



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0135

Commission Meeting 03/31/2021
Agenda Item # 2

To: Commission
From: Commission Staff
Date: March 25, 2021
Re: Polling in State Senate Races

This memo reports back to you with information and analysis concerning a complaint filed with the Commission in September 2020 by the Lincoln County Democratic Committee concerning telephone calls made to voters in State Senate District 13. The person(s) making the calls stated that they were conducting a survey by or on behalf of “public opinion research.” The Lincoln County Democratic Committee characterized the calls as a “push poll” that “explicitly aim[ed] to influence voters with biased opinion and misinformation.” Most of the calls apparently were made during or around September 8-10, which were the three days directly after Labor Day. Some residents of District 13 were contacted on their cell phones by a text message containing a link to an online poll on SurveyMonkey.com, which asked the same questions.

At its September 30, 2020 meeting, the Commission directed its staff to conduct an investigation. Subsequently, representatives of the Senate Republican caucus responded to the Commission staff by explaining that the calls were part of polling activities undertaken for the purpose of deciding how to allocate limited campaign funds among several State Senate districts and to test the effectiveness of campaign messages in each district. They contend that their poll complied with the Election Law because it was covered by an exception for telephone surveys. The calls were paid for by the Maine Senate Republican Majority PAC and the Maine Prosperity Alliance PAC (referred to below as the “Respondents” or the “Respondent PACs”), and arranged through a political consulting firm, Red Maverick Media, that produces independent expenditure communications for the Senate Republican caucus.

On November 25, 2020, the Respondent PACs provided the Commission staff with the telephone scripts for the telephone calls and written polling results prepared by the telephone services subcontractor that directly made the calls. After considering these

documents, the Commission staff asked the Respondents to reply to the complaint by the Lincoln County Democratic Committee. On January 26, 2021, the Commission received a cover letter from Respondents' counsel and a seven-page factual memo from the Maine Senate Republican Majority PAC. The Commission staff was planning on presenting this item to you at the February 24, 2021 meeting. The matter was postponed until your March 31, 2021 meeting due to scheduling conflicts for the Respondents' counsel.

The Commission staff concludes that the telephone calls were not covered by the push poll disclosure statute, because the telephone services subcontractor collected survey results and Red Maverick Media provided those results to the Respondent PACs.

The Respondents argue that they were not required to include a "paid for" disclosure statement in the calls or file an independent expenditure report for the survey because of an exception in the Election Law for "[t]elephone surveys that meet generally accepted standards for polling research and that are not conducted for the purpose of influencing the voting position of call recipients." The Commission staff is persuaded that the purpose of the telephone calls was to survey public opinion, based on evidence that is summarized on pages 9-12 of this memo (number of persons called in each district, date of calls, questions asked, *etc.*). Based on published articles concerning polling standards, we have offered below our own analysis as to whether the telephone calls meet generally accepted standards for polling, although we are not experts ourselves.

The Commission staff's overall recommendation is to take no further action on the complaint, because the Legislature intended to exempt telephone surveys from the "paid for" disclosure requirement and independent expenditure reporting requirement. Nevertheless, we acknowledge there is certainly room to debate whether the poll meets "generally accepted standards for polling research." Please let us know at the March 31, 2021 meeting if you would like the staff to gather additional factual information as part of the investigation or obtain a polling expert. (Our attempts to obtain an expert opinion through a national association of polling organizations were not successful.)

LEGAL REQUIREMENTS

Special Disclosure Requirements for Push Polls

Maine Election Law contains a push poll disclosure statute (21-A M.R.S. § 1014-B(1)). Under this statute, a “push poll” is defined to mean a paid telephone survey that meets the following five criteria:

1. A list or directory is used, exclusively or in part, to select respondents belonging to a particular subset or combination of subsets of the population, based on demographic or political characteristics such as race, sex, age, ethnicity, party affiliation or like characteristics;
2. The survey fails to make demographic inquiries on factors such as age, household income or status as a likely voter sufficient to allow for the tabulation of results based on a relevant subset of the population consistent with standard polling industry practices;
3. The pollster or polling organization does not collect or tabulate survey results;
4. The survey prefaces a question regarding support for a candidate on the basis of an untrue statement; and
5. The survey is primarily for the purpose of suppressing or changing the voting position of the call recipient.

Information to be included in the calls. A push poll must identify the person(s) *sponsoring* the call by stating “this is a paid political advertisement by [name].” Id. The push poll must also identify the organization *making* the call by stating “This call is conducted by [name].” Id. If the persons sponsoring the call are not registered with the Commission (*e.g.*, as a PAC or party committee), the calls must include a telephone number and address for the sponsor. Id. If the organization is affiliated with a candidate, then the candidate’s name and office sought must be disclosed. Id. Each call, if it qualifies as an independent expenditure, is subject to those requirements as well. Id.

Registration of a designated agent. Persons conducting push polling in Maine must continuously maintain an individual or corporation in Maine to be a designated agent. Id. The person must file a registration statement with the Commission. Id.

“Paid for” disclaimer statement required for telephone calls made after Labor Day

Title 21-A, section 1014 lays out the requirements for when a paid communication to voters must identify who paid for the communication. The section contains a number of subsections that apply to different types of communications in different time periods.

Under 21-A M.R.S. § 1014(5), prerecorded and scripted live telephone calls naming a clearly identified candidate that are made *from Labor Day to the general election* must clearly state the name and address of the person who financed the expenditure for the communication and whether the communication was authorized by a candidate.¹ Section 1014(5) exempts telephone surveys that meet generally accepted standards for polling research and that are not conducted for the purpose of influencing the voting position of call recipients. 21-A M.R.S. § 1014(5); Id.

Disclaimer statement requirement for publicly accessible websites

Title 21-A, sections 1014(1) - (2-A) require a similar disclosure statement for other paid advocacy communications concerning candidates, such as broadcasting stations, newspapers, campaign signs, or “publicly accessible sites on the Internet.” Prior to Labor Day, the disclosure requirement applies only if the communication the communication expressly advocates for or against a candidate. From Labor Day to the general election, Whenever a person makes an expenditure to finance a communication that names or depicts a clearly identified candidate that is disseminated from Labor Day to the general election, the communication must state the name and address of the person who made or financed the communication and a statement whether the communication was or was not authorized by a candidate. 21-A M.R.S. § 1014(2-A). This requirement covers websites on the internet and potentially text messages. Id.

Independent Expenditure Reporting

Any communication that expressly advocates for or against a clearly identified candidate made without cooperation, coordination, or in consultation with a candidate or candidate’s committee is an independent expenditure. 21-A M.R.S. § 1019-B. A person who makes an independent expenditure in excess of \$250 during any one candidate’s election shall file a report within two calendar days of making the expenditure if the

¹ If the calls had been made a few days earlier, this subsection would not have applied.

expenditure is made less than 60 days before an election and more than two weeks before an election. 94-270 C.M.R. Ch. 1, § 10(3). Communications that depict a clearly identified candidate that are disseminated from Labor Day to the general election shall be presumed to be made to influence the nomination, election or defeat of a candidate. Id.

FACTUAL INFORMATION

Explanation by the Respondents

The Respondent PACs have responded that the calls were made as part of a telephone survey to gauge the strength of different Senate Republican nominees, to help the caucus decide how to direct limited resources, and to test potential messages for independent expenditure communications. In order to reach 200 voters in each district, the contacts were made by a combination of live callers, automated calls, and text messages. If a respondent completed the survey on Surveymonkey.com, the respondent was included in the survey results.

According to financial reports on file with the Commission, on September 16, 2020, the Maine Senate Republican Majority PAC paid Red Maverick Media \$50,750 for polling. On September 17, 2020, the Maine Prosperity Alliance paid Red Maverick Media \$2,500 for polling. The PACs reported these expenditures for polling in two campaign finance reports that were available to the public on October 5, 2020. The Maine Prosperity Alliance paid for the polling in Senate District 13 (the race between the incumbent, Senate Republican Leader Dana Dow, and the former State Rep. Chloe Maxmin). We believe the Senate 13 polling was paid for by a separate PAC because Dana Dow is a principal officer of the Maine Senate Republican Majority PAC, and the PAC wanted to avoid any appearance of making an in-kind contribution to Sen. Dow.

Red Maverick Media LLC is political consulting firm that was co-founded by Mike Leavitt who has worked on national political campaigns and formerly served as the executive director of the Maine Republican Party. The Senate Republican Caucus also hired Red Maverick Media for digital advertising and direct advocacy robocalls that were reported by the PAC as independent expenditures.

It appears that the telephone polling was directly administered by a subcontractor, Victory Phones, LLC of Grand Rapids, Michigan, that describes itself as a leader in automated telephony services and data compilation (victoryphones.com). Victory Phones prepared the polling results provided to the Respondents.

Polling Scripts

Polling was conducted in 14 State Senate districts.² Two hundred respondents were telephoned in each district, through a combination of cell phones and landlines. It appears that calling began on Tuesday, September 8, 2020 (the day after Labor Day) and continued for two more days through Thursday, September 10, in most cases.

The Respondents provided the Commission with draft scripts for nine of those districts. As you can see, each script follows a common pattern. Each respondent was asked three demographic questions:

- gender,
- age range, and
- political party affiliation,

Each respondent was asked two questions about anticipated voting:

- how likely was the respondent to vote in the general election?
- if the election were today, would the respondent vote for the Republican or Democratic nominee (both nominees were identified by name).

Each respondent was asked to identify which of six policy issues was most important to them (economy, COVID, healthcare, education, immigration, foreign affairs).

In the nine districts for which we have scripts, respondents were asked two additional questions:

² The 14 State Senate districts polled were 2, 7, 11, 12, 13, 14, 15, 16, 20, 23, 29, 30, 31, and 34.

- Would the respondent be more or less likely to vote for the Republican nominee based on a positive message concerning the nominee? (e.g., “Trey Stewart has reached across the aisle to get results for the county and is consistently considered one of the more effective representatives in Augusta”)
- Would the respondent be more or less likely to vote for the Democratic nominee based on a negative message concerning the nominee?³

The polling results indicate that the questions containing positive and negative messages about candidates were not asked in five districts: 12, 15, 20, 23, and 31.

In its complaint, the Lincoln County Democratic Committee contends that the purpose of these positive and negative messages was to influence the respondents who received the calls through misinformation. The Respondents reply that they were testing positive and negative messages about candidates for possible use in future independent expenditure communications to voters. They do not specify the mediums, but independent expenditure communications by PACs and party committees are often made through digital ads, mailings, print ads, broadcast ads, robocalls, etc.

In summary, unless a respondent terminated the calls midway, each respondent was either asked eight questions (Districts 2, 7, 11, 13, 14, 16, 29, 30 or 34) or asked six questions (Districts 12, 15, 20, 23, 31). All questions were multiple choice.

Email Correspondence.

The Respondents provided email correspondence between Shawn Roderick and Heather Priest of the Respondent PACs and Red Maverick Media. On September 2, 2020, Connor Smith of Red Maverick conveyed the draft scripts for the nine districts and confirmed that they intended to talk the next day. Two days later, Mr. Smith checked in to see if Shawn Roderick wanted to provide edits to the scripts. On September 4, 2020, Mr. Roderick proposed some adjustments to the positive/negative messages. Red Maverick responded by email confirming that calls would begin on September 8.

³ These nine State Senate districts are 2, 7, 11, 13, 14, 16, 29, 30, and 34.

Polling Results (including Cross Tabulations)

The Respondents provided polling results for all 14 districts, in two different formats. The Respondents are requesting that the Commission keep the results confidential under the Commission’s investigations statute because, if disclosed, the information would reveal sensitive political or campaign information belonging to the PACs. This statute is designed to facilitate the Commission’s investigation of whether legal violations occurred. We have conveyed these polling results to you in your meeting packet in a separate envelope marked confidential.

The polling results were provided in a two or three-page memo for each district. The memo lists the questions asked. Under heading for the question, the memo sets out the percentage of respondents who provided each answer, for example:

Republican	30%
Democrat	39%
Independent	31%
Certain to Vote	91%
Very Likely	8%
Somewhat Likely	1%

The polling results include some demographic information concerning the respondents that was presumably obtained from another data source provided the (municipality, history of voting in general elections, and type of phone utilized for the call).

The PACs also received lengthier cross-tabulated results. These show the portions of respondents who answered two questions in different combinations. For example, in Senate District 31, the cross tabs show the percentage of respondents who characterized themselves as independents who had decided to vote for Craig Pendleton, vote for Donna Bailey, or were undecided.

STAFF ANALYSIS AND RECOMMENDATION

In this memo, the Commission staff provides our analysis based on our review of the polling information received to date. The Commission staff's expertise does not include public opinion research or conducting telephone influence campaigns. Anecdotally, we have learned over time that PACs and party committees regularly engage in polling to research the opinion of voters and develop strategy about pitching candidates and ballot questions to voters. Depending on their informational objectives and budget, sometimes they test positive messages about their candidate or ballot question, or a negative message about the opposition. We understand the objections to negative campaigning, but it is speech that is protected by the First Amendment of the U.S. Constitution.

Below we offer our own observations as election administrators who have no personal knowledge of technical polling procedures. We are relying on the specific information we have received to date concerning the September 8-10 calls and some published descriptions of polling industry standards. If you believe further expert opinion would assist you, we can explore this for a next phase of the investigation.

I. EVIDENCE SUPPORTING RESPONDENTS' CONTENTION THAT THE POLLING WAS TO RESEARCH OPINIONS OF VOTERS

The Commission has received some evidence suggesting that the purpose of the September 8-10 telephone calls was to research public opinion, rather than engaging in a telephone influence campaign (push poll). We are not asserting that this evidence is completely dispositive, but it does support the Respondents' explanation of the purpose of the polling.

(1) In a seven-page memo, the Maine Senate Republican PAC has provided a coherent narrative of the purpose of the September 8-10 telephone calls. This explanation was consistent with an explanation provided by Shawn Roderick in a February 16, 2020 videoconferenced interview. The PAC writes:

We had a limited budget so we had to rely heavily on the data collected to help us decide how we should allocate resources. ... [T]he purpose of these surveys was to determine the competitiveness of these races. The data collected allowed us to

identify which races were the most competitive. These were done early in the election cycle (in September), before any voters could even vote, so that we could have time to plan out our strategy for allocating resources. The surveys also enabled us to determine the messaging that would be the most effective in supporting our candidates.

The PAC cites three specific spending decisions made by the Senate Republican caucus based on the Sept. 8-10 polling results:

- doubling the amount of money the caucus spent on radio in support of nominee Trey Stewart to boost his name recognition among unaffiliated voters
- cutting spending for the nominee in District 14 after the polling indicated his race was not competitive
- concentrating its spending in District 13 to focus more on Republican voters, after determining that Sen. Dana Dow was not performing as well as the caucus would like with Republicans.

(2) In early September, employees at Red Maverick Media corresponded by email with the Respondents (specifically, Shawn Roderick and Heather Priest) to discuss the September 8-10 telephone calls. In these contemporaneous emails and invoices, they refer to the calls as “polling” or “the polls.” There is no reference to “voter persuasion” or any of the other synonyms for a telephone campaign to persuade voters.

(3) The telephone services subcontractor, Victory Phones, compiled polling results in two different formats (the shorter memo’s and the longer crosstabs). Red Maverick Media provided those results to the Respondents by email on September 14. If the Sept. 8-10 telephone calls were merely a push poll, why would these documents have been compiled and provided to the Respondent PACs? The very fact that Red Maverick Media prepared and communicated these results is suggestive of a purpose to conduct research.

(4) Not only were the polling results provided to the Respondent PACs, there appears to be some intent on the part of Chris Leavitt and Shawn Roderick to study the results to determine strategy going forward. On September 14, 2020, Mr. Leavitt conveyed the polling results to Mr. Roderick in the form of a

compressed zip file. Mr. Leavitt and Mr. Roderick had further email correspondence regarding campaign strategy based on these poll results. Red Maverick Media was also one of the firms preparing paid communications to voters concerning candidates (independent expenditures) for the Senate Republican caucus. The proposed meeting to develop a strategy based on the polling results is more supportive of the Respondents' explanation that the polling was to research public opinion than the Lincoln County Democratic Committee's contention that this was a push poll.

(5) Only 200 calls were made in each Senate district. If the September 8-10 phone calls were primarily made as a push poll, one would expect many more calls to be made (particularly for the total fee of \$53,250). Our general understanding is that contacting voters through robocalls is a relatively inexpensive method of voter contact.

(6) Calls were made on September 8-10, 2020 approximately two months before the November 3, 2020 general election. If the primary purpose of the calls was to "push" the respondents who answered the calls toward the Republican nominee, wouldn't these calls be timed closer to the November 3, 2020 election date? Instead, calls were made at a time that could inform subsequent paid communications to voters, such as digital ads, mailers, robocalls, or other advertising, consistent with the explanation from Respondents.

(7) In alleging that the September 8-10 calls were a push poll, the complaint by the Lincoln County Democratic Committee focuses on the positive statements about the Republican nominee and the negative statement about the Democratic nominee. This is understandable, but the greater information about the September 8-10 telephone calls shows that the questions that were asked in five of the State Senate districts (12, 15, 20, 23, and 31) did not include the positive or negative messages about the candidates. (See polling result memos and crosstabs.) These five districts constitute approximately one-third of the total telephone effort costing \$53,250. If the September 8 telephone calls were primarily a voter-influence campaign, why would Respondents pay for polling in these five districts

only to ask neutral questions? The more logically consistent explanation is that Respondents had informational interests in these districts.

By offering this evidentiary points about the Sept. 8-10 calls, we do not mean to imply that the telephone effort by Red Maverick Media has all the hallmarks of a thorough or high-quality poll. As discussed below in our application of general polling standards, some the demographic questions that one might expect are not present. The poll is somewhat shorter than telephone surveys by professional research organizations. The poll does not ask questions about how the candidates are perceived (e.g., favorability, approval of policy views or performance in office). Nevertheless, the points set out above are more supportive of the Respondents' explanation of the purpose of the polling than the characterization in the Lincoln County Democratic Committee's complaint.

II. ALLEGED VIOLATION OF PUSH POLLING STATUTE

Given the information provided, Commission staff believes that this activity does not qualify as a "push poll" under Maine law. In the push poll disclosure statute (21-A M.R.S. § 1014-B(1), a "push poll" is defined to mean a paid telephone survey that meets the following five criteria:

1. A list or directory is used, exclusively or in part, to select respondents belonging to a particular subset or combination of subsets of the population, based on demographic or political characteristics such as race, sex, age, ethnicity, party affiliation or like characteristics;
2. The survey fails to make demographic inquiries on factors such as age, household income or status as a likely voter sufficient to allow for the tabulation of results based on a relevant subset of the population consistent with standard polling industry practices;
3. The pollster or polling organization does not collect or tabulate survey results;
4. The survey prefaces a question regarding support for a candidate on the basis of an untrue statement; and
5. The survey is primarily for the purpose of suppressing or changing the voting position of the call recipient.

After reviewing the survey results, staff accepts that the poll would meet the 1st and 2nd criteria of the push poll definition. The 3rd criteria, however, clearly weighs against this activity as being considered a push poll under Maine Law because the respondents submitted over 200 pages of collected/tabulated survey results. Commission staff believes that this fact is dispositive and that the respondents did not engage in a push poll as defined by 21-A M.R.S. § 1014-B(1).

If the Commission disagrees, then the 4th and 5th criteria should be discussed further. Commission staff remains hesitant to recommend that a statement intended to cast a negative light is “untrue” within the meaning of the 4th criteria.⁴ The Commission is in the better position to assess whether a statement is “untrue” and to assess the credibility of the respondents contentions that the purpose of the poll was to engage in message testing and not to change the voting position of the call recipients.

II. ALLEGED VIOLATIONS OF DISCLAIMER AND INDEPENDENT EXPENDITURE REPORTING REQUIREMENTS.

Because the September 8-10 telephone calls and SurveyMonkey.com website referred to specific State Senate candidates and were disseminated to voters just after Labor Day, the Lincoln County Democratic Committee allege that this paid activity violates two other statutes:

- The calls allegedly are alleged to have violated title 21-A, section 1014(5), because they did not include a statement of who paid for them, and whether a candidate authorized them,

⁴ “When first introduced, L.D. 1055 (120th Legis. 2001) (An Act to Regulate Push Polling), this criterion requiring that the poll contain false statements was not included. Adam Thompson, the Executive Director of the Maine Democratic Party, testified that the bill should be consistent with the definition provided by the American Association of Political Consultants (“AAPOR”) and that it must “include lies and untruths about candidates or referenda.” The AAPOR’s position on push polls is that push polls must disseminate false or misleading attacks on candidates. After the public hearing on the bill, this criterion of “untrue statement” was added through an amendment. Based on our preliminary research, we are inclined toward the view that the Maine Legislature purposefully limited the applicability of this section to statements that can be demonstrated to be untrue. While the statements in the poll are certainly intended to cast positive and negative light, they are matters of opinion. For these reasons, staff is unsure that the Senate District #13 survey meets the definition of conducting a ‘push poll.’ Staff Memorandum, September 22, 2020, p. 9-10.

- The calls and the surveymonkey.com website are alleged to have violated title 21-A, section 1019-B(2), because the communications must be presumed to be independent expenditures and no person filed an independent expenditure report for these communications.⁵

We note that these two statutes apply to the September 8-10 telephone calls only because the calls were made just after Labor Day (Monday, September 7, 2020). If Red Maverick Media had been hired in time to do the calls just four days earlier, there would be no compliance problem with sections 1014(5) and 1019-B(2).

Both the disclaimer provision for telephone calls (1014(5)) and the independent expenditure reporting statute (1019-B) contain similar exception for telephone surveys that

- meet generally accepted standards for polling research and
- are not conducted for the purpose of influencing the voting position of call recipients.⁶

As a matter of public policy, the Maine Legislature has decided that these telephone surveys do not need to state who paid for them and are not subject to independent expenditure reporting. Below we provide our own two-part analysis of the telephone calls, although we are not experts on generally accepted standards for polling research.

A. GENERALLY ACCEPTED STANDARDS FOR POLLING RESEARCH

For your consideration below, the Commission staff of polling standards based on an educational statement published by the American Association of Public Opinion Research to the September 8-10 polling. First, however, we do recommend that you apply the test of generally accepted standards for polling research in a way that is generous, not narrow. We find the phrase “generally accepted standards for polling

⁵ Once the presumption applies to the communication, the sponsor of the communication may come forward within 48 hours and rebut the presumption that the communication was intended to.

⁶ The wording of these two exceptions vary slightly in the two statutes but are substantially similar. 21-A M.R.S. §§ 1014(5); 1019-B(5)(B).

research” to be problematic because it is unclear where the Commission or organizations seeking to engage in telephone surveys should look for these standards.

The American Association of Public Opinion Research (“AAPOR”) has issued an educational statement intended to help a lay audience in distinguishing legitimate polling from “push polling,” which the AAPOR characterizes as political telemarketing in the guise of research. In the statement, the AAPOR lists seven factors indicating that advocacy calls disguised as legitimate polling will generally:

- Ask only a few questions all about a single candidate or single issue;
- The questions are uniformly strongly negative (or strongly positive) descriptions of the candidate or issue;
- The organization conducting the calls is not named, or a phony name is used;
- Evasive answers are given in response to requests for more information about the survey;
- The number of people called is very large, sometimes many thousands.
- The calls are not based on a random sample; and
- It is difficult to find out which organization conducting the interview.

The Respondents have contended that this activity meets generally accepted polling practices and that the purpose of the poll was to engage in message testing. The purpose of message testing is to determine whether the framing of an issue or candidate would change a person’s perspective on the candidate. This data would be used both in the current and future campaigns.

The AAPOR has commented that message testing is not push polling⁷. The AAPOR has stated:

“The fact that a poll contains negative information about one or more candidates does NOT (emphasis in original) in and of itself make it a ‘push poll.’ Political campaigns routinely sponsor legitimate “message-testing” surveys that are used by campaign consultants to test out the effectiveness of various possible campaign messages or campaign ad content, often including negative messages. Political

⁷ Push polling as defined by the AAPOR not Title 21-A.

message-testing surveys may sometimes be confused with fake polling, but they are very different.”

The AAPOR goes on to provide criteria to evaluate whether the communications are fraudulent polls or message testing but cautions that the criteria apply most of the time but that exceptions will arise. The criteria for legitimate message testing are:

1. At the beginning of the call, the interviewer clearly identifies the call center actually making the calls. (However, legitimate political polling firms will often choose not to identify the client who is sponsoring the research, be it a candidate or a political party, since that could bias the survey results.)
2. The interview contains more than a few questions.
3. The questions usually ask about more than one candidate or mention both sides of an issue.
4. Questions, usually near the end of the interview, ask respondents to report demographic characteristics such as age, education level, and party identification.
5. The survey is based on a random sample of voters.
6. The number of respondents falls within the range of legitimate surveys, typically between 400 and 1500 interviews.

Identification of polling firm. Here, the pollsters identified themselves as “Public Opinion Research” not Victory Phones or Red Maverick Media, the vendors who were instrumental in administering the poll. As was previously referenced by Commission staff, the name Public Opinion Research, is a generic name that is untraceable online and the provided phone number only links to an automated message service that has no option to connect to a real person. In the opinion of Commission staff, the interviewer failed to accurately identify the person who was conducting the call. This factor would suggest that the communication did not meet the accepted polling standards.

Number of questions. The next criterion is that the interviewer asked more than a few questions. Each survey conducted by the Respondents asked eight questions. In the opinion of Commission staff, eight questions does not seem to be “more than a few.” Commission staff would concede that, in the context of polling, this is a lay person’s

opinion and should be afforded no special weight in the Commission’s consideration. The Commission could decide either way on this criterion.

Number of candidates identified. The next criterion is that the questions usually ask about more than one candidate. The polls provided a positive statement about one candidate and a negative statement about the other candidate in the same race. This factor weighs in favor of meeting the generally accepted polling standard.

Demographic questions asked. The next criterion is that that the poll collects demographic data. The demographic questions asked in polls will vary from surveyor to surveyor and survey to survey. The Commission staff reviewed standardized or (in the case of SurveyMonkey) recommended demographic questions to ask as part of each political survey.

	Pew Research ⁸	SurveyMonkey	Associated Press
Gender	X	X	X
Age	X	X	X
Education Level	X	X	X
Race	X	X	X
Employment Status		X	
Household Income		X	X
Partisanship			X
No. of People living in Household	X		
Landline vs. Cellphones	X		
Zip Code	X		

The poll asked the gender, age, and political affiliation. The poll did not ask about education level or race⁹, two demographics that are always asked by Pew Research, Associated Press, and recommended by Survey Monkey polls. Commission staff is of the opinion that the survey did not collect enough demographic data and that this criterion

⁸ Pew Research has multiple sets of standardized demographic questions that will be swapped depending on the content of the survey that they are conducting. This list only represents the demographics that are always asked regardless of the survey’s content.

⁹ The Respondent will likely argue that this was a cost saving measure. Commission staff believes that while that is possible, that does not go to whether the poll meets scientific polling standards and would instead be considered by the Commission if the intent of the poll was not to influence an election.

suggests that the poll did not meet accepted polling standards.¹⁰ Nevertheless, the questions asked may be consistent with the PACs' costs constraints and consistent with whatever objectives the PACs were pursuing in conducting the poll.

Respondents selected randomly. The next criterion is that the poll was conducted with a random sample. The Respondents represent that the poll was conducted by a random sample of voters in each district and the Commission staff has seen no reason why this is false. For this reason, this criterion weighs in favor of meeting the scientific standard.

Number of respondents. The final criterion from the AAPOR is that the polls had a minimum sample size of 400 people. The polls for each district only had 200 people. The Respondents indicate that this was for cost savings reasons; staff thinks that this would go to the intent to influence, rather than the accepted polling standard. Staff would also note, however, that the 400-sample size is based on a national average and Maine has a smaller population. The 200-sample size would seem reasonable to staff due to Maine's smaller population than the national average. For this reason, staff believes that this factor weighs in favor of meeting the generally accepted polling standard.

Commission staff believes that this analysis is too close to provide a strong recommendation. Criteria 1, 2, and 4 (identity of pollster, number of questions, and lack of certain demographic questions) would weigh in favor of the poll not meeting standardized polling practices, but criteria 3, 5, and 6 (both candidates mentioned, random sample, and sample size) would weigh in favor that the poll did meet standardized polling practices.

Staff does not believe that these criteria are a checklist but are a list of factors to balance and that each criterion could be given different levels of importance to the Commission's analysis. For instance, the first criterion could be rated highly and be dispositive, or the Commission could find that the criterion really doesn't impact the analysis at all or put it anywhere in-between.

¹⁰ Commission staff would caution the Commission in relying on representation of both staff and Mr. Tardy. To protect the confidentiality of the records, some representations as to the record's contents may result in an inaccurate picture of the materials. If the Commission were to review the polling data it would provide an accurate picture as to this criterion.

B. THE PURPOSE OF THE CALLS WERE TO INFLUENCE THE CALL RECIPIENTS

Based on the evidence described on pages 9-12 of this memo, the Commission staff believes that the purpose of the telephone calls, text messages, and online survey were more suggestive of an intent to conduct public opinion research, rather than to engage in a push poll. For your reference, we have attached two Statements of Reasons by members of the Federal Election Commission (“FEC”) in considering an enforcement matter (Matter Under Review 5842) concerning 2006 telephone surveys that referred to candidates for the U.S. Congress paid for by the Economic Freedom Fund (“EFF”). The EFF was created 3 months before the 2006 election. The EFF conducted polls that asked questions such as:

- Baron Hill voted to keep the death tax in place and refused to vote to make permanent the tax cuts that have caused record economic growth since 2001. Does knowing this make you less likely to vote for Barren Hill?
- Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors. Does knowing this make you less likely to vote for Baron Hill?
- Baron Hill has over \$60,000 in contributions from trial lawyers and his [sic] voted repeatedly to stop reform of the medical malpractice system resulting in less [sic] doctors and higher health care costs for Indiana residents. Does knowing this make you less likely to vote for Baron Hill?

The majority of Commissioners¹¹ in the FEC’s opinion, considered whether the communications contained express advocacy. In doing so, the majority appears to have applied the AAPOR standard of “push polls.” The majority opinion found that the polls ran two months before the election, twenty questions were asked, the data was collected / analyzed, and there were questions regarding multiple issues. For these reasons, the FEC voted to not find a violation. The FEC’s minority opinion, in deciding whether the intent of the calls was to influence an election found that the questions were asked in an

¹¹ A 3-2 Margin.

inflammatory and leading manner, not designed to illicit a genuine response regarding an issue.

C. REFERENCES TO CANDIDATES ON SURVEYMONKEY.COM

Some of the online questions that were posted on Surveymonkey.com after Labor Day referred to candidates by name. The webpages were arguably covered by the disclaimer requirement in section 1014(2-A). This provision, however, contains an exception: “The disclosure is not required if the communication was not made for the purpose of influencing the candidate’s nomination for election or election.” The Commission staff accepts the Respondents’ factual contention that the Survemonkey.com website was primarily established for the purpose of public opinion research.

The Commission may wish to consider whether the webpages on Surveymonkey.com were subject to independent reporting requirements in section 1019-B due to the presumption that applies after Labor Day to communications naming a clearly identified candidate. In the interview by Commission staff, Shawn Roderick described the text messages and questions on Surveymonkey.com as part of the telephone survey that is exempt from the disclaimer requirement and independent expenditure reporting requirement. In order to meet the survey requirements of 200 voters per district, some voters were contacted through their telephone by text and were invited to respond online. There is an argument that the text messages and the website (which is linked in the text messages) should therefore be covered by the exception for telephone surveys. If the Commission believes that these survey websites are the kind of advocacy communication that the Legislature intended to be covered by the presumption, the Commission staff is available to discuss this issue further at the March 31 meeting. The references to candidates on Survemonkey.com do not expressly advocate for or against candidates but do contain the same positive and negative messages about the candidates. The time period to rebut the presumption of 48 hours after dissemination of the communication has passed.

CONCLUSION

The Commission staff recommends taking no further action on the complaint by the Lincoln County Democratic Committee. After considering the evidence described above in this memo, we believe the purpose of the calls was to research public opinion. The Commission staff would be happy to gather any additional factual information you would like as part of the investigation. We could also make more efforts at obtain an expert in public opinion polling and/or telephone influence campaigns, although there are budgetary challenges to paying any fee. If you are inclined to find that any statutes were violated, we recommend scheduling a penalty phase for your April meeting. Thank you for your consideration of this memo.



**Lincoln County Democratic Committee
Campaign Office 2020**

521 Main St. Damariscotta
office@lincolncountydemocrats.com
https://lincolncountydemocrats.com

14th September 2020

Jonathan Wayne
Executive Director, Maine Ethics Commission
135 State House Station
Augusta, Maine 04333

Dear Mr. Wayne,

I am writing to file a complaint about illegal advocacy calls, also known as “push polls,” taking place in Senate District 13 – in violation of Maine Title 21-A Chapter 13 §1014-B, Maine Title 21-A Chapter 13 §1014, and Maine Title 21-A Chapter 13 §1019-B. This fraudulent intervention into the SD13 election process is a fake poll that explicitly aims to influence voters with biased opinion and misinformation extolling the Republican candidate, Dana Dow, and attacking the Democratic candidate, Chloe Maxmin. Our country has learned a great deal over the past four years about how dangerous these illegitimate misinformation efforts are and how effective they can be.

There is widespread agreement that these kinds of illegal campaign tactics threaten democracy and undermine election integrity. It is deeply disturbing to see this kind of political corruption find its way to Maine and a State Senate campaign. With only weeks until Election Day, and record absentee voting expected by early October, I urge the Commission to undertake a swift investigation that rules on this, identifies these bad actors, and holds them accountable to the full sanctions of Maine Law. It needs to happen while there is time remaining to inform voters, to counter the illegal influence, and mitigate harm done to candidates and the electoral process.

I have read and heard multiple accounts (beginning September 8th and ongoing) from voters who have received calls and/or texts asking them to participate in a poll. The “poll” is presented as an impartial political survey, but goes on to ask questions clearly designed to influence the voting position of the call recipient by casting one candidate in a positive light and the other in a negative light on the basis of statements that are presented as facts but are actually biased opinion statements. Here is a [link](#) to the push poll in Survey Monkey form.

The American Association for Public Opinion Research (AAPOR) [defines](#) a "push poll"

as “a form of negative campaigning that is disguised as a political poll.” The AAPOR has released the following statement on the issue:

“‘Push polls’ are not surveys at all, but rather unethical political telemarketing -- telephone calls disguised as research that aim to persuade large numbers of voters and affect election outcomes, rather than measure opinions. This misuse of the survey method exploits the trust people have in research organizations and violates the AAPOR Code of Professional Ethics and Practices.”

The organization conducting this push poll in District 13 only provides a phony name, “Public Opinion Research” (not to be confused with the AAPOR), another hallmark of illegal push polling [according](#) to the AAPOR. The telephone number given for the organization (207-280-8543) dead-ends in a generic pre-recorded message with no option to reach a real person. The fact that there is no avenue by which to contact the opaque operation behind these surveys is further evidence that this is a push poll.

Finally, these surveys demonstrate another characteristic of push polling by failing to make sufficient inquiries of demographic variables to allow for the tabulation of results based on a relevant subset of the population consistent with current standard polling industry practices. All legitimate political polling relies on statistical adjustment called “weighting” to make sure that samples align with the broader population on key characteristics. Pew Research Center [writes](#) that “weighting a poll on just a few variables like age, race and sex is insufficient for getting accurate results.” Standard polling industry practice is to account for at least eight to twelve variables. For example, the [Gallup](#) and [New York Times/Siena College](#) polls adjust on eight and ten variables, respectively. Pew Research Center polls adjust on [twelve variables](#). The push polling taking place in District 13 accounts for only four variables, and therefore is clearly not in line with standard polling industry practices. Most glaringly, it fails to ask about household income, race, and education. The omission of the education variable in particular is a revealing characteristic of a push poll [according to Pew Research](#).

Push polling is permitted in Maine but must comply with a number of requirements around transparency and disclosure. This push poll violates multiple Maine campaign law statutes.

Maine Title 21-A Chapter 13 §1014-B dictates that push polls must include the following disclosure: “This is a paid political advertisement by (name of persons or organizations).” Neither the phone calls nor text surveys include this disclosure. Furthermore, neither the independent expenditure disclosure nor the address for the

person or organization sponsoring the call is disclosed as required by §1014-B.

The documented calls are also in violation of Maine Title 21-A Chapter 13 §1014 subsection 5, in particular: “Prerecorded automated telephone calls and scripted live telephone communications that name a clearly identified candidate during the 28 days, including election day, before a primary election, during the 35 days, including election day, before a special election or during the period of time from Labor Day to the general election day for a general election must clearly state the name of the person who made or financed the expenditure for the communication and whether the communication was authorized by a candidate, except for prerecorded automated telephone calls paid for by the candidate that use the candidate's voice in the telephone call and that are made in support of that candidate. Telephone surveys that meet generally accepted standards for polling research and that are not conducted for the purpose of influencing the voting position of call recipients are not required to include the disclosure.”

Lastly, the documented activities are almost certainly in violation of independent expenditure reporting requirements detailed in Maine Title 21-A Chapter 13 1019-b. Costs incurred for these activities, including conducting telephone calls with a live agent as documented, using the SurveyMonkey.com platform, and utilizing texting software to distribute the communication as documented, were surely in excess of the \$250 reporting requirement.

Attached is a PDF of the survey and other accounts of the push poll in phone based form.

I urge the Commission to pursue this case of illegal election interference with the full force and authority of the great state of Maine. With Election Day drawing close, there is an imperative to alert the public, expose bad actors, and hold them to account. Irrespective of candidate, party, or platform, this kind of corrupt attack should become the highest priority of good government’s oversight responsibilities, through investigative efforts and sanctions. The forces behind such illegal incursions need to know that Mainers will not tolerate interference in our free and fair elections.

Sincerely,



Christopher K. Johnson
Chair, Lincoln County Democratic Committee

Documentation of Push Polling in Maine Senate District 13



H. J. McGinness

to me ▾

10:36 AM (4 hours ago)



Got the phone number (assuming it wasn't spoofed): 207-843-9721

The woman who conducted the "poll" asked in general terms:

1. What is my party affiliation Dem, Rep, or Independent?
2. Was I going to vote for or was I leaning toward voting for Dana Dow or Chloe Maxim?
3. Would i be more likely to vote for Senator Dow if I knew he was a successful businessman followed by a list of other positive characteristics?
4. Would I be less likely to vote for Representative Maxmin if I knew she supported radical ideas from California and other obviously negative characteristics (to the "pollster").
5. What is the most important issue for me in the upcoming election. Health Care, COVID-19, the Economy, Immigration, and one or two others I can't recall just now.

The call ended with a statement that it was a poll conducted by a generic sounding polling group (can't recall the name exactly). There were no disclaimers or other qualifying statements.

Sent from my iPad



[REDACTED]

to me ▾

Thu, Sep 10, 7:56 PM (19 hours ago)



I have gotten one and took it for a few questions and then it became obvious what its intentions were and I hung up. [REDACTED]

Another voter, Martha, received the poll as well by both phone and text and provided the following link to the survey which was sent to her in a text:

<https://www.surveymonkey.com/r/ZFFCQJR?UID=277765bc>

Another voter, who wished to remain anonymous, reported responding to a push poll of the same description on September 10th from "SHIRLEY MLSME" after having received calls on September 9th and 8th displaying the same name but different numbers (2072808543 and 2072808009). This person also reported a live person on the other end asking the questions.

NOTE: Due to heavy pixilation in the original the survey is reproduced here by Commission staff directly from the online survey. Question 1 is omitted in the original.

Maine Senate District 13 General Election Survey

1. Hello, we are conducting a new brief survey on behalf of Public Opinion Research. Thank you in advance for your time. What is the likelihood that you will vote in the General Election in Maine this coming November?

- Certain to Vote
- Very Likely
- Somewhat Likely
- Somewhat Unlikely
- Extremely Unlikely

2. Are you male or female?

- Male
- Female

3. Which age range do you fit under?

- 18-35
- 36-50
- 51-65
- 66+

4. Are you a Republican, Democrat, or Independent?

- Republican
- Democrat
- Independent

5. If the General Election for State Senate were held today, would you vote for Dana Dow or Chloe Maxmin?

- Dana Dow
- Chloe Maxmin
- Undecided

6. Would you be more or less likely to vote for Dana Dow if you knew that he is a small business owner known for his ability to bring consensus and a pragmatic approach to problem solving and that he's led Maine's response to COVID-19 ensuring that our businesses stay afloat and families remain safe and healthy?

- Much More Likely
- Somewhat More Likely
- Somewhat Less Likely
- Much Less Likely
- It makes no difference

7. Would you be more or less likely to vote for Chloe Maxmin if you knew that she is in lock step with radical liberals who want to bring burdensome California and New York policies to Maine that would be devastating for Maine businesses and families?

- Much More Likely
- Somewhat More Likely

- Somewhat Less Likely
- Much Less Likely
- It makes no difference

8. Which issue is most important to you?

- Jobs and the Economy
- COVID-19
- Healthcare Costs
- Public Education
- Immigration
- Foreign Affairs

Thank you for your time. This survey was conducted by Public Opinion Research. To reach Public Opinion Research, please call (207) 280-8543

OK



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

October 23, 2020

Via USPS and Email

Joshua A. Tardy, Esq.
Rudman & Winchell
P.O. Box 1401
Bangor, ME 04402

Dear Josh:

Thank you for your presentation to the Commission on Governmental Ethics and Election Practices at its meeting on October 16, 2020. This letter is to request documents from the Maine Senate Republican Majority PAC and the Maine Prosperity Alliance PAC (referred to below as “the respondents”) related to the surveys concerning State Senate candidates arranged through Red Maverick Media and conducted by telephone and SurveyMonkey.com between August 15, 2020 and the present.

Requested documents. Please provide these documents in electronic format (e.g., email or file transfer website) no later than Wednesday, November 11:

1. all written communications transmitted between the respondents and Red Maverick Media ordering the surveys or containing a description of the surveys to be conducted,
2. all invoices, billing statements or other requests for payment by Red Maverick Media,
3. the questions for the telephone surveys in all Senate districts, and
4. all survey results transmitted by Red Maverick Media, including tabulations, summaries or reports.

Confidentiality of investigative working papers. Maine Election Law directs the Commission to keep confidential certain categories of information and records (“investigative working papers”) acquired in the course of conducting an investigation. 21-A M.R.S.A. § 1003(3-A). These categories include:

- financial information not normally available to the public,

Joshua A. Tardy, Esq.

October 23, 2020

Page 2

- information that, if disclosed, would reveal sensitive political or campaign information belonging to a ... political action committee ... or other person who is the subject of an audit, investigation or other enforcement matter, even if the information is in the possession of a vendor or third party, and
- information or records subject to a privilege against discovery or use as evidence.

If you believe any of the documents provided in response to this request are in these categories, please specify those records. The Commission is authorized to release investigative working papers if they are materially relevant to a memorandum, interim or final report by the Commission staff or a decision by the Commission concerning an audit or investigation.

Definition. For purposes of this request, the term “communication” means, without limitation, any exchange or transfer of information by any means (*e.g.*, whether written, electronic, or by other methods). The term includes but is not limited to electronic mail, text or instant messages, proposals, campaign plans, budgets, purchase orders, agreements, contracts, or purchase orders.

If you have any questions, please call me at 287-4179 or email me at Jonathan.Wayne@maine.gov. Thank you.

Sincerely,

Jonathan Wayne
Executive Director

cc: Shawn Roderick, Maine Prosperity Alliance PAC

Joshua A. Tardy
(207)992-2267
jtardy@rudmanwinchell.com

November 25, 2020

Jonathan Wayne
Executive Director
Maine Commission on Governmental Ethics and Election Practices
135 SHS
Augusta, ME 04333

Dear Jonathan,

I have enclosed responsive documents as you requested in your October 23 letter. In accordance with 21-A M.R.S.A. sec. 1003(3A), we believe that all polling results must remain confidential. (I have done no redactions.)

Please feel free to call me with any questions.

Regards,



Joshua A. Tardy
JAT/rmk

Enclosures



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

December 17, 2020

Via USPS and Email

Joshua A. Tardy, Esq.
Rudman & Winchell
P.O. Box 1401
Bangor, Maine 04402

Dear Mr. Tardy:

Thank you for the information concerning telephone and online surveys paid for by the Maine Senate Republican Majority PAC and the Maine Prosperity Alliance PAC. This letter is to request that the PACs provide a written response *by January 12, 2021* to the enclosed September 14, 2020 complaint filed by the Lincoln County Democratic Committee ("LCDC").¹

The LCDC contends that the surveys violated three Maine statutes:

- 21-A M.R.S. § 1014 (the telephone calls and online survey lacked a statement of who paid for the communications and whether candidates authorized them),
- 21-A M.R.S. § 1019-B (no independent expenditure report was filed concerning the communications), and
- 21-A M.R.S. § 1014-B (the surveys lacked specific disclosures required for push polls).

Although the complaint was initially filed with reference to surveys in State Senate District #13, the same compliance concerns may apply to the surveys conducted in the other Senate districts. One statutory provision that is relevant to the outcome of the complaint is the exception in § 1014(5) for “[t]elephone surveys that meet generally accepted standards for polling research and that are not conducted for the purpose of influencing the voting position of call recipients,” and a similar exception in § 1019-B(5)(B).

This matter is tentatively scheduled to be considered by the Commission at its meeting on Wednesday, January 27, 2021 at 9:00 a.m. Please respond to the complaint with whatever factual information or legal argument you believe to be relevant. In your response, the Commission staff suggests addressing:

¹ If you would like to refer to supplemental information provided by the LCDC, it can be found at the Commission's webpages for its September 30 and October 16 meetings (<https://www.maine.gov/ethics/meeting/2020-09-30> and <https://www.maine.gov/ethics/meeting/2020-10-16>).

1. Please describe the purpose of the surveys. If researching public opinion, what types of information were the PACs trying to learn from the surveys? Can you cite, in general terms, any activities by the PACs that relied on the survey results? (If your response contains any information that the Commission needs to keep confidential under 21-A M.R.S. § 1003(3-A), please designate the information as confidential.)
2. Did the surveys meet generally accepted standards for polling research?²
3. The LCDDC has asserted that the calls and online surveys were aimed at influencing voters with misinformation extolling the Republican nominee and attacking the Democratic nominee. Please point to any evidence indicating that phone calls and online questions were *not* intended to influence voters.

Please respond by Tuesday, January 12, 2021 so that Commission staff and counsel can consider your response, confer with counsel and make written recommendations to the Commission in time for the January 27 meeting. If you have any questions, please call me at 287-4179 or email me at Jonathan.Wayne@maine.gov.

Sincerely,

A handwritten signature in blue ink that reads "Jonathan Wayne" followed by a stylized initial "JC".

Jonathan Wayne

Executive Director

cc: Shawn Roderick, Maine Prosperity Alliance PAC (by email)

² Please feel free to rely on any standards you believe are generally accepted for election-related polling. At present, the Commission staff intends to rely primarily on factors set out in the Statement on "Push" Polls (released June 2007 and updated Oct. 2015) published by the American Association for Public Opinion Research (www.aapor.org), and factors applied to telephone polling by the members of the Federal Election Commission in their Statements of Reasons in two enforcement proceedings, Matters Under Review 5842 (Economic Freedom Fund) and 5835 (Democratic Congressional Campaign Committee). Documents concerning closed matters under review can be found at <https://www.fec.gov/legal-resources/enforcement/>. The Commission or its staff may wish to incorporate other sources in the course of its investigation.

Joshua A. Tardy, Esq.
(207) 947-4501
jtardy@rudmanwinchell.com

Michael A. Hockenbury, Esq.
(207) 947-4501
mhockenbury@rudmanwinchell.com

January 26, 2021

Via email at: Jonathan.Wayne@maine.gov

Jonathan Wayne
Executive Director
135 State House Station
Augusta, Maine 04333

**RE: Maine Senate Republican Majority PAC and Maine Prosperity Alliance PAC –
Polling Information**

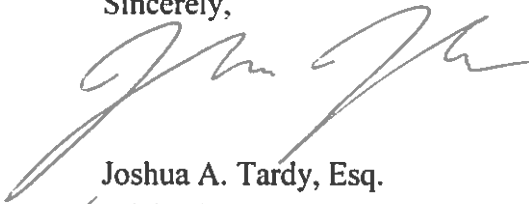
Mr. Wayne,

This firm represents the Maine Senate Republican Majority PAC and Maine Prosperity Alliance PAC. Enclosed please find our clients' response to the Commission's request dated December 17, 2020.

In sum, our position is that these surveys are not reportable as independent expenditures as they met generally accepted standards for polling research and were not conducted for the purpose of changing the voting position of the call recipients. (21-A M.R.S. §1019-B(5)(B)).

Furthermore, because the questioned surveys do not constitute "push polls" pursuant to 21-A M.R.S. §1014-B, a disclaimer is not required

Sincerely,



Joshua A. Tardy, Esq.
✓ Michael A. Hockenbury, Esq.
RUDMAN WINCHELL

TO: Interested Parties
FROM: Maine Senate Republican Majority PAC
DATE: 1/22/21
RE: Polling Information

Overview:

The Maine Senate Republican Majority PAC conducted surveys in early September of 2020 in 13 different State Senate districts in order to guide our strategy for the election cycle. The Maine Prosperity Alliance PAC conducted surveys in one State Senate District. The polls were conducted to determine the state of races and understand the competitiveness of certain districts. We had a limited budget so we had to rely heavily on the data collected to help us decide how we should allocate resources. We conducted over 1,400 interviews. In each district we ensured that we had the correct weighting (examples include but are not limited to gender ratio, age ratio, and nationality ratios in each district) and required a minimum of 200 interviews in each district. Additionally, in some cases we went back into the field to get more interviews to ensure we had more data to make sure we were getting accurate results. The data collected informed our strategy.

Question 1: Please describe the purpose of the surveys. If researching public opinion, what types of information were the PAC's trying to learn from the survey? Can you cite, in general terms, any activities by the PACs that relied on the survey results? (If your response contains any information that the Commission needs to keep confidential under 21-A M.R.S. 1003(3-A). Please designate the information as confidential.)

As stated in the introduction of this memo, the purpose of these surveys was to determine the competitiveness of these races. The data collected allowed us to see which races were the closest at that time. Working on limited financial resources, we could only afford to spend money in the most competitive districts. This data allowed us to identify which races were the most competitive. These were done early in the election cycle (in September), before any voters could even vote, so that we could have time to plan out our strategy for allocating resources. The surveys also enabled us to determine the messaging that would be the most effective in supporting our candidates. And we utilized the demographic questions including age, gender, political party, type of phone, general vote history and county to determine where best to utilize our resources. For example, in former Senator Dana Dow's poll, we saw that Senator Dow was not performing as well as we would like among Republican voters. We were able to target our spending to Republicans on mediums that included but were not limited to direct mail, digital advertising, radio advertising, television advertising and volunteer efforts to make phone calls and knock on doors. We have attached with this letter the IE reports that show the advertising efforts we made on behalf of Senator Dow. In Senate District 2, we saw in the data we had collected that Representative (now Senator) Trey Stewart did not have high name recognition among unaffiliated voters so we doubled the amount of money we were spending on radio in this district to raise his recognition among unaffiliated voters. In Senate District 14, we spent money over the summer on digital to help raise the name recognition as our candidate. But following the receipt of the data collected in this district in September, we determined that this

district was not competitive enough to warrant our resources so we did dramatically cut our spend in this district. These are just some of the examples of how the data we collected informed our decisions. Attached are IE reports showing our spending in these three districts.

Question 2: Did the surveys meet generally accepted standards for polling research?

Our surveys follow a strict criteria. If they did not, they would be completely useless to the PAC. Surveys serve a critical purpose and they have to be accurate, especially on a limited budget under which this PAC was operating. All of the polls followed the below methodology:

We partner with strategic vendors who produce statistically significant, scientifically accurate, surveys by engaging in a multi-step process pre-fielding.

1. First, we build out demographic/geographic models from subscription service third party data sources that utilize publicly available voter files to form their models. (A Sample Frame)
A sample frame is the technical term for the demographic and geographic model that we build out for balancing purposes.
2. From that point we fashion input (base) files of randomized phone numbers into our systems with the mission of aggregating responses in an unbalanced (raw) manner.
3. We then aggregate raw response fieldwork from within the randomized pool of potential voters.
4. Once we have aggregated enough raw responses (determined by the desired sample size as requested by the client, 200 in this case), we will then fashion the data to represent the base file model for key demographic and geographic targets, including age, gender, political party, type of phone, general vote history and county. This can include interview Mode as well.

As an example, if we plan to have a racial demographic make-up of 83% Caucasian, 8% African American and 9% Other, but we aggregate an unfiltered sample of 86% Caucasian, 10% African American and 4% Other, we will balance the raw data file to lower the sample of African Americans to 9% and reduce the sample of Caucasians to 83% in order to accomplish a sample of 9% Other. We would then have a correctly balanced racial demographic sample. We do this for each controlling demographic and geographic data point, until the final balanced output from the raw interviews achieves the correct Demographic and Geographic profile for the District, Region, State, or Nation being measured. This is the best practice for achieving meaningful insight for Clients to make decisions about the impact of their efforts, to test messages, and generally determine the state of the race.

Lastly, by way of further explanation, the vendor with which we partner use multiple pieces of software in this process - some written by our partner - those are proprietary- while others like SPSS and R Studio we maintain subscription licenses for, or maintain a robust open source utilization as the case may be. The IBM SPSS® software platform offers advanced statistical analysis, a vast library of machine learning algorithms, text analysis, open source extensibility,

integration with big data and seamless deployment into applications. RStudio is an integrated development environment (IDE) for R. It includes a console, syntax-highlighting editor that supports direct code execution, as well as tools for plotting, history, debugging and workspace management. These programs are widely used by polling firms across the country including in the 2020 Presidential election, mentioned here. We have also utilized a "hand balancing" technique from time to time depending on the raw aggregate interview set.

Question 3: The LCDC has asserted that the calls and online surveys were aimed at influencing voters with misinformation extolling the Republican nominee and attacking the Democratic nominee. Please point to any evidence indicating that phone calls and online questions were not intended to influence voters.

The premise of this accusation is based on the LCDC claiming we were spreading "misinformation" about their Democratic candidate. That is an opinion, not a fact. The fact is we were message testing facts about candidates. Everything that we tested was factual. See message tests below with citations.

SD 2:

Question 6:

Would it make you more or Less Likely to Vote for Trey Stewart if you knew that Trey Stewart has reached across the aisle to get results for the county and is consistently considered one of the most effective representatives in Augusta?

Representative (now Senator) Stewart passed more legislation than any other Republican legislator during the 129th Legislature. This can be proven by visiting the legislative website and searching to see that Representative Stewart passed 12 bills. We found it was more than any other Republican member.

State of Maine Legislature Bill Status Search Results

Question 7:

Would it make you more or Less Likely to Vote for Mike Carpenter if you knew that Mike Carpenter is a rubber stamp for Portland liberals at the expense of businesses in Aroostook County making it harder for folks to do business in their community?

Senator Carpenter voted with his party 95 percent of the time and consistently voted with legislators from Portland on bills we believe make it hard to do business in Maine. This can be proven by comparing every single one of his roll call votes to Senate Leadership. Further, we compared his key roll call votes with Senate Leadership on bills that were testified by experts to have had a negative impact on businesses. See examples below:

- Roll Call LD 1098 (SP 330)
 - "An Act To Help Small Employers by Making the Minimum Wage Increase More Gradual in Nonurban Areas"
 - Sponsored by Senator Lisa Keim

Expert Testimony:

- Maine Hospitality Group
- Maine Retail Association
- Maine Farm Bureau
- Maine Tourism Association
- NFIB

- Roll Call LD 278 (SP 90)
 - "An Act Regarding Pay Equality"
 - Sponsored by Senator Catherine Breen

Expert Testimony

- Hospitality Maine
- Maine Chamber
- Retail Association

- Roll Call LD 1529 (HP 1112)
 - "An Act Concerning Nondisclosure Agreements in Employment"
 - Sponsored by Representative Thom Harnett

Expert Testimony

- Maine Chamber
-

SD 13:

Question 6

Would you be more or less likely to vote for Dana Dow if you knew that he is a small business owner known for his ability to bring consensus and a pragmatic approach to problem solving and that he's led Maine's response to COVID-19 ensuring that our businesses stay afloat and families remain safe and healthy?

Senator Dow is a business owner and he was in Republican Leadership who worked on COVID-19 issues.

Question 7

Would you be more or less likely to vote for Chloe Maxmin if you knew that she is in lock step with radical liberals who want to bring burdensome California and New York policies to Maine that would be devastating for Maine businesses and families?

Representative (now Senator) Maxmin sponsored a Green New Deal Bill in the Maine Legislature (see below) and Representative Alexandria Ocasio-Cortez is from New York. Representative (now Senator) Maxmin also voted on the budget that would increase spending

in Maine and voted against reforms to the minimum wage (see below) which experts testified would help Maine businesses.

- LD 1282 (HP 924)
 - "An Act To Establish a Green New Deal for Maine"
 - Sponsored by Representative Chloe Maxmin

- Roll Call LD 1001 (HP 743)
 - "An Act Making Unified Appropriations and Allocations for the Expenditures of State Government, General Fund and Other Funds, and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2019, June 30, 2020 and June 30, 2021" (Emergency) (Governor's Bill)
 - Sponsored by Representative Drew Gattine

- LD 612 (HP 440)
 - "An Act To Promote Youth Employment"
 - Sponsored by Representative Richard Bradstreet

Expert Testimony

- Retail Association of Maine
- Maine Farm Bureau
- Maine Grocers and Food Association
- NFIB

- LD 739 (HP 544)
 - "An Act To Help Small Businesses by Establishing an Alternate Minimum Wage"
 - Sponsored by Representative Shelley Rudnicki

Expert Testimony

- NFIB Testimony
- Maine Heritage Policy Center
- Retail Association of Maine

SD 14:

Question 6

Would you be more or less likely to vote for Mark Walker if you knew that he is the no nonsense, solution focused leader we need in times like these with extensive business experience and a record of working with all parties to find answers to the problems our community is facing?

Mr. Walker is Mayor of Hallowell and has been elected in a majority Democratic town three times. He has worked in a bipartisan manner evidenced by the reporting done covering his time in office.

Central Maine, 9/10/2017

"Walker is a registered Republican, and Geoff Haughton, owner of the Liberal Cup, said leading such a liberal city is proof that a moderate, bi-partisan approach to civic issues is an effective way to get things done."

Question 7

Would you be more or Less Likely to vote for Shenna Bellows if you knew that she votes to further her party, not the people she represents and that she's voted numerous times for job-killing regulations that hurt Maine employers and even blocked reforms to improve the business climate in Maine?

Representative (now Secretary) Shenna Bellows voted to increase the minimum wage, sponsored bills to increase workers compensation rates and voted to remove the tip credit, all of which experts testified would hurt businesses in Maine. See below.

- LD 1757 (HP 1210)
 - "An Act To Protect Maine's Economy by Slowing the Rate at Which the State's Minimum Wage Will Increase and Establishing a Training and Youth Wage" (Emergency)
 - Sponsored by Representative Joel Stetkis

Expert Testimony:

- NFIB Testimony
- Maine Department of Labor
- Maine State Chamber
- Maine Heritage Policy Center

- LD 947 (SP 276)
 - "An Act To Extend the Notice of Injury Period in the Maine Workers' Compensation Act of 1992"
 - Sponsored by Senator Shenna Bellows

Expert Testimony

- Testimony of Maine Chamber
- Testimony of MEMIC
- Maine Motor Transport

- LD 673 (SP 235)
 - "An Act To Restore the Tip Credit to Maine's Minimum Wage Law"
 - Sponsored by Senator Roger Katz

Expert Testimony

- Maine State Chamber
 - Maine Heritage Policy Center
 - Maine Grocers Association
-

SD 29:

Question 6

Would you be more or less likely to vote for Stephanie Anderson if you knew that she has 28 years of experience as Cumberland County's district attorney and that she has a proven record of putting felons away and even established the first drug court in Maine to help fight the opioid crisis?

Each of these points about Ms. Anderson are true and she created the first drug court in Maine as District Attorney.

Question 7

Would you be more or less likely to vote for Anne Carney if you knew that she co-sponsored a bill that would have raised the cost of refilling your oil tank by about 40 cents/gallon?

Ms. Carney sponsored LD 434 in the 129th and it could increase oil cost by 40 cent per a gallon.

- LD 434 (HP 343)
 - "An Act To Price Carbon Pollution in Maine"
 - Sponsored by Representative Deane Rykerson

Title 21-A Maine Revised Statutes

Current with the Second Regular Session of the 129th Maine Legislature.

§ 1003. Investigations by commission

1. Investigations. The commission may undertake audits and investigations to determine whether a person has violated this chapter, chapter 14 or the rules of the commission. For this purpose, the commission may subpoena witnesses and records whether located within or without the State and take evidence under oath. A person or entity that fails to obey the lawful subpoena of the commission or to testify before it under oath must be punished by the Superior Court for contempt upon application by the Attorney General on behalf of the commission. The Attorney General may apply on behalf of the commission to the Superior Court or to a court of another state to enforce compliance with a subpoena issued to a nonresident person. Service of any subpoena issued by the commission may be accomplished by:

A. Delivering a duly executed copy of the notice to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of that person;

B. Delivering a duly executed copy of the notice to the principal place of business in this State of the person to be served; or

C. Mailing by registered or certified mail a duly executed copy of the notice, addressed to the person to be served, to the person's principal place of business.

2. Investigations requested. A person may apply in writing to the commission requesting an investigation as described in subsection 1. The commission shall review the application and shall make the investigation if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred.

2-A. Repealed. Laws 2001, c. 535, § 1.

3. State Auditor. The State Auditor shall assist the commission in making investigations and in other phases of the commission's duties under this chapter, as requested by the commission, and has all necessary powers to carry out these responsibilities.

3-A. Confidential records. Investigative working papers of the commission are confidential, except that the commission may disclose them to the subject of the audit or investigation, other entities as necessary for the conduct of an audit or investigation and law enforcement and other agencies for purposes of reporting, investigating or

prosecuting a criminal or civil violation. For purposes of this subsection, “investigative working papers” means documents, records and other printed or electronic information in the following limited categories that are acquired, prepared or maintained by the commission during the conduct of an audit, investigation or other enforcement matter:

- A.** Financial information not normally available to the public;
- B.** Information that, if disclosed, would reveal sensitive political or campaign information belonging to a party committee, political action committee, ballot question committee, candidate or candidate’s political committee, or other person who is the subject of an audit, investigation or other enforcement matter, even if the information is in the possession of a vendor or 3rd party;
- C.** Information or records subject to a privilege against discovery or use as evidence; and
- D.** Intra-agency or interagency communications related to an audit or investigation, including any record of an interview, meeting or examination.

The commission may disclose investigative working papers or discuss them at a public meeting, except for the information or records subject to a privilege against discovery or use as evidence, if the information or record is materially relevant to a memorandum or interim or final report by the commission staff or a decision by the commission concerning an audit, investigation or other enforcement matter. A memorandum or report on the audit or investigation prepared by staff for the commission may be disclosed at the time it is submitted to the commission, as long as the subject of the audit or investigation has an opportunity to review it first to identify material that the subject of the audit or investigation considers privileged or confidential under some other provision of law.

4. Attorney General. Upon the request of the commission, the Attorney General shall aid in any investigation, provide advice, examine any witnesses before the commission or otherwise assist the commission in the performance of its duties. The commission shall refer any apparent violations of this chapter to the Attorney General for prosecution.

§ 1012. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

- 1. Clearly identified.** “Clearly identified,” with respect to a candidate, means that:
 - A.** The name of the candidate appears;
 - B.** A photograph or drawing of the candidate appears; or

C. The identity of the candidate is apparent by unambiguous reference.

...

§ 1014. Publication or distribution of political communications

...

2. Not authorized by candidate. If the communication described in subsection 1 is not authorized by a candidate, a candidate's authorized political committee or their agents, the communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication, except that a communication broadcast by radio is only required to state the city and state of the address of the person that financed the communication. If the communication is in written form, the communication must contain at the bottom of the communication in print that is no smaller in size than 12-point bold print, Times New Roman font, the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE."

2-A. Other communications. Whenever a person makes an expenditure to finance a communication that names or depicts a clearly identified candidate and that is disseminated during the 28 days, including election day, before a primary election, during the 35 days, including election day, before a special election or during the period of time from Labor Day to the election day for a general election through the media described in subsection 1, the communication must state the name and address of the person who made or financed the communication and a statement that the communication was or was not authorized by the candidate, except that a communication broadcast by radio is only required to state the city and state of the address of the person that financed the communication. The disclosure is not required if the communication was not made for the purpose of influencing the candidate's nomination for election or election.

2-B. Top 3 funders; independent expenditures. A communication that is funded by an entity making an independent expenditure as defined in section 1019-B, subsection 1 must conspicuously include the following statement:

"The top 3 funders of (name of entity that made the independent expenditure) are (names of top 3 funders)."

The information required by this subsection may appear simultaneously with any statement required by subsection 2 or 2-A. A communication that contains a visual aspect must include the statement in written text. A communication that does not contain a visual aspect must include an audible statement. This statement is required only for communications made through broadcast or cable television, broadcast radio,

Internet audio programming, direct mail or newspaper or other periodical publications.

A cable television or broadcast television communication must include both an audible and a written statement. For a cable television or broadcast television communication 30 seconds or less in duration, the audible statement may be modified to include only the single top funder.

The top funders named in the required statement consist of the funders providing the highest dollar amount of funding to the entity making the independent expenditure since the day following the most recent general election day.

A. For purposes of this subsection, “funder” includes:

(1). Any entity that has made a contribution as defined in section 1052, subsection 3 to the entity making the independent expenditure since the day following the most recent general election day; and

(2) Any entity that has given a gift, subscription, loan, advance or deposit of money or anything of value, including a promise or agreement to provide money or anything of value whether or not legally enforceable, except for transactions in which a fair value is given in return, since the day following the most recent general election day.

B. If funders have given equal amounts, creating a tie in the ranking of the top 3 funders, the tie must be broken by naming the tying funders in chronological order of the receipt of funding until 3 funders are included in the statement. If the chronological order cannot be discerned, the entity making the independent expenditure may choose which of the tying funders to include in the statement. In no case may a communication be required to include the names of more than 3 funders.

C. The statement required under this subsection is not required to include the name of any funder who has provided less than \$1,000 to the entity making the independent expenditure since the day following the most recent general election day.

D. If only one or 2 funders must be included pursuant to this subsection, the communication must identify the number of funders as "top funder" or "top 2 funders" as appropriate. If there are no funders required to be included under this subsection, no statement is required.

E. When compiling the list of top funders, an entity making an independent expenditure may disregard any funds that the entity can show were used for purposes unrelated to the candidate mentioned in the communication on the basis that funds were either spent in the order received or were strictly segregated in other accounts.

F. In any communication consisting of an audio broadcast of 30 seconds or less or a print communication of 20 square inches or less, the requirements of this subsection are satisfied by including the name of the single highest funder only.

G. If the list of funders changes during the period in which a recurring communication is aired or published, the statement appearing in the communication must be updated at the time that any additional payments are made for that communication.

H. The commission may establish by routine technical rule, adopted in accordance with Title 5, chapter 375, subchapter 2-A, forms and procedures for ensuring compliance with this subsection. Rules adopted pursuant to this paragraph must ensure that the information required by this subsection is effectively conveyed for a sufficient duration and in a sufficient font size or screen size where applicable without undue burden on the ability of the entity to make the communication. The rules must also provide an exemption for types of communications for which the required statement would be impossible or impose an unusual hardship due to the unique format or medium of the communication.

...

4. Enforcement. A violation of this section may result in a civil penalty of no more than 100% of the amount of the expenditure in violation, except that an expenditure for yard signs lacking the required information may result in a maximum civil penalty of \$ 200. In assessing a civil penalty, the commission shall consider, among other things, how widely the communication was disseminated, whether the violation was intentional, whether the violation occurred as the result of an error by a printer or other paid vendor and whether the communication conceals or misrepresents the identity of the person who financed it. If the person who financed the communication or who committed the violation corrects the violation within 10 days after receiving notification of the violation from the commission by adding the missing information to the communication, the commission may decide to assess no civil penalty.

5. Telephone calls. Prerecorded automated telephone calls and scripted live telephone communications that name a clearly identified candidate during the 28 days, including election day, before a primary election, during the 35 days, including election day, before a special election or during the period of time from Labor Day to the general election day for a general election must clearly state the name of the person who made or financed the expenditure for the communication and whether the communication was authorized by a candidate, except for prerecorded automated telephone calls paid for by the candidate that use the candidate's voice in the telephone call and that are made in support of that candidate. Telephone surveys that meet generally accepted standards for polling research and that are not conducted for the purpose of influencing the voting position of call recipients are not required to include the disclosure.

6. Exclusions. The requirements of this section do not apply to:

A. Handbills or other literature produced and distributed at a cost not exceeding \$ 100 and prepared by one or more individuals who are not required to register or file campaign finance reports with the commission and who are acting independently of and without authorization by a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee or an agent of a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee;

B. Campaign signs produced and distributed at a cost not exceeding \$ 100, paid for by one or more individuals who are not required to register or file campaign finance reports with the commission and who are acting independently of and without authorization by a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee or an agent of a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee;

C. Internet and e-mail activities costing less than \$ 100, as excluded by rule of the commission, paid for by one or more individuals who are not required to register or file campaign finance reports with the commission and who are acting independently of and without authorization by a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee or an agent of a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee;

D. Communications in which the name or address of the person who made or authorized the expenditure for the communication would be so small as to be illegible or infeasible, including communications on items such as ashtrays, badges and badge holders, balloons, campaign buttons, clothing, coasters, combs, emery boards, envelopes, erasers, glasses, key rings, letter openers, matchbooks, nail files, noisemakers, paper and plastic cups, pencils, pens, plastic tableware, 12-inch or shorter rulers, swizzle sticks, tickets to fund-raisers and similar items determined by the commission to be too small and unnecessary for the disclosures required by this section and in electronic media advertisements where compliance with this section would be impractical due to size or character limitations; and

E. Campaign signs that are financed by the candidate or candidate's authorized committee and that clearly identify the name of the candidate and are lettered or printed individually by hand.

§ 1014-B. Push polling

1. Push poll defined. For purposes of this section, “push poll” means any paid telephone survey or series of telephone surveys that are similar in nature that reference a candidate or group of candidates other than in a basic preference question, and when:

- A.** A list or directory is used, exclusively or in part, to select respondents belonging to a particular subset or combination of subsets of the population, based on demographic or political characteristics such as race, sex, age, ethnicity, party affiliation or like characteristics;
- B.** The survey fails to make demographic inquiries on factors such as age, household income or status as a likely voter sufficient to allow for the tabulation of results based on a relevant subset of the population consistent with standard polling industry practices;
- C.** The pollster or polling organization does not collect or tabulate survey results;
- D.** The survey prefaces a question regarding support for a candidate on the basis of an untrue statement; and
- E.** The survey is primarily for the purpose of suppressing or changing the voting position of the call recipient.

“Push poll” does not include any survey supporting a particular candidate that fails to reference another candidate or candidates other than in a basic preference question.

2. Push polls; political telephone solicitations; requirements. Push polling must be conducted in accordance with this subsection.

- A.** A person may not authorize, commission, conduct or administer a push poll by telephone or telephonic device unless, during each call, the caller identifies the person or organization sponsoring or authorizing the call by stating “This is a paid political advertisement by (name of persons or organizations),” and identifies the organization making the call, if different from the sponsor, by stating “This call is conducted by (name of organization).”
- B.** If any person identified as either sponsoring or authorizing the call is not required to file any document with election officials pursuant to this Title, a valid, current, publicly listed telephone number and address for the person or organization must be disclosed during each call.
- C.** If any person sponsoring or authorizing the call is affiliated with a candidate, the candidate’s name and the office sought by that candidate must be disclosed during each call.
- D.** If the call is an independent expenditure, as defined in section 1019-B, that a candidate has not approved the call must be disclosed during each call.

It is not a violation of this subsection if the respondent voluntarily terminates the call or asks to be called back before the required disclosures are made, unless the respondent is in any way encouraged to do so by the person initiating the call.

A person may not state or imply false or fictitious names or telephone numbers when providing the disclosures required under this subsection.

All oral disclosures required by this subsection must be made in a clear and intelligible manner and must be repeated in that fashion upon request of the call respondent. Disclosures made by any telephonic device must offer respondents a procedure to have the disclosures repeated.

This subsection does not apply to a push poll or political telephone solicitation or contact if the individuals participating in the call know each other prior to the call.

A person who violates this subsection may be assessed a forfeiture of \$ 500 by the commission.

3. Registered agents; requirements; registration. Persons conducting push polling shall register and comply with the requirements of this subsection.

A. A person who conducts a paid push poll or political telephone solicitation or contact, prior to conducting that poll, solicitation or contact, must have and continuously maintain for at least 180 days following the cessation of business activities in this State a designated agent for the purpose of service of process, notice or demand required or permitted by law, and shall file with the commission identification of that designated agent. Conducting business in this State includes both placing telephone calls from a location in this State and calls from other states or nations to individuals located within this State. The designated agent must be an individual resident of this State, a domestic corporation or a foreign corporation authorized to do business in this State. This paragraph does not apply to any entity already lawfully registered to conduct business in this State.

B. The commission shall create and maintain forms for the designation of agents required pursuant to paragraph A and require, at a minimum, the following information:

(1) The name, address and telephone number of the designated agent; and

(2) The name, address and telephone number of the person conducting business in this State.

C. The person conducting push polling shall notify the commission of any changes in the designated agent and the information required by paragraph B.

D. A person who violates this subsection may be assessed a forfeiture of \$ 500 by the commission.

4. Permitted practices. This section does not prohibit legitimate election practices, including but not limited to:

- A. Voter identification;
- B. Voter facilitation activities; or
- C. Generally accepted scientific polling research.

§ 1019-B. Reports of independent expenditures

1. Independent expenditures; definition. For the purposes of this section, an “independent expenditure”:

- A. Is any expenditure made by a person, party committee or political action committee, other than by contribution to a candidate or a candidate’s authorized political committee, for any communication that expressly advocates the election or defeat of a clearly identified candidate; and
- B. Is presumed to be any expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 28 days, including election day, before a primary election; during the 35 days, including election day, before a special election; or from Labor Day to a general election day.

2. Rebutting presumption. A person presumed under this section to have made an independent expenditure may rebut the presumption by filing a signed written statement with the commission within 48 hours of disseminating the communication stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. The commission may gather any additional evidence it deems relevant and material and shall determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

3. Report required; content; rules. [2009, c. 524, § 6 (RPR); MRSAT. 21-A, § 1019-B, sub—§ 3 (RP).]

4. Report required; content; rules. A person, party committee or political action committee that makes any independent expenditure in excess of \$250 during any one candidate’s election shall file a report with the commission. In the case of a municipal election, the report must be filed with the municipal clerk.

- A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements. Rules adopted

pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

B. A report required by this subsection must contain an itemized account of each expenditure in excess of \$250 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate.

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. The commission may adopt procedures requiring the electronic filing of an independent expenditure report, as long as the commission receives the statement made under oath or affirmation set out in paragraph B by the filing deadline and the commission adopts an exception for persons who lack access to the required technology or the technological ability to file reports electronically. The commission may adopt procedures allowing for the signed statement to be provisionally filed by facsimile or electronic mail, as long as the report is not considered complete without the filing of the original signed statement.

5. Exclusions. An independent expenditure does not include:

A. An expenditure made by a person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents;

B. A telephone survey that meets generally accepted standards for polling research and that is not conducted for the purpose of changing the voting position of the call recipients or discouraging them from voting;

C. A telephone call naming a clearly identified candidate that identifies an individual's position on a candidate, ballot question or political party for the purpose of encouraging the individual to vote, as long as the call contains no advocacy for or against any candidate; and

D. A voter guide that consists primarily of candidates' responses to surveys and questionnaires and that contains no advocacy for or against any candidate.

CMR 94-270

Chapter 001. PROCEDURES

...

SECTION 10. REPORTS OF INDEPENDENT EXPENDITURES

...

B. . "Expressly advocate" means any communication that

(1) uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!"; or

(2) is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.

...

AAPOR Statements on "Push" Polls

The problem of so-called “push polls”

When advocacy calls are made under the guise of research

This statement from AAPOR explains how to tell the difference between fraudulent political polls—commonly referred to as “push polls”—and legitimate polling, including message testing. AAPOR condemns political telemarketing under the guise of research and is committed to providing information that explains what this unethical campaign practice is and what you can do about it.

A “Push Poll” is Not a Legitimate Poll

A so-called "push poll" is an insidious form of negative campaigning, disguised as a political poll. “Push polls” are not surveys at all, but rather unethical political telemarketing -- telephone calls disguised as research that aim to persuade large numbers of voters and affect election outcomes, rather than measure opinions. This misuse of the survey method exploits the trust people have in research organizations and violates the AAPOR Code of Professional Ethics and Practices.

Identifying Advocacy Calls Made Under the Guise of Research

Political telemarketing calls, when disguised as research, may sometimes be difficult to differentiate from a legitimate survey. Here are characteristics that will *usually* indicate to a respondent that the call is *not* a legitimate survey.

- One or only a few questions are asked, all about a single candidate or a single issue.
- The questions are uniformly strongly negative (or sometimes uniformly positive) descriptions of the candidate or issue.
- The organization conducting the calls is not named, or a phony name is used.
- Evasive answers are given in response to requests for more information about the survey.

In addition, the following characteristics will indicate to journalists, reporters, and survey professionals that a telephone call is not a legitimate survey.

- The number of people called is very large, sometimes many thousands.
- The calls are not based on a random sample.
- It is difficult to find out which organization conducted the interviews.

Fraudulent Polls vs. Message Testing

The fact that a poll contains negative information about one or more candidates does NOT in and of itself make it a 'push poll.' Political campaigns routinely sponsor legitimate "message-testing" surveys that are used by campaign consultants to test out the effectiveness of various possible campaign messages or campaign ad content, often including negative messages. Political message-testing surveys may sometimes be confused with fake polling, but they are very different. One way to tell is that message-testing surveys exhibit the characteristics of a legitimate survey, such as:

- At the beginning of the call, the interviewer clearly identifies the call center actually making the calls. (However, legitimate political polling firms will often choose not to identify the client who is sponsoring the research, be it a candidate or a political party, since that could bias the survey results.)
- The interview contains more than a few questions.
- The questions usually ask about more than one candidate or mention both sides of an issue.
- Questions, usually near the end of the interview, ask respondents to report demographic characteristics such as age, education level, and party identification.
- The survey is based on a random sample of voters.
- The number of respondents falls within the range of legitimate surveys, typically between 400 and 1500 interviews.

AAPOR stresses that these criteria apply most of the time, but exceptions will arise. Journalists and members of the public are encouraged to investigate allegations of "push polling" to ascertain whether or not the calling activity was carried out for legitimate research purposes.

The Threats of Fraudulent Political Calls (Political Telemarketing Under the Guise of Research)

Political advocacy calls made under the guise of a survey abuse the public's trust. They gain the attention of respondents under false pretenses by taking advantage of the good will people have toward legitimate research.

When disguised as research, these calls create negative images of legitimate surveys, especially when they distort issues or candidate characteristics in order to influence opinion.

They go beyond the ethical boundaries of political polling by bombarding voters with distorted or even false statements in an effort to manufacture negative attitudes.

The hostility created in this way affects legitimate surveys by reducing the public's willingness to cooperate with future survey requests.

AAPOR Position on So-Called "Push Polls"

- AAPOR Councils have repeatedly warned members and the public about the harm done by unethical political telemarketing that is conducted under the guise of research.
- The **AAPOR Code** identifies fraudulent political polling as unethical conduct. The Code states: "We will not misrepresent our research or conduct other activities (such as sales, fundraising, or political campaigning) under the guise of conducting research" [section I.A.2.].
- AAPOR has reacted to complaints about suspected "push polls" and conducted investigations.
- AAPOR urges its members and the media to uncover instances of political telemarketing under the guise of research and help us alert the public promptly when these fraudulent political polls occur.

Issues in Message Testing

Despite their legitimacy of purpose, message-testing surveys occasionally generate vigorous complaint. They are sometimes the subject of public controversy in political campaigns, and may appear in press stories about dubious campaign practices. AAPOR recognizes that message tests may need to communicate positive or negative information in strongly political terms, in a tone similar to campaign advertisements. Still, these surveys should be judged by the same ethical standards as any other poll of the public: Do they include any false or misleading statements? Do they treat the respondent with fairness and respect?

Issues with Automated Calling

Automated telephone calling technologies, including pre-recorded political messages, automated touch-tone polls, and interactive voice response technology, also offer possibilities for abuse through fraudulent "push polling." The issues are the same whether a live telephone caller or an automated system makes the call. Advocacy or canvassing calls should never be misrepresented to voters as research calls, whatever the mechanism of communication.

How Can You Help Combat Fraudulent Political Polling -- So-Called "Push" Polls?

AAPOR urges its members and the media to uncover unethical political telemarketing and help alert the public.

If you suspect you have received a political telemarketing call disguised as a survey, try to get as much information as possible from the caller, particularly the name and location of the organization doing the "interviewing." Take notes on the specific

questions that you were asked.

Also ask what organization is conducting the calls, the number of people called, the questions that will be included, and how the information from the call will be used.

If you are a reporter who receives information on a purported “push poll”, seek to discern if the call in question was part of a legitimate message-testing survey or was indeed political telemarketing under the guise of research. Solicit the opinions of experts who can evaluate it accordingly.


For more information contact: Standards@aapor.org.

AAPOR Statement Released on June 2007. Updated October 2015.

FACTANK

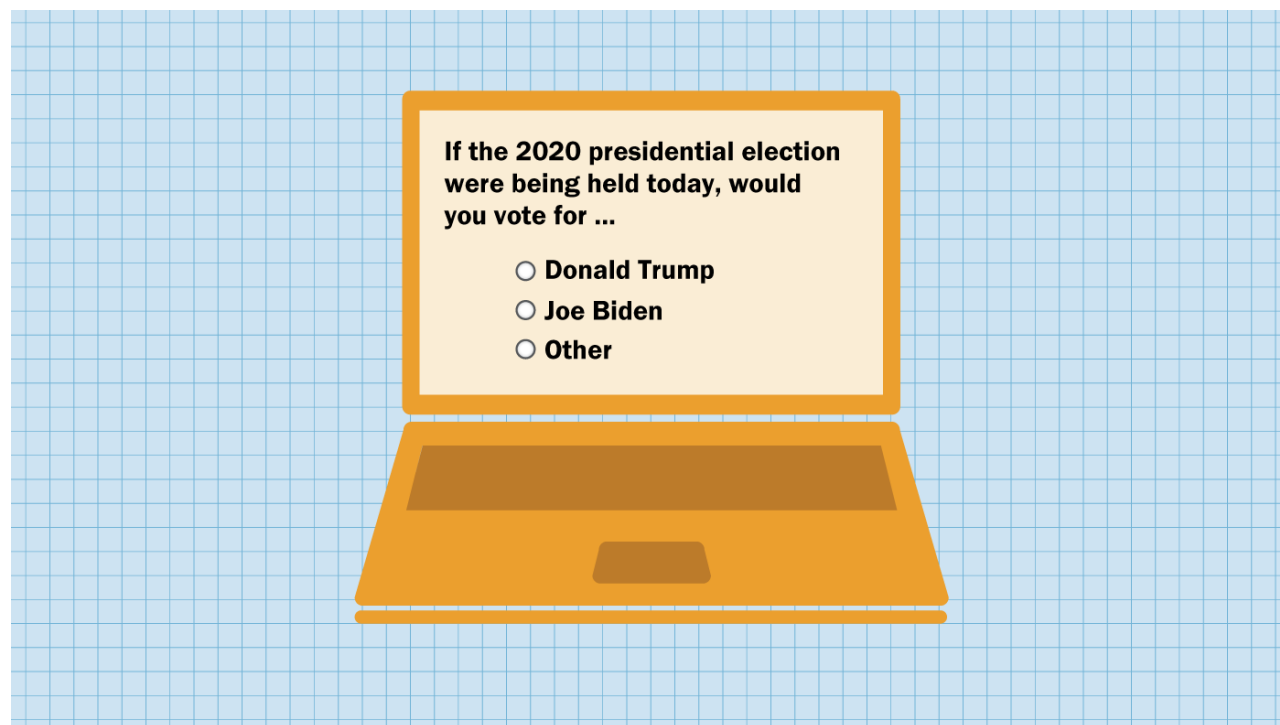
NEWS IN THE NUMBERS

AUGUST 5, 2020

 Trust, Facts and Democracy

Key things to know about election polling in the United States

BY COURTNEY KENNEDY



A robust public polling industry is a marker of a free society. It's a testament to the ability of organizations outside the government to gather and publish information about the well-being of the public and citizens' views on major issues. In nations without robust polling, the head of government can simply *decree* citizens' wants and needs instead.

After the 2016 presidential election, some observers understandably questioned whether polling in the United States is still up to the task of producing accurate information. Errors in 2016 laid bare some real limitations of polling, even as clear-eyed reviews of national polls in both [2016](#) and [2018](#) found that polls still perform well when done carefully.

One way to help avoid a repeat of the skepticism about surveys that followed the last presidential election is to narrow the gap between perception and reality when it comes to how polling works. People have many notions about polling – often based on an introductory statistics class, but sometimes even less – that are frequently false. The real environment in which polls are conducted bears little resemblance to the idealized settings presented in textbooks.

With that in mind, here are some key points the public should know about polling heading into this year’s presidential election.

The real environment in which polls are conducted bears little resemblance to the idealized settings presented in textbooks.

Different polling organizations conduct their surveys in quite different ways.

Survey methodology is undergoing a period of creative ferment. Currently, CNN and Fox News conduct polls by telephone using live interviewers, CBS News and Politico field their polls online using opt-in panels, and The Associated Press and Pew Research Center conduct polls online using a panel of respondents recruited offline. There is even a fourth group of pollsters that combine methods like robocalls and online surveying with opt-in samples. These different approaches have consequences for [data quality](#), as well as [accuracy in elections](#).

The barriers to entry in the polling field have disappeared. Technology has disrupted polling in ways similar to its impact on journalism: by making it possible for anyone with a few thousand dollars to enter the field and conduct a national poll. As with journalism, there are pluses and minuses to this democratization. There has been a wave of experimentation with new approaches, but there has also been a proliferation of polls from firms with little to no survey credentials or track record. In 2016, this contributed to a state polling landscape overrun with fast and cheap polls, most of which made a preventable mistake: failing to correct for an overrepresentation of [college-educated voters](#), who leaned heavily toward Hillary Clinton. Some newcomer polls might provide good data, but poll watchers should not take that on faith.

A poll may label itself “nationally representative,” but that’s not a guarantee that its methodology is solid. When applied to surveys, the phrase “nationally representative” sounds like a promise of a poll’s trustworthiness. But the term doesn’t convey any specific technical information or come with any guarantees. Surveys can be

sampled and adjusted to represent the country on certain dimensions, so any person can make this claim about any poll, regardless of its quality. Unfortunately, this is part of a broader trend in which the lingo used to promote surveys (“organic sampling,” “next-gen sampling” or “global marketplace,” for example) can on some occasions obscure flawed methodologies that [lead to bias](#). Poll watchers would do well to focus on key questions for vetting polls, such as those included in [this guide for reporters](#) published by the American Association for the Advancement of Science’s SciLine, or Pew Research Center’s own [field guide to polling](#).

The real margin of error is often about double the one reported. The notion that a typical margin of error is plus or minus 3 percentage points leads people to think that polls are more precise than they really are. Why is that? For starters, the margin of error addresses only *one* source of potential error: the fact that random samples are likely to differ a little from the population just by chance. But there are three other, equally important sources of error in polling: [nonresponse](#), [coverage error](#) (where not all the target population has a chance of being sampled) and [mismeasurement](#). Not only does the margin of error fail to account for those other sources of potential error, it implies to the public that they do not exist, which is not true.

[Several](#) recent [studies show](#) that the [average error](#) in a poll estimate may be closer to 6 percentage points, not the 3 points implied by a typical margin of error. While polls remain useful in showing whether the public tends to favor or oppose key policies, this hidden error underscores the fact that polls are not precise enough to call the winner in a close election.

Huge sample sizes sound impressive, but sometimes they don’t mean much. Students learning about surveys are generally taught that a very large sample size is a sign of quality because it means that the results are more precise. While that principle remains true in theory, the reality of modern polling is different. As [Nate Cohn of The New York Times has explained](#), “Often, the polls with huge samples are actually just using cheap and problematic sampling methods.”

Students learning about surveys are generally taught that a very large sample size is a sign of quality because it means that the results are more precise. While that principle remains true in theory, the reality of modern polling is different.

Adding more and more interviews from a biased source does not improve estimates. For example, online opt-in polls are based on convenience samples that [tend to overrepresent](#) adults who self-identify as Democrats, live alone, do not have children and have lower incomes. While an online opt-in survey with 8,000 interviews may sound more impressive than one with 2,000 interviews, a [2018 study by the Center](#) found virtually no difference in accuracy.

There is evidence that when the public is told that a candidate is extremely likely to win, some people may be less likely to vote. Following the 2016 election, many wondered whether the pervasive forecasts all but guaranteeing a Clinton victory – two modelers put her chances at 99% – led some would-be voters to conclude that the race was effectively over and their vote would not make a difference. Now there is scientific research to back up that logic. A team of researchers [found experimental evidence](#) that when people have high confidence that one candidate will win, they are less likely to vote. This helps explain why [some analysts of polls say](#) elections should be covered using traditional polling estimates and margins of error rather than [speculative win probabilities](#) (also known as probabilistic forecasts).

Estimates of the public’s views of candidates and major policies are generally trustworthy, but estimates of who will win the “horse race” are less so. Taking 2016 as an example, both Donald Trump and Clinton had historically poor favorability ratings. That turned out to be a signal that many Americans were struggling to decide whom to support and whether to vote at all. By contrast, a [raft of state polls in the Upper Midwest](#) showing Clinton with a lead in the horse race proved to be a mirage.

Leaving aside the fact that the national popular vote for president doesn’t directly determine who wins the election, there are several reasons why the final vote margin is harder to accurately gauge, starting with the fact that it is notoriously difficult to figure out which survey respondents [will actually turn out to vote](#) and which will not. This year, there will be added uncertainty in horse race estimates stemming from possible pandemic-related barriers to voting. Far more people will vote by mail – or try to do so – than in the past, and if fewer polling places than usual are available, lines may be very long. All of this is to remind us that the real value in election polling is to help us understand *why* people are voting – or not voting – as they are.

All good polling relies on statistical adjustment called “weighting” to make sure that samples align with the broader population on key characteristics. Historically, public opinion researchers have relied on the ability to adjust their datasets using a core set of demographics to correct imbalances between the survey sample and the population. There is a growing realization among survey researchers that weighting a poll

on just a few variables like age, race and sex is insufficient for getting accurate results. Some groups of people – such as older adults and college graduates – are more likely to take surveys, which can lead to errors that are too sizable for a simple three- or four-variable adjustment to work well. Pew Research Center studies in [2016](#) and [2018](#) found that adjusting on more variables produces more accurate results.

A number of pollsters take this lesson to heart. The high-caliber [Gallup](#) and [New York Times/Siena College](#) polls adjust on eight and 10 variables, respectively. Pew Research Center polls adjust on [12 variables](#). In a perfect world, it wouldn't be necessary to have that much intervention by the pollster – but the real world of survey research is not perfect.

Failing to adjust for survey respondents' education level is a disqualifying shortfall in present-day battleground and national polls. For a long time in U.S. politics, education level was not consistently correlated with [partisan choice](#), but [that is changing](#), especially among white voters. As a result, it's increasingly important for poll samples to accurately reflect the composition of the electorate when it comes to educational attainment. Since people with higher levels of formal education are more likely to participate in surveys and to self-identify as Democrats, the potential exists for polls to overrepresent Democrats. But this problem can easily be corrected through adjustment, or weighting, so the sample matches the population. The need for battleground state polls to adjust for education was among the most important [takeaways](#) from the polling misses in 2016.

Transparency in how a poll was conducted is associated with better accuracy.

The polling industry has several platforms and initiatives aimed at promoting transparency in how polls are conducted, including the American Association for Public Opinion Research's [Transparency Initiative](#) and the [Roper Center archive](#). FiveThirtyEight's [Nate Silver found](#) that polling firms participating in these organizations have less error on average than those that don't. Participation in these transparency efforts does not guarantee that a poll is rigorous, but it is undoubtedly a positive signal. Transparency in polling means disclosing essential information including the poll's sponsor, data collection firm, where and how participants were selected and the mode of interview, field dates, sample size, question wording and weighting procedures.

The problems with state polls in 2016 do not mean that polling overall is broken. Yes, polls in the Upper Midwest systematically underestimated support for Trump, but experts [figured out why](#): Undecided voters ultimately broke heavily for Trump; most state polls overrepresented college graduates; and turnout was higher than expected in many rural counties but lower in urban ones. Lost in the shuffle, meanwhile, was that *national* polls in 2016 were quite [accurate by historical standards](#). Clinton's advantage in

the national popular vote ended up being 2 percentage points, compared with 3 points in the final polling average.

The 2018 midterms brought further evidence that polling still works well when done carefully. The Democratic Party's advantage nationally in the U.S. House of Representatives ended up being 9 points in the final vote, versus an average of 7 points in the final polls.

Evidence for “shy Trump” voters who don’t tell pollsters their true intentions is much thinner than some people think. Do people sometimes lie to pollsters? Sure. But the notion that Trump supporters were unwilling to express their support to pollsters was overblown, given the scant evidence to support it. A committee of polling experts evaluated five different tests of the “shy Trump” theory and [turned up little to no evidence](#) for each one. Later, a [researcher from Yale](#) and Pew Research Center [conducted separate tests](#) that also found little to no evidence in support of the claim. The “shy Trump” theory might account for a small amount of the error in 2016 polls, but it was not among the main reasons.

A systematic miss in election polls is more likely than people think. A legendary quote from House Speaker Tip O’Neill said that “all politics is local.” But that has become [less and less true](#) in the U.S. over time. State-level outcomes are highly correlated with one another, so polling errors in one state are likely to repeat in other, similar states.

As [Nate Silver has explained](#), if Clinton was going to fall short of her standing in the polls in Pennsylvania, she was also likely to underperform in demographically similar states such as Wisconsin and Michigan. In 2016, most of the forecasters trying to predict the election outcome underestimated the extent to which [polling errors were correlated](#) from one state to another. Forecasters are more aware of this issue than they were four years ago, but they do not have a foolproof way to overcome it.

National polls are better at giving Americans equal voice than predicting the Electoral College. The 2000 and 2016 presidential elections demonstrated a difficult truth: National polls can be accurate in identifying Americans’ preferred candidate and yet fail to identify the winner. This happens when the national popular vote winner (e.g., Al Gore, Hillary Clinton) differs from the Electoral College winner (e.g., George W. Bush, Donald Trump).

National polls can be accurate in identifying Americans' preferred candidate and yet fail to identify the winner.

For some, this raises the question: What is the use of national polls if they don't tell us who is likely to win the presidency? In fact, national polls try to gauge the opinions of *all* Americans, regardless of whether they live in a battleground state like Pennsylvania, a reliably red state like Idaho, or a reliably blue state like Rhode Island. In short, national polls tell us what the *entire* citizenry is thinking. If pollsters only focused on the Electoral College, the vast majority of Americans (about 80%) who live in uncompetitive states would essentially be ignored, with their needs and views deemed too unimportant to warrant polling.

Fortunately, this is not [how most pollsters view the world](#). As the noted political scientist Sidney Verba explained, "Surveys produce just what democracy is supposed to produce – equal representation of all citizens."

Topics [Polling](#), [Trust, Facts and Democracy](#), [Election 2020](#), [Research Methods](#)



Courtney Kennedy is director of survey research at Pew Research Center.

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A Resource for State Preelection Polling

The Current Population Survey provides high-quality data that can mitigate overrepresentation of college graduates in polls

BY **NICK HATLEY** AND **COURTNEY KENNEDY**



A voter arrives to cast her ballot at a polling center located in a high school gymnasium. (John Moore/Getty Images)

How we did this [+](#)

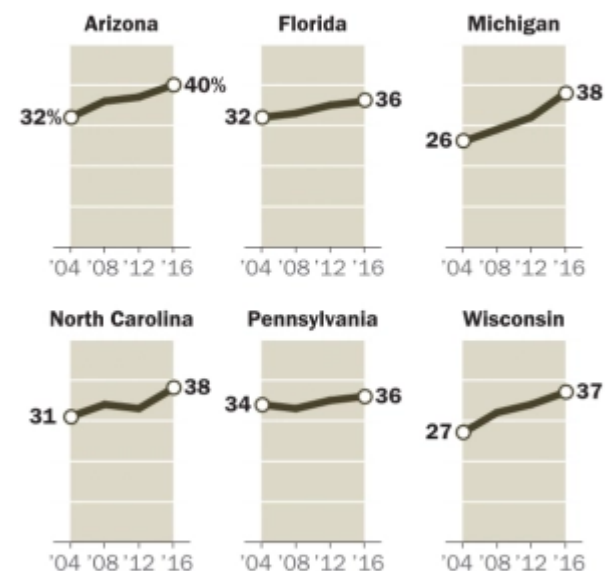
Post-mortem [analysis](#) of the 2016 election found that a failure to adjust for overrepresentation of college graduates was among the reasons many state-level polls underestimated support for Donald Trump. Voters who graduated from a four-year college are more likely to answer surveys than other adults and, in recent years, they are also more likely to support a Democrat for president. If a battleground state poll does not adjust for

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having too many college graduates, it is at risk of overstating support for a Democratic presidential candidate (in this case, Joe Biden).

CPS shows the share of voters who are college grads is roughly 40% or less in battleground states

% of voters in each state who are college graduates



Source: Current Population Survey Voting and Registration Supplement.

"A Resource for State Preelection Polling"

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Since 2016, many pollsters heeded this lesson and added an education adjustment to their work. Additionally, most national pollsters as well as some state pollsters had been making the adjustment for many election cycles and continue to do so. But not all have fixed this issue. For example, a June poll appeared to show Biden with a massive 18-percentage-point lead in Michigan. But a look at the sample shows why: More than two-thirds (69%) of those interviewed were college graduates – nearly double the rate among Michigan voters in recent elections. Regardless, a high-profile polling aggregator fed this poll into its average for the state, demonstrating how readily problems from 2016 can repeat.

One challenge in adjusting for education is identifying the proper benchmark. Using the June poll example, a rate of 69% college graduates is clearly too high. But what is the “right” number? Technically, no one knows, because the goal is to align the survey with the education profile of those who will vote in an election that has not yet happened. While the precise number is unknown, historical data from a large, high-quality federal study ably fills this need. In the month or so following each presidential and midterm election, the U.S. Census Bureau conducts the [Current Population Study \(CPS\) Voting and Registration](https://www.census.gov/data/tables/2019/othercurrent/tables/2019-01-01/cps-voting.html)

[Supplement](#). The study does not ask *who* people voted for, but it does ask *whether* they voted. With more than 90,000 interviews nationally, more than a third of which are done in-person, the CPS supplement is among the nation's best measurements of the demographics of voters and nonvoters.

The state-by-state results are freely available to the public, but for many they are difficult to access as they require software and servers that can process large data files. This report provides the CPS data on the education profile of voters in all 50 states and the District of Columbia for the past four presidential elections. State pollsters can use this data to inform their weighting adjustments. Poll observers can use this data to determine whether the share of college graduates in a battleground state poll is reasonable.

There are several critical factors to keep in mind:

Polls should be judged based on their *weighted* sample. The issue is not whether raw poll samples have too many college graduates. It is almost a given that they do. The issue is whether the pollster has adjusted for the issue – weighting down college graduates proportional to their plausible share of voters in the upcoming election. If a poll's methodology states that education was included as an adjustment variable, often that is enough to safely assume this issue was addressed. If a poll did not adjust for education, observers curious about quality can ask the pollster what share of the weighted sample were college graduates. Reputable pollsters will recognize why this information would be of interest and provide it. If a pollster is unwilling to provide this information, that is a strong sign that the poll may not be trustworthy.

The expectation should be plausibility, not perfection. The CPS data gives a reality check for the typical proportion of a state's voters who are college graduates. But the proportion in an upcoming election could always be somewhat higher or lower than in the CPS data. One takeaway from the data compiled here is that large election-to-election changes (for example, more than 8 percentage points) in the college graduate rate are highly unlikely – in other words, implausible. Changes on the order of several percentage points, however, are to be expected. Observers should not expect that a poll exactly mimics prior elections' education profile; they should only expect that it comes reasonably close. For example, the CPS shows that the share of presidential election voters in Florida who are college graduates has recently been in about the mid-30% range. A 2020 Florida preelection poll should, therefore, have a college graduate rate in its weighted sample of between about 30% and 45%. If the rate is well above 45%, the poll runs the risk of overestimating support for Biden and underestimating support for Trump.¹

A plausible education profile is important, but other factors matter too. A poll's education profile is far from the *only* factor that observers should consider when evaluating quality. For example, ideally a poll draws its participants from a source that includes nearly everyone in the state (or in the country for national polls). Examples of such sources are registered voter files, telephone random-digit dialing and the U.S. Postal Service residential address database. Other factors that are important to a [poll's trustworthiness](#) include the sponsor, sample size, question wording and adjustments on other variables such as age, sex, race and geography. In other words, a plausible education profile should be on the checklist for trustworthiness in battleground state polls – but there are other items on the list as well.

Ideally, an education adjustment accounts for multiple levels and variation between race groups. For clarity, this analysis focuses on whether college graduates are overrepresented in poll estimates. But for practitioners, additional layers of detail can be important. A college vs. non-college adjustment is good, but a more detailed adjustment aimed at achieving proper representation of more fine-grained levels can be even better. For example, a pollster can use the CPS data to adjust for the share with a high school education or less, the share with some college experience (which typically includes trade schools and two-year college degrees), the share with a four-year college degree, and the share with a graduate degree.

Similarly, in geographies with relatively large shares of Hispanic, Black or Asian American populations, a pollster may further improve accuracy by adjusting the education profile *within* the largest race and ethnicity groups. For example, Pew Research Center's national polls are adjusted to ensure that education groups (high school or less, some college, college graduate) are represented properly among Hispanic, Black, White and Asian Americans.

The CPS trend lines generally are fairly stable and slowly increasing. The stability of the state-level CPS trends dispels the notion that a pollster cannot anticipate roughly what the college graduate rate among a state's voters will be. While other voter demographics (for example, the share who live in rural areas) may shift noticeably, the share who graduated from a four-year college simply do not tend to fluctuate wildly, according to the CPS. Furthermore, to the extent that there is movement, it is somewhat predictable: the college graduate rate has tended to increase by about 2 to 3 percentage points in the last four elections in battleground states. State pollsters could reasonably factor in such a modest increase when adjusting polls this cycle.

While this report focuses on the CPS, there are other useful sources of information that can be used to improve or assess the representativeness of a poll. For example, pollsters

sampling from registered voter files can use race, age, sex, political party and other variables on file to adjust their samples. While voter file data on those characteristics can be quite accurate, appended data about voters' education level tends to be less so. A [2018 Pew Research Center study of five national voter files](#) found that individuals' education level was either missing or inaccurate 49% of the time, on average, across the files.

Some polls – particularly those releasing estimates for all U.S. adults – do not need weighting targets that are specific to likely or registered voters. An alternative source that works well for such polling is the American Community Survey (ACS). Unlike the CPS, the ACS does not provide data on those who voted in an election. It does, however, provide authoritative data on the shares of all adults with various levels of education at the state level and much lower.

Finally, it is worth reiterating that education is just *one of several* dimensions that tend to require adjustment in polls. A poll also needs to be representative with respect to geography, age, race, ethnicity, urbanicity, sex and potentially more. Adjustments for political partisanship and urbanicity are increasingly common in polling. As the polling field enters the heat of the 2020 election, it's imperative that public polls are strong on all the fundamentals, since it may be difficult to predict what new challenge may arise.

Voter's education distribution has remained relatively stable since in recent presidential elections

Among voters in each state in each general election...

State	2004 HS or less	2004 Some college	2004 College grad	2008 HS or less	2008 Some college	2008 College grad	2012 HS or less	2012 Some college	2012 College grad	2016 HS or less	2016 Some college	2016 College grad
AK	32	38	30	29	38	33	31	38	32	30	34	36
AL	42	31	28	44	31	24	39	32	29	35	34	32
AR	44	30	26	44	29	26	41	27	32	37	29	34
AZ	32	36	32	28	35	36	26	38	37	23	36	40
CA	28	35	37	27	35	38	25	34	42	25	32	43
CO	26	30	44	25	31	43	23	34	44	22	30	48
CT	34	25	41	31	29	40	28	27	45	29	25	46
DC	25	19	56	25	21	53	24	16	59	18	16	66
DE	39	29	31	41	28	31	35	28	36	36	26	38
FL	37	31	32	34	33	33	34	31	35	31	32	36

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State	2004 HS or less	2004 Some college	2004 College grad	2008 HS or less	2008 Some college	2008 College grad	2012 HS or less	2012 Some college	2012 College grad	2016 HS or less	2016 Some college	2016 College grad
GA	36	32	32	35	31	34	36	30	34	33	31	36
HI	28	35	37	32	30	38	30	31	39	26	31	43
IA	38	37	26	33	33	34	34	35	32	30	35	35
ID	35	37	28	34	33	33	30	36	35	28	37	35
IL	35	31	34	34	31	36	30	29	41	28	30	42
IN	45	29	26	44	29	27	36	30	34	36	29	35
KS	33	32	35	28	34	38	28	31	41	25	35	40
KY	45	30	25	38	36	26	40	34	26	36	33	31
LA	46	28	26	44	27	29	44	30	26	40	30	31
MA	34	24	42	29	24	46	28	24	48	25	25	50
MD	34	28	38	31	28	41	29	27	44	26	28	46
ME	44	29	27	40	30	30	36	29	36	34	31	35
MI	41	33	26	36	35	29	35	34	32	30	32	38
MN	30	36	35	28	36	36	27	35	38	24	34	41
MO	40	30	30	39	34	27	35	34	31	36	33	31
MS	50	29	21	46	30	24	41	33	26	43	31	26
MT	35	37	28	37	32	31	31	36	33	30	34	36
NC	40	29	31	33	33	34	33	34	33	29	33	38
ND	31	41	28	32	37	31	28	35	37	29	34	36
NE	35	33	32	30	35	36	30	33	37	27	36	38
NH	36	27	37	31	31	38	29	30	40	30	28	42
NJ	39	25	36	35	25	41	29	27	43	29	24	47
NM	35	37	28	31	30	40	30	28	42	30	35	36
NV	38	35	27	35	35	30	35	35	31	30	40	31
NY	38	27	35	34	29	37	32	28	41	28	27	45
OH	43	30	26	41	30	29	42	30	28	37	29	34
OK	42	29	29	37	32	30	32	32	35	33	28	39
OR	31	39	30	28	38	34	29	34	37	26	31	43

PA	2004 HS or less	25 2004 Some college	34 2004 College grad	2008 HS or less	27 2008 Some college	33 2008 College grad	2012 HS or less	28 2012 Some college	35 2012 College grad	2016 HS or less	28 2016 Some college	36 2016 College grad
State [▲]	[◆]	[◆]	[◆]	[◆]	[◆]	[◆]	[◆]	[◆]	[◆]	[◆]	[◆]	[◆]
RI	38	25	37	34	29	37	34	28	39	33	29	37
SC	37	36	26	43	30	27	34	33	33	34	30	35
SD	39	35	27	35	34	31	33	36	31	28	37	35
TN	41	31	28	42	28	31	36	29	35	33	29	38
TX	35	32	33	34	34	32	32	34	34	27	33	41
US	37	31	32	34	32	34	32	31	37	30	31	40
UT	30	37	33	26	44	30	24	41	35	20	37	43
VA	33	27	40	34	25	41	30	28	42	28	30	42
VT	36	26	38	34	27	39	31	26	43	27	27	45
WA	28	37	35	24	37	38	26	33	41	24	31	45
WI	41	32	27	36	33	32	33	33	34	31	32	37
WV	50	26	23	49	30	21	46	26	29	43	27	30
WY	37	39	23	36	38	27	37	36	27	28	40	32

Source: Current Population Survey Voting and Registration Supplement 2004-2016

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1. While, on average, polls that severely overrepresent college graduates risk overestimating support for Biden, other factors may lead to a different outcome. For example, if such a poll was conducted by robocalling landline numbers – an approach that tends to reach proportionately too many older White voters – then the use of robocalling may affect the poll's accuracy more than the proportion of college graduates. ↩



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In the Matter of)	
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Economic Freedom Fund)	
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**STATEMENT OF REASONS OF
COMMISSIONER CYNTHIA L. BAUERLY AND
COMMISSIONER ELLEN L. WEINTRAUB**

On April 14, 2009 the Commission failed by a vote of 3-2 to approve the Office of General Counsel's recommendations to find reason to believe that Economic Freedom Fund ("EFF") violated 2 U.S.C. §§ 433, 434, and 441a(f) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, and by knowingly accepting prohibited contributions and contributions in excess of \$5,000.¹

The Federal Election Campaign Act of 1971, as amended ("the Act") requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a predicate to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). "Reason to believe" is a threshold determination that by itself does not establish that the law has been violated. In fact, "reason to believe" determinations indicate only that the Commission found sufficient legal justification to open an investigation to determine whether there is probable cause that a violation of the Act has occurred.²

EFF was created three months before the 2006 election. In its filings with the IRS, EFF reported raising \$5,050,450 between August 1, 2006 and December 31, 2006. Almost all of the funds, \$5,000,000, were donated by one contributor, Bob J. Perry, who also was a major contributor to Swift Boat Veterans during the 2004 election cycle. EFF received the remaining funds, \$50,450, from approximately six individuals between September and October of 2006, and raised no funds after the November 2006 election. EFF reported to the IRS spending \$4,835,805 between August 1, 2006 and December 31, 2006. Almost all of that spending, \$4.8 million, occurred in the three months prior to the 2006 elections. EFF's website shows that it produced 59 advertisements, which included television and radio advertisements and mailers. The vast majority of these advertisements attacked eight Democratic House candidates in West Virginia, Georgia, Iowa, and Oregon, five of which the National Republican Congressional Committee ("NRCC") had publicly designated as vulnerable, labeling them "sitting ducks."

¹ Chairman Walther, Commissioners Bauerly and Weintraub voted to approve the recommendations while Vice-Chairman Petersen and Commissioner Hunter dissented. The Commission subsequently voted to close the file.

² See 72 Fed. Reg. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007).

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Statement of Reasons

EFF also funded automated calls to voters in Indiana, Iowa, West Virginia, and Georgia. For example, in Indiana, EFF conducted push polls targeting Democratic candidate Baron Hill in the 9th District congressional race:

Caller: This is survey 2006 with a 45-second public survey. Are you registered to vote in Indiana?

Caller: Do you intend to vote in the November 7th Election?

...

Caller: Baron Hill voted to keep the death tax in place and refused to vote to make permanent the tax cuts that have caused record economic growth since 2001. Does knowing this make you less likely to vote for Barron Hill?

...

Caller: Baron Hill has over \$60,000 in contributions from trial lawyers and his [sic] voted repeatedly to stop reform of the medical malpractice system resulting in less [sic] doctors and higher health care costs for Indiana residents. Does knowing this make you less likely to vote for Baron Hill?

...

Caller: Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors. Does knowing this make you less likely to vote for Baron Hill?

...

Caller: Thank you for your time and views. This survey was conducted by the Economic Freedom Fund. Goodbye.

In its response, EFF claims that with respect to the Indiana poll, "EFF intended to conduct research regarding the mood and views of citizens of that state regarding issues of public importance, including the legislative record of public officials." EFF Response at 7. The plain text of the poll belies this claim. It begins by asking whether the listener is registered to vote and intends to vote in the November 7th Election. If the poll were truly conducted to research "the mood and views of citizens . . . regarding issues" there would be no need to ask whether the individual was a voter or intends to vote in the election. These introductory questions and the phrasing of the remaining questions ("less likely to vote for") provide an electoral nexus and indicate that the purpose of the poll was to influence a federal election.

The poll only discusses "issues" in a most superficial and misleading manner. The only common thread between the litany of "issues" addressed in the poll is the voting record of Baron Hill, a candidate in the November 7th election. Moreover, each "question" regarding an "issue" asks: "Does knowing this make you less likely to vote for Barron Hill?" The question does not ask the listener to discuss their "mood and view[] . . . regarding issues of public importance,"

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but ties Barron Hill's legislative record directly to the upcoming election and the listener's intended vote.

Respondent is not a candidate or party conducting "message testing" to determine which issues resonate with voters. In fact, EFF specifically denies being a political committee, and instead claims to be an issues group. Political committee status is triggered when a group spends more than \$1,000 in a calendar year "for the purpose of influencing any election for federal office." 2 U.S.C. §§ 431(4) and (9)(A). If its purpose were not to influence an election for federal office, why would EFF need to poll whether "knowing this make[s the listener] less likely to vote for" a candidate?

Furthermore, the question regarding Baron Hill's vote "to allow the sale of sexually explicit materials to minors" and asking "Does knowing this make you less likely to vote for Baron Hill?" is written in an inflammatory and leading manner, not designed to illicit a genuine response regarding an issue, but to dissuade the listener – who the poll has determined is registered to vote and intends to vote – from voting for Baron Hill. This ad is reminiscent of the infamous "Bill Yellowtail" ad, discussed in *McConnell v. FEC*, 540 U.S. 93, 193 n.78 (2003), which the Court recognized was not a legitimate issue ad.³ This poll question, like the Bill Yellowtail ad, does not discuss any issue, it merely smears the reputation of the candidate.

A sample of *Economic Freedom Fund's* solicitations state that its purpose is to "educate Americans . . . on economic issues that affect their daily lives" and to "take steps forward and continue on a path of effective economic development" rather than "turn back the clock to higher taxes and burdensome government regulation." EFF Supplement Response, Exh. 1 at 1. It is hard to imagine why an organization that is genuinely interested in economic issues would concern itself with sexually explicit materials and minors.

EFF also reportedly conducted at least one push poll targeting Congressman Leonard Boswell, who was seeking re-election in 2006 in the Third Congressional District of Iowa. According to publicly available information, the poll or polls asked listeners questions such as, "Do you want liberal female California Nancy Pelosi and her supporters to take total control over the US house [sic] of Representatives? Does knowing that Boswell voted for liberal Pelosi (either two or four) times make you less likely to vote for him?" Even more than the Baron Hill ad, it is patently clear that this is not an "issue" ad; in fact, there's not a single issue discussed in the ad aside from Boswell's voting record with regard to Nancy Pelosi.

In addition to the advertisements and push polls, EFF also financed 43 mailers targeting many of the same candidates. While we believe some of the mailers in this matter present close calls, there are two mailers in particular that warrant examination. In Georgia, EFF distributed a mailer that begins by stating, "Getting to know John Barrow has been a disappointment. Rather than being a leader for Georgia, John Barrow is its least effective member of Congress. . . .

³ The text of the "Bill Yellowtail" ad stated: "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

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INEFFECTIVE. LIBERAL. CONGRESSMAN JOHN BARROW." The mailer then attacks Barrow's voting record in Congress by contending that Barrow did not support "Georgia values" by voting to make "liberal San Francisco politician Nancy Pelosi the Speaker of the House" and voting to cut funding for air travel security. The mailer concludes with the tag line, "John Barrow/Not Representing Georgia Values." Similarly, EFF distributed mailers attacking Congressman Jim Marshall, one of which begins by asking, "Who is Jim Marshall representing . . . illegal immigrants or Georgia families?" The mailer then states that Marshall voted against prohibiting illegal immigrants from getting food stamps and against law enforcement funding that aids local police in reporting illegal immigrants to federal authorities. The mailer goes on to align Marshall with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney and concludes, in a much larger font size: "Jim Marshall does NOT represent Georgia values!"

With respect to the John Barrow ad, calling a candidate the "least effective member of Congress" could only be interpreted as an attack on his qualifications or fitness for office. There simply is no other reasonable interpretation of that statement. The Jim Marshall ad questions who Marshall is representing and unambiguously concludes: "Jim Marshall does NOT represent Georgia values!" Neither of these two ads includes any call to action related to pending legislation or to an issue. Neither ad encourages the listener to contact their representative regarding an issue.

Based upon the reality that EFF raised more than \$5 million, spent more than \$4.8 million in the three months prior to the election attacking federal candidates the NRCC had determined were "sitting ducks," and paid for so-called polls that contained a clear electoral nexus and attacked a federal candidate's voting record, we agreed with the Office of General Counsel in finding reason to believe that EFF may be a political committee. Because our analysis relied in major part upon the General Counsel's Factual and Legal Analysis, we believe it is important to place this analysis on the public record.

5/21/09
Date

5/21/09
Date

Cynthia L. Bauerly 59 KB
Cynthia L. Bauerly
Commissioner

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

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ATTACHMENT A

29044241157

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Economic Freedom Fund

MUR: 5842

INTRODUCTION

This matter concerns allegations that the Economic Freedom Fund ("EFF"), an entity organized under Section 527 of the Internal Revenue Code, has violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The complaint alleges that EFF is a federal political committee that has failed to register and report with the Federal Election Commission ("Commission") and failed to comply with the Act's contribution limits and source prohibitions during the 2006 cycle. In its Response, EFF denies its activities triggered political committee status. Based on available information discussed below, there is reason to believe that EFF violated 2 U.S.C. §§ 433, 434, and 441a(f) by failing to register as a political committee with the Commission, failing to report contributions and expenditures, and knowingly accepting contributions in excess of \$5,000.

FACTUAL BACKGROUND

According to its IRS Form 8871, EFF was formed on August 1, 2006 and is based in Sacramento, California. EFF states that its purpose is to "promote policies and issues favoring economic freedom, growth and prosperity of the economy, to the benefit of the people of the United States." EFF IRS Form 8871. Based on a review of publicly available information, we have found that representatives of EFF did not make any public statements regarding EFF's purpose to the press.

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EFF reports raising \$5,050,450 between August 1, 2006 and December 31, 2006. See EFF IRS 8872 Forms. Almost all of the funds, \$5,000,000, were donated by one contributor, Bob J. Perry, who also was a major contributor to Swift Boat Veterans during the 2004 election cycle. EFF received the remaining funds, \$50,450, from approximately six individuals between September and October of 2006, and raised no funds after the November 2006 election. Although EFF asserts that none of its solicitations referenced federal candidates and the available written solicitations confirm this statement, the Commission has no information as to whether EFF sought to raise funds in any other manner, and the Commission has no information regarding EFF's fundraising communications with Perry.

EFF reports spending \$4,835,805 between August 1, 2006 and December 31, 2006. See EFF IRS 8872 Forms. However, much of the spending (\$4.8 million) occurred in the three months prior to the 2006 elections.

EFF's website shows that it produced 59 advertisements, which included television and radio advertisements and mailers.¹ The vast majority of these advertisements attacked certain Democratic House candidates in West Virginia, Georgia, Iowa, and Oregon. In particular, EFF targeted Democratic incumbents that were considered to be vulnerable. Of the eight "vulnerable" Democratic incumbents designated as "sitting ducks" by the National Republican Congressional Committee ("NRCC"), five of these candidates, Darlene Hooley of Oregon, Jim Marshall of Georgia,

¹ See Economic Freedom Fund webpage, <http://www.economicfreedomfund.com>.

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John Barrow of Georgia, Alan Mollohan of West Virginia, and Leonard Boswell of Iowa, were the focus of EFF's media campaign.²

Of the 59 advertisements, EFF spent approximately \$1.9 million to finance 16 television and radio advertisements, most of which referred to numerous clearly identified federal candidates in West Virginia, Georgia, and Iowa. EFF targeted many of the same candidates in 43 mailers.

In Georgia, EFF distributed seven mailers attacking Congressman John Barrow, who was running for re-election in 2006 in Georgia's 12th Congressional District. One mailer begins by stating, "Getting to know John Barrow has been a disappointment. Rather than being a leader for Georgia, John Barrow is its least effective member of Congress. . . . INEFFECTIVE. LIBERAL. CONGRESSMAN JOHN BARROW." The mailer then attacks Barrow's voting record in Congress by contending that Barrow did not support "Georgia values" by voting to make "liberal San Francisco politician Nancy Pelosi the Speaker of the House" and voting to cut funding for air travel security. The mailer concludes with the tag line, "John Barrow/Not Representing Georgia Values."

Similarly, EFF distributed six mailers attacking Congressman Jim Marshall, who was up for re-election in Georgia's 8th Congressional District. One mailer begins by asking, "Who is Jim Marshall representing . . . illegal immigrants or Georgia families?" The mailer then states that Marshall voted against

² See Bree Hocking, *In Marginal District, Hooley Leads Wealthy Challenger*, ROLL CALL, October 19, 2006; see also, Shaila Dewan, *Two Democrats Struggle as Georgia Bucks a Trend*, NEW YORK TIMES, November 13, 2006 (reporting that Marshall and Barrow were on Republican Party's "short list of beatable incumbents" and that the NRCC spent more than a half-million dollars on each race while EFF bought advertising for these races as well). In addition, according to a news report, Republican candidate Mike Erickson, who ran in the 5th Congressional District in Oregon, received "large donations from the Republican-leaning Economic Freedom Fund, which has been active against Democratic House members in West Virginia, Iowa, Georgia and Oregon." Joseph B. Frazier, *Pelosi Says Democrats Must 'Drain the Swamp' to Get Health Reform*, ASSOCIATED PRESS, October 13, 2006. Both Commission and IRS disclosure reports, however, do not indicate that EFF gave any contributions to Erickson's campaign.

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prohibiting illegal immigrants from getting food stamps and against law enforcement funding that aids local police in reporting illegal immigrants to federal authorities. The mailer goes on to align Marshall with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney and concludes, "Jim Marshall does NOT represent Georgia values!"

EFF also appears to have funded automated calls to voters in Indiana, Iowa, West Virginia, and Georgia.³ For example, in Indiana, EFF conducted push polls targeting Democratic challenger Baron Hill, who was first elected to represent the 9th Congressional District in Indiana in 1998 but lost his bid for re-election in 2004.⁴

Caller: This is survey 2006 with a 45-second public survey. Are you registered to vote in Indiana?

Caller: Do you intend to vote in the November 7th Election?

...

Caller: Baron Hill voted to keep the death tax in place and refused to vote to make permanent the tax cuts that have caused record economic growth since 2001. Does knowing this make you less likely to vote for Barron Hill?

...

Caller: Baron Hill has over \$60,000 in contributions from trial lawyers and his [sic] voted repeatedly to stop reform of the medical malpractice system resulting in less doctors and higher health care costs for Indiana residents. Does knowing this make you less likely to vote for Baron Hill?

...

³ See, e.g., Paul J. Nyden, *GOP Leaders Blasts 527s*, THE CHARLESTON GAZETTE, Sept. 22, 2006; Ben Evans, *Former Swift Boat Attack-Ad Backer Takes on House Democrats*, ASSOCIATED PRESS, Sept. 14, 2006; Georgia Women Vote!: An Open Letter to Bob "Swift Boat" Perry, at <http://georgiawomenvote.blogspot.com/2006/09/open-letter-to-bob-swift-boat-perry.html>.

⁴ *Indiana Sues California Group Over Automated Calls*, ASSOCIATED PRESS, Sept. 18, 2006.

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Caller: Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors. Does knowing this make you less likely to vote for Baron Hill?

...

Caller: Thank you for your time and views. This survey was conducted by the Economic Freedom Fund. Goodbye.⁵

In addition, EFF apparently conducted at least one push poll targeting Congressman Leonard Boswell, who was seeking re-election in 2006 in the Third Congressional District of Iowa.⁶ According to publicly available information, the poll or polls asked listeners questions such as, "Do you want liberal female California Nancy Pelosi and her supporters to take total control over the US house [sic] of Representatives? Does knowing that Boswell voted for liberal Pelosi (either two or four) times make you less likely to vote for him?"⁷

III. LEGAL ANALYSIS

EFF may be a "political committee" subject to the contribution limitations, source prohibitions, and reporting requirements of the Act. See 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To address

⁵ See *Indiana Media Market Issues ID Survey*. The Indiana Attorney General apparently has sued EFF over the automated calls for violating Indiana's telemarketing law. See *Indiana v. Economic Freedom Fund*, Cause No. 07C01-0609-MI-0425 (Brown Circuit Court, Ind.); see also, *Indiana Sues California Group Over Automated Calls*, ASSOCIATED PRESS, September 18, 2006. The parties, however, entered into an agreement whereby EFF agreed to refrain from making the automated calls. See Agreed Entry, *Indiana v. Economic Freedom Fund*, Cause No. 07C01-0609-MI-0425 (Brown Circuit Court, Ind.).

⁶ See <http://klsnow.blogspot.com/2006/09/more-unethical-practices-one-maybe-two.html>.

⁷ *Id.*

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overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("MCFL"). The Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and it interprets that test as limited to organizations whose major purpose is federal campaign activity. See Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (2007); see also FEC's Mem. in Support of Its Second Mot. for Summ. J., *Emily's List v. FEC*, Civ. No. 05-0049 at 21 (D.D.C. Oct. 9, 2007).

The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal Office." 2 U.S.C. § 431(9)(A)(i). The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Further, Commission regulations provide that funds received in response to any communication are contributions to the person making the communication "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57.

A. Economic Freedom Fund May Have Exceeded the Statutory Threshold for Expenditures by Spending Over \$1,000 For Communications Expressly Advocating the Election or Defeat of a Clearly Identified Candidate

In determining whether an organization makes an expenditure, the Commission “analyzes whether expenditures for any of an organization’s communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b).” Supplemental Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007). Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” See 11 C.F.R. § 100.22(a); see also *MCFL*, 479 U.S. at 249 (“[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than “Vote for Smith” does not change its essential nature.”). Courts have held that “express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.” *FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424 U.S. at 44, n.52, included the word “support,” in addition to “vote for” or “elect,” on its list of examples of express advocacy communication).

The Commission’s regulations further provide that express advocacy includes communications containing an “electoral portion” that is “unmistakable, unambiguous,

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and suggestive of only one meaning” and about which “reasonable minds could not differ as to whether it encourages actions to elect or defeat” a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. See 11 C.F.R. § 100.22(b). In its discussion of then-newly promulgated section 100.22, the Commission stated that “communications discussing or commenting on a candidate’s character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.” See 60 Fed. Reg. 35292, 35295 (July 6, 1995).⁸

While the Commission has many of EFF’s communications, it does not have access to all of the scripts for the push polls reportedly funded in Georgia, Iowa, and West Virginia. Nevertheless, the information available at this time suggests a reasonable likelihood that EFF made expenditures over \$1,000. For example, the push poll apparently funded by EFF in Indiana, *see supra* Section II, contains express advocacy under 11 C.F.R. § 100.22(a). It uses phrases or “magic words,” such as “vote” accompanied by a clearly identified candidate, Baron Hill, as set forth in section

⁸ In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. ___, 127 S.Ct. 2652 (2007) (*WRTL*), the U.S. Supreme Court held that “an ad is the functional equivalent of express advocacy,” and thus subject to the ban against corporate funding of electioneering communications, “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.*, 127 S.Ct. at 2667. Although 11 C.F.R. § 100.22 was not at issue in the matter, the Court’s analysis included examining whether the electioneering communication had “indicia of express advocacy” such as the “mention [of] an election, candidacy, political party, or challenger” or whether it “take[s] a position on a candidate’s character, qualifications, or fitness for office.” *Id.* The Commission subsequently incorporated the principles set forth in the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R § 114.15. See Final Rule on Electioneering Communications, 72 Fed. Reg. 72899, 72914 (Dec. 26, 2007).

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100.22(a).⁹ It explicitly asks listeners if they are registered voters in Indiana and asks if they "intend to vote in the November 7th Election." Furthermore, it proceeds to take a position about Hill such as "Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors." The poll then asks the listener, "Does knowing this make you *less likely* to vote for Baron Hill?" (emphasis added), leading the listener and attempting to elicit a yes response. Stating the magic words in a question form does not make them any less direct. Furthermore, as Hill is the challenger in this race, there is no reason to attack his policy positions in a poll targeting registered Indiana voters other than to urge them not to vote for him.¹⁰

The push poll also appears to contain express advocacy under section 100.22(b) as it is unmistakably electoral, and reasonable minds could not differ as to whether it

⁹ EFF's push poll is similar to the push poll funded by Club for Growth ("CFG") in MUR 5365. In MUR 5365, the Commission determined that CFG's push poll concerning Gunner Delay contained express advocacy under 11 C.F.R. § 100.22(a). CFG's poll contained magic words such as "vote" and "election" and referred to a specific federal candidate, Gunner Delay. In addition, the poll took clear positions as to Delay, such as "Conservative Gunner Delay voted to cut taxes in four straight session of the Arkansas General Assembly" and "He is the only candidate who will oppose all tax increases," and sought to urge support for him by stating, "If you strongly support Gunner Delay's record, please say yes now." In contrast, in MUR 5860 (Friends of Conrad Burns-2006), the Commission determined that the push poll did not contain express advocacy under either sections 100.22(a) or 100.22(b). In MUR 5860, the poll asked the listener about his or her own preferences about the candidates and certain policy issues by posing questions such as "Do you intend to vote for Sen. Conrad Burns? Do you intend to vote for Jon Tester? Do you think parents should have the right to choose their child's school?" The poll then presented a hypothetical question by asking, "If you knew the following information about Jon Tester – the information implied that Jon Tester would raise taxes, including references to Tester's record that have appeared in Sen. Burns' commercials – and that Sen. Burns has never voted to increase taxes, would that change your opinion about Sen. Burns?" Unlike the polls funded by EFF and CFG, this poll compared both candidates' positions on an issue, did not take a clear position as to either candidate, and did not tell listeners which candidate to vote for or against.

¹⁰ Although the Commission's express advocacy regulation was not at issue in *WRTL*, the Court's consideration of what could be regulated as an electioneering communication set forth a test that included elements similar to those used in 11 C.F.R. § 100.22(b). While the *WRTL* test is not applicable here, the push poll at issue would meet the Court's test, if the other qualifying factors were met, for regulable electioneering communications. The push poll contains, to varying degrees, the "indicia of express advocacy" discussed in *WRTL*, such as the discussion of "a candidate's character, qualifications, or fitness for office." *WRTL*, 127 S.Ct. at 2667. Further, the push poll does not direct the reader to take action to express a view on a public policy issue or urge the reader to contact public officials with respect to the issue. In sum, the push poll is susceptible of no reasonable interpretation other than as an appeal to vote for or against a particular candidate.

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encourages actions to defeat a clearly identified candidate. By explicitly asking the listener whether they are registered voters in Indiana and intend to vote in the November 7 election, the poll's electoral portion is unambiguous. In addition, the poll attacks the accomplishments of Baron Hill by making statements about policy positions while he was in office and asking the listener whether they are "less likely" to vote for Hill. Most of all, because Hill was a challenger in 2006, reasonable minds could not differ as to whether the poll urges the listener to vote against Hill as attacking the policy positions of a challenger in a poll targeting registered Indiana voters otherwise makes no sense.

Some of the mailers that EFF distributed appear to contain express advocacy under 11 C.F.R. § 100.22(b) as well. For example, one mailer attacks the leadership capabilities of Congressman John Barrow by stating that he "has been a disappointment" and is Georgia's "least effective member of Congress." The mailer further describes Barrow as being "liberal" and "not representing Georgia values" by voting for "liberal San Francisco politician Nancy Pelosi" as Speaker of the House and voting to cut funding for air travel security. Thus, the mailer, which question Barrow's character, qualifications, and lack of accomplishments, is unambiguously electoral. Further, as the mailer does not limit its content to positions that Barrow has taken on specific legislative issues but generally addresses Barrow's ineffectiveness as a Congressman and weakness as a leader, a reasonable mind could only conclude that the mailer encourages the defeat of Barrow.

The mailer attacking Jim Marshall similarly contains express advocacy under section 100.22(b). The mailer questions the character, qualifications, or

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accomplishments of Marshall by attacking his votes on illegal immigration, aligning him with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney and declaring that he "does NOT represent Georgia values!" By attacking Marshall's fitness to represent Georgians, the mailer is candidate centered and unambiguously electoral. While the mailer discusses Marshall's votes on illegal immigration, because the mailer also proceeds to describe Marshall as "liberal" and assert that he does not represent Georgia values, a reasonable mind could only conclude that pamphlet urges the defeat of Marshall.¹¹

Based on the content of the communications available at this time, we believe it is appropriate to investigate the extent to which EFF made expenditures over \$1,000. While the Commission has many of EFF's communications, it does not have access to scripts for the push polls reportedly funded in Georgia, Iowa, and West Virginia and does not know if the advertisements and mailers on EFF's website represent the entire universe of its communications.

B. Economic Freedom Fund's Major Purpose Appears to Have Been Federal Campaign Activity

Publicly available information suggests that the objective of EFF was to influence the 2006 federal mid-term elections. As discussed *supra* section II, EFF was formed in August 2006, only three months before the elections. It appears that EFF raised all of its funds, approximately \$5 million, and spent most of its funds, approximately \$4.8 million, during this three month period. Almost all of EFF's activities, which included broadcast advertisements, mailers, and automated telephone calls, appear to be

¹¹ These mailers also appear to exhibit the indicia of express advocacy described in *WRTL*. Both mailers attack the leadership capabilities and question the qualifications and fitness for office of the candidates in each of the above-referenced mailers by describing John Barrow as the "least qualified member of Congress" and declaring that Jim Marshall "does NOT represent Georgia values."

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negative attack advertisements targeted at vulnerable Democratic incumbents, as reported in the press. *See supra* section II. Although EFF's response claims that it engaged in significant non-federal activities, only five of its 16 broadcast advertisements and 43 mailers concerned non-federal candidates. Since the 2006 elections, EFF has engaged in no fundraising, and its disbursements also substantially decreased.

IV. CONCLUSION

For all the foregoing reasons, the Commission finds reason to believe that Economic Freedom Fund violated 2 U.S.C. §§ 433, 434 and 441a(f) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, and by knowingly accepting contributions in excess of \$5,000.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

In the Matter of)	
)	MUR 5842
Economic Freedom Fund; and)	
Charles H. Bell, Jr.)	

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN
AND COMMISSIONER CAROLINE C. HUNTER**

This matter was generated by a complaint filed by Democracy 21 and the Campaign Legal Center (“Complainants”), alleging that Economic Freedom Fund (“EFF”) failed to register as a political committee and, therefore, failed to comply with the limits, prohibitions, and reporting requirements set forth in the Federal Election Campaign Act of 1971, as amended (“the Act”), based on its sponsorship of ads and telephone opinion polls during the 2006 election cycle.¹ After reviewing the complaint and EFF’s response, along with the recommendation of the Office of General Counsel (“OGC”) to find reason to believe (“RTB”) that a violation of the Act occurred, we voted (i) against finding a reason to believe that EFF violated the Act² and (ii) to close the file. Ultimately, and as explained in greater detail below, we found that none of EFF’s communications contained express advocacy and, therefore, concluded that EFF was not subject to the Act’s requirements relating to political committees, nor its limitations and source prohibitions.

BACKGROUND

EFF is an unincorporated association that is registered with the Internal Revenue Service (“IRS”) as a political organization under section 527 of the Internal Revenue Code (“IRC”).³ Its mission “is to educate citizens on issues of public importance related

¹ Complainants originally filed this complaint against EFF and an additional respondent. The Commission determined that the respondents should be split into separate Matters Under Review (“MURs”).

² Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively. The undersigned objected. MUR 5842, Certification dated April 15, 2009.

³ Response at 1.

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to public policy – specifically, the economic and related impacts of certain legislative and other official acts of elected officials – as well as influence the legislative and other official actions of public officials.”⁴

Among the activities it undertook during the 2006 election cycle, EFF produced 59 advertisements, which included television ads and mailers, and sponsored telephone opinion polls. OGC makes no argument that any of EFF’s television ads expressly advocate the election or defeat of a federal candidate. And out of the dozens of mailers that EFF produced and disseminated, OGC identified only two that it argues contain express advocacy.

The first such mailer references Congressman Jim Marshall of Georgia (hereinafter referred to as the “Marshall mailer”). It states:

WHO IS JIM MARSHALL REPRESENTING ...

illegal immigrants or Georgia families?

Jim Marshall voted against prohibiting illegal immigrants from getting food stamps. (Source: HR 4766, 7/13/04)

Jim Marshall voted against law enforcement funding that aids local police in reporting illegal immigrants to federal authorities – making it harder for law enforcement to crack down on those who are in this country illegally. (Source: Roll Call 341, 7/8/04)

[pictures of Jim Marshall, Nancy Pelosi, and Cynthia McKinney]

Congressman Jim Marshall gave into liberal peer pressure.

In addition to voting with liberal Nancy Pelosi to **aid illegal immigrants with tax paid benefits**, Jim Marshall joined with ultra-liberal Cynthia McKinney and **voted to keep the Death Tax**. (Source HR 4766, 7/13/04, HR 8, 4/13/05)

Jim Marshall does NOT represent Georgia values!⁵

The second mailer that OGC alleges contains express advocacy references Congressman John Barrow, also of Georgia (hereinafter referred to as the “Barrow mailer”). It states:

⁴ *Id.*

⁵ Complaint, Attach. D.

Getting to know John Barrow has been a disappointment.

Rather than being a leader for Georgia, John Barrow is its least effective member of Congress. (Source: www.congress.org)

Rather than supporting Georgia values, John Barrow voted to make liberal San Francisco politician Nancy Pelosi the Speaker of the House. Nancy Pelosi has advocated for a "cut and run" policy in Iraq. (Source: Congressional Quarterly Records)

INEFFECTIVE LIBERAL

CONGRESSMAN JOHN BARROW

Cutting Funding for Air Travel Security

In the weeks before the London airplane bombing plot was foiled, John Barrow voted to cut funding for air travel security by over \$10 million. (Source: Roll Call Vote 217, 5/25/06)

That's bad, but so is John Barrow's other vote ... Barrow voted AGAINST ending the temporary protected status for hundreds of thousands of immigrants in the United States – allowing them to work and live here without having to file for citizenship.

John Barrow Not Representing Georgia Values⁶

As noted above, EFF also conducted telephone opinion polls. One such poll, done via an automated telephonic system, ran in Indiana.⁷ In it, respondents were asked a series of questions, some of which sought demographic information, and others that tested various issues. The demographic questions were:

- Are you registered to vote in Indiana?
- Do you intend to vote in the November 7th election?
- Are you 55 years of age or older?

⁶ *Id.*, Attach. E.

⁷ OGC mentions another alleged poll that EFF conducted in Iowa. We do not have the script of that poll and the only information provided to us by OGC comes from an anonymous email reprinted in a blog cited by neither Complainants nor Respondent. As we have stated on prior occasions, we have serious concerns about such information being presented to us without any opportunity for the respondent to reply before an RTB determination. See MUR 6056 (Protect Colorado Jobs), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II (June 2, 2009). Without any other information, we do not believe that such an anonymous source can serve as the basis for an RTB finding.

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- Do you agree that only marriage between one man and one woman should be legal and binding in Virginia?
- On the issue of abortion, do you consider yourself to be pro-life?
- Do you consider yourself to be a Republican?
 - [if no] Are you a Democrat?
- Do you have a favorable opinion of President George W. Bush?
- Are you male?
- Have you ever contributed to or financially supported a political campaign, church, or other religious or non-profit organization?⁸

The non-demographic questions were as follows:

- Do you want your taxes not raised and if possible cut?
 - [if yes] In America when a person dies, the IRS can take up to 55% of the inheritance left for family and friends. Do you want Congress to permanently eliminate this unfair death tax?
 - Baron Hill voted to keep the death tax in place and refused to vote to make permanent the tax cuts that have caused record economic growth since 2001. Does knowing this make you less likely to vote for Barron Hill [sic]?
- Do you believe that frivolous and abusive lawsuits cost us all too much money?
 - [if yes] Baron Hill has over \$60,000 in contributions from trial lawyers and his [sic] voted repeatedly to stop reform of the medial [sic] malpractice system resulting in less doctors and higher health care costs for Indiana residents. Does knowing this make you less likely to vote for Baron Hill?
- The new Medicare prescription benefit law went into effect in January of this year. Would it surprise you to know due to that new law, over 78,000 elderly Indianans in your neighborhoods can now obtain the drugs that they need but that they could not afford before?
 - [if yes] Baron Hill voted against the Medicare prescription drug law that helps over 78,000 of his elderly constituents get drugs they could not afford before. Does knowing this make you less likely to vote for Barron Hill [sic]?

⁸ Complaint, Attach. G

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- Barron Hill [sic] voted to allow the sale of a broad range of violent and sexually explicitly materials to minors. Does knowing this make you less likely to vote for Baron Hill?
- Baron Hill's votes would have terminated the Head Start program that feeds young children from low income families. Hill also voted against increased funding for more teachers and better teacher training. Does knowing this make you less likely to vote for Baron Hill?
- While in Congress Baron Hill voted 12 times to use money from the social security trust fund, your retirement account, to fund projects like the national endowment for the Art. [sic] Does knowing this make you less likely to vote for Baron Hill?⁹

At the end of the poll, EFF is disclosed as the entity that conducted the poll. OGC considered this poll to meet the regulatory definition of express advocacy.

As both Complainants and Respondent note, the pollster hired by EFF to conduct the poll in Indiana brought a federal declaratory judgment action against the State of Indiana and its Attorney General in the Southern District of Indiana, arguing that subjecting non-commercial political calls to the state prohibition on automated calling systems was preempted by federal law and unconstitutionally infringed on interstate commerce and the pollster's First Amendment rights.¹⁰ EFF conducted no further activity in Indiana.¹¹

ANALYSIS

The Act defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year."¹² The Supreme Court has limited the scope of the term "expenditure" to "reach only funds used for communications that expressly advocate the

⁹ *Id.*

¹⁰ Complaint, Attach. L (Complaint in *Freeeats.com v. Indiana ex. rel. Carter*, 1:06-cv-1403-ljm-wtl (S.D. Ind., filed Sept. 21, 2006)). The District Court dismissed this case on October 10, 2007, pursuant to the decision of the United States Court of Appeals for the Seventh Circuit that dismissal of *Freeeats.com*'s complaint on abstention grounds was proper. *Freeeats.com, Inc. v. Indiana*, 502 F.3d 590 (7th Cir. 2007). On Sept. 18, 2006, the Indiana Attorney General had filed a state action against EFF for violating the Indiana's automated dialing machine statute. *Id.* at 593. Though irrelevant to our analysis, we are unaware of the status of that state court action. *Indiana v. Economic Freedom Fund*, No. 07C01-0609-M1-0425 (Brown Cty. (Ind.) Cir. Ct., filed Sept. 18, 2006).

¹¹ Response at 7 n.5.

¹² 2 U.S.C. § 431(4)(A).

election or defeat of a clearly identified candidate.”¹³ Similarly, the Court narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but “earmarked for political purposes.”¹⁴ Therefore, only an entity that made expenditures or received contributions in excess of \$1,000 can be considered a political committee. Conversely, if an entity does not reach those expenditure and contribution thresholds, it cannot be a political committee as a matter of law.

However, even if an entity exceeds either the contribution or expenditure thresholds, it still may not trigger political committee status, for the Court has further construed the term “political committee” to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”¹⁵ In other words, the Act does not reach those “engaged purely in issue discussion,” but instead can only reach “that spending that is unambiguously related to the campaign of a particular federal candidate” – specifically, “communications that expressly advocate the election or defeat of a clearly identified candidate.”¹⁶ Therefore, when examining whether a group has triggered political committee status under this two-step process, the Commission must first determine whether the group has made in excess of \$1,000 in expenditures or received in excess of \$1,000 in contributions. Only if this inquiry is answered in the affirmative will the Commission then analyze whether the major purpose of the group is campaign activity.

For matters arising out of the 2004 election cycle, though, the Commission had concluded, erroneously in our view, that it could find RTB that an organization had triggered political committee status if the available information demonstrated that a group’s objective was to influence a federal election.¹⁷ An RTB finding would then trigger an investigation to confirm that the group’s objective to influence a federal

¹³ *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

¹⁴ *Id.* at 23 n.24, 24, 78. In order to avoid the “hazards of uncertainty” regarding the meaning of “earmarked for political purposes,” the United States Court of Appeals for the Second Circuit interpreted the phrase to include only donations “that will be converted to expenditures [*i.e.*, express advocacy] subject to regulation under FECA.” *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (emphasis added).

¹⁵ *Buckley*, 424 U.S. at 79-80.

¹⁶ *Id.*

¹⁷ See, e.g., MURs 5487 (Progress for America Voter Fund), 5751 (The Leadership Forum), and 5541 (The November Fund). The Commission concluded in these matters that evidence that these organizations triggered the statutory threshold of \$1,000 in contributions or expenditures was not necessary before finding RTB, where available information suggested that the organization had the sole or primary objective of influencing federal elections and had raised and spent “substantial” funds in furtherance of that objective.

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election was its major purpose and determine whether the group in question had made expenditures or received contributions in excess of \$1,000.

While discussing this matter in executive session in September 2007, the Commission decided that, for matters arising out of the 2006 election cycle and going forward, the Commission would now require that there be some information suggesting a specific expenditure was made or contribution received prior to authorizing an investigation. Though we were not on the Commission at the time this decision was made, we agree with our previous (and current) colleagues that if there is no evidence of expenditures made or contributions received, then the inquiry ends there without any probe of the group's major purpose.¹⁸

Therefore, consistent with the Act, the case law, and the Commission's 2007 direction to OGC, we look to EFF's own communications to determine whether it made expenditures or received contributions in excess of \$1,000. As an initial matter, we agree with OGC that there is no evidence that EFF received or solicited contributions under 11 C.F.R. § 100.57. Thus, the only way that EFF could have triggered political committee status is if it made expenditures, *i.e.*, express advocacy communications.¹⁹ As noted above, the Court has construed the term "expenditure" to reach only communications "expressly advocating" the election or defeat of a candidate. Commission regulations define "expressly advocating" as any communication that:

(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign

¹⁸ We have already explained much of our reasoning regarding the reason to believe standard and political committee status elsewhere. See MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II.

¹⁹ This is true regardless of whether EFF, or any entity, is organized under section 527 of the IRC. Interestingly, Complainant argues that "[g]roups such as section 527 'political organizations' are formed for the principal purpose of influencing candidate elections and, as explained by the Court in *Buckley*, their expenditures 'can be assumed to fall within the core area sought to be addressed by Congress.' They are, by definition, campaign related." Complaint at 18 (quoting *Buckley*, 424 U.S. at 79). Complainant completely ignores the fact that *Buckley* was discussing disclosure by candidates or political committees as being assumed to fall within the regulable bounds of Congress, not disclosure by "groups such as 527 'political organizations.'" Only if EFF was found to be a political committee would its expenditures fall under the "core area" that *Buckley* was describing. That statement cannot be bootstrapped as support that spending by 527s is subject to regulation under the Act. To do so would assume the very proposition Complainant is attempting to prove.

slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.²⁰

Section 100.22(b), in large part, mimics the rule set forth by the United States Court of Appeals for the Ninth Circuit in *FEC v. Furgatch*.²¹ At issue in *Furgatch* was a newspaper advertisement criticizing then-President Jimmy Carter that ran one week before the 1980 presidential election. The ad was captioned "DON'T LET HIM DO IT." It made a number of specific references to the upcoming election and the election process (e.g., "The President of the United States continues to degrade the *electoral process*"; "He [the President] continues to cultivate the fears, not the hopes of the *voting public*"; "If he succeeds the country will be burdened with *four more years* of incoherencies, ineptness and illusion, as he leaves a legacy of low-level *campaigning*"). The ad specifically mentioned current and former opponents of the President (e.g., "[The President's] running mate outrageously suggested [former primary opponent] Ted Kennedy was unpatriotic"; "[T]he President himself accused Ronald Reagan of being unpatriotic"). The ad concluded by re-stating: "DON'T LET HIM DO IT."

²⁰ 11 C.F.R. § 100.22.

²¹ 807 F.2d 857 (9th Cir. 1987). In promulgating section 100.22, the Commission stated that "the *Furgatch* interpretation" of express advocacy was being incorporated into the new regulation. Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35,295 (July 6, 1995) ("Express Advocacy E&J"). Courts similarly have noted that section 100.22(b) is based on *Furgatch*. See *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 384 (4th Cir. 2001) ("*VSHL*") (noting that the Commission was "[d]rawing on *Buckley*, *MCFL*, and *Furgatch* when it drafted section 100.22); *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 11 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997) ("*MRLC*") ("It is obvious that subpart (b) of the FEC regulation comes directly from" *Furgatch*).

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In analyzing this ad, the court held that the express advocacy threshold will be met only if a communication “when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”²² The court further held that “[t]his standard can be broken into three main components”:

- “[S]peech is ‘express’ ... if its message is unmistakable and unambiguous, suggestive of only one plausible meaning”;
- “[S]peech may only be termed ‘advocacy’ if it presents a *clear plea for action*”; and
- “[Speech] must be clear what action is advocated. Speech cannot be ‘express advocacy of the election or defeat of a clearly identified candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate”²³

The court then emphasized that “if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy.”²⁴

In applying this standard to the ad at issue, the court stated that the “pivotal question” raised in the ad was “not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it.... ‘Don’t let him’ is a command. The words ‘expressly advocate’ action of some kind.”²⁵ The court acknowledged that “whether the advertisement expressly advocates the defeat of Jimmy Carter is a very close call.”²⁶ The court ultimately concluded, however, that “[r]easonable minds could not dispute that [the] advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not ‘let him do it.’”²⁷ Though the court considered the timing of ad in reaching its conclusion, it noted that external context remains an “ancillary” consideration, “peripheral to the words themselves.”²⁸

²² *Furgatch*, 807 F.2d at 864.

²³ *Id.* (emphasis added).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 861.

²⁷ *Id.* at 865.

²⁸ *Id.* at 863. See also *Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (“express advocacy must contain some explicit words of advocacy”) (emphasis added).

Thus, the *Furgatch* express advocacy test as incorporated by section 100.22(b), though slightly broader than *Buckley*'s "magic words" standard, still sets a very high bar. Nevertheless, section 100.22(b) has trod a rocky road in the courts. In fact, it has been held unconstitutional by every federal court that has considered it on its merits.²⁹ However, for purposes of reaching our conclusion in this matter, we assume the constitutionality of section 100.22(b).

As mentioned above, OGC argues that two of EFF's mailers and the telephone opinion poll it conducted in Indiana contained express advocacy.³⁰ We disagree. Assuming *arguendo* that section 100.22 is constitutional, we conclude that neither the mailers nor the telephone opinion poll constitute express advocacy under this regulation.³¹

None of EFF's Television Ads Or Mailers Constitute Express Advocacy

While we agree with OGC that all of the TV ads and a vast majority of the mailers produced by EFF do not expressly advocate the election or defeat of a federal candidate, we diverge with respect to the two Georgia mailers that reference

²⁹ See, e.g., *VSHL*, 263 F.3d at 392; *MRLC*, 914 F. Supp. at 12; *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding "that 11 C.F.R. § 100.22(b)'s definition of 'express advocacy' is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley v. Valeo*"). *But see Real Truth About Obama v. FEC*, 2008 WL 4416282 (E.D. Va. 2008) (denying preliminary injunction against FEC to enjoin the Commission from enforcing the Act against plaintiffs and all other entities similarly situated), appeal docketed, No. 08-1977 (4th Cir. Sept. 16, 2008). States with statutes modeled after section 100.22(b) have fared no better. See, e.g., *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRTL II*"); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *Ctr. for Individual Freedom, Inc. v. Ireland*, 2008 WL 4642268 (S.D. W.Va.), *amended by* 2009 WL 2009 WL 749868 (S.D. W.Va.).

³⁰ These three communications are the only ones that OGC claimed reach the level of express advocacy. We agree with OGC's apparent determination that none of EFF's television ads or the other EFF mailers fell under the definition of express advocacy.

³¹ Complainants contend that express advocacy is irrelevant when discussing 527 organizations; rather, if a 527 organization runs ads that "promote, support, attack, or oppose federal candidates," they are "clearly for the purpose of influencing a federal election." Complaint at 18. We do not agree. As ably articulated by Respondent (at 4), neither a court nor this Commission has ever held that something other than "express advocacy" can be used to define "expenditure." The Commission rejected just such an argument in 2004. See FEC Minutes, FEC Agenda Document 04-77 (Aug. 19, 2004) at 9. Moreover, Complainants themselves have argued in the past against just such an application – instead, Complainants stated, in comments submitted to the Commission, that "the Commission cannot, and should not, ... subject public communication ... to the campaign finance laws beyond the current rules that apply to 'express advocacy' and 'electioneering communications.' Furthermore, neither the Commission nor Congress can apply a non 'bright-line' test such as 'promote, support, attack, or oppose' to the uncoordinated communications of non-profit groups or other corporations." Comments of Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics, filed in response to Notice of Proposed Rulemaking 2004-6 (emphasis added).

Congressmen Marshall and Barrow, respectively. Under the Commission's regulations, neither of these two mailers can fairly be deemed to contain express advocacy.³²

As a preliminary matter, we agree with OGC that the ads do not fall under section 100.22(a). The ads do not contain any of the regulation's enumerated "magic word" phrases. Nor do the ads constitute express advocacy under the standard set forth in *FEC v. Massachusetts Citizens for Life* ("MCFL").³³ Finally, there are no campaign slogans or similar individual words that only can be reasonably understood as admonitions to vote for or against a particular federal candidate. Therefore, the ads do not contain express advocacy under section 100.22(a).

However, OGC alleges that the Marshall and Barrow mailers do fall within the scope of section 100.22(b). We disagree. The plain language of subsection (b) limits its reach to speech that "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 its "electoral portion" is "unmistakable, unambiguous, and suggestive of only one meaning."³⁴ Even where a communication "discusses or comments on a candidate's character, qualifications, or accomplishments," as long as "reasonable minds" can interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified federal candidate, the ad will not be considered to contain express advocacy, as defined by section 100.22(b).³⁵

³² In prior matters, we have struggled to ascertain how OGC differentiates between communications that contain express advocacy and those that do not. See MURs 5694 & 5910 (Americans for Job Security), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, 13-15 (April 27, 2009) (comparing ads in different MURs and similarly questioning whether any distinction could be found among them). That question exists here, as well, for we fail to see a principled distinction between the two mailers that allegedly contain express advocacy and the television ads and other mailers that do not. To us, some of the television ads and other mailers contain the same information presented in a similar manner as the two ads in question. Compare Complaint, Attachs. E & F (communications containing express advocacy according to OGC) with *id.*, Attachs. B, C, & D (communications not containing express advocacy). For the reasons stated below, we believe that none of EFF's ads contain express advocacy.

³³ 479 U.S. 238, 243 (1986). In *MCFL*, the Supreme Court held that a mail piece which purported to provide "everything you need to know to vote pro-life," and expressly stated "vote pro-life" accompanied by photos of candidates identified as supporting a pro-life position, constituted express advocacy.

³⁴ 11 C.F.R. § 100.22(b).

³⁵ Express Advocacy E&J, *supra* note 21, at 35,295 ("Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.") (emphasis added). The E&J also states that "the revised rules in section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages." *Id.*

Under this standard, neither mailer in question expressly advocates the election or defeat of a federal candidate. The Marshall mailer (unlike the ad in *Furgatch*, for example) contains no reference to Congressman Marshall's candidacy, his opponent, or anything else relating to a federal election or the election process. Nor does the mailer contain any clear plea for action. Instead, the mailer focuses on the Congressman's legislative record, specifically his votes on the issues of immigration and the estate tax, and states that Congressman Marshall voted with "liberal" Nancy Pelosi and "ultra-liberal" Cynthia McKinney on these issues. The mailer concludes with the statement: "Jim Marshall does NOT represent Georgia values!"

Under section 100.22(b), a communication must contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" in order for the communication to be deemed express advocacy. It is unclear how a communication can be said to contain an *electoral* portion if the communication, like the Marshall mailer, includes no references to a candidacy, an election opponent, or any other language regarding the federal election process. Moreover, the Marshall mailer's lack of any call to action—which according to the *Furgatch* court, is necessary for speech to "be termed 'advocacy'"³⁶—further undermines the notion that the mailer contained an electoral portion.

The statement "Jim Marshall does NOT represent Georgia values!" could be read as an attack on the character, qualifications, or accomplishments of Congressman Marshall. But considering (i) the absence of any election references or any clear call to action in the mailer and (ii) the mailer's focus on the Congressman's votes on specific issues, we cannot conclude that this statement—either on its own or in the overall context of the mailer—can "have no other reasonable meaning than to encourage actions to elect or defeat" Congressman Marshall. One could reasonably interpret the Marshall mailer as suggesting that the reader contact Congressman Marshall and insist that he listen less to his party's leadership and more to the constituents in his district on the issues of immigration law and the estate tax.

Like the Marshall mailer, the Barrow mailer focuses on votes cast by the Congressman—one on immigration and the other on funding for air travel security. It states that Barrow is not representing what EFF believes to be "Georgia values," arguing that Barrow instead has been supportive of "liberal San Francisco politician Nancy Pelosi" and, thus, concludes that the Congressman has been "a disappointment" and Georgia's "least effective member of Congress." As with the Marshall mailer, the Barrow mailer does not reference a candidacy or an election and contains no clear call to action. Without such elements, a reasonable mind could conclude that this communication is conveying the message that the Congressman's constituents should contact Barrow to urge him to better "represent[] Georgia values" on the issues mentioned in the mailer and to be a better, more "effective" representative for the people in his district.

³⁶ *Furgatch*, 857 F.2d at 864.

Regarding the absence of a call to action in either of the mailers, while such a call is not explicitly required under the language of the regulation (notwithstanding the *Furgatch* court's statement that "speech may *only* be termed 'advocacy' if it presents a *clear plea for action*"³⁷), the lack of a call to action significantly expands the scope of plausible non-electoral interpretations and, thus, increases the likelihood that a reasonable person might interpret a communication as something other than expressly advocating the election or defeat of a federal candidate. And if there is an alternative interpretation that a reasonable person is capable of reaching, then the ad in question cannot, as a matter of law, be express advocacy.³⁸ As mentioned above, both of the mailers at issue can be read by a reasonable person as containing non-electoral messages.³⁹

We do not necessarily foreclose (though it is not easy to envision) the possibility that a communication lacking any reference to a candidacy or an election could still have an electoral portion. And perhaps there are scenarios where a communication without a call to action could properly be deemed express advocacy. But when a communication (such as the Marshall or Barrow mailer) contains neither references to a candidacy or election nor a call to action, we fail to see how such a communication justifiably can be said to contain an electoral portion that "is unmistakable, unambiguous, and suggestive of only one meaning," especially where, as here, the predominant focus in each of the communications was the legislative record of the respective federal officeholders. Moreover, these ads fall well short of the ad under review in *Furgatch*, which the court in that case deemed to be a "very close call."⁴⁰ Therefore, we conclude that a reasonable person can interpret the Marshall and Barrow mailers as containing messages other than urging readers to vote for or against the federal officeholders at issue, and thus, that the mailers do not constitute express advocacy under section 100.22, regardless of whether the candidate's character, qualifications, or accomplishments are discussed in the mailers.

³⁷ *Id.* (emphasis added).

³⁸ *See id.* ("We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy.").

³⁹ An explicit call to non-electoral action is not required for an ad to fall outside the reach of section 100.22(b). To hold otherwise would turn the standard articulated by the *Furgatch* court (that "speech may only be termed 'advocacy' if it presents a clear plea for action") on its head. The regulation states that a communication contains express advocacy if it could only be understood by a reasonable person as urging the election or defeat of a federal candidate. The absence of a non-electoral call to action (*e.g.*, "Contact your Senator and tell her to support legislation that protects the environment") does not in any way prevent a reasonable person from interpreting a communication as urging something other than voting for or against a particular federal candidate.

⁴⁰ *Furgatch*, 807 F.2d at 861.

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The Indiana Poll that EFF Commissioned Did Not Constitute Express Advocacy

OGC also argues that the poll commissioned by EFF in Indiana contained express advocacy. Because the poll meets neither prong of section 100.22, we conclude that the poll is outside the regulatory reach of this provision.

To begin, we take exception to the characterization of the EFF poll as a “push poll.” The term “push poll” is not defined in the Act and, thus, the use of this term has no legal bearing on whether the poll at issue constituted express advocacy. Presumably, the EFF poll is described as such because of its use of negative information about Baron Hill in some of its questions. However, as polling professionals readily attest, legitimate public opinion polls often test negative messages about candidates. According to respected political analyst Stuart Rothenberg, “[s]erious polls can include push questions that contain some explosive or even incorrect information, but that doesn’t make them advocacy calls.”⁴¹ And professional pollster Neil Newhouse similarly notes: “Testing negatives about candidates on a public opinion poll doesn’t make the instrument a push poll.”⁴²

In the Statement of Reasons we signed in MUR 5835 (DCCC), we set forth criteria that pollsters and political commentators from across the political spectrum use to differentiate between “push polls” and public opinion polls:

- Push polls typically ask just a question or two, whereas real surveys are almost always much longer and typically include demographic questions about the respondent (such as age, race, education, income), as well as innocuous questions such as “whether the country is headed in the right direction,” Presidential job rating, and initial voting preference.
- Push pollers usually don’t record the respondents’ answers to the questions asked, while public opinion polls do.
- Push polls are generally very short – no longer than three or four questions, while public opinion polls can last as long as 20 or 25 minutes, or as short as five or six minutes.
- Push polls don’t “sample” public opinion; they try and change it, whereas public opinion polls scientifically sample voters in a specific constituency, such as a state, county or congressional district.

⁴¹ Stuart Rothenberg, *For the Thousandth Time: Don’t Call Them Push Polls*, Roll CALL, Mar. 8, 2007.

⁴² Neil Newhouse, *Think You’ve Been ‘Push Polled’? Maybe Not*, Politico, Nov. 19, 2007, available at <http://www.politico.com/news/stories/1107/6977.html> (accessed Apr. 7, 2009).

- Push polls generally occur very close to Election Day to make it more difficult to track down the initiator of push polls. Public opinion polls that test campaign messages are usually fielded days or weeks prior to the main media crush in a campaign (meaning, prior to when candidates are going back and forth with TV ads and mailings).⁴³

Applying these criteria, the EFF poll appears to be more akin to a legitimate public opinion poll than a push poll. Here, the polls ran two months before the election. Twenty questions were asked—nearly half of which were demographic in nature. There is no evidence that data was not collected and analyzed. Nor is there any evidence that the pollster did not scientifically sample potential recipients. That there were questions regarding multiple issues provides further support that this was a traditional public opinion poll. Moreover, many of the questions that addressed whether a listener was “less likely” to vote for the candidate based on a particular message were only given to those listeners who answered a previous question in a particular way. If this truly were a “push poll,” then no such allowance would likely have been made – every listener would have heard all questions. Instead, much of this poll appears to have been message testing for persons who already held a particular view about the issue that was the subject of a particular policy question.

The only factor that potentially could point in the direction of a “push poll” is that, according to the polling script, this poll only lasted forty-five seconds. Upon closer inspection, however, that fact holds less relevance given the automated technology used. Even in that forty-five seconds, the poll had the potential to ask twenty questions, which according to professional pollsters, far exceeds the number of questions that a true “push poll” would include. And the mere fact that the EFF poll was conducted using automated technology in no way suggests that it was *per se* not a valid opinion poll. Several well-respected and widely read polls, including those by Rasmussen Reports⁴⁴ and SurveyUSA,⁴⁵ are also conducted using automated technologies. Therefore, it is untenable to argue that EFF’s poll is a “push poll” simply because it, too, was automated.

In sum, the EFF poll looks much more like a legitimate public opinion than a push poll. However, as we noted earlier, “push poll” is not a defined term in the Act. Thus,

⁴³ MUR 5835 (DCCC), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, 9-11 (citing Mark Blumenthal, *So What Is a Push Poll?* (Aug. 22, 2006), at http://www.pollster.com/blogs/so_what_is_a_push_poll.php; Newhouse, *supra* note 42).

⁴⁴ Rasmussen Reports: Methodology (“Rasmussen Reports collects data for its survey research using an automated polling methodology.”) at http://www.rasmussenreports.com/public_content/about_us/methodology (last visited April 24, 2009).

⁴⁵ See, e.g., Mark Blumenthal, *A Primary Electorate is a Moving Target*, THE NATIONAL JOURNAL, May 26, 2009, available at <http://www.nationaljournal.com/njonline/mysterypollster.php> (last visited June 1, 2009) (describing the automated polling techniques of SurveyUSA and Public Policy Polling).

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whether a communication is or is not a push poll is not germane for purposes of determining whether the organization sponsoring the communication is a political committee subject to the Act's limits, prohibitions, and reporting requirements. Rather, the relevant consideration is whether the EFF poll expressly advocated the election or defeat of a federal candidate. For the reasons set forth below, we conclude that the EFF poll did not constitute express advocacy under the Commission's regulations.

An analysis under section 100.22(a) focuses on the specific language within a communication to determine whether particular words or phrases convert the communication into express advocacy. OGC argues that the phrase "Does knowing this make you less likely to vote for Baron Hill?" falls under 100.22(a) because it contains the word "vote"—a so-called magic word. We disagree.

The "magic" of the "magic words" test is that these words are generally *necessary* for a communication to be considered express advocacy under section 100.22(a). Having one or more of these "magic words," however, is not *sufficient* to automatically transform speech into express advocacy. That "vote" and "Baron Hill" appear in the same sentence does not convert the poll into express advocacy. Rather, these words must be viewed in the context of the ad itself.⁴⁶ Plucking the words "vote" and "Baron Hill" out of the question and viewing them in isolation provides no context in which to assess the primary purpose of the speech.

To conclude that merely because a sentence within a communication contains both a magic word like "vote" or "defeat" and the name of candidate converts the sentence into express advocacy *per se* would mean that a sentence like the following would also fall within the ambit of section 100.22(a): "Tell your representative not to vote against President Smith's bill for protecting the environment." Even though the sentence contains "vote against President Smith," that phrase in the context of the entire sentence has a completely different meaning than when viewed in isolation. To consider this statement express advocacy simply because of a single phrase that could be considered express advocacy in a much different context would obviously be an unreasonable result. Similarly, each of the questions at issue here, in the context of a public opinion poll, do not urge the poll respondent to actually vote against Hill; instead, they ask whether the preceding statements would make the respondent less likely to vote for Baron Hill. In other words, these questions can be understood to be eliciting information, rather than conveying "a clear plea for action,"⁴⁷ and, therefore, have a reasonable meaning other than express advocacy.

OGC also argues that the demographic question—"Do you intend to vote in the November 7th election?"—also constitutes express advocacy under section 100.22(a). If

⁴⁶ 11 C.F.R. § 100.22(a).

⁴⁷ See *Furgatch*, 807 F.2d at 863. Although discussing express advocacy outside the "magic words" test, the *Furgatch* court held that "a stray comment viewed in isolation may suggest an idea that is only peripheral to the primary purpose of speech as a whole." *Id.*

this is true, then every research poll that asks respondents whether they intend to vote on election day would fall within the regulatory reach of section 100.22(a)—a clearly unsustainable conclusion. In this instance, the word “vote” is not used in the context of a message urging the listener to vote for or against a federal candidate, but rather in a question seeking demographic information asked of all respondents.⁴⁸ Thus, this question cannot be said to contain express advocacy.

The poll also does not constitute express advocacy under section 100.22(b). As we noted in detail above, simply because some of the messages tested in a poll may be provocative and hard-hitting does not render the poll express advocacy. One such statement highlighted by OGC and some of our colleagues was: “Baron Hill voted to allow the sale of a broad range of violent and sexually explicit materials to minors. Does knowing this make you less likely to vote for Baron Hill?” OGC does not specifically argue that this statement attacks his character. Rather, OGC argues that EFF “takes a position about Hill” and then “attempt[s] to elicit a yes response” and “attacks the accomplishments of Baron Hill by making statements about policy positions while he was in office.” As we explained in our discussion about the Marshall and Barrow mailers, the mere fact that a communication questions the accomplishments of a candidate or attacks his character does not necessarily make the communication express advocacy, so long as a reasonable person could interpret it as encouraging something other than actions to elect or defeat a federal candidate. Clearly, an opinion poll can be given such an alternative interpretation. Specifically, this poll appears to be testing how certain statements about Hill, like this one, resonate with the individual providing the responses.⁴⁹

We agree with our colleagues that the specific statement about Hill’s vote on the sale of explicit materials “is reminiscent of the infamous ‘Bill Yellowtail’ ad, discussed in *McConnell v. FEC*.”⁵⁰ This does not, however, end the analysis. Our colleagues

⁴⁸ Since it has no electoral portion that specifically ties the question to any candidate, the question does not breach the section 100.22(b) express advocacy threshold either.

⁴⁹ Some of our colleagues appear to misunderstand the poll when they state that the pollster only asked this question to individuals “who the poll has determined [are] registered to vote and intend[] to vote.” MUR 5842, Statement of Reasons, Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at unnumbered p. 3 (“Bauerly and Weintraub SOR”). Even a cursory review of the poll itself, however, shows that this question was asked of all poll respondents, regardless of whether they indicated they were registered to vote and intended to do so. Either a Yes or a No answer to the registration question takes the respondent to the intent to vote question; and either a Yes or No answer to the intent to vote question takes the respondent to the age question. Complaint, Attach. G at 1. Therefore, neither a Yes nor a No answer to the registration or intention to vote questions ended the call. Were this the sort of poll that our colleagues believe it to be, then an answer of No to either the registration or intention to vote question would have ended the call. And all respondents, regardless of their previous answers, are asked the question at issue, number 11. *Id.* at 3 Had the point of the poll been to expressly advocate the defeat of Baron Hill, the question would not have been asked of non-voters, for there would have been no need to influence their opinion.

⁵⁰ Bauerly and Weintraub SOR at unnumbered p. 3 (citing 540 U.S. 93, 193 n.78 (2003)).

appear to believe that, because the *McConnell* court “recognized” that the Bill Yellowtail ad “was not a legitimate issue ad,” it and any similar ad can be regulated. This is simply not the case. Rather, one must determine if the ad contains express advocacy. And the *McConnell* court specifically noted that the Bill Yellowtail ad did not “urge the viewer to vote for or against a candidate.”⁵¹ Therefore, the Bill Yellowtail ad is not “express advocacy.” After all, had that ad, and other ads like it, fallen within the regulatory definition of express advocacy, there would have been no need for Congress to institute the “electioneering communication” standard.

Both the Commission and Complainants in this matter have, in the past, understood this simple point. In its brief on the merits to the Court in *McConnell*, the Commission reviewed examples of “issue advertisements” provided by the appellants as evidence that the statutory definition of “electioneering communication” was overbroad.⁵² One ad “criticized then-Senate candidate Debbie Stabinow for her past votes against repeal of the estate tax.”⁵³ Another “criticized the targeted legislators for already having voted in June 2000 ‘to block federal safety standard that would help protect workers,’ and culminated in a plea to voters to tell the candidates that ‘[their] politics cause[] pain.’”⁵⁴ A third “criticized Representatives for voting in 1995 ‘with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy.’”⁵⁵ The Commission never disagreed with appellants that these ads were “issue advertisements” (i.e., not express advocacy), but rather argued that “the advertisements were just as likely to influence the outcome of the candidate elections in connection with which they were run *as advertisements containing express advocacy*,” and, therefore, the statutory electioneering communications provision was not overbroad.⁵⁶ And Complainants, in representing Intervenor-Defendants in *McConnell*, noted specifically that the Bill Yellowtail ad, like other similar ads, “avoids the ‘magic words’ of ‘express advocacy,’ and ... could be said to address some ‘issue.’”⁵⁷

Setting aside any discussion of electioneering communications, which are irrelevant to this analysis, all of the ads discussed in the *McConnell* litigation, including

⁵¹ *McConnell*, 540 U.S. at 193.

⁵² Brief of Federal Election Commission, *FEC v. McConnell*, 540 U.S. 93 (2003) (No. 02-1674 et. al) at 106-08.

⁵³ *Id.* at 107.

⁵⁴ *Id.* (brackets in original).

⁵⁵ *Id.* at 107-08.

⁵⁶ *Id.* at 107 (emphasis added).

⁵⁷ Brief of Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords (Redacted), *FEC v. McConnell*, 540 U.S. 93 (2003) (No. 02-1674 et. al) at 44.

the Bill Yellowtail ad, targeted candidates and criticized particular votes they made. None, however, became express advocacy on the basis of that content. Depending on the facts, some may have been electioneering communications and some may have been intended to influence. But all parties agreed that they were not express advocacy. As such, noting that a poll question is “reminiscent” of the Bill Yellowtail ad, which did not constitute express advocacy, provides support not for our colleagues’ position, but our own – that, just like the Bill Yellowtail ad, this poll did not contain express advocacy.⁵⁸

We also point out that, in analyzing whether the EFF poll meets the section 100.22 standard, we are not permitted to attempt to ascertain EFF’s ultimate intent for sponsoring the poll. The Supreme Court has, on numerous occasions, stated that an intent-based test is not a constitutionally sound standard for distinguishing between speech that may be regulated and speech that may not. For instance, in *FEC v. Wisconsin Right to Life*,⁵⁹ Chief Justice Roberts noted that “an intent-based test would chill core political speech” and, quoting *Buckley*, “‘blanket[] with uncertainty whatever may be said’ and ‘offer[] no security for free discussion.’”⁶⁰ Therefore, regardless of what EFF’s motives might have been for sponsoring the poll or what its thoughts were for how to use the data gleaned from the poll, the Commission cannot, as a matter of law, conclude that this poll—which did not contain express advocacy—nevertheless fell within the ambit of section 100.22(b) because of suspicions about EFF’s subjective intent regarding the poll. As the Supreme Court has made abundantly clear, we may only focus on the words contained in the communication and, to a limited extent, the context in order to discover the meaning of those words. To go beyond this limited inquiry—and instead seek to discern the intent of the speaker—runs counter to the instructions enunciated by the Supreme Court.

Finally, we note that it is irrelevant that Baron Hill was not an incumbent at the time the poll was conducted. As we stated in the Statement of Reasons in MURs 5694 & 5910 (Americans for Job Security), merely because a communication refers to a candidate who is not an officeholder does not have a unique bearing on the express advocacy analysis, provided the communication can otherwise be interpreted by a

⁵⁸ We note that the term “express advocacy” is not found in our colleagues’ Statement of Reasons; it is only found in the Factual and Legal Analysis drafted by OGC that they attached to their statement. Our colleagues do use the term “‘issue’ ad” to describe the poll. But this term has no regulatory meaning. Similarly, stating that the poll “attacked a federal candidate’s voting record” or “smear[ed] the reputation of the candidate,” as our colleagues do in their Statement, does not render the poll an expenditure under the Act. Only the presence of express advocacy can do that.

⁵⁹ 127 S. Ct. 2652, 2665-66 (2007) (“*WRTL II*”).

⁶⁰ *Id.* at 2666 (quoting *Buckley*, 424 U.S. at 43). Thus, for 33 years, questioning the intent of the speaker has been off-limits for regulators and courts. Given this long history, it is troubling for us to see that some of our colleagues believe that asking the following question is appropriate when considering whether speech subjects an entity to regulation: “If its purpose were not to influence an election for federal office, why would EFF need to poll whether ‘knowing this make[s] the listener] less like to *vote* for’ a candidate?” Bauerly and Weintraub SOR at unnumbered p. 3 (brackets and emphasis in original).

reasonable person as something other than a message urging the election or defeat of a federal candidate. Thus, that Baron Hill had not been in Congress the previous term did not limit in any way EFF's ability to poll issues important to the organization and link them to the candidate.⁶¹

Therefore, we conclude that the EFF poll, like the Marshall and Barrow mailers, did not contain express advocacy.⁶² Consequently, we cannot agree with the Complainants' allegation that EFF made expenditures in excess of \$1,000.

EFF Was Not a Political Committee

As stated above, the Act defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year."⁶³ An organization that does not trigger the Act's contribution or expenditure thresholds, therefore, cannot be "a political committee." As we demonstrated above, EFF did not receive any contributions or make any expenditures. Thus, we do not need to conduct a "major purpose" analysis with respect to EFF in order to conclude that it was not a political committee.

Nonetheless, we address EFF's major purpose because 1) the complaint places most of its focus on this issue; and 2) even if we assume *arguendo* that EFF tripped the contribution or expenditure threshold, we still would conclude that EFF was not a political committee because its major purpose was not electing or defeating federal candidates. Complainants assert that an entity registering as a 527 organization by definition satisfies the major purpose test (with limited exceptions). That is simply not

⁶¹ Nor does the fact that some of the poll questions reference Baron Hill's legislative record cause the poll to be considered express advocacy under section 100.22. As the Court reiterated in *WRTL II*, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 127 S. Ct. at 2670 (quoting *Buckley*, 424 U.S. at 42).

⁶² Complainants fail to provide a single example of express advocacy in any of EFF's communications. Instead, they argue that "[t]he ads run by respondents, when taken as a whole, can only be interpreted by a reasonable person as opposing the election of particular candidates for Congress, and thus meet the Commission's existing regulatory definition of 'express advocacy.'" Such an argument fails to comprehend the regulation, which examines separately each communication made by a speaker to determine whether, "as a whole," the communication constitutes express advocacy. The notion that an express advocacy determination can be based on a holistic analysis of the cumulative body of communications made by a speaker finds no basis in the Act, the Commission's rules, or the relevant case law. Therefore, we addressed above only OGC's determination that the specific Georgia mailers and the Indiana telephone opinion poll constitute express advocacy.

⁶³ 2 U.S.C. § 431(4)(A).

so. As we have explained elsewhere,⁶⁴ “political organization” status under section 527 of the IRC does not equate to “political committee” status under the Act.

Critically, the Commission has previously rejected this approach.⁶⁵ For example, in 2001, the Commission noted that the IRC “definition is on its face substantially broader than the Act’s definition of ‘political committee.’”⁶⁶ The Commission also noted that the IRS had already found that “activities such as circulating voting records, voter guides and ‘issue advocacy’ communications – those that do not expressly advocate the election or defeat of a clearly identified candidate – fall within the ‘exempt function’ category under IRC section 527(E)(2).”⁶⁷ And in 2004, when the Commission proposed to rewrite the definition of “political committee,” it considered two alternatives by which all or nearly all “527 organizations would be considered to have the nomination or election of candidates as a major purpose”⁶⁸ Both proposals were rejected in favor of the current definition, which does not rely on an entity’s tax status.⁶⁹

Moreover, as the Commission itself has noted, imposing political committee status automatically on section 527 organizations would entail “a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000, and again in 2002, when it substantially transformed the nation’s campaign finance laws through BCRA.”⁷⁰ Though Congress is fully cognizant of the activities undertaken by 527 organizations (including sponsorship of communications critical of federal candidates), it has consciously chosen not to enact legislation that

⁶⁴ MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II.

⁶⁵ The Fourth Circuit has rejected the concept as well. *See N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418, 430 (4th Cir. 2003) (“*NCRTL I*”), *vacated and remanded* (for further consideration in light of *McConnell v. FEC*, 540 U.S. 93 (2003)), 541 U.S. 1007 (2004) (rejecting such presumptions: “Any attempt to define statutorily the major purpose test cannot define the test according to the effect some arbitrary level of spending has on a given election.”).

⁶⁶ Advanced Notice of Proposed Rulemaking, Definition of Political Committee, 66 Fed. Reg. 13,681 (Mar. 7, 2001). *See also* Political Committee Status Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5597-98 (Feb. 7, 2007) (“Political Committee Supp. E&J”) (“In fact, neither FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status.”).

⁶⁷ 66 Fed. Reg. at 13,687.

⁶⁸ Notice of Proposed Rulemaking, Political Committee Status, 69 Fed. Reg. 11,736, 11,748 (Mar. 11, 2004).

⁶⁹ *See* 11 C.F.R. § 100.5.

⁷⁰ Political Committee Status Explanation and Justification, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004).

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would convert all such groups into political committees.⁷¹ Instead, Congress has chosen to regulate these groups more narrowly by imposing limited reporting requirements in 2000, and then by amending those requirements in 2002.⁷²

Complainants' citation of *McConnell* provides no support for equating 527 groups with political committees defined under the Act. The *McConnell* court, while quoting the IRC definition for 527 organizations under the auspices of discussing 2 U.S.C. § 441i(d)'s restrictions on soliciting funds for tax-exempt organizations, specifically stated that "parties remain free to solicit hard-money contributions to ... § 527 organizations that already qualify as federal PACs."⁷³ Thus, the Court, like Congress and the Commission, understood the distinction between 527 organizations that qualify for political committee status and those that do not. For if all 527 organizations were political committees, then the statutory restriction on solicitations for 527 organizations would have been superfluous. *McConnell*, therefore, merely provides more proof that Congress did not intend for all 527 organizations to be political committees by virtue of their tax status.

Finally, Complainants' reliance on old advisory opinions for the premise that "any group that chooses to register as a 'section 527 group' ... is by definition an entity" that meets the "major purpose" test is flawed. All of those advisory opinions predated *FEC v GOPAC*, which, as Complainants themselves note, "further limited the 'major purpose' test to encompass ... only 'the nomination or election of a particular candidate or candidates for federal office.'"⁷⁴ To the extent those previous opinions linked 527 status to the major purpose test, the Commission no longer equates the two.⁷⁵

⁷¹ *Id.* at 68,064 ("Congress appeared to be fully aware that some groups were operating outside [the Act]'s registration and reporting requirements as well as its limitations and prohibitions... [and] consciously did not require 527 organizations to register with the Commission as political committees."); *see also* Political Committee Supp. E&J, *supra* note 66, at 5599 ("While Congress has repeatedly enacted legislation governing 527 organizations, it has specifically rejected every effort ... to classify organizations as political committees based on section 527 status."). *See generally* *Cottage Savings Ass'n v. Comm'r of Internal Revenue*, 499 U.S. 554, 562 (1991) (when Congress revises a statute, its decision to leave certain sections unchanged indicates acceptance of the preexisting construction and application of the unchanged terms).

⁷² Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155.

⁷³ 540 U.S. at 177.

⁷⁴ Complaint at 15 (quoting 917 F. Supp. 851, 859 (D.D.C. 1996)).

⁷⁵ *See, e.g.*, Advisory Opinion 2006-20 (Unity 08) (determining that a 527 organization would have to register as a political committee because it planned on making expenditures in excess of \$1,000 and its "self-proclaimed major purpose is the nomination and the election of a presidential and a vice-presidential candidate"; nowhere in the analysis of "major purpose" is the entity's tax status considered); *cf.* Advisory Opinion 2003-12 (Flake) (as part of facts given, 527 organization "is not a political committee"); 2003-07 (Virginia Highlands) (same).

Turning to the “major purpose” test itself, even assuming *arguendo* that EFF made “expenditures,” it still would not be a political committee. EFF ran multiple ads and communications in multiple states. Some of them referenced federal candidates, some did not.⁷⁶ None of them expressly advocated the election or defeat of a candidate.⁷⁷ None of its solicitations referenced federal candidates.⁷⁸ And as OGC itself notes, there is no evidence that EFF made any public statements regarding its purpose, let alone any public statement that would specifically demonstrate that its major purpose was to influence federal elections.⁷⁹

In *GOPAC*, even though the Court found that *GOPAC*’s “ultimate major purpose” was to influence the election of Republican candidates for the House of Representatives, the court held that *GOPAC* was not a political committee, reasoning that, as a means to promote the election of Republican candidates, while *GOPAC* engaged in genuine issue advocacy that mentioned the name of a federal candidate (who was inextricably linked to the issues), such spending could not be regulated.⁸⁰

Therefore, simply because EFF referenced federal candidates in its issue advocacy efforts, it does not follow that EFF’s major purpose was influencing the nomination or election of particular candidates for federal office. Rather, judging by its activities, EFF appears to have focused on particular issues in particular areas where the citizenry likely would be particularly receptive to its message, especially in the context of highly publicized federal elections.⁸¹ And in its own words, EFF’s purpose “is to educate

⁷⁶ Response at 2.

⁷⁷ See *infra* at pp. 10-20.

⁷⁸ Response at 2; Supp. Response, Ex. 1.

⁷⁹ Some have asserted that an organization’s “major purpose” may be established through “public statements of purpose.” See *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (citing *GOPAC*, 917 F. Supp. at 859) (discussing *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 392 (D.C. Cir. 1981)); *rev’d on other grounds on reconsid.*, 2005 WL 588222 (D.D.C. 2005). But see *WRTL II*, 127 S. Ct. at 2665-66 (cautioning against looking to subjective or contextual factors); *NCRTL II*, 525 F.3d at 284-85 (same), which cast serious doubt on the validity of examining anything other than the amount of express advocacy of the organization when analyzing its “major purpose.”

⁸⁰ *GOPAC*, 917 F. Supp. at 858, 862-64 & n.2. Cf. *Malenick*, 310 F. Supp. 2d at 230 (entity held to be a political committee where it sent out hundreds of public communications expressly advocating the election of clearly identified federal candidates, and received and forwarded to the intended recipient approximately 230 individual checks (totaling approximately \$185,000) made payable to the federal candidate or campaign committees so identified in the communications).

⁸¹ See *Buckley*, 424 U.S. at 42 (“For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.”); *WRTL II*, 127 S. Ct. at 2670 (“[A] group can certainly choose to run an issue ad to coincide with public interest Discussion of issues cannot be

citizens on issues of public importance related to public policy – specifically, the economic and related impacts of certain legislative and other official acts of elected officials – as well as influence the legislative and other official actions of public officials.”⁸² Any referencing of federal candidates in its communications, therefore, appears to have been in furtherance of those objectives.

Even assuming *arguendo* that EFF was subjectively hopeful that certain candidates would be successful in the 2006 elections and even supposed that its ads might impact certain races, that is not enough to “pass” the major purpose test. As the Fourth Circuit observed in *NCRTL II*,

[T]he Court in *Buckley* must have been using “*the* major purpose” test to identify organizations that had the election or opposition of a candidate as their only or primary goal – this ensured that the burdens facing a political committee largely fell on election-related speech, rather than on protected political speech. If organizations were regulable merely for having the support or opposition of a candidate as “*a* major purpose,” political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley*’s “unambiguously campaign related” test, but it would also subject a large quantity of ordinary political speech to regulation.⁸³

Finally, though an organization could theoretically satisfy “the major purpose” test through independent spending that is “so extensive” that the organization’s major purpose may be regarded as campaign activity,⁸⁴ neither Congress, nor the Commission, nor the courts have established any guidance on what constitutes sufficiently extensive spending. As *GOPAC* illustrates, without any “‘bright-line’ rules that are easily understood and followed by those subject to them – contributors, recipients, and organizations”⁸⁵ – political committee status cannot be imposed on an entity. Because no such bright-line rule exists and, in any event, no evidence was presented to us that EFF’s spending was “so extensive” with regard to any specific election or the 2006 election

suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”).

⁸² Response at 1.

⁸³ 525 F.3d at 287-88 (emphasis in original) (internal citations omitted)

⁸⁴ See *MCFL*, 479 U.S. at 262.

⁸⁵ 917 F. Supp. 851, 861-62.

cycle in general, we do not believe that the amount of EFF's alleged spending would trigger "major purpose" status for EFF.

Therefore, for all the reasons stated above, even assuming *arguendo* that EFF made expenditures in excess of \$1,000 during a calendar year, we would conclude that EFF did not have the major purpose of electing or nominating a federal candidate and, thus, is not a political committee.

CONCLUSION

Contrary to the allegations made in the complaint and the recommendations of OGC, there is no reason to believe that EFF violated the Act or Commission regulations.⁸⁶ Consequently, EFF did not fail to register and report as a political committee under 2 U.S.C. §§ 433, 434; it did not accept prohibited and excessive

⁸⁶ The Commission is not required to create legal and constitutional issues in its administration and enforcement of the law. Indeed, the prudent and preferred course is to avoid such issues. Therefore, where the Commission has two reasonable ways of interpreting the law, its regulations, and enforcement practices, one which avoids legal and constitutional doubt and the other which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the former, safer course. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."))). See also *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt"). As a result, given the numerous legal and constitutional concerns raised above, we clearly would be within our discretion to dismiss this case and, in light of those concerns, we would exercise that discretion. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (internal citations omitted)). See also *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).

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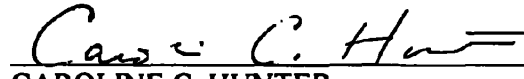
contributions under 2 U.S.C. § 441a(f); and it did not make prohibited expenditures on communications containing express advocacy under 2 U.S.C. § 441b. For these reasons, we voted against OGC's recommendation and, instead, voted to close the file in this matter.

29044242702

6/10/2009
Date


MATTHEW S. PETERSEN
Vice Chairman

6/10/2009
Date


CAROLINE C. HUNTER
Commissioner

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