August 6, 2012

By Electronic Mail

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

Re: Comments on Advisory Opinion Request 2012-27 (National Defense Committee)

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2012-27, a request submitted by National Defense Committee ("NDC"), a section 501(c)(4) organization, asking whether it is required "to register and report as a 'political committee' and whether its speech might be deemed 'express advocacy.'" AOR 2012-27 at 1. Specifically, NDC asks:

1. "Will any of National Defense's proposed speech constitute 'express advocacy' and be subject to regulation?" *Id.* at 5.
2. "Will the Commission continue to apply and enforce 11 C.F.R. § 100.22(b)?" *Id.* at 6.
3. "Will any of National Defense's donation communications be deemed 'solicitations' and subject to regulation?" *Id.*
4. "Will any of the activities described trigger the requirement to register and be regulated as a 'political committee'?" *Id.*

As explained below, the Commission should advise NDC that the Commission will continue to apply and enforce section 100.22(b), that several of NDC's proposed ads constitute express advocacy, that several of NDC's proposed donation communications would constitute solicitations of contributions, and that the Commission lacks sufficient information to determine whether NDC's future activities will render it a political committee.

I. Several of NDC's proposed ads constitute express advocacy.

NDC seeks the Commission's opinion as to whether any of its seven proposed ad scripts constitute express advocacy. Commission regulation defines "expressly advocating" to include any communication that:

(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," . . . "vote Pro-Life'" or "vote Pro-Choice'" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, . . . "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), . . . ; 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.

11 C.F.R. § 100.22.

Under this test, NDC's proposed scripts "A," "B," "C," "D" and "E" all contain express advocacy.

The script for ad "A," entitled "Let's Make History," states: "Nydia Velazquez has been one of the least effective member of Congress. This fall, let's make history by changing that." This statement could only be interpreted by a reasonable person as containing advocacy of the defeat of Congresswoman Nydia Velazquez and is, therefore, express advocacy under section 100.22(b).

The script for ad "B," entitled "Ethically Challenged," states: "Nydia Velazquez. Ethically challenged. A key supporter of the Troubled Asset Relief Program. Calls bailed-out Wall Street greedy one day, but takes hundreds of thousands from it the next. A leader you can believe in? Call Nydia Velazquez and let's make sure we end the bailouts that bankrupt America." This statement criticizes a candidate as "ethically challenged" and questions whether she can be "believe[d] in." This ad could only be interpreted by a reasonable person as containing advocacy of the defeat of Congresswoman Nydia Velazquez and is, therefore, express advocacy under section 100.22(b).

The script for ad "C," entitled "ObamaCare," reads:

"Nancy Pelosi and ObamaCare, what a pair! Even though most Americans opposed ObamaCare, Pelosi maintained her support of socialized medicine. But we can't let ObamaCare win. Our proud patriotic voices must stand against ObamaCare and vote socialized medicine out. Support conservative voices and public servants ready to end ObamaCare's reign."

The ad identifies Congresswoman Nancy Pelosi and President Obama, criticizes their support of ObamaCare, which the ad describes as "socialized medicine," urges the listener to "vote" against

socialized medicine and to "[s]upport conservative . . . public servants ready to end ObamaCare's reign." This ad's use of "vote . . . out," combined with clearly identified candidates and their policy positions criticized in the ad constitutes express advocacy under section 100.22(a). The express advocacy in this ad is materially indistinguishable from the example "'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice" provided in section 100.22(a).

The script for ad "D," entitled "Military Voting Matters," states: "Nancy Pelosi is such a disappointment for service men and women. Instead of supporting express delivery of overseas military ballots, Pelosi favored sluggish postal unions. Shouldn't military voices and votes matter? . . . Be heard this fall." This ad characterizes Congresswoman Nancy Pelosi as a "disappointment for service men and women," references "military voices and votes" and urges the listener to "be heard this fall." This ad could only be interpreted by a reasonable person as containing advocacy of the defeat of Congresswoman Pelosi and is, therefore, express advocacy under section 100.22(b).

The script for ad "E," entitled "Military Voting Hindered," reads:

> Our heroes on the front lines know that Obama's assault on America's military is putting their lives, the care of wounded warriors, and the GI and Veterans' benefits they were promised at risk. Is that why Obama's Justice Department and Congressional liberals refuse to stand up for military voting rights? Shouldn't those who dodge bullets for our freedom be free to vote their conscience and vote out those who won't keep their promises? Take a stand with us and make sure military voting is taken seriously.

The ad identifies President Obama, criticizes President Obama's "assault on America's military," alleges that President Obama and "Congressional liberals refuse to stand up for military voting rights" asserts that military personnel should "be free to vote their conscience and vote out those who won't keep their promises" and urges listeners to "take a stand." This ad could only be interpreted by a reasonable person as containing advocacy of the defeat of President Obama and is, therefore, express advocacy under section 100.22(b).

II. Section 100.22(b) is clearly constitutional and must be applied and enforced by the Commission.

NDC asks "whether the Commission will apply and enforce 11 C.F.R. § 100.22(b) against any speech by National Defense." AOR 2012-27 at 6. NDC notes that "[p]rior to *Citizens United*, several federal courts invalidated 11 C.F.R. § 100.22(b)," describes the recent Fourth Circuit decision in *The Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*RTAA*"), upholding section 100.22(b) against constitutional challenge as an "outlying opinion," and fails to mention altogether the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), in which the Court defined the "functional equivalent of express advocacy" using a legal standard nearly identical to section 100.22(b). AOR 2012-27 at 6.

Indeed, the Fourth Circuit in *RTAA* explicitly overturned its earlier decision in *Va. Soc'y.*

for Human Life v. FEC, 263 F.3d 379 (4th Cir.2001), which NDC cites as authority for its argument that section 100.22(b) is unconstitutional. The Court explained:

> In 2001, we held that § 100.22(b) was unconstitutional because it "shift[ed] the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation." *Va. Soc'y. for Human Life, Inc. v. Fed. Election Comm'n*. But this conclusion can no longer stand, in light of *McConnell* and . . . *Wisconsin Right to Life*.

RTAA, 681 F.3d at n.2 (citations omitted).

In *RTAA*, the Fourth Circuit explained in detail how the Supreme Court's decisions in *WRTL* and *Citizens United* make clear that section 100.22(b) is constitutional.

> [In *WRTL*], the Chief Justice's controlling opinion further elaborated on the meaning of *McConnell*'s "functional equivalent" test. The Chief Justice held that where an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," it could be regulated in the same manner as express advocacy. [*WRTL*, 551 U.S. at 470]. The Chief Justice explicitly rejected the argument, raised by Justice Scalia's concurring opinion, that the only permissible test for express advocacy is a magic words test[.]
>
> . . . .
>
> Contrary to Real Truth's assertions, *Citizens United* also supports the Commission's use of a functional equivalent test in defining "express advocacy." In the course of striking down FECA's spending prohibitions on certain corporate election expenditures, the *Citizens United* majority first considered whether those regulations applied to the communications at issue in the case. Using *Wisconsin Right to Life*'s "functional equivalent" test, the Court concluded that one advertisement—Hillary: The Movie—qualified as the functional equivalent of express advocacy because it was "in essence ... a feature-length negative advertisement that urges viewers to vote against Senator [Hillary] Clinton for President." . . .
>
> In addition to its overbreadth argument, Real Truth argues that even if express advocacy is not limited to communications using *Buckley*'s magic words, § 100.22(b) is nonetheless unconstitutionally vague. Here again, however, Real Truth's arguments run counter to an established Supreme Court precedent. The language of § 100.22(b) is consistent with the test for the "functional equivalent of express advocacy" that was adopted in *Wisconsin Right to Life*, a test that the controlling opinion specifically stated was not "impermissibly vague." Moreover, just as the "functional equivalent" test is objective, so too is the similar test contained in § 100.22(b).
>
> Both standards are also restrictive, in that they limit the application of the

> disclosure requirements solely to those communications that, in the estimation of any reasonable person, would constitute advocacy. Although it is true that the language of § 100.22(b) does not exactly mirror the functional equivalent definition in *Wisconsin Right to Life—e.g.*, § 100.22(b) uses the word "suggestive" while *Wisconsin Right to Life* used the word "susceptible"—the differences between the two tests are not meaningful.

RTAA, 681 F.3d at 551-52 (citations omitted) (footnote omitted).

Notwithstanding the pre-*WRTL* decisions cited by NDC, the Supreme Court's decisions in *WRTL* and *Citizens United*, together with the Fourth Circuit's decision in *RTAA*, make clear that section 100.22(b) is constitutional and must be applied and enforced by the Commission.

III. Several of NDC's donation communications constitute "solicitations" and funds received in response to those solicitations will be "contributions."

NDC "seeks guidance as to whether its proposed communications would be deemed 'solicitations' under the Commission's regulations and practices" such that the funds received are "contributions" that may trigger political committee status. AOR 2012-27 at 6. As the Commission explained recently in advisory opinion 2012-11 (Free Speech): "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." AO 2012-11 at 9 (citing *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995))

NDC includes in its AOR four "proposed donation requests." Requests "A," "B" and "D" all clearly indicate that the funds received in response to the requests will be targeted to the defeat of President Obama and are therefore "solicitations" under FECA. Funds received by NDC in response to these solicitations will be "contributions" under FECA.

Request "A," entitled "Military Voices and Votes Must be Heard," clearly indicates that funds received will be targeted to the defeat of President Obama by "stand[ing] up for military voting rights this fall" and helping military members "vote out Obama." This request for funds is a "solicitation" and funds received by NDC in response to it will be "contributions" under FECA.

Request "B," entitled "America the Proud?," clearly indicates that funds received will be targeted to the defeat of President Obama by "roll[ing] back the Commander in Chief's liberal agenda" after referencing the Commander in Chief's efforts to "win this fall." This request for funds is a "solicitation" and funds received by NDC in response to it will be "contributions" under FECA.

Request "D," entitled "Fighting Back," clearly indicates that funds received will targeted to the defeat of President Obama by using the funds to "beat back the liberal Obama agenda and bring about real change in Washington" after indicating that "[s]upporters of traditional constitutional values have . . . planned how to make the most effective use of your support this

fall." This request for funds is a "solicitation" and funds received by NDC in response to it will be "contributions" under FECA.

IV. If NDC makes expenditures exceeding $1,000 or receives contributions exceeding $1,000, and has the "major purpose" of influencing federal elections, it will be a "political committee" under FECA.

NDC asks whether any of its described activities will "trigger the requirement to register and be regulated as a 'political committee'?" AOR 2012-27 at 7. FECA defines "political committee" as any "committee, club, association, or other group of persons" that makes more than $1,000 in expenditures or receives more than $1,000 in contributions during a calendar year. 2 U.S.C. § 431(4)(a). The Supreme Court in *Buckley* limited the application of FECA's "political committee" definition to organizations controlled by a candidate or whose "major purpose" is the nomination or election of candidates. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

The Commission has explained its case-by-case approach to determining an organization's political committee status in a 2007 Supplemental Explanation and Justification regarding "political committee status"—an approach recently upheld against constitutional challenge in *RTAA*, 681 F.3d at 555-58. *See* Supplemental Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007).

> [D]etermining political committee status under FECA, as modified by the Supreme Court, requires an analysis of both an organization's specific conduct—whether it received $1,000 in contributions or made $1,000 in expenditures—as well as its overall conduct—whether its major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).

Id. at 5597. The Commission has explained its application of the "major purpose" doctrine as follows:

> The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity. . . .
>
> An analysis of public statements can also be instructive in determining an organization's purpose. . . .
>
> Because such statements may not be inherently conclusive, the Commission must evaluate the statements of the organization in a fact-intensive inquiry giving due weight to the form and nature of the statements, as well as the speaker's position within the organization.
>
> The Federal courts' interpretation of the constitutionally mandated major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements. . . . The Commission may need to examine statements by the

> organization that characterize its activities and purposes. The Commission may also need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization. In addition, the Commission may need to examine the organization's fundraising appeals.
>
> Because *Buckley* and *MCFL* make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns, any rule must permit the Commission the flexibility to apply the doctrine to a particular organization's conduct.

Id. at 5601-02 (emphasis added).

In *RTAA*, the Fourth Circuit upheld the constitutionality of the Commission's "major purpose" test against a challenge that the test was impermissibly vague and overbroad. 681 F.3d at 555-58. The Court said of this test:

> At bottom, we conclude that the 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. Accordingly, we find the policy constitutional.

Id. at 558

Given that application of the "major purpose" doctrine requires examination of an organization's conduct, combined with existing uncertainty regarding NDC's conduct, it is impossible at this time, based on the information provided in AOR 2012-27, to determine whether NDC's activities will trigger political committee status.

NDC's proposed ads "A," "B," "C," "D" and "E" contain express advocacy. If NDC spends in excess of $1,000 to produce and distribute these ads, it will have met the $1,000 expenditure threshold for political committee status.

NDC's proposed requests for funds "A," "B" and "D" are solicitations and funds received in response to these solicitations will be contributions under FECA. If NDC receives contributions in excess of $1,000, it will have met $1,000 contribution threshold for political committee status.

NDC states that does not have "as its major purpose the election or defeat of clearly identified candidates," AOR 2012-27 at 1, yet it proceeds to list among its planned activities the making of disbursements for several ad scripts containing express advocacy and donation requests that constitute solicitations. If NDC has as its major purpose dissemination of its proposed express advocacy ads, solicitation of contributions or any other federal election-influencing activities, then it will have met the "major purpose" threshold for political committee status. This determination will depend in part on what other activities, if any, NDC will engage in, and whether the election-influencing activities discussed above will predominate over NDC's

non-election-influencing activities. Since NDC has not presented the Commission with a full picture of its activities as a whole, it is impossible for the Commission to make a determination as to NDC's major purpose. Of course, if NDC's activities are to encompass only or primarily those activities discussed in NDC's advisory opinion request, then clearly NDC would meet the major purpose test. But NDC cannot present the Commission with incomplete information and then reasonably expect the Commission to make a determination based on that incomplete information.

The Commission should advise NDC that it is unable to determine at this time, based on the information presented in NDC's request, whether NDC will receive sufficient contributions, make sufficient expenditures, or engage in sufficient federal election-related activities to establish its major purpose as influencing federal elections, so as to trigger federal political committee status.

We appreciate the opportunity to submit these comments.

Sincerely,

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