

BEFORE THE FEDERAL ELECTION COMMISSION

In re:)
Notification of Availability of a Petition) Notice 2018-16
for Rulemaking, Definition of Contribution)
(Federal Register, December 3, 2018))

**FREE SPEECH COALITION, INC.,
FREE SPEECH DEFENSE AND EDUCATION FUND, INC.,
60 PLUS ASSOCIATION, CONSERVATIVE LEGAL DEFENSE AND EDUCATION
FUND, DOWNSIZEDC.ORG, FORTHRIGHT STRATEGY, GUN OWNERS OF
AMERICA, THE NATIONAL RIGHT TO WORK COMMITTEE, PUBLIC
ADVOCATE OF THE UNITED STATES, THE SENIOR CITIZENS LEAGUE, AND
THE UNITED STATES CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND, INC.
STATEMENT ON THE PETITION FOR RULEMAKING ON
DEFINITION OF CONTRIBUTION (83 Fed. Reg. 62282)
(March 4, 2019)**

The **Free Speech Coalition, Inc.** (“FSC”), founded in 1993, and tax-exempt under section 501(c)(4) of the Internal Revenue Code (“IRC”), is a nonpartisan group of diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs. FSC’s purpose is to help protect the First Amendment rights of those organizations through the reduction or elimination of excessive federal, state, and local regulatory burdens which have been placed on the exercise of those rights.

The Free Speech Defense and Education Fund, Inc. (“FSDEF”), established in 1996, is the education and litigation sister organization of FSC. FSDEF is tax-exempt under IRC section 501(c)(3). It seeks to protect human and civil rights secured by law, study and research such rights, and educate its members, the public, and government officials concerning such rights by various means, including publishing papers, conducting educational programs, and supporting public interest litigation.

60 Plus Association, Conservative Legal Defense and Education Fund, DownsizeDC.org, Gun Owners of America, The National Right to Work Committee, Public Advocate of the United States, The Senior Citizens League, and The United States Constitutional Rights Legal Defense Fund, Inc., are nonprofit organizations that are concerned about their First Amendment rights. ForthRight Strategy assists nonprofits organizations.

INTRODUCTION

On August 27, 2018, the Federal Election Commission (“FEC”) received a “Petition for Rulemaking to Revise 11 C.F.R. § 100.52” from the Institute for Free Speech to amend the regulatory definition of “contribution.” Thereafter, the FEC published the Notification of

Availability in the Federal Register, which was published on December 3, 2018. *See* 83 *Fed. Reg.* 62282. The Notification of Availability set a deadline for public comments of February 1, 2019.

ARGUMENT

I. The FEC Regulation’s Definition of “Contribution” Should Be Amended to Properly Inform the Regulated Community of Its Scope.

The IFS Petition for Rulemaking asks the Commission to amend its regulatory definition of “contribution” in 11 C.F.R. § 100.52(a) to incorporate the limiting interpretative construction that the courts have applied to save the Federal Election Campaign Act (“FECA”) from being unconstitutionally vague. FECA defined “contribution” in the context of the critical phrase “for the purpose of ... influencing” a federal election. *Buckley v. Valeo*, 424 U.S. 1 (1976), narrowly construed that phrase to apply to donations, when made to organizations which are not political committees, only if such donations are “earmarked for political purposes.” *Id.* at 78. *See* Petition at 3.

Because *Buckley* did not explain its term “political purposes,” the Petition relies on a Second Circuit opinion which expounded a constitutionally permissible reading of “for the purposes of ... influencing...” *Id.* at 4. As the Petition explains, contributions to organizations which are not political committees are only for the purpose of influencing an election if they are “earmarked for activities or ‘communications that expressly advocate the election or defeat of a clearly identified candidate.’” *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995).

FSC and FSDEF agree with the IFS’s conclusion that the FECA definition of “contribution” when “applied to donations to groups other than political committees” extends only to “donations given for the express purpose of being use specifically for express advocacy, or in response to express and unambiguous solicitations for that purpose.” Petition at 5.

One of the purposes of administrative regulations is to interpret, clarify, and provide clear, practical guidance on the application of statutes. If the Commission’s regulations continue only to track a statute that “poses constitutional problems,” then it actually does public harm by chilling speech.¹ Thus, the Petition should be granted in order to amend the regulatory definition of “contribution” to avoid the vague and overinclusive problems that were identified in *Buckley* and *Survival Educ. Fund*.

¹ *Buckley* at 77.

Lastly, IFS's Petition was inspired by the August 3, 2018 decision of the U.S. District Court for the D.C. District in *CREW v. FEC* striking down a portion of the Commission's regulations relating to the reporting of donors to advocacy organizations that engage in independent expenditures. Although an appeal of that decision is pending, it might not be decided until relatively late in the 2020 election cycle, making it all the more important that Commission initiate and complete a rulemaking on this issue.

II. The Definition of "Expenditure" Likewise Should Be Amended.

IFS's Petition was inspired by the recent district court decision in *CREW v. FEC*, explaining the type of "contributions" requiring to be included in independent expenditure reporting. However, many of the same reasons advanced by IFS support the Commission using this occasion to clarify the regulatory definition of "expenditure" in 11 C.F.R. § 100.111(a). In *Buckley*, the Supreme Court pointed out that the language of "for the purpose of influencing" was present in the statutory definitions for both "contribution" and "expenditure."

Moreover, in *Buckley*, the Supreme Court also imposed a saving construction on the definition of "expenditure," to include only "communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley* at 80. However, the basic definition of "expenditure" in § 100.111(a) covers "anything of value, made by any person for **the purpose of influencing** any election for Federal office." (Emphasis added.) The FEC should use this rulemaking to consider amending its definition to recognize that a disbursement is a FECA "expenditure" only if is made specifically for express advocacy purposes.

CONCLUSION

For the reasons set out above, the Petition for Rulemaking of the Institute for Free Speech should be granted, and the Commission should initiate a rulemaking to improve the definitions of both "contribution" and "expenditure."

Respectfully submitted,

/s/

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