IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS COMMITTEE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civil Action No.: 1:04CV00007 (JDB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

By this action, Plaintiff Kean for Congress Committee ("Kean Committee") seeks reversal of the dismissal by the Federal Election Commission ("FEC" or "Commission") of its administrative complaint charging that a Virginia corporation known as the Council for Responsible Government, and its so-called "Accountability Project" (collectively, "CRG"), illegally funded and disseminated advertisements aimed at defeating the Kean Committee's candidate, Tom Kean, Jr., in the June, 2000 New Jersey Congressional primary. On a 3-3 partisan vote,[1] the FEC rejected its Office of General Counsel's advice and refused to open an FEC investigation into the allegations and dismissed the Kean Committee's case. For numerous reasons, the three controlling Commissioners' justification for finding no reason to believe that CRG violated the federal election laws was arbitrary, capricious and contrary to law. The dismissal of the administrative complaint should therefore be reversed.

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. ("FECA"), contains various provisions requiring corporations, "persons" and "political committees" to file reports with the Commission and to disclose election-related contributions and expenditures under specified circumstances. A key question underlying the application of such statutory provisions in this case is whether the advertisements CRG disseminated weeks before the election were "express advocacy" so as to trigger the FECA prohibitions or — alternatively — whether they were predominantly public "issue ads," thereby warranting First Amendment protection. As the FEC's own General Counsel and the non-controlling Commissioners concluded, CRG's ads clearly contained language that urged voters to defeat

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[1] "[W]hen the Commission deadlocks and consequently dismisses a complaint, the 'declining-to-go-ahead' Commissioners are a 'controlling group' for purposes of the Commission's decision to dismiss the complaint." Common Cause v. Federal Election Comm'n, 108 F.3d 413, 415 (D.C. Cir. 1997).

Tom Kean, Jr. Under Buckley v. Valeo, 424 U.S. 1 (1976), and Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), the ads cannot reasonably be given any other meaning. Nor did the ads contain *any* discussion of public issues. Instead, they baldly attacked Mr. Kean's qualifications for Congress — claiming, for example, that he lacked experience, never worked or lived in New Jersey, and never held a job in the private sector — and exhorted readers to "Tell Tom Kean Jr." that "New Jersey needs New Jersey leaders." This communication unambiguously urged readers not to vote for Mr. Kean.

In finding to the contrary, the controlling Commissioners made several fatal errors. They misapplied the "express advocacy" standard set forth in controlling Supreme Court precedent; ignored the FEC's own regulation governing "express advocacy"; took out of context or wholly ignored pertinent facts; and failed to address pertinent provisions of the FECA itself. Accordingly, the dismissal of Plaintiff's administrative complaint cannot stand.

BACKGROUND

A. Nature of the Action

Plaintiff Kean Committee is an unincorporated political association that is registered with the FEC pursuant to 11 C.F.R. § 102.1(a). First Amended Complaint for Declaratory and Injunctive Relief ("Compl.") ¶ 10; Defendant Federal Election Commission's Statement of Material Facts as to which There Is No Genuine Issue ("Def's SMF") ¶ 2. The Kean Committee was designated by Thomas H. Kean, Jr. as his principal campaign committee for his campaign for the United States House of Representatives from New Jersey's Seventh Congressional District in the 2000 elections. FEC Exh. 1; Def's SMF ¶ 1; Plaintiff's Statement of Material Facts as to Which There Is No Genuine Dispute ("Plf's SMF") ¶ 1.

Plaintiff seeks review under 2 U.S.C. § 437g(a)(8)(B) of the FEC's dismissal of the Kean Committee's administrative complaint dated May 31, 2000. By letter dated November 10, 2003, counsel for the FEC advised Plaintiff that it "was equally divided on whether to find reason to believe the Counsel for Responsible Government, Inc. & its Accountability Project violated the Federal Election Campaign Act of 1971, as amended," and that, "[a]ccordingly, on November 4, 2003, the Commission closed the file in this matter"; that "[a] Statement of Reasons providing a basis for the Commission's decision will follow," and that "dispositive portions of the file will be placed on the public record within 30 days." The FEC failed to provide the basis for the Commission's decision or dispositive portions of the file within the 30-day period, which expired on December 10, 2003. FEC Exh. 10; Def's SMF ¶ 14; Plf's SMF ¶ 10.

On January 5, 2004, Plaintiff filed the Complaint initiating this action. Two weeks later, on or about January 16, 2004, the controlling Commissioners released their Statement of Reasons indicating that, in a 3-3 vote — at least four of the six FEC Commissioners must agree in order to take any action — they had failed to find reason to believe that the CRG or William "Bill" Wilson or Gary Glenn, Members of CRG's Board of Directors, had violated the FECA. Plf's SMF ¶ 13; see also Plf's Exh. 4.

Accordingly, by its First Amended Complaint, Plaintiff seeks a judicial determination and declaration that the FEC's dismissal of the Kean Committee's complaint, its failure to find reason to believe that CRG or its Board Members violated the FECA, its failure to approve discovery to investigate the Kean Committee's allegations, and its controlling Statement of Reasons for its actions, were arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. Plaintiff further seeks an order requiring the FEC to conform to that declaration within 30 days. See 2 U.S.C. § 437g(a)(8)(C).

B. Factual and Procedural History

1. The 2000 New Jersey Congressional Republican Primary

In 2000, Tom Kean, Jr. ran in the New Jersey Congressional Seventh Republican primary against Mike Ferguson, among other candidates. The New Jersey primary election was held on June 6, 2000. Def's SMF ¶ 3; Plf's SMF ¶ 2.

In a May 24, 2000 newspaper article, in the Newark Star-Ledger, Gary Glenn is identified as a CRG Board Member and quoted as stating that "[t]he very purpose of our group is to influence the outcome of elections . . . . The outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy. Clearly, we believe Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy." According to other newspaper reports, CRG spent over $100,000 "to hurt the chances of . . . Kean in June 6 primary, while boosting the chances of Warren Township educator Mike Ferguson." Plf's Exh. 1, Attachment B at 1; Plf's SMF ¶ 4.

In or about May of 2000, the CRG disseminated numerous advertisements advocating the defeat of Tom Kean. The Kean Committee submitted two such advertisements, each consisting of two pages, with its administrative complaint. Superimposed against of photograph of Mr. Kean wearing a "Tom Kean Jr. for Congress" campaign button in the first advertisement is the following statement:

TOM KEAN, JR.
No experience. Hasn't lived in New Jersey for 10 years.
It takes more than a name to get things done.

The second page of the advertisement contains the following statement:

> **NEVER.** Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean Jr. may be a nice young man and you may have liked his dad a lot — but he needs more experience dealing with local issues and concerns. For the last

> 5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean Jr. . . . **New Jersey needs New Jersey leaders.**

In the second advertisement, superimposed against the same photograph of Mr. Kean is the following statement:

> For the last 5 years Tom Kean Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress — Tom never paid property taxes. No experience. **TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrisey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**

The second page of the advertisement shows photographs of the following: former basketball player Larry Bird, Senator Ted Kennedy, what appears to be a statute of a Revolutionary War "Minuteman," and the same photograph of Tom Kean Jr. that appears elsewhere in the advertisements. Superimposed over the four photographs is the statement, "What do all of these things have in common? They all have homes in Massachusetts." Plf's Exh. 1, Attachment A; Plf's SMF ¶ 3.

Mike Ferguson won the election and presently holds the Congressional seat sought by Mr. Kean. Mr. Kean lost the Republican primary by fewer than 3,400 votes. Compl. ¶ 16; Def's SMF ¶ 3.

2. The Kean Committee's Administrative Complaint

On or about May 31, 2000, the Kean Committee filed with the FEC a sworn administrative complaint pursuant to 2 U.S.C. § 437g(a) alleging that the campaign mailings

disseminated by the CRG violated numerous provisions of the FECA. Plf's Exh. 1. The FEC designated the administrative complaint matter under review ("MUR") 5024. See Plf's Exh. 2.

The FECA prohibits contributions or expenditures by corporations in federal elections. 2 U.S.C. § 441b(a).[2] The federal election laws also require that a person's independent expenditures in support of, or in opposition to, a federal candidate and costing in excess of $250 be publicly disclosed in a filing with the FEC, id. § 434(c); 11 C.F.R. § 109.2; and that any group of persons whose principal purpose is to influence federal elections register with the FEC as a federal political committee and disclose its contributions and expenditures, see 2 U.S.C. §§ 431(4)(a), 433, 434. The federal election laws further require that any communication advocating the election or defeat of a clearly-identified candidate contain a disclaimer stating whether the communication was authorized by any candidate, see id. § 441d(a); 11 C.F.R. § 110.11(a)(1). The Kean Committee's administrative complaint alleged that the challenged communications by the CRG, which was formed in or about May of 2000 for the express purpose of making political expenditures, violated each of these legal requirements. See Plf's Exh. 1 at 2.

The FECA also provides that expenditures made by any person in cooperation, consultation, or concert with, or at the suggestion of, a candidate, the candidate's authorized political committees, or their agents, shall be considered a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i). The administrative complaint further alleged that CRG may have coordinated its expenditures with other federal candidates, such that the challenged

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[2] The instant case arose under FECA before it was amended by the Bipartisan Campaign Reform Act, and the Commission decided these cases prior to the Supreme Court's decision in McConnell v. Federal Election Comm'n, 124 S. Ct. 619 (2003) (decided Dec. 10, 2003), which addressed § 441b, among other FECA provisions. See Plf's Exh. 3 at 1 n.1.

communications may have constituted corporate contributions subject to disclosure. See Plf's Exh. 1 at 8; see also Plf's Exh. 6 at 3.

As a committee that is registered with the FEC and regularly files reports with the FEC, the Kean Committee is established and operated to participate in federal elections. Accordingly, by its administrative complaint, Plaintiff urged the FEC to take any and all action within its power to correct and prevent the illegal activities of the CRG, including requirements that it register with the FEC, that it report its contributions and expenditures, that it comply with all limitations as to source and amount of funds used to influence federal elections, and that it identify in any future campaign communications whether they were authorized by any candidate. See Plf's Exh. 1 at 9.

The FEC failed to act on the administrative complaint within 120 days. Accordingly, as an aggrieved party, the Kean Committee challenged the Commission's inaction under 2 U.S.C. § 437(g)(1), by filing a Complaint with this Court on September 18, 2001. See Kean for Congress Comm. v. Federal Election Comm'n, Civ. No. 01-1979 (JDB). Thereafter, upon consultation with counsel for the FEC regarding the status of the administrative complaint, the Kean Committee filed an unopposed Notice of Dismissal of the Complaint in Civ. No. 01-1979 on February 4, 2002.

3. The Commission's Dismissal of the Administrative Complaint

On September 3, 2003, the General Counsel of the FEC recommended in pertinent part that the Commission: (i) find reason to believe that CRG violated 2 U.S.C. §§ 434, 441b(a), and 441d(a); (ii) find reason to believe that two of CRG's Board Members, Bill Wilson and Gary Glenn, violated 2 U.S.C. § 441b(a); and (iii) approve a document subpoena to CRG, deposition subpoenas to CRG and its Board Members, and written questions to CRG and its Board

Members. The General Counsel's Report noted that Messrs. Wilson and Glenn were not made respondents at the time of the administrative complaint, but were internally generated as respondents by the FEC. See Plf's Exh. 6 at 16 n.17.

Despite the FEC General Counsel's recommendation, the Commissioners split 3-3 on the recommendations made in the General Counsel's Report and accordingly dismissed the matter on a vote of 6-0. FEC Exh. 10; Plf's Exh. 2; Def's SMF ¶ 14; Plf's SMF ¶ 9. By letter dated November 10, 2003, the FEC advised that the Commission was "equally divided" on whether to find reason to believe the CRG violated the FECA, and closed the file on November 4, 2003. FEC Exh. 10; Def's SMF ¶ 14; Plf's SMF ¶ 10.

The non-controlling group of Commissioners included Ellen L. Weintraub, Scott E. Thomas, and Danny Lee McDonald ("non-controlling Commissioners"). In its Statement of Reasons dated December 16, 2003, the non-controlling group agreed with the legal analysis and recommendations contained in the General Counsel's Report, which concluded — based upon applicable law and the Commission's regulations — that the communications at issue contained express advocacy and were made in violation of 2 U.S.C. § 441b, stating: "We agreed with the General Counsel's recommendations and have no doubt that the brochures satisfy the tests for express advocacy laid out at both 11 C.F.R. § 100.22(a) and 100.22(b)." It also supported the General Counsel's view that CRG failed to include an adequate disclaimer in the communications under 2 U.S.C. § 441d, and failed to register and report as a political committee with the FEC under 2 U.S.C. §§ 433 and 434. Plf's Exh. 3 at 4; Plf's SMF ¶ 11.

As of the filing of the Complaint initiating this action on January 5, 2004, the controlling group of Commissioners had failed to provide a Statement of Reasons setting forth a basis for the

Commission's decision, in violation of FEC regulations. See 11 C.F.R. § 5.4(a)(4). Compl. ¶ 24.

On or about January 16, 2004, the controlling group of Commissioners finally released its Statement of Reasons, which did not find reason to believe that CRG and two of its Board Members had violated the FECA, rejected the First General Counsel's Report dated September 3, 2003, and therefore not approve discovery on CRG and its Board Members. See Plf's Exh. 4; Plf's SMF ¶ 13.

The controlling group of Commissioners included Bradley A. Smith, David M. Mason and Michael E. Toner ("controlling Commissioners"). Completely disregarding as "unconstitutional" portions of the applicable FEC regulation regarding express advocacy, see 11 C.F.R. § 100.22(b), the controlling group concluded in its Statement of Reasons dated January 13, 2004 that the communications at issue did not contain express advocacy, and therefore were not expenditures in violation of the FECA. The controlling group further found that its conclusion regarding express advocacy required that the Commission reject the Kean Committee's contention that CRG should be forced to register with the Commission, disclose its donors, and observe the FECA's contribution limits and prohibitions as a political committee. The controlling group's Statement of Reasons concluded that "[t]he Commission thus rightly did not approve the Office of the General Counsel's request to conduct what could be an extensive investigation into the corporation's activity, including interrogatories, document subpoenas, and depositions to pursue this untenable theory, and closed the file on the matter." The controlling group's Statement of Reasons failed to address the Kean Committee's allegation that CRG might have coordinated its expenditures with other federal candidates. See Plf's Exh. 4 at 7; Plf's SMF ¶¶ 14, 16.

The controlling group of Commissioners attached copies of the challenged communications to its Statement of Reasons. No additional materials from the administrative record were released with the Statement of Reasons on January 16, notwithstanding the FEC's statement in early November that dispositive portions of the record would be made public within 30 days. See Plf's Exh. 4.

After dismissing Plaintiff's administrative complaint on November 4, 2003, the Commission revised its policy concerning public disclosure of materials from closed administrative matters. See 68 Fed. Reg. 70,426 (Dec. 18, 2003). Plaintiff's counsel asked the Commission to comply with the policy in this case, and on March 1, 2004, FEC counsel released additional administrative records, including CRG's written response to the Kean Committee's administrative complaint, its articles of incorporation, and a redacted version of the General Counsel's Report. See Plf's Exh. 5.

On March 15, 2004, the FEC filed its Motion to Dismiss or, in the alternative, for Summary Judgment for lack of subject matter jurisdiction. The FEC simultaneously filed an "Objection to Related Case Designation," asserting that the LCvR 40.3 "requires that this matter be returned to the Calendar Committee for random assignment." Defendant Federal Election Commission's Objection to Related Case Designation at 6. On April 9, 2004, this Court ordered that the instant case retain its current assignment as related to Civ. No. 01-1979.

C. Standard of Review

Under the FECA, a court reviewing the FEC's dismissal of an administrative complaint must determine whether the agency action was "contrary to law." 2 U.S.C. § 437g(8)(C). Thus, the FEC's dismissal of the Kean Committee's administrative complaint should be reversed if it "was based upon an impermissible interpretation of the FECA or was arbitrary and capricious." Common Cause v. Federal Election Comm'n, 906 F.2d 705, 706 (D.C. Cir. 1990). "Because, in so doing, [courts] are dealing with a determination or judgment which an administrative agency alone is authorized to make, [they] must judge the propriety of such action solely by the grounds invoked by the agency." Id. (quotation omitted).

Although "[j]udicial review of the FEC's decision is deferential," Common Cause, 906 F.2d at 706, "'[t]here is . . . no reason for courts — the supposed experts in analyzing judicial decisions — to defer to agency interpretations of the Court's opinions,'" University of Great Falls v. National Labor Relations Bd., 278 F.3d 1335, 1341 (D.C. Cir. 2002) (quoting Akins v. Federal Election Comm'n, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), vacated on other grounds, 524 U.S. 11 (1998)). Moreover, "it is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action." IMS, P.C. v. Alvarez, 129 F.3d 618, 621 (D.C. Cir. 1997) (quotation omitted). Thus "[d]espite [courts'] substantial deference to an agency's interpretation of its own regulations," the D.C. Circuit will not "allow [an agency] to ignore its own regulation in an attempt to save its imperfect/unsatisfactory decision-making." Transactive Corp. v. United States, 91 F.3d 232, 238 (D.C. Cir. 1996) (citations omitted).

ARGUMENT

I. BECAUSE THE CONTROLLING COMMISSIONERS MISAPPLIED SUPREME COURT PRECEDENT, THE FEC'S DISMISSAL OF THE ADMINISTRATIVE COMPLAINT SHOULD BE REVERSED AS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

The FEC's dismissal of the Kean Committee's administrative complaint should be reversed as arbitrary, capricious, and contrary to law because it was based on a misapplication of the Supreme Court's decisions in Buckley v. Valeo, 424 U.S. 1 (1976), and Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"). Importantly, the controlling Commissioners are entitled to no deference as to the proper interpretation of these judicial precedents. See University of Great Falls, 278 F.3d at 1341.

A. The Challenged Advertisements Constituted Express Advocacy under Buckley and MCFL

The FECA prohibits corporations from making contributions or expenditures in connection with elections to any political office, including primary elections. 2 U.S.C. § 441b(a). In Buckley, the Supreme Court upheld as constitutional certain reporting requirements on expenditures under the FECA, but sought to ensure that the requirements could not "be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79. It therefore "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." MCFL, 479 U.S. at 249.[3] Only those expenditures "used for communications that expressly advocate the election or

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[3] For purposes of this case, the express advocacy standard is important for at least three reasons. First, it triggers § 441b's prohibition of corporate contributions or expenditures in connection with federal campaigns. Second, the FECA and Commission regulations provide that whenever a person makes an expenditure on express advocacy through various types of mass media or advertising, the communication must include a statement of sponsorship or disclaimer. See 2 U.S.C. § 441d(a); 111 C.F.R. § 110.11(a)(1). Third, the express advocacy standard is implicated by the FECA's requirement that persons who make yearly campaign expenditures of

defeat of a clearly identified candidate," or that are "unambiguously related to the campaign of a particular federal candidate" must be reported under Buckley. 424 U.S. at 80. The Court provided no further guidance on the meaning of express advocacy other than to set forth a non-exhaustive list of "words of advocacy of election or defeat, such as 'vote for,' 'elect, 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' Id. at 44 n.52 & 80 n.108.

In MCFL, the Supreme Court relied upon Buckley to similarly hold that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249. The Court clarified the scope of the express advocacy standard, however, explaining that "[t]he fact that [a] message is marginally less direct than "Vote for Smith" does not change its essential nature." Id. Rather, the issue is whether a communication "provides in effect an explicit directive," such as "vote for these (named) candidates." Id.

The communication in MCFL consisted of a newsletter with a headline on the front page stating, "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and additional language stating, "[n]o pro-life candidate can win in November without your vote in September." Id. at 243-44. On the back page was printed, "VOTE PRO-LIFE," with a removable coupon identifying "pro-life" candidates that voters could clip and take to the polls. The Court held that the newsletter "falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public." Id. at 250. It continued:

> The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. [It] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. [It] goes beyond

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$250 or more to file statements with the FEC. See 2 U.S.C. § 434(c); see also Compl. ¶ 18; infra Part III.A.

> issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.

Id. at 249.

Courts interpreting MCFL have "recognize[d] that the context-dependent nature of language introduces ambiguities requiring certain case-specific considerations . . . such as proximity of the communication to an election." Federal Election Comm'n v. Christian Coalition, 52 F. Supp. 2d 45, 60 (D.D.C. 1999) (citing cases). Nonetheless, many courts read MCFL as "prohibiting only those communications that contain specific *words* of advocacy." Id. (emphasis in original). In Federal Election Comm'n v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987), however, the Ninth Circuit rejected "[a] test requiring the magic words . . . or their nearly perfect synonyms" because "[i]ndependent campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate." The Furgatch court held that to be express advocacy under the FECA, speech "must, when read as a whole . . . be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Id. at 864.

In any event, the application of the express advocacy standard to CRG's advertisements "must be decided solely as a matter of law." Christian Coalition, 52 F. Supp. 2d at 62. Although the lower courts have differed about where to locate the outer limits of the "express advocacy" standard, there is no ambiguity about how to apply that standard here. CRG's communications directed against Mr. Kean are at the core of "express advocacy," and it is clear that the controlling Commissioners' decision in this case widely misses the mark.

The MCFL Court held that "[t]he fact that [a] message is marginally *less* direct than "Vote for Smith" does *not* change its essential nature," and that a communication violates § 441b

if it "provides *in effect* an explicit directive: vote for these (named) candidates." 479 U.S. at 249 (emphasis added); see also Christian Coalition, 52 F. Supp. 2d at 61 (considering the "relevant precedent" and concluding that "the communication must in effect contain an explicit directive"). In sharp contrast, the controlling Commissioners here reason that "[t]he fact that the communication in *MCFL* included an *explicit* term of advocacy, i.e., VOTE, and direct reference to those candidates that the electorate should vote *for* was precisely what rendered the MCFL communication 'express' advocacy." Plf's Exh. 4 at 4 (emphasis in original) (quotation omitted). The controlling Commissioners conclude that the reader must make a "deduction" from the language of the CRG advertisements in order to derive a "call to action to vote against Mr. Kean, Jr.," and that this need to "fill the gap" is "fatal to the complainant's argument that the first brochure contains express advocacy." Plf's Exh. 4 at 4.

The controlling Commissioners' argument that a reader of CRG's ads must make a "deduction" in order to "fill the gap" is incorrect. No "deduction" or subjective inference is required. As the FEC's own General Counsel found, CRG's ads "contain individual words, which in context have no other reasonable meaning than to urge the election or defeat" of Tom Kean, Jr. Plf's Exh. 6 at 13. The ads explicitly assert that "New Jersey needs New Jersey leaders," state CRG's view that Mr. Kean is not a New Jersey leader, and urge voters to "Tell Tom Kean Jr." as much. Any reader would understand that he or she is being asked to reject Mr. Kean's candidacy. As further explained below, the controlling Commissioners' view that the communication must nonetheless include "an *explicit* term of advocacy . . . and direct reference to those candidates that the electorate should vote *for*" (Plf's Exh. 4 at 4) in order to satisfy the Supreme Court's express advocacy standard is a gross mischaracterization of the law. See McConnell v. Federal Election Comm'n, 124 S.Ct. 619, 634 (2003) (observing that "Buckley

and MCFL . . . in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech" and that "[t]he notion that the First Amendment erects a rigid barrier between express and issue advocacy . . . cannot be squared with this Court's longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad"); see also infra Part II.B (discussing McConnell).

B. The Challenged Advertisements Provided in Effect an Explicit Directive to Vote *against* Tom Kean, Jr. and *for* Candidates with Different Qualifications

The first advertisement in question has a photograph of Mr. Kean wearing a campaign button stating "Tom Kean Jr. for Congress" on which is superimposed language charging that Mr. Kean has "[n]o experience," that he "[h]asn't lived in New Jersey for 10 years, and that "[i]t takes more than a name to get things done." Plf's Exh. 1, Attachment A. The second page has the word "NEVER" emblazoned in bold letters, and claims that Mr. Kean "Never worked in New Jersey," "Never ran for office," "Never held a job in the private sector," "Never paid New Jersey property taxes," and that "he needs more experience dealing with local issues and concerns." Id. The ad concludes that "New Jersey faces some tough issues" and that "[w]e can't afford on-the-job training," and exhorts readers to "[t]ell Tom Jean Jr. . . . New Jersey needs New Jersey leaders." Id.

As the FEC's General Counsel correctly concluded, these words "in context can have no other reasonable meaning than to advocate Kean's defeat." Plf's Exh. 6 at 13. The ad — which was disseminated in the midst of the primary campaign — makes clear that Mr. Kean is running for Congress, it claims that he is not qualified for the job, and it urges readers to "tell" Mr. Kean that New Jersey needs leaders other than him. Yet the controlling Commissioners do not even address the directive "Tell Tom Kean Jr." in its decision, reasoning instead that "[the word]

'never' is more naturally read in this brochure as an adjective modifying the itemized list of what Mr. Kean has allegedly never done in his life: namely, never worked in New Jersey, never ran for office, never held a private sector job, and never paid New Jersey property taxes." Plf's Exh. 4 at 4-5. They conclude that, "[t]hus, the first brochure simply lacks any explicit exhortation to take electoral action." Id.

The controlling Commissioners' analysis is seriously flawed. They take the word "never" completely out of context, and ignore entirely the ad's urging of voters to "*Tell Tom Kean Jr.* . . . New Jersey needs New Jersey leaders." Plf's Exh. 1, Attachment A at 4 (emphasis added). "Tell Tom Kean Jr." directs voters to defeat Mr. Kean in his bid for Congress on the grounds that he "never" obtained the requisite experience "with local issues and concerns." Id. That Tom Kean Jr. should be rejected on election day is the only reasonable interpretation of this language. Similarly, to state that "New Jersey needs New Jersey leaders" while emphasizing that Mr. Kean is not a genuine New Jersey resident is to effectively admonish New Jersey voters not to vote for Tom Kean, Jr. The conclusion that the ad "simply lacks any explicit exhortation to take electoral action" ignores the relevant facts, and is the essence of arbitrary reasoning.[4] Plf's Exh. 4 at 5.

The controlling Commissioners note that the ad does not contain the buzzword "vote," or identify who the candidate readers should vote "for," Plf's Exh. 4 at 4, but ignore that Buckley's illustrative list of words also includes more general terms such as "support" and "reject." And

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[4] By positing the existence of a "gap" in CRG's ads and the need for readers to "make a deduction," the controlling Commissioners would create a loophole whereby parties could avoid "express advocacy" simply by breaking, into two sentences, their support for or opposition to a candidate. For example, imagine a message reading: "Mr. X is a bad person. Vote against bad people." The controlling Commissioners would apparently find this outside the scope of "express advocacy" because it does not explicitly say, "Vote against Mr. X," but rather requires the reader to make a "deduction" to that effect.

the Supreme Court held in MCFL that the FECA *does apply* to a "message marginally less direct than 'vote for Smith.'" 479 U.S. at 249. Thus, the controlling Commissioners' deeming as "fatal" the supposed "deduction that the reader must make to fill the gap" misconstrues the pertinent standard. Because there can be no serious question that the challenged communication "provides *in effect* an explicit directive" to defeat Mr. Kean, the ad constitutes express advocacy even though it is "less direct" than a precise exhortation to "vote against" him. MCFL, 479 U.S. at 249 (emphasis added).

As the FEC's General Counsel correctly determined, the second advertisement "[s]imilarly . . . has no other reasonable meaning than advocacy of Kean's defeat." Plf's Exh. 6 at 13. Indeed, the second ad — which was again circulated right before the election — appears even more adamant in denouncing Mr. Kean's eligibility for Congress. The ad depicts the same photo of Mr. Kean wearing a "Tom Kean Jr. for Congress" badge, and specifically refers to his candidacy in bold letters: "TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS." Plf's Exh. 1, Attachment A at 1. As the FEC's General Counsel explained, the "text casts Kean as an interloper who had not lived in New Jersey for over five years, who lacked political experience, and who, 'until he decided to run for Congress . . . never paid property taxes.'" Plf's Exh. 6 at 14. The ad further characterizes Mr. Kean has having "No experience," it identifies "some difficult problems" facing New Jersey, and it then asserts that by comparison "Pat Morrisey has experience dealing with important issues." Plf's Exh. 1, Attachment A at 1. Thus, in the words of the FEC's General Counsel, the campaign ad "compares Kean's asserted lack of experience unfavorably to the experience of one of Kean's opponents." Plf's Exh. 6 at 14. Concluding that "It takes more than a name to get things done," the ad finally urges readers

to "Tell Tom Kean Jr. . . . NEW JERSEY NEEDS NEW JERSEY LEADERS." Plf's Exh. 1, Attachment A at 1.

Like the communication in MCFL, the second ad "falls squarely within § 441b, for it represents express advocacy of the election of [a] particular candidate[] distributed to members of the general public." 479 U.S. at 250. Although the communication's words are arguably "less direct" than something like, "vote against Tom Kean, Jr.," the "essential nature" of the ad plainly "provides in effect an explicit directive" to defeat Mr. Kean. Id. at 249. In no uncertain terms, the ad exhorts voters to "Tell Tom Kean, Jr." — who wears a "Tom Kean Jr. for Congress" button in the ad — that New Jersey does not want him in Congress. Plf's Exh. 1, Attachment A. Of course, the obvious means by which voters would "Tell" this to Tom Kean, Jr. is by casting votes against him and for a candidate with purportedly more experience. Additionally, by heralding that "New Jersey needs New Jersey leaders" while painting Tom Kean Jr. as a rank outsider, the ad unquestionably conveys the message that New Jersey voters should not vote for Mr. Kean. It is difficult to envision a communication that would constitute express advocacy under the controlling Commissioners' view of the law other than one that contains the precise words, "vote for candidate X," or "vote against candidate Y." But inclusion of the specific words "vote for" or "vote against" is not — and has never been — the bottom-line standard for finding express advocacy. See McConnell, 124 S.Ct. at 687-89. The controlling Commissioners' legal analysis is just wrong. They are entitled to no deference in interpreting judicial opinions, and their decision should be reversed. See University of Great Falls, 278 F.3d at 1341.

Indeed, more than a month before the controlling Commissioners filed their Statement of Reasons, the Supreme Court in McConnell made clear that Buckley and its progeny do not

require "magic words" as a prerequisite to an express advocacy finding. Not unlike the thrust of the controlling Commissioners' Statement of Reasons in this case, in McConnell "[t]he major premise of plaintiffs' challenge . . . [wa]s that Buckley drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." 124 S. Ct. at 687. The Supreme Court flatly rejected that argument:

> That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law. In Buckley we . . . provided examples of words of express advocacy, such as "vote for," "elect," "support," . . . "defeat," [and] "reject," and those examples eventually gave rise to what is now known as the "magic words" requirement. . . . [But] our decisions in Buckley and MCFL were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.
>
> Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. See Buckley, [424 U.S.] at 45. Indeed, the unmistakable lesson from the record in this litigation . . . is that Buckley's magic-words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election . . . .

McConnell, 124 S.Ct. at 687-89 (footnotes, citations and quotations omitted). Thus, as McConnell makes clear, the controlling Commissioners gravely misinterpret the Supreme Court precedent governing this case by "erect[ing] a rigid barrier between express advocacy and so-called issue advocacy," in spite of the Court's "longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." Id. at 688-89.

Notably, the controlling Commissioners do not deny that, at least as to the second ad, the message "vote against Mr. Kean and for other more qualified candidates" is "in effect" conveyed. They nonetheless reject the contention that the slogan, "NEW JERSEY NEEDS NEW JERSEY LEADERS," and the language of the ad is express advocacy "because there is no information that the slogan appearing in these brochures was employed or adopted by any of Kean's opponents as part of their campaigns," and "[t]here is simply no basis to conclude that this slogan is identified with any campaign or that readers can perform that identification." Plf's Exh. 4 at 5. In other words, the controlling Commissioners conclude that because the slogan that CRG used against Mr. Kean was not the slogan specifically adopted by one of his opponents, it cannot be express advocacy.

But nothing in Buckley or MCFL conditions a finding of express advocacy on the identification of an ad with the campaign or slogan of a particular opposing candidate. In fact, the Supreme Court found the disclaimer of endorsement contained in the MCFL communication irrelevant to the legal question of whether it constituted express advocacy. See 479 U.S. at 249. The slogan "New Jersey needs New Jersey leaders" was part of the message that CRG used to attack Mr. Kean's qualifications and thus oppose his candidacy for public office. That is enough, in and of itself, to constitute "express advocacy." Whether that same slogan had previously been used by one of Mr. Kean's opponents is irrelevant. CRG engaged in "express advocacy" because it opposed Mr. Kean; "express advocacy" does not presuppose that CRG must also have endorsed, or have embraced the slogan of, one of Mr. Kean's opponents.[5]

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[5] In any event, one of the legal *requirements* that the Kean Committee seeks to have enforced by this lawsuit is the mandate that any communication advocating the election or defeat of a clearly-identified candidate contain a disclaimer stating *whether the communication was authorized by any candidate.* See 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1). In other words, if a communication is express advocacy, the sponsor must indicate whether it is authorized by a

Moreover, the controlling Commissioners here argue that the "Tom Kean Jr. for Congress" campaign button that appears in both advertisements in conjunction with the language urging defeat of Tom Kean is effectively irrelevant to the express advocacy analysis because "Mr. Kean, Jr. is not the intended beneficiary of the ostensible express advocacy." Plf's Exh. 4 at 4-5. In other words, they reason that because the sticker appears in the context of an ad that opposes rather than supports Tom Kean Jr., it should be ignored. But the express advocacy test is concerned with communications that convey messages of election *or* defeat. Buckley, 424 U.S. at 44 n.52 & 80 n.108. When placed in the context of both ads' statements condemning Mr. Kean's eligibility for Congress, the button is certainly a part of the message that he should be rejected. Because the button can only be construed in the context of identifying Tom Kean as a candidate for Congress, in an advertisement that attacks him *politically*, it clearly constitutes express advocacy under Buckley and MCFL.[6]

C. Because the Challenged Ads Contain *No* Discussion of Public "Issues," Whether They Constitute Express Advocacy Is Not Even a Close Question

As explained above, the premise underlying the "express advocacy" standard is the First Amendment concern that the FECA's prohibitions could impermissibly chill the discussion of public issues. See Buckley, 424 U.S. at 79; MCFL, 479 U.S. at 249. The flyer in MCFL "listed the candidates . . . and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues. A 'y' indicated that a candidate supported the MCFL

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particular candidate under the FECA. Thus, put another way, CRG's failure to include such a disclaimer cannot be valid grounds for finding that the communication did not advocate the election or defeat of a clearly-identified candidate (Mr. Kean) in the first place.

[6] The controlling Commissioners' reasoning in connection with the ads' inclusion of a campaign button is also arbitrary and capricious because it is inconsistent with the prior FEC decision cited in their Statement of Reasons. See infra Part II.D.

view on a particular issue and an 'n' indicated that the candidate opposed it." 479 U.S. at 243. The Supreme Court nevertheless reasoned that because the communication in effect urged voters to support pro-life candidates, it "cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. [It] goes beyond issue discussion to express electoral advocacy." Id. at 249.

By contrast, the first ad in this case does not mention a single public issue. Its sole message is that Mr. Kean should not be elected to Congress. The ad thus presents a much clearer example of express advocacy than the communication discussed in MCFL itself. Although the second anti-Kean ad adverts to some public policy issues, as the FEC's General Counsel observed, "it does so only in the context of commenting on Kean's inexperience." Plf's Exh. 6 at 15. Because the issues are mentioned only as examples of areas on which Mr. Kean allegedly lacks experience, the ad does not discuss their merits or advocate a particular viewpoint. It thus stands in sharp contrast to the communication before the Supreme Court in MCFL, which discussed issues underlying the pro-life message and the "correct position" on those issues in point-by-point detail. See 479 U.S. at 243.

The Buckley decision grappled with the ambiguity created when an ad contains public discussion of issues and also includes advocacy for or against a candidate. Here, the anti-Kean ads do not even pose as issue ads. If they are not issue ads — by process of elimination — then they must be candidate-related. The ads forthrightly present themselves as related to Mr. Kean's run for Congress, and they make *ad hominem* attacks on his qualifications for office. They are

therefore necessarily "pointed exhortations to vote for [or against] particular persons" subject to the § 441b of the FECA. MCFL, 479 U.S. at 249.[7]

D. The Controlling Commissioners' Failure Even to Find "Reason to Believe" That a Violation Occurred Here Cannot Be Squared with the FEC's Prior Ruling That Campaign Buttons Constituted Express Advocacy Warranting Vigorous Investigation and Enforcement Action

The controlling Commissioners take pains to discount the effect of the "Tom Kean Jr. for Congress" button portrayed in the photo backdrop of both ads, while admitting that "in MUR 4313 (Coalition for Good Government) the Commission concluded that a Richard Lugar for President bumper sticker featured in a television advertisement provided a basis for an express advocacy finding." Plf's Exh. 4 at 5. Their emphasis on MUR 4313, however, only highlights the arbitrariness of their decision in this case.

MUR 4313 presented the question of whether an issue ad could be transformed into express advocacy merely because the ad[8] included images of bumper stickers used to identify

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[7] The controlling Commissioners deflect this inevitability by vaguely asserting that "[t]he complainant's other arguments in support of an express advocacy finding rest on factors that are simply insufficient to support such a finding: whether the ad discusses public policy issues or whether it addresses issues other than qualifications to hold federal office." Plf's Exh. 4 at 5. This is simply "an unusually raw ipse dixit." Independent Petroleum Ass'n of America v. Dewitt, 279 F.3d 1036, 1042 (D.C. Cir. 2002). The controlling Commissioners' attempt to dodge a core question squarely addressed below, see Plf's Exh. 1, merely underscores the scarce leeway that exists even to argue that the challenged ads constitute issue discussion versus express advocacy within the meaning of Buckley and MCFL.

[8] The full audio text of the advertisement reads:

> The issue is simple. Our Everglades are dying and big sugar is to blame. Big sugar and big sugar's campaign contributions to Washington politicians.
>
> Now four Senators, Lugar, Dole, Spector and Gramm can make a difference for Florida. [Each Senator is pictured above his campaign bumper sticker.] But only Senator Lugar stands with Florida against big sugar's money and for the Everglades.

four separate members of the U.S. Senate, one of whom was a presidential contender. According to the General Counsel's Report in that case, accompanying the bumper sticker was a message that "'only Senator Lugar stands with Florida against big sugar's money and for the Everglades.'" Plf's Exh. 7 at 31. The question before the FEC, then, was whether "the campaign bumper stickers were used in the advertisement only for color and identification purposes [so that] the purpose of the advertisement was to call attention the Everglades conservation issue and to Senator Lugar's support thereof, and to put pressure on the other three named Senators to support the Lugar sugar tax bill in the U.S. Senate." Id.

The FEC found that the bumper sticker transformed the ad into express advocacy designed to influence a presidential election in spite of several striking indicators that the sponsor's intent was to impact *the issue* — not a distant presidential race. Plf's Exh. 7 at 31. First, of course, the ad discussed an "Everglades conservation issue" and urged voters to tell their Senators to tax sugar — which was purportedly "to blame" for the "dying" Everglades. See supra note 8. Second, the ad was run in a non-election year, during a state party fundraising event that played no part in the convention delegate selection process. Plf's Exh. 7 at 30. And third, although the ad urged viewers to call the four Senators who could vote on the Everglades bill, it did not mention three prominent contenders for the presidency who were not members of the Senate and therefore could not influence the issue. See id. at 31. By contrast, as discussed

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> So call Senators Dole, Spector and Gramm. Tell them you support two cents a pound to save our Everglades. And don't sugarcoat it.
>
> [During the exhortation to call the Senators, the screen displays the words "Call 1-800-274-4117. Tell Them To Support 2 Cents A Pound to Save Our Everglades."]

Plf's Exh. 7 at 12.

above in Part I.C, the ads in this case were run weeks before the election, they contained no countervailing discussion of public issues, and they mentioned only Mr. Kean and his opponents in the Congressional race.

The fact that in MUR 4313 the FEC found reason to believe that a FECA violation had occurred so as to commence a thorough investigation, that it later found probable cause to believe that a FECA violation did in fact occur, and that went so far as to ultimately negotiate a conciliation agreement with the respondent renders the controlling Commissioners' refusal to *take the first step* of initiating a meaningful investigation by finding reason to believe in this case virtually indefensible. The controlling Commissioners attempt to justify their instant decision by reasoning that "unlike the more prominent bumper sticker in MUR 4313 that was 'enhanced by the positive prominence given to Senator Lugar's stand on the sugar issue,' at best the Kean sticker merely places the picture in the context of an election." Plf's Exh. 4 at 5 (quoting First General Counsel Report in MUR 4313 dated Oct. 18, 1996 at 31 n.6, filed herewith as Plf's Exh. 7). But the fact that the Richard Lugar sticker was "enhanced" by his position on the "sugar issue" only rendered the express advocacy finding in that matter *more* complicated than the express advocacy question presented here. The closer a communication comes to issue discussion, the closer it comes to protected speech, and thus the *less* likely it is that the FECA provisions at issue would apply.

Similarly, that "the principal effect of the sticker here is to put the communication in the context of an election" does not support the FEC's decision but, instead, buttresses the grounds for making an express advocacy finding against CRG. Plf's Exh. 4 at 5. If the ad were designed to attack Mr. Kean gratuitously and completely *out of* the context of an election, the case for finding express advocacy would be murkier. Under such circumstances, Mr. Kean would not be

a "clearly identified candidate" in the first place. Buckley, 424 U.S. at 80. The controlling Commissioners' analysis — that the button's placement of the ad in an election context provides a basis for concluding that the ads do *not* exhort Mr. Kean's defeat — turns logic upside down, underscores that CRG's ads could scarcely present a clearer picture of express advocacy under Supreme Court precedent, and should be rejected as arbitrary and capricious.

II. THE FEC'S DECISION SHOULD BE REVERSED AS CONTRARY TO LAW BECAUSE THE CONTROLLING COMMISSIONERS IGNORED THE AGENCY'S OWN REGULATION

Buckley and MCFL are not the sole source of legal standards governing the FEC's decision here. The FEC has a very precise regulation. As the non-controlling Commissioners explained in their finding reason to believe that a FECA violation occurred, "[o]n October 5, 1995, the Federal Election Commission promulgated a regulation designed 'to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates.'" Plf's Exh. 3 at 5 (quoting 60 Fed. Reg. 52,069 (1995)). "The Commission promulgated this regulation only after a lengthy rulemaking proceeding in which the Commission received literally thousands of comments." Id. (citing 60 Fed. Reg. 35,292 (1995)). The regulation is codified at 11 C.F.R. § 100.22, and has two sub-parts:

> *Expressly advocating* means any communication that —
>
> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or *communications of campaign slogan(s) or individual word(s) which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s),* such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

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

(Emphasis added).

The non-controlling Commissioners continue: "In the Explanation and Justification to the regulation, the Commission states that subsection (b) of the regulation reflected the analysis of Buckley's express advocacy requirement articulated by the Ninth Circuit in [Furtgatch]." Plf's Exh. 3 at 3 (citing 60 Fed. Reg. 35,292, 35,295 (1995)). "The Commission transmitted these regulations to Congress, and after thirty days passed without any resolution disapproving the express advocacy rules, the Commission implemented the regulation." Id. (citing 2 U.S.C. § 438(d)).

A. The FEC's Decision Is Arbitrary, Capricious and Contrary to Law Because the Controlling Commissioners Misapply 11 C.F.R. § 100.22(a), which Tracks Buckley v. Valeo

In the decision challenged by this lawsuit, the controlling Commissioners state that "[t]he first part of the Commission's express advocacy regulation tracks the Supreme Court's opinion in Buckley v. Valeo." Plf's Exh. 4 at 2. They go on to purportedly apply 11 C.F.R. § 100.22(a). As the controlling Commissioners concede, under subpart (a), express advocacy includes "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).'" Plfs Exh. 4 at 2 (quoting 11 C.F.R. § 100.22(a)). As explained supra Part I, the CRG ads at issue here readily meet this

standard. They discuss no issues. The only message conveyed by the ads is that voters should reject Tom Kean, Jr. Thus, the FEC's decision should be reversed as contrary to law because the controlling Commissioners' Statement of Reasons is directly at odds with the standard set forth in subpart (a) of § 100.22, which codifies the Buckley and MCFL holdings.

Importantly, the controlling Commissioners do not even try to posit some "other reasonable meaning" that the ads might have other than "to urge the . . . defeat of [a] clearly identified candidate," Tom Kean Jr. 11 C.F.R. § 100.22(a). The closest they come is to seize upon the word "never" in the first ad, take it out of context, and suggest that this particular word "is more naturally read in this brochure as an adjective modifying the itemized list of what Mr. Kean has allegedly never done in his life." Plf's Exh. 4 at 4. Given that the regulation the controlling Commissioners purport to apply mandates an "express advocacy" finding if "the 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)," it was arbitrary and capricious for the controlling Commissioners not to do two things: first, to consider the word "never" in the context of the ads as a whole and, second, to address whether the ads can have any other reasonable meaning than to defeat Tom Kean Jr. 11 C.F.R. § 100.22(a) (emphasis added). Instead, they simply rely on ipse dixit to reach a favored outcome. This kind of decision-making is unsustainable. See generally Teledesic LLC v. Federal Communications Comm'n, 275 F.3d 75, 84 (D.C. Cir. 2001) (under arbitrary and capricious standard, agency must articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made," and must give "reasoned consideration to all of the relevant facts and issues") (quotation omitted).

B. The FEC's Decision Is Arbitrary, Capricious and Contrary to Law Because the Controlling Commissioners Blatantly Disregard 11 C.F.R. § 100.22(b)

Even assuming arguendo that the FEC's dismissal of the administrative complaint arose from a proper application of 11 C.F.R. § 100.22(a), the decision cannot stand. The controlling Commissioners cavalierly dispense with sub-part (b) of the FEC's own regulation governing express advocacy on the grounds that it "has been held unconstitutional" by two courts outside this Circuit. Plf's Exh. 4 at 2 n.5. But "[i]t is axiomatic that 'an agency is legally bound to respect its own regulations and commits procedural error if it fails to abide them.'" Algonquin Gas Transmission Co. v. Federal Energy Regulatory Comm'n, 948 F.2d 1305, 1315 (D.C. Cir. 1991) (quoting Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989)); see also Transactive Corp., 91 F.3d at 238 (D.C. Cir. 1996) ("Despite [courts'] substantial deference to an agency's interpretation of its own regulations," the D.C. Circuit "cannot allow [an agency] to ignore its own regulation . . . ." (citations omitted)).

As the non-Controlling Commissioners explain, after a lengthy rulemaking and thousands of comments, the Commission promulgated § 100.22(b) based on the Ninth Circuit's decision in Furgatch. Plf's Exh. 3 at 3 (citing 60 Fed. Reg. 35,292, 35,295 (1995)). Section § 100.22(b) remains in effect to this day. Yet in a footnote, the controlling Commissioners dismiss sub-part (b) virtually out-of-hand. Plf's Exh. 4 at 2 n.5 (quoting Virginia Society for Human Life v. Federal Election Comm'n, 263 F.3d 379 (4th Cir. 2001); Maine Right to Life v. Federal Election Comm'n, 98 F.3d 1 (1st Cir. 1996)). They make no attempt to apply it to the facts of this case, or to otherwise distinguish it. The controlling Commissioners' treatment of § 100.22(b) was facially arbitrary, and contrary to law.

As an initial matter, the notion that the FEC must vary application of its own regulations based on the latest ruling by a federal court — whatever or wherever that court may be — is

nonsense, and unworkable. In the event of a Circuit split on a question of the legality of an FEC regulation, candidates would have no idea how to act so as to be in compliance with applicable law. Here, of course, the FEC could have — but did not — formally repeal the regulation in light of the decisions of the First and Fourth Circuits. It is therefore valid and binding on all six Commissioners.

Moreover, in Virginia Society for Human Life (which the controlling Commissioners rely on to justify negating sub-part (b)), the court observed that "in a closed meeting" on September 22, 1999, the FEC adopted a policy that § 100.22(b) would not be enforced in the First or Fourth Circuits in light of case law rendering the regulation effectively invalid in those Circuits. 263 F.3d at 382, 388. The court nonetheless rejected the FEC's argument that the plaintiff lacked standing based on the non-enforcement policy, because "the FEC's policy is not contained in a final rule that underwent the rigors of notice and comment rulemaking." Id. at 388. Rather, "'[t]he [existing] rule constitutes the purported legal norm that binds the class regulated by statute.'" Id. (quoting Chamber of Commerce v. Federal Election Comm'n, 69 F.3d 600, 603 (D.C. Cir. 1995)). Moreover, the court added, "the FEC's policy statement . . . is too narrow to fully protect [the plaintiff] because the policy is limited to the Fourth Circuit." Id. at 389. "The FEC has not given any assurances that it will refrain from enforcing 11 C.F.R. § 100.22(b) in the District of Columbia." Id. Similarly, for purposes of this case, § 100.22(b) remains in full force and effect in this Circuit.[9] It is not dispensable at the whim of individual Commissioners.

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[9] Alternatively, even assuming arguendo that such a "non-enforcement policy" is valid absent amendment or repeal of the regulation, because the relevant events occurred in New Jersey — which lies within the Third Circuit — it would not apply in this case.

The D.C. Circuit "'ha[s] made clear . . . that an agency does not have the authority to play fast and loose with its own regulations or to ignore a regulation that does not give it a . . . way to reach a desired result.'" Louisiana Ass'n of Independent Producers and Royalty Owners v. Department of Energy, 978 F.2d 744, 1992 WL 314004 (D.C. Cir. Oct. 22, 1992) at *2 (quoting Panhandle Eastern Pipe Line Co. v. FERC, 613 F.2d 1120, 1135 (D.C. Cir. 1979)). At a minimum, the agency must "giv[e] a plausible reading to its own regulations." Id. Here, the controlling Commissioners evidently sidestepped § 100.22(b) entirely because it would have produced a result contrary to that which the controlling Commissioners desired. This blatant disregard for the governing law is reversible error.

Moreover, the Supreme Court's 2003 decision in McConnell v. Federal Election Comm'n — which the controlling Commissioners presumably had before them when they refused to apply § 100.22(b) based on the First and Fourth Circuit rulings — makes abundantly clear that those courts were wrong on the law. In Maine Right to Life Comm. v. Federal Election Comm'n, 98 F.3d 1 (1st Cir. 1996), the First Circuit found the regulation "contrary to the . . . FECA[,] as the Supreme Court . . . ha[s] interpreted it." Id. at 1 (affirming "for substantially the reasons set forth" by the district court) (quotation omitted). The district court, in turn, had concluded that "[w]hat the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues." 914 F. Supp. at 12 (citation omitted). Yet the McConnell Court made clear that "our decisions in Buckley and MCFL were specific to the statutory language before us; they *in no way* drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." 124 S.Ct. at 688 (emphasis added).

Similarly, in Virginia Society for Human Life, Inc., the Fourth Circuit considered a facial challenge to § 100.22(b), and concluded that "[t]he regulation goes too far because it shifts the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation." 263 F.3d at 392 (quotation omitted). Here again, McConnell wholly undermines the Fourth Circuit view. The Supreme Court in fact underscored its "*longstanding* recognition that the presence or absence of magic words *cannot* meaningfully distinguish electioneering speech from a true issue ad." 124 S.Ct. at 689 (emphasis added). It added: "Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." Id. Thus, the Fourth and First Circuit decisions can hardly be said to support the controlling Commissioners' action.

In any event, the constitutionality of § 100.22(b) is not before this Court. Under D.C. Circuit authority, the controlling Commissioners are not empowered to simply discard a valid FEC regulation. For this reason alone, the FEC's decision should be reversed. See Transactive Corp. v. United States, 91 F.3d 232, 238 (D.C. Cir. 1996) ("[W]e cannot allow [an agency] to ignore its own regulation in an attempt to save its imperfect/unsatisfactory decision-making in this case."); IMS, P.C. v. Alvarez, 129 F.3d at 621 ("[I]t is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.") (quotation omitted).

III. THE CONTROLLING COMMISSIONERS ERRED IN FINDING NO REASON TO BELIEVE THAT CRG VIOLATED THE FECA

A. CRG's Dissemination of Communications Containing Express Advocacy Violated 2 U.S.C. §§ 441b(a), 441d(a) and 434(c)

As the FEC's General Counsel found, by making corporate expenditures to create and distribute advertisements containing express advocacy, CRG made illegal expenditures. See Plf's Exh. 6 at 15. Therefore, the controlling Commissioners erred in finding no reason to believe that CRG violated section 441b(a) of the FECA, which renders it "unlawful for any . . . corporation . . . to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . held to select candidates for political office."

The FECA also prohibits any officer or director of any corporation from consenting to any contribution or expenditure by the corporation. 2 U.S.C. § 441b(a). The FEC internally rendered Gary Glenn, CRG's Chairman or Vice Chairman of the Board of Directors, and Bill Wilson, a Board Member and Secretary/Treasurer, respondents to the Kean Committee's administrative complaint. Plf's Exh. 6 at 16 n.17. The FEC's General Counsel concluded that "[b]ased on the information provided in the complaint, both individuals appear to have consented to the expenditures in question" in violation of the FECA. Id. at 16. Gary Glenn is publicly quoted as stating in connection with the ads attacking Tom Kean, Jr., "[t]he outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy." See id. at 9-10; Plf's Exh. 1, Attachment B at 1-2. Bill Wilson is quoted as stating in this connection that "[a]ll we have done is used our First Amendment right . . . to inject our ideas into the debate . . . It's that simple." Plf's Exh. 1, Attachment B at 2. There was, therefore, sufficient

reason to believe that Mr. Glenn and Mr. Wilson had knowledge of and consented to the ads in question, thereby justifying further investigation of the administrative complaint.

Moreover, because the ads contained express advocacy, CRG was required under the FECA to include a disclaimer. Section 441d(a) provides that:

> Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication [shall clearly state whether it was authorized by any candidate].

CRG's ads contained only the following: "Paid for by the Accountability Project of the CRG." Plf's Exh 1, Attachment A. However, as the FEC's General Counsel observed, "that disclaimer is incomplete because it failed to state whether the brochures were authorized by a candidate or candidate's committee." Plf's Exh. 6 at 17-18. The controlling Commissioners' failure to find reason to believe that CRG also violated 2 U.S.C. § 441d(a) was error, and the FEC's decision should be reversed.

Under 2 U.S.C. § 431(11), "[t]he term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." As a "person" under the FECA, CRG was subject to § 434(c), which provides that "[e]very person . . . who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement . . . for all contributions received by such person." The administrative complaint alleged that CRG's ads violated § 434(c). See Plf's Exh. 1 at 2. The FEC's General Counsel, in turn, found reason to believe that CRG violated § 434(c) because "the available information indicates that the expenditures for the brochures exceeded $250." Plf's Exh. 6 at 15. In particular, two newspaper articles attached to the

administrative complaint established reason to believe that CRG spent well in excess of $250. See id. at 9-10; Plf's Exh. 1, Attachment B at 1 (reporting that CRG is "blanketing the 7th Congressional District with leaflets attacking two of the candidates seeking the Republican nomination — Assemblyman Joel Weingarten and Tom Kean Jr." and that CRG "says it has spent $65,000 in the district so far and is prepared to spend $100,000 or more in the next two weeks"); id., Attachment C at 2 (quoting CRG Board of Directors member Gary Wilson as stating that CRG hopes to raise and spend $3 million in 2000 for primary and general election campaigns).

The controlling Commissioners do not address § 434(c), but indicate that the finding that the ads lacked express advocacy largely resolved the issues before them. See Plf's Exh. 4 at 7. Because the ads did in fact advocate the defeat of Tom Kean, and because rote common sense establishes reason to believe that the ads cost more than $250, the failure to render a decision as to a § 434(c) was arbitrary, capricious, and contrary to law.

B. Alternatively, as a Political Committee CRG Was Required to Register with the FEC and File Periodic Reports under §§ 433 and 434

Sections 441b(a), 441d(a) and 434(c) apply to corporations or persons, respectively. CRG, however, is also a "political committee" under the FECA. As such, it was required to register with the Commission and file periodic reports containing detailed information under §§ 433 and 434.

Section 431(4)(A) defines "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." As explained above, the Kean Committee provided newspaper articles establishing reason to believe that CRG spent well above the $1,000 mark, and the FEC's General Counsel found

that CRG's activities satisfied the statutory definition of "political committee." Plf's Exh. 6 at 16-17. But the controlling Commissioners do not address § 431(4)(A) in support of their finding that CRG was not a political committee. Plf's Exh. 4 at 7. Because they fail even to consider this issue, and because there were ample factual grounds to justify the FEC's opening an investigation into Plaintiff's allegations that CRG failed to comply with §§ 433 and 434, the Commission's dismissal of the administrative complaint should be reversed.

The controlling Commissioners further err in concluding that there was no reason to believe "that CRG's major purpose is political activity and that it should therefore be forced to register with the Commission, disclose its donors, and observe the Act's contribution limits and prohibitions, as a political committee." Plf's Exh. 4 at 7. Just as it established standards for "express advocacy," the Supreme Court in Buckley set forth a definition of "political committee" out of concern that "[t]he general requirement that 'political committees' and candidates disclose their expenditures could raise . . . vagueness problems." 424 U.S. at 79. Specifically, it held that an organization is a "political committee" if it is "under the control of a candidate or the major purpose of [the organization] is the nomination or election of a candidate." Id. Here, the FEC's General Counsel correctly concluded that "[t]he available information indicates that . . . [CRG]'s major purpose was indeed to influence elections." Plf's Exh. 6 at 17. The administrative complaint cited statements by CRG Board Member Gary Glenn that "[t]he very purpose of our group is to influence the outcome of elections," that "[t]he outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy," and that "[c]learly, we believe Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy." Plf's Exh. 1 at 8 (quoting Attachment B at 1, 3). Moreover, as the General

Counsel observed, "there is no indication that [CRG] had engaged in any other type of activity." Plf's Exh. 6 at 17.

The controlling Commissioners fail to consider this evidence, concluding instead that the mere "conclusion that these brochures lack express advocacy, and hence are not expenditures" dictates whether CRG is a political committee. Plf's Exh. 4 at 7. At a minimum, the facts set forth establish sufficient grounds to investigate the administrative complaint allegations further. As the D.C. Circuit has observed, courts "have a responsibility . . . 'to assure that the agency has given reasoned consideration to all the material facts and issues.'" Louisiana Ass'n. of Indep. Producers and Royalty Owners v. Department of Energy, 978 F.2d 744, 1992 WL 314003 (D.C. Cir. Oct. 22, 1992), at *2 (quoting West Va. Pub. Servs., Comm'n v. Department of Energy, 681 F.2d 847, 859 (D.C. Cir. 1982)).

C. The Controlling Commissioners Improperly Failed to Further Investigate Whether CRG Coordinated Its Efforts with a Federal Candidate

Finally, in its administrative complaint, the Kean Committee "call[ed] upon the FEC to expeditiously investigate the election communications from CRG, and take all necessary actions to ensure that CRG *and any candidate with whom it has been coordinating* are brought into full compliance with the federal election laws." Plf's Exh. 1 at 9 (emphasis added); see also Plf's Exh. 6 at 3 (in which FEC General Counsel observed that "Complainants state that Respondent might have coordinated its expenditures with other federal candidates"). Under 2 U.S.C. § 441a(a)(7)(B)(i), "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered a contribution to such candidate" that is subject to disclosure.

The controlling Commissioners again failed to address this issue in their decision. However, a newspaper article attached to the administrative complaint reported that CRG's "goal

is to hurt the chances of . . . Kean in the June 6 primary, while boosting the fortunes of Warren Township educator Mike Ferguson." Plf's Exh. 1, Attachment B at 1. Another article stated that, although CRG and Ferguson denied any coordination, "skeptics point out that the group's hard-hitting fliers have mentioned only three of the four Republican candidates, raising suspicions they are designed to help the fourth candidate, Mike Ferguson." Plf's Exh. 1, Attachment C at 1. Once again, the specter of coordination raised by the articles attached to the administrative complaint should — at a minimum — have justified opening an investigation into whether § 441a(a)(7)(B)(i) of the FEC was violated.

CONCLUSION

For the foregoing reasons, the instant motion should be granted, and summary judgment entered in Plaintiff's favor.

Respectfully submitted,

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