130 S.Ct. 876, 889 (2010) (the "First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day").

25. Free Speech is chilled from engaging in any of its constitutionally protected activities because it reasonably fears it would be subject to an investigation with possible enforcement action leading to civil or criminal penalties. *See* 2 U.S.C. § 437g(d) (providing, among other options, for imprisonment of up to one year for knowingly and willfully making or receiving contributions, donations, or expenditures aggregating $2,000 or more during a calendar year in violation of the FECA); *see also* Matter Under Review ("MUR") 5487 (Progress for America Voter Fund), Conciliation Agreement (FEC 2007) (imposing a $750,000 civil penalty by the Commission based on failures to register and report as a political committee); MUR 5634 (Sierra Club, Inc.), Conciliation Agreement (FEC 2006) (imposing a $28,000 civil penalty based on violations of § 100.22(a) or (b) and the then-in-effect corporate expenditure ban at 2 U.S.C. § 441b(a)).

26. Free Speech has a reasonable belief that the FEC could investigate or impose civil or criminal penalties for exercising constitutionally protected conduct due to the FEC defining the terms "express advocacy" and "solicitation" in a vague and overbroad fashion, as well as its vague and contradictory approach to deciding whether a group meets the "major purpose test" before imposing political committee status. 11 C.F.R. § 100.22(b); *see* 60 Fed. Reg. at 35294–35296 (expanding on § 100.22(b)'s definition of express advocacy); Political Committee I, 69 Fed. Reg. at 68056–68059 (expanding on § 100.57's definition of solicitations for contributions); Political Committee II, 72 Fed. Reg. at 5605 (describing numerous factors that play into major purpose and political committee determination).

27. The Commission has levied fines amounting to hundreds of thousands of dollars for failure to report as a political committee, with one former commissioner stating that "the Commission takes these kinds of cases very seriously, and . . . when an organization fails to file as a political committee, it carries serious legal consequences." "FEC Collects $630,000 in Civil Penalties from Three 527 Organizations," Federal Election Comm'n, Dec. 13, 2006, http://fec.gov/press/press2006/20061213murs.html. Free Speech is further chilled by the Department of Justice's declaration that "[t]he investigation and prosecution of knowing and willful violations of [FECA] are priorities of this Department. Please be assured that we intend to vigorously pursue instances where individuals or organizations knowingly and intentionally violate the clear commands of this important statute." EXHIBIT J (Letter from John C. Keeney, Deputy Assistant Attorney General, Department of Justice, to Fred Wertheimer, President, Democracy 21, June 26, 2008). That the FEC considers § 100.22(b) a "clear command," and could refer these matters to the Department of Justice, provides a chill leaving Free Speech on thin ice.

The Advisory Opinion Request

28. On February 29, 2012, Free Speech submitted an advisory opinion request ("AOR"), attached as EXHIBIT A, to the FEC pursuant to 2 U.S.C. § 437f. The AOR asked if any of eleven proposed advertisements for radio, television, newspaper, and the Internet website Facebook constituted "express advocacy" pursuant to § 100.22(a) or (b), thus meeting the definition of "expenditure" under 11 C.F.R. § 100.11. Second, the AOR asked if any of Free Speech's proposed donation requests constituted "solicitations" for "contributions". Finally, the request asked whether these actions would trigger the major purpose test and classify Free Speech as a political committee pursuant to 11 C.F.R. § 100.5 and require it to register and report with the FEC.

29. Pursuant to 11 C.F.R. § 112.1, the FEC accepted the AOR for review, assigned it AOR number 2012-11, and posted it on the FEC's website for public comment on or about March 9, 2012.

30. On April 11, 2012, the FEC's general counsel issued a draft advisory opinion in response to Free Speech's AOR. The draft advisory opinion, Draft A (FEC Agenda Document No. 12-24, attached as EXHIBIT B), concluded that none of Free Speech's proposed advertisements constituted express advocacy and none of its donation requests constituted solicitations for contributions, leaving Free Speech free to run its advertisements without registering and reporting as a political committee. Draft A recognized the significant constitutional infirmities raised by the FEC's problematic regulations, policies, and practices, and incorporated several recognized speech-protective precedents in its analysis. *See, e.g.*, EXHIBIT B at 38 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations") (citing *Citizens United*, 130 S. Ct. at 897).

31. An alternate draft, Draft B (FEC Agenda Document No. 12-24-A, attached as EXHIBIT C), was also issued on April 11, 2012 and concluded that seven of Free Speech's eleven

proposed advertisements constituted express advocacy and would thus be expenditures, two of Free Speech's proposed donation requests constituted "solicitations" for "contributions", and that Free Speech's activities would require it to register and report as a political committee. Draft B also analyzed Free Speech's activities and concluded that Free Speech's major purpose was federal campaign activity based on a loose variety of factors.

32. On April 12, 2012, at an open meeting of the FEC, the Commission considered both draft advisory opinions A and B but declined to vote on either draft. A transcription of this portion of the meeting is attached as EXHIBIT K.

33. On April 26, 2012, the FEC issued yet another draft advisory opinion, Draft C (FEC Agenda Document No. 12-24-B, attached as EXHIBIT D), which concluded that one of Free Speech's proposed advertisements constituted express advocacy and none of its donation requests constituted "solicitations" of "contributions," leaving Free Speech otherwise free to run its advertisements and donation requests without registering and reporting as a political committee.

34. On April 26, 2012, at an open meeting of the FEC, the Commission failed by a vote of 3-3 to approve Draft B. The Commission also failed by a vote of 3-3 to approve Draft C. The Commission did not consider Draft A for a vote. A transcription of this meeting is attached as EXHIBIT L, and certification of the vote taken is attached as EXHIBIT E.

35. On May 8, 2012, the FEC approved a "partial response" advisory opinion (attached as EXHIBIT G; approval attached as EXHIBIT F). This "partial response" advisory opinion did not solve any of the resounding contradictions between earlier Drafts A, B, and C, and left the underlying questions of what constitutes political committee status, express advocacy, major purpose, and the definition of a solicitation unanswered. In addition, FEC Vice Chair Weintraub and Commissioners Walther and Bauerly issued a "Concurring Opinion," and Chair Hunter and Commissioners McGahn and Petersen

issued a Statement of Reasons (attached as EXHIBITS H and I, respectively). One set of commissioners would have imposed the full range of registration and reporting requirements on these three gentlemen while the other found constitutional infirmities in doing so.

36. The Weintraub, Walther, and Bauerly opinion explained that Section 100.22(b) has been applied frequently by the Commission and is "in effect." *See* EXHIBIT H at 2. It does not purport to explain how these commissioners would have found seven of the proposed eleven advertisements to be express advocacy other than to repeat key phrases found in Section 100.22(b) itself. In addition, when pressed to explain glaring inconsistencies in the FEC's practices and its draft advisory opinions, Vice Chair Weintraub explained she got "tired of it" and elected not to answer every question posed by her colleague. *See* EXHIBIT K (Transcript of FEC Open Meeting (relating to Free Speech), April 12, 2012) at 21. Accordingly, Free Speech was left with an incomplete and "partial response," even by Vice Chair Weintraub's and Commissioners Walther and Bauerly's own admission. *See* EXHIBIT H (Free Speech Statement I) at 1.

37. The FEC's final advisory opinion concluded that "two of Free Speech's 11 proposed advertisements would expressly advocate the election or defeat of a clearly identified [f]ederal candidate; four of the proposed advertisements would not expressly advocate the election or defeat of a clearly identified [f]ederal candidate; and two of the four proposed donation requests would not be solicitations under the Act." EXHIBIT G at 1. This then leaves the five remaining advertisements and two donation requests unanswered by the Commission, and this final advisory opinion lacks any clear guidance about what constitutes express advocacy, a solicitation, the major purpose test, or political committee status under applicable regulations.

38. Pursuant to 11 C.F.R. § 112.4(a), the FEC certified on April 27, 2012 that it was unable to approve Draft B or Draft C issued by the deadlocked segments of the Commission

because it lacked the necessary four votes to approve either. *See* EXHIBIT E. It did certify the limited compromise draft on May 8, 2012. *See* EXHIBIT F. The FEC's failure to affirmatively provide a four-vote, binding advisory opinion with definitive answers to Free Speech's request carries significant constitutional concerns. In short, its immediate effect is to mute Free Speech, lest it face civil or criminal penalties under risk of violating 2 U.S.C. § 437g.

39. The Commission's refusal to issue a conclusive advisory opinion deprives Free Speech of a legal reliance defense that it could otherwise receive under 2 U.S.C. § 437f(c). The advisory opinion process in this matter is complete and deprived Plaintiff of a legal right—to engage freely in constitutionally protected speech and association.

Ensuing Harm to Plaintiffs

40. Free Speech is a small group with limited means. It requested an advisory opinion because it could not determine if it could speak without having to expend time and money complying with FEC registration, reporting and disclaimer requirements—costs that would diminish or completely consume funds reserved for political speech. The harms imposed by political committee status regulations have been recognized as a matter of law. *See MCFL*, 479 U.S. at 256, 262 (imposing political committee status would make "engaging in protected speech a severely demanding task" and any government interest in disclosure can be met in a manner "less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act"); *see also Citizens United,* 130 S.Ct. at 897 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations").

41. Free Speech filed its AOR with a request for expedited review on February 29, 2012. *See* 11 C.F.R. § 112.4(b); Advisory Opinion Procedure, 72 Fed. Reg. 32160 (Jul. 7, 2009). It took more than two months for the Commission to tell Free Speech that it could not provide an answer to the basic questions it posed. Because of this, Free Speech had to

silence itself. It remains muted due to the effect of these challenged regulations and practices.

42. Between February 29 and April 14, Wyoming's Democratic Presidential Primary season came and went, leaving Free Speech muted during a time period when most citizens are interested in political issues.

43. Because the FEC failed to issue an advisory opinion answering the fundamental questions posed, Free Speech is, as three FEC commissioners noted, "in legal limbo." EXHIBIT I (Statement on Advisory Opinion 2012-11 (Free Speech), Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, May 9, 2012) at 3. Because no objective line has been drawn between express advocacy and issue advocacy and because Free Speech cannot comply with the burdensome registration and reporting requirements thrust upon political committees, its message remains censored until its First Amendment rights have been restored.

44. Were Free Speech forced to register and report with the federal government, its planned speech and association become increasingly difficult, if not impossible. Under applicable FEC regulations for political committees, it will have to appoint a treasurer, record and detail every contribution it receives over $50 with the donor's address, and photocopy or digitally image every check it receives over $50. 11 C.F.R. §§ 102.7(a) and (b), 102.8, 102.9(4)(a), 103.3. The treasurer will have to keep receipts for all disbursements over $200, and keep all of these records for three years. 11 C.F.R. § 102.9. "These regulations are more than minor clerical requirements. Rather, they create major disincentives for speech, with the effect falling most heavily on smaller entities that often have the most difficulty bearing the costs of compliance." *McConnell v. FEC*, 540 U.S. 93, 332 (2003) (Kennedy, J., dissenting); *see also Citizens United*, 130 S.Ct. at 897 (Kennedy, J.) ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations").

45. To engage in fundraising, if Free Speech's proposed donation requests are deemed "solicitations," then careful compliance with the FEC's required disclaimers and authorizations must be included for each communication. 11 C.F.R. §§ 100.26, 110.11(a)(3), 110.11(b)(3).

46. In addition to rigorous internal procedures, if forced to be a political committee Free Speech will have to comply with significant reporting requirements. It will have to report cash on hand, 11 C.F.R. § 104.3(a)(1), as well as its receipts detailed in nine different categories, 11 C.F.R. § 104.3(a)(2), including dividends, interest or other receipts over $200. 11 C.F.R. § 104.3(a)(4)(vi). Furthermore, it will have to report disbursements detailed in ten different categories, 11 C.F.R. § 104.3(b)(1), including the name and address of each person to whom an "operating expenditure" is made over $200, 11 C.F.R. § 104.3(b)(3)(i), along with a host of other regulatory requirements. *See generally* 11 C.F.R. § 104. All this just to "talk about ranching." *See* EXHIBIT A (Free Speech AOR) at 3, 17.

47. Beyond political committee registration and reporting demands, if Free Speech's underlying advertisements are deemed "express advocacy," then a host of reporting requirements are also triggered, further complicating and burdening its ability to get its message out. Up to 20 days before an election, a political committee must report all independent expenditures aggregating less than $10,000 with its regular reports. 11 C.F.R. § 104.4(b). Following this $10,000 threshold, additional $10,000 aggregates require reporting within 48 hours. 11 C.F.R. § 104.4(b). Within 20 days before an election, independent expenditures that aggregate to $1,000 or more must be reported within 24 hours. 11 C.F.R. § 104.4(c). Even if the speech in question were regulable, the Commission itself is not sure whether the scripts constitute express advocacy or electioneering communications, each subject to wholly different reporting regimes. *See* EXHIBIT K (Transcript of FEC Open Meeting (relating to Free Speech), April 12, 2012) at 9 ("Commissioner McGahn: . . . . As a practical matter, if you're a political committee

and you do an electioneering communication first, you don't have to file Form 9, Electioneering Communication Reports. Those are only for non political committees. So if you file Form 9, that means, I guess you're not a political committee, but then you are a political committee so you didn't have to file that form. It just doesn't make any sense").

48. The members of Free Speech do not believe that they have sufficient resources and knowledge, and cannot meaningfully exercise their First Amendment rights, if forced to comply with the complicated registration and reporting regime at issue, including appointing a treasurer, the numerous reports that require disclosure of contributions in nine categories and expenditures in ten categories, as well as detailed independent expenditure reports. Having no alternatives but to either file suit or register and report as a political committee when it is not, the vague and overbroad reach of the challenged provisions and practices has effectively chilled Free Speech, already silencing it from speaking this spring.

Ongoing Harm to Plaintiffs

49. The 2012 election cycle already proves tumultuous. The longer Free Speech waits for clear guidance about its speech, the less effective its message, and the more injury it suffers. As soon as possible, Free Speech would like to engage in the issue advocacy communications it detailed in its AOR. Free Speech would like to pay for advertisements from its general fund to publicly discuss policy issues, legislation, President Obama, and other topics. *See* EXHIBIT A at 2–4.

50. An example of a prohibited issue advocacy communication is listed as script "B" in the AOR – "Environmental Policy." It reads: "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." EXHIBIT A at 3. This is but one example of relevant and locally popular messages Free Speech believes are important to discuss both now and in the future.

51. During the advisory opinion process, the Department of Labor attempted to implement controversial rules that would have prohibited farm and ranch children from performing common chores. *See* "US Labor Department proposes updates to child labor regulations," U.S. Dep't of Labor, Aug. 31, 2011, http://www.dol.gov/opa/media/press/whd/WHD20111250.htm. However, Free Speech was prohibited from being able to "talk about ranching" due to the FEC's cumbersome advisory opinion process. This proposed rule has now been withdrawn, and Free Speech has forever lost its opportunity to speak out about that issue in connection with public servants and candidates for public office during the time of its relevancy. *See* "Labor Department statement on withdrawal of proposed rule dealing with children who work in agricultural vocations," U.S. Dep't of Labor, Apr. 26, 2012, http://www.dol.gov/opa/media/press/whd/WHD20120826.htm. Free Speech would still like to speak out about ranching and the Obama Administration now and in the future as detailed in the AOR and herein but cannot due to the unconstitutional regulations and practices challenged by Plaintiff.[1]

52. In its AOR, Free Speech included detailed information about its immediate speech plans for 2012. *See* EXHIBIT A at 2–4, Exhibits 2–3. Without a ruling enjoining the

[1] Similarly, the FEC has muted other organizations during the pendency of advisory opinion processes and related litigation. In its most recent loss on constitutional grounds, *Carey v. FEC*, the Commission thwarted a veterans and military group from speaking out about Representative Weiner. 791 F.Supp.2d 121 (D. D.C. 2011). During the pendency of that litigation, the infamous "Weinergate" scandal came to light, during which the organization was completely muted from speaking about Representative Weiner due to the FEC's antics. *See* Martin Gould, "Weiner Admits He Lied, But Won't Resign," Newsmax, June 6, 2011, http://www.newsmax.com/InsideCover/Weiner-scandal-Breitbart-explicit/2011/06/06/id/399019. Here, the FEC continues this tired practice.

challenged provisions and the FEC's practices, its First Amendment rights will be forever lost in 2012.

53. Free Speech would like to tailor future messages to issues as they arise during and beyond the 2012 electoral cycle. To avoid the vague and overbroad sweep of § 100.22(b), Free Speech must at minimum submit AORs for each new message to obtain prior Commission "permission." Without a clear standard and practice in place, this hinders—and may prevent entirely—Free Speech from effectively discussing pertinent political issues.

54. While the FEC has adopted a "flexible" approach to determining express advocacy, political committee status, and the major purpose test, this "flexibility" comes with a significant price. These flexible, *ad hoc* policies may permit the FEC to regulate more speech, but it results in practices and policies even the Commission cannot articulate or apply consistently. These practices and policies have muted, do mute, and will mute Free Speech from exercising its protected First Amendment freedoms. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) (speech permit program facially unconstitutional because "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression").

55. As soon as possible, Free Speech would like to solicit donations to support its issue advocacy. It plans to distribute its fundraising requests by e-mail, pamphlet, or other inexpensive means. Without an immediate ruling from this court, Free Speech will not have the necessary time to fundraise and generate support for its message from likeminded individuals. Whether or not it is a political committee, Free Speech must include disclaimers with "solicitations" for "contributions," and does not know which

donation requests might meet this description. *See* 11 C.F.R. §§ 100.26, 110.11(a)(3), 110.11(b)(3).

56. Free Speech would like to draft future fundraising requests beyond the 2012 electoral cycle but can find no objective standard indicating which communications constitute "solicitations" leading to "contributions" and which do not. 11 C.F.R. § 100.5(a), Political Committee Status I, 69 Fed. Reg. at 68056–68059. Without clarity in this area, Free Speech's ability to raise support and funds for its messaging is entirely halted.

57. Already, under the threat of registering and reporting, Free Speech has been forced to seriously limit its efforts. If it desires to speak now, it must keep track of its current finances *as if* it were a political committee, for if it must register and report, its first report "shall also include all amounts *received* prior to becoming a political committee . . . even if such amounts were not received during the current reporting period." 11 C.F.R. § 104.3(a) (emphasis added). Its first report "shall also include all amounts *disbursed* prior to becoming a political committee . . . even if such amounts were not disbursed during the current reporting period." 11 C.F.R. § 104.3(b) (emphasis added). Without knowing whether one is a political committee, or how one becomes a political committee, one must already act as if one were a political committee whether one can afford to do so or not.

Free Speech's Structure and Operations

58. Free Speech is an unincorporated nonprofit association formed pursuant to the Wyoming Uniform Nonprofit Association Act. Wyo. Stat. Ann. §§ 17-22-101 to 115. It has registered as a "political organization" under 26 U.S.C. § 527 with the Internal Revenue Service.

59. Free Speech wishes to spend more than $1,000 on communications discussing salient issues of the day in connection with public servants and candidates for federal office.

The exact communications it proposed to disseminate are described in Exhibits 2 and 3 to the AOR (EXHIBIT A), along with information concerning timing and budget costs. Because the initial publication times for the advertisements (beginning April 1, 2012) have long since passed due to the FEC's cumbersome advisory opinion process, Free Speech has modified its communication plans. *See* EXHIBIT M.

60. Free Speech would like to disseminate the "Environmental Policy" scripts through radio with a total proposed cost of $1,000, the "Gun Control" script on Facebook with a total proposed cost of $700, as well as the "Financial Reform" script by newspaper and print with a total proposed cost of $500. The allocation of costs for this campaign and dates of each type of advertisement is included as EXHIBIT M. If allowed, these advertisements would run at different times: radio ads between June 25 and November 3, 2012; newsprint ads on June 23 and July 22, 2012; Facebook ads between July 6 to August 1 and October 1 to November 2, 2012. Free Speech is unable to run these ads given the unconstitutional nature of the challenged regulations and the incoherent application of them by the FEC.

61. Free Speech would like to make use of all of its proposed donation request scripts detailed in the AOR but cannot given the FEC's unconstitutionally incoherent application of the various regulations and rulings that determine whether requests for donations constitute "solicitations" for "contributions." It would like to do so precisely so that it may run additional issue advocacy advertisements in the future on similar issues.

62. Free Speech does not, and will not, engage in any speech that is "express advocacy" as defined by the Supreme Court in *Buckley*, 424 U.S. at 44. That is, express advocacy consists of "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id*. In contrast, "[i]ssue advocacy conveys information and educates." *WRTL*, 551 U.S. at 470. Unlike express advocacy, or certain other forms of speech, the government possesses no legitimate

interest in its regulation. *Id.* at 452 ("Issue ads . . . are not equivalent to contributions, and the corruption interest cannot justify regulating them").

63. Free Speech faces a credible threat of prosecution were it to engage in the activity described herein without registering as a political committee, complying with political committee requirements, providing legally sufficient disclaimers and disclosures on solicitations and communications and otherwise conforming its activities to restrictions set forth in the FECA and the FEC's regulations, and reporting its communications.

CAUSE OF ACTION 1
Claim of Unconstitutionality of 11 C.F.R. § 100.22(b) – "Expressly Advocating"

64. Plaintiff realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

65. On its face and as applied, § 100.22(b) is unconstitutional because it triggers a host of regulatory burdens based on vague and overbroad standards in conflict with the First Amendment. Plaintiff also challenges the policies and practices adopted in the FEC's Explanation and Justification for Final Rules on Express Advocacy, 60 Fed. Reg. 35291 (July 6, 1995), as the Commission relies on this document to shape the reach and interpretation of § 100.22(b). In earlier challenges, other courts have declared 11 C.F.R. § 100.22(b) constitutionally infirm. *See Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D. Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Duchess Co., Inc. v. FEC*, 6 F.Supp. 2d 248 (S.D.N.Y. 1998). This Court should do the same.

66. Despite these glaring constitutional infirmities, the FEC has indicated that it was "able to apply the alternative test set forth in 11 CFR 100.22(b) free of constitutional doubt based on *McConnell's* statement that a 'magic words' test was not constitutionally required . . . ." Political Committee Status II, 72 Fed. Reg. at 5604. In the present matter, three commissioners indicated that § 100.22(b) remained "in effect". *See* EXHIBIT H at 2.

This is true even though both *McConnell* and *Wisconsin Right to Life* indicated that a finding of express advocacy requires the presence of these "magic words." *See McConnell*, 540 U.S. at 193; *WRTL*, 551 U.S. at 474 n.7.

67. Regulations imposing registration and reporting requirements for independent expenditures, defined in 2 U.S.C. § 434 and codified in 2 C.F.R. § 104, are unconstitutional unless the expenditures are for express advocacy communications. *See Buckley*, 424 at 44 n.52 ("communications containing express words of advocacy of election or defeat"); *MCFL,* 479 U.S. at 249. Section 100.22(b) does not limit itself to express advocacy communications and is constitutionally invalid and exceeds the FEC's statutorily limited authority under the FECA as a result.

68. On its face, § 100.22(b) goes beyond any proper construction of express advocacy and offers no clear guidelines for speakers to tailor their constitutionally protected conduct and speech, subjecting them to criminal and civil penalties just for exercising protected First Amendment freedoms. If government officials are allowed to pore over proposed communications to decide whether an unknown "external event," or an "electoral portion," or the undefined "proximity to the election," in the view of "reasonable minds," triggers regulation and civil and criminal penalties, would-be speakers are chilled by the very existence of this vague regulation.

69. On its face, § 100.22(b) goes beyond any proper construction of express advocacy by failing 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." *Buckley*, 424 U.S. at 44. As a result, it is unconstitutionally overbroad. In accord with the regulation's own language, speech may be regulated or penalized because issue advocacy is deemed to be too "electoral" or an "external event" transforms it into express advocacy. Thus, robust issue advocacy communications are suppressed by the threat of the application of § 100.22(b), rendering it constitutionally infirm.

70. As applied, § 100.22(b) is unconstitutionally vague because the Commission maintains a practice of applying a variety of *ad hoc*, case-by-case factors in each enforcement matter, advisory opinion, and consideration of the regulation in question. The Commission never makes public what factors it will consider, what (maximum) weights will be applied to these factors, or how the actual weights will be determined, and cannot do so because the Commission changes these things from case to case. *See, e.g.*, Matter Under Review ("MUR") 6073 (Patriot Majority 527s), First General Counsel's Report ("FGCR") at 9 (FEC 2009) (the meaning of "expenditure" and express advocacy is found through a "distillation . . . through the enforcement process"); MUR 5831 (Softer Voices), FGCR at 10 (FEC 2008) (reasoning that communications which cast candidates in a "positive light" constitute express advocacy"); MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 4 (FEC 2009) (communications may become express advocacy if the Commission finds an indeterminable "electoral nexus"); MUR 5988 (American Future Fund), Statement of Reasons of Chairman Steven T. Walther and Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 12 (FEC 2009) (focusing too sharply on the "qualifications, accomplishments, and fitness for office" of a candidate may transform speech into express advocacy); MUR 5440 (The Media Fund), Transcript of Probable Cause Hearing at 42–43 (FEC 2007) (speech that discusses a candidate in "strong terms" may be express advocacy"); MUR 5634 (Sierra Club), FGCR at 11 (FEC 2005) (determination of express advocacy is dependent upon the "reasonable mind" of the audience); MURs 6051 and 6052 (Wal-Mart Stores, Inc.), FGCR at 10 (FEC 2009) (examining a host of factors "on balance" to decide if speech constitutes express advocacy). The Commission's practice stands in stark defiance of already settled principles of First Amendment jurisprudence protecting against vague speech practices and censorship and must be stricken. *See WRTL*, 551 U.S. at 469 (First Amendment standards must "eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a

virtually inevitable appeal'") (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock. Co.*, 513 U.S. 527, 547 (1995)).

71. As applied, § 100.22(b) is unconstitutionally overbroad because the Commission regularly applies it to cover protected issue advocacy communications in defiance of the First Amendment. *See, e.g.,* MUR 5988 (American Future Fund), Statement of Reasons of Commissioners Weintraub, Bauerly, and Walther; MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn (providing an exhaustive list of FEC matters illustrating the overreach of § 100.22(b)). The *Buckley* Court narrowed the term "expenditure" due to both vagueness and overbreadth concerns. In order to avoid overbreadth, the Court employed a bright-line rule, limiting regulation only to those communications that used terms of express advocacy. 424 U.S. at 83–84. In this way, the Court protected against sweeping in more protected speech than was necessary to prevent corruption. Here, the FEC ignores this judicial wisdom and applies its regulations in defiance of these bright line rules, causing its regulation and practices to suffer from overbreadth.

72. In this instance, the Commission's set of *three* draft advisory opinions, *two* statements of reasons, and *one* advisory opinion, almost all contradicting one another, plus the initiating Plaintiff's advisory opinion request, illustrate the inherent vagueness and overbreadth of the challenged regulation and practices when applied to Free Speech's proposed conduct. Even the nation's premiere expert in election law itself does not understand or agree upon the basic reach of express advocacy, causing the suppression of First Amendment liberties nationwide. These challenged regulations and practices must necessarily be stricken and injunctive relief awarded, along with other remedies, as a result.

CAUSE OF ACTION 2
Claim of Unconstitutionality – Prior Restraint

73. Plaintiff re-alleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

74. Like the provisions at issue in *Citizens United*, § 100.22(b) and the challenged practices here act as the functional equivalent of a prior restraint. "As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak." *Citizens United*, 130 S.Ct. at 895. "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. This is an unprecedented governmental intervention into the realm of speech." *Id.* at 896. In this instance, the evils worked by the FEC's maintenance of the challenged regulations, policies, and practices far exceed those found in *Citizens United*, giving rise to the relief requested.

75. Section 100.22(b) and the challenged regulations, policies, and practices are the foundation for the arbitrary actions of the FEC, allowing it to classify some speech as express advocacy, with heavy regulations and compliance requirements, and other, comparable speech as issue advocacy, with little to no regulation. But this line is never known or understood in advance. Since the regulation itself provides no clear parameters and the FEC's history of enforcement and interpretation only expands the reach of § 100.22(b), Free Speech is prevented from speaking about political issues. Free Speech's only recourse is to plead with the Commission for permission to speak out about the issues it cares about through the advisory opinion process, and to do so each time it wishes to communicate a new message.

76. Even, in the current case, when a would-be speaker (Free Speech) has exhausted the FEC's tiresome advisory opinion process in a good faith effort to comply with the law, the FEC has failed to provide answers to its most basic legal questions, nor answer whether Free Speech must comply with the regulation and practices in question. This is not a novel occurrence. In the past, the Commission has deadlocked when asked about basic definitions of the regulations it maintains, chilling speech all along the way. *See Citizens United*, 2009 WL 1261928, *28–*31 (Brief of *Amici Curiae*, The Wyoming Liberty Group and Goldwater Institute Scharf-Norton Center for Constitutional Litigation in Support of Appellant). These practices leave Free Speech muted and illustrates that the FEC's regulatory process operates as a prior restraint.

77. "When the FEC issues advisory opinions that prohibit speech, '[m]any persons, 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*, 130 S.Ct. at 896 (citing *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). Plaintiff has taken the rare stance of standing in opposition to the FEC's system of prior restraint and seeks to have the challenged regulation and practices declared constitutionally infirm, along with other remedies imposed.

CAUSE OF ACTION 3
Claim of Unconstitutionality - The "Solicitation" Standard

78. Plaintiff re-alleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

79. Plaintiff cannot realistically raise funds or seek donations due to the cumbersome application of the FEC's vague solicitation standards. This inhibits it from associating with likeminded individuals and speaking out to raise awareness of issues deemed important to its members while raising financial support.

80. Before it was declared constitutionally invalid in *EMILY's List*, 581 F.3d at 17–18, the FEC maintained 11 C.F.R. § 100.57 to define when funds received in response to fundraising or donation requests would be deemed "contributions" under the law. 11 C.F.R. § 105(a); s*ee also* Political Committee I, 69 Fed. Reg. at 68056–59; Political Committee II, 72 Fed. Reg. at 5602–03. The Commission announced that § 100.57 "will not be enforced." "FEC Statement on the D.C. Circuit Court of Appeals Decision in EMILY's List v. Federal Election Commission", Federal Election Comm'n, Jan. 12, 2010, http://www.fec.gov/press/press2010/20100112EmilyList.shtml. The Commission subsequently approved the repeal of § 100.57. 75 Fed. Reg. 13223. It still leaves unanswered, however, when funds received in response to fundraising requests constitute "contributions" under the law and when fundraising requests are deemed "solicitations."

81. The FECA requires that 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" include a disclaimer. 2 U.S.C. 441d(a); *see also* 11 C.F.R. § 110.11(a)(3).

82. In accord with *FEC v. Survival Education Fund (SEF)*, 65 F.3d 285, 295 (2d Cir. 1995), the Second Circuit held that a fundraising or donation request may fall within the reach of the FECA and constitute a solicitation "if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office."

83. In *Buckley*, the Supreme Court narrowed the term "contribution" to mean only: (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; (3) donations given to other persons or organizations but "earmarked for political purposes." *Buckley*, 424 U.S. at 24 n.78.

84. The *SEF* Court sought to avoid the "hazards of uncertainty" regarding the vague phrase "political purposes" and limited its meaning to encompass only donations "that will be converted to expenditures subject to regulation under FECA." 65 F.3d at 295. "Expenditures subject to regulation under FECA" are those properly cabined by the *Buckley* Court's express advocacy limitation. In addition, like the operative burden-shifting that occurred in *Citizens United*, giving "the benefit of doubt to protecting rather than stifling speech," 130 S.Ct. at 891 (*citing WRTL*, 551 U.S. at 469), the *SEF* Court required that a fundraising communication must "leave[] no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year." *SEF*, 65 F.3d at 295. This approach articulates a clear standard to those who would fundraise in being able to draft communications properly either as "solicitations" or outside of the reach of the FECA and unencumbered.

85. During the Free Speech advisory opinion process, one set of commissioners explained that the full reach of what constitutes a "solicitation" can be found only by toiling through lengthy conciliation agreements and General Counsel Reports issued by the FEC in enforcement matters. *See* EXHIBIT C (AO 2012-11 Draft B) at 17–18, n.6. This same set of commissioners explained that even though *EMILY's List* struck § 100.57 as unconstitutional, "nothing in the opinion undermined the general premise that a solicitation that indicates that donated funds will be used to support or oppose the election of a clearly identified candidate results in 'contributions.'" *Id.* Long live § 100.57.

86. Another set of commissioners reasoned in a draft advisory opinion that the *SEF* Court meant what it stated and required clear indications that contributions would be "targeted to the election or defeat of a clearly identified candidate for federal office." EXHIBIT D (AO 2012-11 Draft C) at 38–39 (*citing SEF*, 65 F.3d at 295). This leads to a conclusion

that none of Plaintiff's proposed donation requests would constitute "solicitations" under the law.

87. The nation's premiere expert on election law does not itself agree about what constitutes a solicitation, inhibiting Free Speech from associating with likeminded individuals, speaking, and seeking financial support. As a result, these practices and policies must be stricken and injunctive, and other remedial relief, awarded.

CAUSE OF ACTION 4
Claim of Unconstitutionality - "Major Purpose" and "Political Committee Status" Tests

88. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

89. A "political committee" is defined as any "committee, club, association, or other group of persons that receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A).

90. The Supreme Court limited the reach of political committee status by recognizing that the FECA applied "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 540 U.S. at 80. It also limited the FECA to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" (known as the "major purpose" test). *Id.* at 79; *see also Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007) (invalidating Colorado's expansive major purpose test and imposing *Buckley*'s bright line, constitutionally-mandated major purpose test).

91. Whether or not an organization must register and report as a "political committee" is dependent upon the FEC's analysis of its major purpose. The FEC's interpretation and

enforcement policy concerning "political committee status" can be found in 69 Fed. Reg. 68056 and 72 Fed. Reg. 5595. In these documents, the Commission explains that it maintains no objective rule for determining when "political committee" status is triggered, and regulation required, but instead "requires the flexibility of a case-by-case analysis of an organization's conduct." Political Committee II, 72 Fed. Reg. at 5601. Going further, these guidelines provide that there must a "fact intensive inquiry" to allow "investigations into the conduct of specific organizations that may reach well beyond publicly available statements" and this includes "spending on [f]ederal campaign activity." *Id.*

92. The FEC openly admits that the "major purpose" it examines is "[f]ederal campaign activity," not the "nomination or election of a candidate" as required by *Buckley* to be the major purpose. *See* Political Committee II, 72 Fed. Reg. at 5605, *cf. Buckley*, 424 U.S. at 79. The relevant rulemakings concerning political committee status also indicate that major purpose can be determined from, among other things: thank you letters to donors, geographic targeting of speech, whether communications were "attacking" candidates, and the relative timing of the cessation of a group's activities. Political Committee II, 72 Fed. Reg. at 5604–05.

93. The FEC's supplemental Explanation and Justification from 2007 describes its enforcement policy for the major purpose test to hinge on 11 C.F.R. §§ 100.22(b) and the now-defunct 100.57. Political Committee II, 72 Fed. Reg. at 5602–05. Section 100.57 has subsequently been declared invalid in *EMILY's List v. FEC*, 581 F.3d 1, 25 (D.C. Cir. 2009), but § 100.57 appears to live on through its reference and incorporation via the supplemental Explanation and Justification for the regulation, as well as some commissioners' continued invocation of § 100.57: "*Emily's List* invalidated 100.57 for reasons wholly unrelated to the regulation's articulation of when a solicitation results in [f]ederal contributions. Our draft's application of this premise is consistent with the

Commission's longstanding approach to this issue." EXHIBIT H (Free Speech Statement I) at 2–3.

94. The major purpose test as fashioned by *Buckley* provides that an organization's major purpose may be determined in one of two ways. 424 U.S. at 79. First, an entity's independent expenditures may become so extensive as to classify it as a political committee. *See MCFL*, 479 U.S. at 262. Second, an organization's founding documents may reveal its major purpose. *See id.* at 252 n.6 (in accord with the record submitted to the Court, MCFL's "central organizational purpose is issue advocacy"). The first test requires an analysis of the organization's annual spending on express advocacy communications in comparison to its overall spending. The second test requires an analysis of the foundational documents of an organization to discern whether there is an intent to be organized as a political committee. The *Buckley* and *MCFL* major purpose test acts as a constitutional restraint against imposing political committee burdens when they would be otherwise unwarranted. Because the FEC expands the major purpose test, and does so with no clarity, its political committee and major purpose practices must be stricken.

95. The nation's premiere expert in election law does not itself understand or agree upon the proper scope of what constitutes a political committee or the major purpose test. Half of the commissioners would have imposed political committee status on Free Speech through application of an open-ended and distorted major purpose analysis imposing severe burdens on Free Speech, *see* EXHIBIT H, and half the commissioners would have followed instructions from *Buckley*, *MCFL*, and other courts in applying constitutionally limited standards. *See* EXHIBIT I. This leaves Plaintiff, as three commissioners noted, in "legal limbo," EXHIBIT I at 3, and without any sense of when its constitutionally protected conduct might trigger an investigation or criminal or civil penalties by the FEC due to violations of these unknown and undefined political committee and major purpose standards.

96. Because there is no adequate remedy at law, this Court should grant injunctive and declaratory relief, as well as other appropriate remedies, against the FEC for its unconstitutional policies regarding the interpretation and application of political committee status and its improper interpretation and application of the major purpose test to the injury and detriment of Free Speech.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for the following relief:

1. A declaratory judgment that the definition of "express advocacy," established by the FEC at 11 C.F.R. § 100.22(b), as well as its related enforcement policies and practices, are unconstitutional on their face and as applied and beyond the reach of the FECA;

2. A declaratory judgment that the FEC's political committee status enforcement policies, including the major purpose test and the definition of solicitation, are unconstitutional on their face and as applied and beyond the reach of the FECA;

3. Preliminary and permanent injunctions enjoining defendant FEC from enforcing § 100.22(b) and related enforcement policies and practices, and the FEC's political committee status enforcement policies, including the major purpose test and the definition of solicitation, as well as any applicable rules and regulations regarding those provisions, against Free Speech;

4. An award of nominal damages of $1 for the violation of Plaintiffs' constitutional rights;

5. Costs and attorneys' fees pursuant to any applicable statute or authority, including 5 U.S.C. § 504 and 28 U.S.C. § 2412;

6. Any other relief that the Court deems just and appropriate.

Dated this 14th of June, 2012.

BRINKMANN / FREE SPEECH VERIFICATION

I, Robert T. Brinkmann, declare as follows:

1. I am a member of Free Speech and a member of its Board of Directors.
2. I have personal knowledge of Free Speech and its activities, including those set out in this Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements contained in this Verified Complaint concerning Free Speech and its existing and proposed activities are true and correct.

Executed on 13 June, 2012.

Robert T. Brinkmann

WATFORD VERIFICATION

I, Max Douglas Watford, Jr., declare as follows:

1. I am a member of Free Speech and a member of its Board of Directors.

2. I have personal knowledge of Free Speech and its activities, including those set out in this Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.

3. I verify under penalty of perjury under the laws of the United States of America that the factual statements contained in this Verified Complaint concerning Free Speech and its existing and proposed activities are true and correct.

Executed on June 13, 2012.

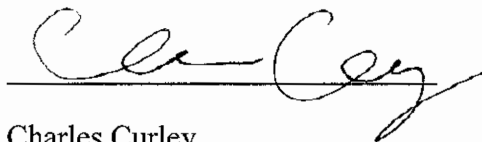
Max Douglas Watford, Jr.

CURLEY VERIFICATION

I, Charles Curley, declare as follows:

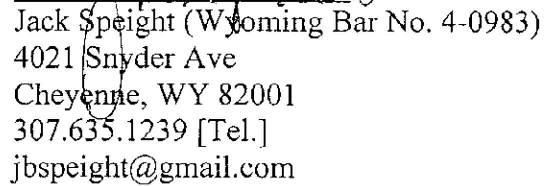
1. I am a member of Free Speech and a member of its Board of Directors.
2. I have personal knowledge of Free Speech and its activities, including those set out in this Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements contained in this Verified Complaint concerning Free Speech and its existing and proposed activities are true and correct.

Executed on 11 June, 2012.



Charles Curley

Respectfully submitted,



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**Motions for pro hac vice admission to be filed.*

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2012, I served upon the below listed persons copies of this document by certified mail:

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Washington, DC 20463

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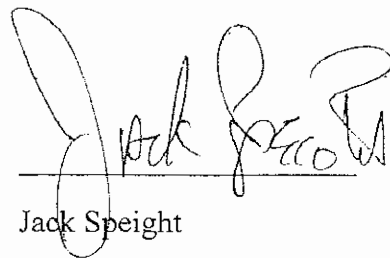

Jack Speight