

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3  
4 In the Matter of )

MUR 5024R

5 )  
6 Council for Responsible Government, Inc. )  
7 and its Accountability Project; and )  
8 Gary Glenn and William "Bill" Wilson, )  
9 as corporate officers )  
10

11 **CONCILIATION AGREEMENT**

12 This matter was generated by a complaint filed with the Federal Election Commission by  
13 Anthony S. Cicatiello and Kean for Congress. The Commission first considered this matter on  
14 November 4, 2003, and voted to dismiss the complaint and close the file in this matter.  
15 Complainants filed suit for judicial review of the dismissal of their administrative complaint, *see*  
16 *Kean for Congress Comm. v. FEC*, Civil Action No. 1:04CV00007 (JDB), United States District  
17 Court for the District of Columbia, and the case was remanded back to the Commission for  
18 reconsideration in light of the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93  
19 (2003). The Commission found reason to believe that the Council for Responsible Government  
20 violated 2 U.S.C. §§ 433, 434, 441d(a), or, in the alternative, that the Council for Responsible  
21 Government and William "Bill" Wilson and Gary Glenn, as corporate officers of the Council,  
22 (referred to collectively hereinafter as "Respondents") violated 2 U.S.C. §§ 441b(a) and 441d(a).

23 NOW, THEREFORE, the Commission and the Respondents, having participated in  
24 informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree  
25 as follows:

Conciliation Agreement  
MUR 5024R  
Page 2

1 I. The Commission has jurisdiction over the Respondents and the subject matter of  
2 this proceeding.

3 II. Respondents have had a reasonable opportunity to demonstrate that no action  
4 should be taken in this matter.

5 III. Respondents enter voluntarily into this agreement with the Commission.

6 IV. The pertinent facts in this matter are as follows:

7 **Background**

8 1. The Council for Responsible Government incorporated in the state of Virginia on  
9 May 2, 2000, and is established pursuant to Section 527 of the Internal Revenue Code. The  
10 organization has no employees and does not maintain office space, but does maintain a mailing  
11 address and one bank account.

12 2. William "Bill" Wilson and Gary Glenn are officers of the Council for Responsible  
13 Government and members of its Board of Directors.

14 3. The Council for Responsible Government is not registered with the Commission as a  
15 political committee. From July 1, 2000 through December 31, 2002, the Council for Responsible  
16 Government reported all of its receipts and disbursements to the Internal Revenue Service.

17 4. The Council for Responsible Government has received no donations since January 1,  
18 2003. Since that time the organization has made approximately \$6,900 in disbursements and  
19 each of these disbursements was made for one of three purposes: post office box rental, legal  
20 fees, or corporate registration filing fees.

21 5. During the 2000 election cycle, the Council for Responsible Government received in-  
22 kind support from U.S. Term Limits, Inc., a 501(c)(4) corporation based in Glenview, Illinois

Conciliation Agreement  
MUR 5024R  
Page 3

1 whose mission is "[t]o rally Americans to restore citizen control of government by limiting the  
2 terms of politicians at the local, state and congressional levels." William "Bill" Wilson, officer  
3 and board member of the Council for Responsible Government is also a member of the Board of  
4 Directors of U.S. Term Limits, Inc. U.S. Term Limits, Inc. is not a respondent in this matter and  
5 it is not registered as a political committee with the Commission.

6 **Applicable Law**

7 6. The Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA")  
8 prohibits corporations from making contributions or expenditures in connection with federal  
9 elections. See 2 U.S.C. § 441b.

10 7. The Act defines "contribution" and "expenditure" to include a gift, loan, advance,  
11 deposit of money or anything of value made by any person for the purpose of influencing any  
12 election for Federal Office. 2 U.S.C. §§ 431(8)(A)(i) and 431(9)(A)(i). The definition of  
13 "person" includes an individual, partnership, committee, association, corporation, or any other  
14 organization or group of persons. 2 U.S.C. § 431(11). "Anything of value" includes any goods  
15 or services including but not limited to securities, facilities, equipment, supplies, advertising  
16 services, membership lists, and mailing lists. 11 C.F.R. § 100.7(a)(1)(iii) and 11 C.F.R.  
17 ~~§ 100.8(a)(1)(iv)(A).~~

18 8. An "independent expenditure" is defined as an expenditure by a person expressly  
19 advocating the election or defeat of a clearly identified candidate which is made without  
20 cooperation or consultation with any candidate, or any authorized committee or agent of such  
21 candidate, and which is not made in concert with, or at the request or suggestion of, any  
22 candidate, or any authorized committee or agent of such candidate. 2 U.S.C. § 431(17).

Conciliation Agreement  
MUR 5024R  
Page 4

1           9. The definition of a "clearly identified" candidate is set forth at 2 U.S.C. § 431(18),  
2 and includes "(A) the name of the candidate involved appears; (B) a photograph or drawing of  
3 the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference."  
4 In July 1995, the definition of "clearly identified" at 11 C.F.R. § 100.17 was amended to include  
5 an "unambiguous reference" to a person's "status as a candidate."

6           10. The definition of "expressly advocating" is set forth in the Commission's regulations  
7 ~~at 11 C.F.R. § 100.22.~~

8           11. Persons, other than political committees, who make independent expenditures in  
9 an aggregate amount, or valued at, more than \$250 in a calendar year must file a statement of  
10 these expenditures with the Commission. 2 U.S.C. § 434(c)(1). Such statements must include  
11 the identification of each person who has made contributions in excess of \$200 to the person  
12 filing such statement which was made for the purpose of furthering an independent expenditure.  
13 2 U.S.C. § 434(c)(2). The statement must also indicate whether the independent expenditure is in  
14 support of, or in opposition to, the candidate involved and include a certification whether or not  
15 such independent expenditure is made in cooperation, consultation, or concert, with, or at the  
16 request or suggestion of, any candidate or any authorized committee or agent of such candidate. *Id.*

17           12. Section 441d of the Act requires that any person making an expenditure for  
18 a communication which expressly advocates the election or defeat of a candidate must include a  
19 statement in the communication stating who has paid for the communication and whether or not  
20 it has been authorized by the candidate and/or his or her authorized committee. 2 U.S.C.  
21 § 441d(a)(3). This requirement extends to persons making independent expenditures. 11 C.F.R.  
22 — § 109.3.

Conciliation Agreement  
MUR 5024R  
Page 5

### 2000 Election Cycle Activities

13. In April 2000 the Council for Responsible Government decided to disseminate communications regarding a candidate in the Republican primary for New Jersey's Seventh Congressional District, Tom Kean, Jr. Council for Responsible Government approached U.S. Term Limits, Inc., a 501(c)(4) organization, for financial assistance in paying for these communications. U.S. Term Limits agreed to pay for the services of the vendor used to layout, print, and mail the communications.

14. The communications consisted of two brochures focusing on the qualifications of candidate Tom Kean, Jr.

15. The first brochure ("Brochure 1") shows two apparently identical photographs of Tom Kean, Jr., one large photograph covering the whole page and a much smaller photograph superimposed on the larger one. In both photographs, Tom Kean, Jr. is wearing a business suit with a campaign button or sticker on the left breast pocket of his suit jacket that states "Tom Kean, Jr. for Congress." The following statement is superimposed over the photographs:

#### 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 contains the following text:

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.

Conciliation Agreement

MUR 5024R

Page 6

1  
2 (Emphasis in original.) The following disclaimer appears at the bottom of the second page of  
3 Brochure 1: "Paid for by the Accountability Project of the CRG."

4 16. The second brochure ("Brochure 2") shows a full-page photograph of Tom Kean,  
5 Jr. on the first page. The photograph appears to be the same photograph with the "Tom Kean, Jr.  
6 for Congress" campaign button or sticker used in Brochure 1. The following text is  
7 superimposed over the photograph:

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

19  
20 (Emphasis in original.) The following disclaimer appears on the bottom of the page: "Paid for  
21 by the Accountability Project of the CRG." The second page of Brochure 2 shows four  
22 photographs almost evenly distributed over the full face of the brochure. The photographs are of  
23 former professional basketball player Larry Bird, of the Boston Celtics; Senator Edward  
24 Kennedy; what appears to be a statue of a Revolutionary War "Minuteman"; and what appears to  
25 be the same photograph of Tom Kean, Jr. with the "Tom Kean, Jr. for Congress" campaign  
26 button or sticker. Superimposed over the photographs is the following statement: "What do all  
27 these things have in common? They all have homes in Massachusetts."

Conciliation Agreement  
MUR 5024R  
Page 7

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1           17.    The text of each of the communications was prepared by William "Bill" Wilson,  
2    an officer and member of the Board of Directors of the Council for Responsible Government.  
3    Pursuant to its agreement to assist in paying for the communications, U.S. Term Limits paid  
4    vendor A&E Mailers for laying out, printing, and mailing the communications. U.S. Term  
5    Limits wrote three checks in the amount of \$3,722.90 each, totaling \$11,168.70, directly to A&E  
6    Mailers to pay for the expenses incurred for the layout, printing, and mailing of the Kean  
7    brochures. Each check was drawn from an account maintained and controlled by U.S. Term  
8    Limits and contained a memo stating, "In-kind contribution for Council for Responsible  
9    Government."

10           18.    None of these communications contained a statement indicating whether or not it  
11    has been authorized by a candidate and/or his or her authorized committee.

12           19.    The Commission's reason to believe findings in this matter relied alternatively on  
13    two separate definitions of express advocacy set forth in 11 C.F.R. § 100.22(a) and 11 C.F.R. §  
14    100.22(b). Respondents maintain that they made these communications with the good faith  
15    belief that they did not contain express advocacy under either definition and that their activity  
16    was constitutionally protected.

17           V.     Respondents believe it is in their best interest to settle this matter. For that  
18    purpose, without admitting or denying the legal conclusions, Respondents will no longer contest  
19    the Commission's finding that there is reason to believe they violated 2 U.S.C. §§ 441b(a) and  
20    441d by making prohibited corporate expenditures totaling \$11,168.70 during 2000 for  
21    communications about Tom Kean, Jr., as described herein, and failing to include a statement in

Conciliation Agreement  
MUR 5024R  
Page 8

public communications as to whether the communications had been authorized by a candidate and/or his or her authorized committee.

VI. 1. Respondents will pay a single civil penalty of \$5,500 to the Federal Election Commission pursuant to 2 U.S.C. § 437g(a)(5)(B). The Commission could have sought a penalty equal to 100 percent of the amount disbursed, or \$11,168.70, 2 U.S.C. § 437g(a)(5)(A), in addition to another statutory penalty amount for the improper disclaimer. However, given the particular facts and circumstances of this matter, including the cessation of all activities by the Council for Responsible Government at the end of 2002, the Commission will accept the statutory penalty to be paid by Respondents.

2. Respondents will submit a filing to the Commission disclosing information regarding the disbursements made in connection with the Kean brochures and the source of the money used to make those disbursements.

3. Respondents will cease and desist from violating 2 U.S.C. §§ 441b and 441d.

VII. Respondents shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

VIII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.



Conciliation Agreement  
MUR 5024R  
Page 9

IX. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and constitutes a final settlement as to Respondents with respect to all issues arising herein in connection with all communications by Respondents prior to and/or in connection with the 2000 Republican congressional primary elections in the State of New Jersey. See 2 U.S.C. § 437g(a)(4). No other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lawrence H. Norton  
General Counsel

11/16/05  
Date

BY:

Rhonda J. Vosdingh  
Rhonda J. Vosdingh  
Associate General Counsel

FOR THE RESPONDENTS:

Nov. 2, 2005  
Date

Richard E. Coleson  
Richard E. Coleson  
Counsel for Council for Responsible  
Government, Inc. and its Accountability  
Project; Gary Glenn and William Wilson

**FEDERAL ELECTION COMMISSION**  
**FACTUAL AND LEGAL ANALYSIS**

**Respondents:** Council for Responsible Government, Inc.  
and its Accountability Project; Gary  
Glenn; William "Bill" Wilson

**MUR: 5024R**

**I. INTRODUCTION**

This matter was generated by a complaint filed with the Federal Election Commission by Anthony S. Cicatiello and Kean for Congress. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that the Council for Responsible Government, Inc. and its Accountability Project, ("the Council"), has violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the Act").

The complaint alleges that the Council is a federal political committee, as defined by the Act, that has failed to register and report with the Commission and failed to comply with the Act's contribution limits and source prohibitions. The complaint also asserts that the Council funded brochures that expressly advocated Tom Kean Jr.'s defeat for the Republican nomination for Congress in New Jersey's Seventh District during the 2000 election cycle. In response to the complaint, the Council denies being a political committee and contends that the brochures constituted issue advocacy, not express advocacy.

The Commission first considered this matter on November 4, 2003, but was evenly divided on a vote to find reason to believe that the Council and two of its officers, Gary Glenn and William Wilson, violated the Act. The Commission subsequently voted to dismiss the complaint and close the file in this matter.

MUR 5024R  
Factual & Legal Analysis

Pursuant to 2 U.S.C. § 437g(a)(8), Complainants filed suit for judicial review of the dismissal of their administrative complaint. *See Kean for Congress Comm. v. FEC*, civil action No. 1:04CV00007 (JDB), United States District Court for the District of Columbia. After the suit was filed, the Commission moved to dismiss the case for lack of standing, but the court denied that motion, allowing the case to proceed on Complainants' previously filed motion for summary judgment on the merits. *See* Order dated January 25, 2005. In their motion for summary judgment, Complainants rely extensively on the Supreme Court's discussion of express advocacy in *McConnell v. FEC*, 124 S.Ct. 619 (2003). However, the Commission's deliberations and vote in this matter took place prior to the Supreme Court's decision in *McConnell*. Thus, in lieu of filing an immediate response to Complainants' motion for summary judgment, the Commission sought a remand from the district court to reconsider its decision in light of *McConnell*.<sup>1</sup> The court granted this request on February 15, 2005.

After considering the matter on remand, the Commission finds reason to believe that the Council violated various provisions of the Act, based on alternative theories, and has opened an investigation to assess all the facts before concluding which theory is more applicable. First, the Council may have failed to register with and report to the Commission as a political committee. Alternatively, the Council may have made prohibited corporate expenditures by funding brochures containing express advocacy, as that term is defined at 11 C.F.R. § 100.22(a) or, if not under section 100.22(a), then as it is defined at section 100.22(b).

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<sup>1</sup> Although *McConnell* arose from a constitutional challenge to provisions of the Bipartisan Campaign Reform Act of 2002—which does not apply to the activity that predated the enactment of the law—the Commission must consider any effect *McConnell* might have on the law that existed at the time of the activity. When the Supreme Court “applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate ... [the Court's] announcement of the rule.” *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

MUR 5024R  
Factual & Legal Analysis

## II. *MCCONNELL V. FEC*

The potential impact in this matter of the Supreme Court's decision in *McConnell* concerns the doctrine of express advocacy, as some violations alleged in the complaint turn on whether the Council made express advocacy communications. Specifically, the key question is whether *McConnell* affects the enforceability or interpretation of the Commission's regulation defining express advocacy, 11 C.F.R. § 100.22. As explained below, the Commission finds that the regulation is consistent with *McConnell*.

The Supreme Court in *McConnell* considered various facial challenges to the Bipartisan Campaign Reform Act of 2002. The Court discussed express advocacy principally to afford context in evaluating the constitutionality of an alternative standard for determining when communications are intended to influence voters' decisions and have that effect. *McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than did the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).<sup>2</sup> Importantly, *McConnell* also did not address the validity of section 100.22(a) or (b), let alone cite the Commission's regulation for any purpose.

*McConnell*'s discussion of express advocacy centered on the proposition that it is a statutory construction, not a constitutional boundary for the regulation of election-related speech. 124 S.Ct. at 688. The Court explained:

A plain reading of *Buckley*<sup>3</sup> makes clear that the express advocacy limitation ... was the product of statutory interpretation rather than a constitutional command. ... [O]ur decisions in *Buckley* and [*FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986)]<sup>4</sup> were

<sup>2</sup> For example, the Court did not illuminate the permissible use of context and timing to discern what speech is or is not express advocacy.

<sup>3</sup> In *Buckley*, to avoid constitutional overbreadth or vagueness problems, the Supreme Court construed certain provisions of the Act "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80.

<sup>4</sup> In *MCFL*, the Supreme Court held that to avoid constitutional overbreadth or vagueness problems, a corporate expenditure for a general public communication, if made independent of a candidate and/or his campaign

MUR 5024R  
Factual & Legal Analysis

1 specific to the statutory language before us; they in no way drew a constitutional  
2 boundary that forever fixed the permissible scope of provisions regulating campaign-  
3 related speech.

4 *Id.* at 688.

5 While some circuit courts have held section 100.22(b) to be invalid on constitutional  
6 grounds, the alleged violations in this matter occurred in the Third Circuit, which has never  
7 addressed the question.<sup>5</sup> Moreover, the circuit courts that have invalidated section 100.22(b)  
8 appeared to proceed, at least in part, from an understanding that express advocacy is a  
9 constitutional imperative and that accordingly, under the First Amendment, "FEC restriction of  
10 election activities was not to be permitted to intrude in any way upon the public discussion of  
11 issues." *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Maine 1996) (emphasis  
12 added), *aff'd*, 98 F.3d 1 (1<sup>st</sup> Cir. 1996). *See also Virginia Society for Human Life v. FEC*,  
13 263 F.3d 379, 391-92 (4<sup>th</sup> Cir. 2001) ("VSHL"). To that extent, these prior decisions were  
14 wrongly reasoned, which at the very least raises a question as to whether these courts would  
15 reach the same conclusion today.

16 Presumably, too, a court now addressing a constitutional challenge to section 100.22(b)  
17 would have to account for the Supreme Court's decision upholding the "promote, support, attack,  
18 or oppose" standard against a constitutional vagueness challenge, as the Court found that the  
19 standard "give[s] [a] person of ordinary intelligence a reasonable opportunity to know what is  
20 prohibited." 124 S.Ct. at 675, n. 64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104 108-109  
21 (1972)). Likewise, a court now addressing a constitutional challenge to section 100.22(b) would

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committee, "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249.

<sup>5</sup> Absent a ruling in that circuit that the regulation is invalid, the Commission is bound to apply its regulations to matters before it. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). *Cf. U.S. v. Mendoza*, 464 U.S. 154 (1984) (holding that an adverse ruling against the federal government in one circuit does not prevent the government from litigating the same issue before another circuit court).

MUR 5024R  
Factual & Legal Analysis

1 have to account for *McConnell*'s decision upholding BCRA's electioneering communication  
2 provision against a constitutional overbreadth challenge. In upholding that provision, *McConnell*  
3 acknowledged that the definition of electioneering communication would cover some ads which  
4 have no electioneering purpose, but noted that "whatever the precise percentage [of such ads]  
5 may have been in the past, in the future, corporations and unions may finance genuine issue ads  
6 during those time frames by simply avoiding any specific reference to federal candidates, or in  
7 doubtful cases, by paying for the ad from a segregated fund." *Id.* at 696.

8 By its very terms, section 100.22 is a carefully tailored provision,<sup>6</sup> and everything that the  
9 Supreme Court said in *McConnell* about the nature of express advocacy applies to this  
10 regulation. In particular, section 100.22 is consistent with *McConnell*'s emphasis on the  
11 language contained in express advocacy communications. Section 100.22(a), for example,  
12 contains the specific phrases from *Buckley* that *McConnell* noted are "examples of words of  
13 express advocacy ... that eventually gave rise to what is now known as the 'magic words'  
14 requirement." *McConnell*, 124 S.Ct. at 687. Section 100.22(a) also covers words "which in  
15 context can have no other reasonable meaning than to urge the election or defeat" of a candidate.  
16 Similarly, section 100.22(b) covers communications that contain an "electoral portion" that is  
17 "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable  
18 minds could not differ as to whether it encourages actions to elect or defeat" a candidate. These  
19 restricting terms ensure that section 100.22(b) will encompass only a "tiny fraction of the

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<sup>6</sup> Express advocacy, in addition to being used as a narrowing construction applied by the Supreme Court in *Buckley* and *MCFL*, is also itself a statutory term. See 2 U.S.C. §§ 431(17) (definition of "independent expenditure"); 441d (disclaimer requirements). Accordingly, the Commission possesses broad authority to interpret the term, to "formulate policy" on it, 2 U.S.C. § 437c(b)(1), and "to make, amend, and repeal such rules ... as are necessary" regarding it, 2 U.S.C. § 437d(a)(8). See also 2 U.S.C. §§ 438(a)(8), 438(d).

MUR 5024R  
Factual & Legal Analysis

1 political communications made for the purpose of electing or defeating candidates during a  
2 campaign.”<sup>7</sup> 124 S.Ct. at 702.

3 In considering this matter on remand, the Commission concludes that there is reason to  
4 believe a violation has occurred based on alternative grounds: (1) that the Council is a political  
5 committee, and (2) that because the brochures distributed by the Council contain express  
6 advocacy, the Council made prohibited independent expenditures. As shown below, the  
7 brochures at issue here constitute express advocacy because they urge Kean’s defeat in the  
8 upcoming primary election, they contain an unmistakable electoral portion, and they address no  
9 public issue. Reason to believe findings do not represent final legal conclusions as to the facts or  
10 law bearing on a matter.<sup>8</sup> In the course of its investigation and further proceedings, the  
11 Commission will gather facts and consider those facts and further legal arguments bearing on  
12 both alternative grounds.

13 **III. FACTUAL AND LEGAL ANALYSIS<sup>9</sup>**

14 **A. Factual Background**

15 The Council incorporated in Virginia on May 2, 2000, and is organized under Section  
16 527 of the Internal Revenue Code. The Council has not registered as a political committee with  
17 the Commission, nor does it appear to be affiliated or associated with any registered political

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<sup>7</sup> The Court found that the express advocacy test is easily evaded by advertisers, and in that respect it has become “functionally meaningless.” 124 S.Ct. at 689. This observation was nothing new. The limits of the express advocacy test were acknowledged in *Buckley* and have been noted by courts ever since. *See id.*

<sup>8</sup> Moreover, in a matter such as this in which the reason to believe findings are based on alternative theories, not every Commissioner voting to find reason to believe necessarily agrees with each of the theories advanced.

<sup>9</sup> All of the events relevant to this matter occurred prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all references or statements of law in this factual and legal analysis regarding the Federal Election Campaign Act of 1971, as amended, pertain to that statute as it existed prior to the effective date of BCRA. Similarly, all references or statements of law regarding the Commission’s regulations pertain to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission’s promulgation of any regulations under BCRA.

MUR 5024R  
Factual & Legal Analysis

1 committee. In press reports attached to the complaint, Bill Wilson, a director of the Council,  
2 stated that the organization had spent \$65,000 in Kean's congressional district and planned to  
3 spend \$100,000 more there and \$3 million overall in 2000 for primary and general election  
4 campaigns. Although the precise nature and amounts of its receipts and disbursements during  
5 the first half of 2000 are unknown because the Council was not required to file reports with the  
6 IRS until July 1, 2000,<sup>10</sup> during the reporting period after the New Jersey primary election, i.e.,  
7 from July 1, 2000 through December 31, 2000, the Council reported in its IRS reports that it  
8 received no receipts and made only \$2,627 in disbursements. In 2001, the Council reported  
9 \$50,000 in receipts and no disbursements. In 2002, the last year for which the Council filed  
10 reports, it reported \$265,000 in receipts—of which \$250,000 was from Club for Growth—and  
11 made \$261,343 in disbursements, of which \$250,000 was spent on a media buy.<sup>11</sup>

12 The Council's activities and public statements have been geared toward influencing  
13 elections. Gary Glenn, Chairman or Vice Chairman of the Council's Board of Directors, is  
14 quoted in a media report attached to the complaint as stating, "The very purpose of our group is  
15 to influence the outcome of elections." Specifically regarding New Jersey's Seventh  
16 Congressional District, Glenn reportedly stated, "The outcome we hope to bring about is the  
17 election of a congressman whose values are consistent with our philosophy. Clearly, we believe  
18 [Kean opponent Michael] Ferguson is a candidate whose record and philosophy is consistent  
19 with our philosophy."

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<sup>10</sup> The law requiring Section 527 organizations to notify the IRS of their status and to file reports became effective on July 1, 2000, after the activities described in the complaint relating to Thomas Kean Jr.'s New Jersey congressional primary election had occurred.

<sup>11</sup> It is unknown whether these reports detail all of the Council's receipts, as IRS regulations would allow the Council to avoid disclosing receipts by paying taxes on them.



MUR 5024R  
Factual & Legal Analysis

The media reports attached to the complaint also noted that the Council distributed brochures in New Jersey's Seventh Congressional District that attacked Kean and another Republican congressional candidate, New Jersey State Assemblyman Joel Weingarten. Complainants provided copies of two brochures that attacked Kean. The first page of one of the brochures ("Brochure 1") shows two apparently identical photographs of Tom Kean Jr., one large photograph covering the whole page and a much smaller photograph superimposed on the larger one. In both photographs, Tom Kean Jr. is wearing a business suit with a campaign button or sticker on the left breast pocket of his suit jacket that states "Tom Kean Jr. for Congress." The following statement is superimposed over the photographs:

**TOM KEAN, JR.**

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

It continues, without photos, on the second page:

**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.**

(Emphasis in original.) The following disclaimer appears at the bottom of the second page of Brochure 1: "Paid for by the Accountability Project of the CRG."

The other brochure ("Brochure 2") shows a full-page photograph of Tom Kean Jr. on the first page. The photograph appears to be the same photograph with the "Tom Kean Jr. for Congress" campaign button or sticker used in Brochure 1. The following text is superimposed over the photograph:

MUR 5024R  
Factual & Legal Analysis

1 For the last 5 years Tom Kean Jr. has lived in Massachusetts.  
2 Before that, he lived in Washington, D.C. And all the time Tom  
3 Kean lived in Massachusetts and Washington, he never held a job in  
4 the private sector. And until he decided to run for Congress—Tom  
5 never paid property taxes. No experience. **TOM KEAN MOVED**  
6 **TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey  
7 faces some difficult problems. Improving schools, keeping taxes  
8 down, fighting overdevelopment and congestion. Pat Morrissey has  
9 experience dealing with important issues. It takes more than a name  
10 to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS**  
11 **NEW JERSEY LEADERS.**  
12

13 (Emphasis in original.) The following disclaimer appears on the bottom of the page: "Paid for  
14 by the Accountability Project of the CRG."

15 The second page of Brochure 2 shows four photographs almost evenly distributed over  
16 the full face of the brochure. The photographs are of former professional basketball player Larry  
17 Bird, of the Boston Celtics; Senator Edward Kennedy; what appears to be a statue of a  
18 Revolutionary War "Minuteman"; and what appears to be the same photograph of Tom Kean Jr.  
19 with the "Tom Kean Jr. for Congress" campaign button or sticker. Superimposed over the  
20 photographs is the following statement: "What do all these things have in common? They all  
21 have homes in Massachusetts."

22 **B. Political Committee Status**

23 The Council appears to be a political committee under the Act, and as such, is subject to  
24 the Act's contribution limitations, source prohibitions, and reporting requirements. *See* 2 U.S.C.  
25 §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any  
26 committee, club, association, or other group of persons that receives "contributions" or makes  
27 "expenditures" for the purpose of influencing a federal election which aggregate in excess of  
28 \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A).

MUR 5024R  
Factual & Legal Analysis

1       The term "contribution" is defined to include "any gift, subscription, loan, advance, or  
2       deposit of money or anything of value made by any person for the purpose of influencing any  
3       election for Federal office." 2 U.S.C. § 431(8)(A)(i). *See, e.g., FEC v. Survival Educ. Fund,*  
4       *Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation "leaves no doubt that  
5       the funds contributed would be used to advocate [a candidate's election or] defeat at the polls,  
6       not simply to criticize his policies during the election year," proceeds from that solicitation are  
7       contributions). The term "expenditure" includes "any purchase, payment, distribution, loan,  
8       advance, deposit or gift of money or anything of value, made by any person for the purpose of  
9       influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

10       As a Section 527 organization, the Council is by law "a party, committee, association,  
11       fund, or other organization (whether or not incorporated) organized and operated primarily for  
12       the purpose of directly or indirectly accepting contributions or making expenditures, or both, for  
13       an exempt function." 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the  
14       "function of influencing or attempting to influence the selection, nomination, election or  
15       appointment of any individual to any Federal, State, or local public office or office in a political  
16       organization," or the election or selection of presidential or vice presidential electors. 26 U.S.C.  
17       § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has  
18       effectively declared that its primary purpose is influencing elections or appointments of one kind  
19       or another.<sup>12</sup>

20       The Council claims in its response to the complaint that it is not a political committee and  
21       cites its articles of incorporation, which state that its mission includes encouraging support

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<sup>12</sup> Cf. *McConnell*, 124 S.Ct. at 678, n.68 (noting the existence of tax-exempt organizations that "engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives.").

MUR 5024R  
Factual & Legal Analysis

1 among the general public for traditional moral and cultural values, free market economics, and  
2 greater accountability of elected officials in government. The articles of incorporation also  
3 explicitly prohibit the organization from expressly advocating the election or defeat of any  
4 clearly identified candidate for public office, or making any contribution to any candidate for  
5 public office.

6 Yet as detailed in the prior section, the Council's public statements and brochures  
7 evidence an attempt to influence elections, especially the congressional primary election in New  
8 Jersey's Seventh Congressional District. For example, one of the Council's leaders, Gary Glenn,  
9 reportedly acknowledged that the Council's purpose was to influence elections and that it sought  
10 to elect a congressman whose values were consistent with the Council's philosophy. *See supra*,  
11 pg. 8. In addition, to further its goals, the Council funded and distributed brochures that stated,  
12 **"TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS. ... NEW**  
13 **JERSEY NEEDS NEW JERSEY LEADERS,"** or that featured a picture of Kean wearing a  
14 campaign emblem followed by the word **"NEVER."** In addition, the Council may have  
15 attempted to influence other elections, evidenced by media reports and a disbursement for a  
16 \$250,000 "media buy" in 2002.<sup>13</sup>

17 Overall, publicly available information demonstrates that the Council's objective was to  
18 influence federal elections, including the congressional primary election in Kean's district. The  
19 Council has apparently raised and spent hundreds of thousands of dollars in furtherance of that  
20 objective. Accordingly, it is appropriate for the Commission to investigate whether the Council  
21 has, among the funds it has spent and received, made \$1,000 in "expenditures," or received  
22 \$1,000 in "contributions," and thus is a political committee. If the Council is a political

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<sup>13</sup> For example, the Council reportedly aired advertisements in Idaho in 2000, attacking a Republican candidate in a congressional primary there.

MUR 5024R  
Factual & Legal Analysis

committee, then it is subject to the contribution limitations, source prohibitions, and reporting requirements of the Act.<sup>14</sup> See 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. Here, the Council may have financed its activities with funds raised outside the limitations and prohibitions of the Act.

C. Corporate Expenditures

Alternatively, the facts may show that the more appropriate basis on which to resolve this matter is that the Council violated 2 U.S.C. § 441b(a). If the brochures the Council funded and distributed were express advocacy, as the complaint alleges, then the disbursements for them were expenditures made in connection with an election to political office, which the Act prohibits corporations from making. 2 U.S.C. § 441b(a). As discussed previously, the Supreme Court held in *MCFL* that a corporate expenditure for a general public communication, if made independent of a candidate and/or his campaign committee, "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249; *supra*, at n.4.

The Commission promulgated 11 C.F.R. § 100.22 to define "expressly advocating" consistent with judicial interpretations, including *Buckley* and *MCFL*. The first part of this regulation, tracking *Buckley* and *MCFL*, defines "expressly advocating" as a communication that uses phrases such as "vote for the President," or "'support the Democratic nominee' . . . , which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s) . . . ." 11 C.F.R. § 100.22(a). The second part of this regulation encompasses communications that, when taken as a whole or with limited reference to external events, contain an "electoral portion" that is "unmistakable, unambiguous, and

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<sup>14</sup> To address 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*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. Here, the Council's activities and public statements indicate that its major purpose is to engage in federal campaign activity.

MUR 5024R  
Factual & Legal Analysis

1 suggestive of only one meaning" and one as to which "reasonable minds could not differ as to  
2 whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or  
3 encourages some other kind of action." 11 C.F.R. § 100.22(b). In this matter, the brochures  
4 constitute express advocacy either under section 100.22(a) or 100.22(b).

5           1.       **The Brochures Are Express Advocacy Under 11 C.F.R. § 100.22(a)**

6           The brochures are express advocacy under section 100.22(a) of the Commission's  
7 regulations because they use words which in context have no other reasonable meaning than to  
8 urge the election or defeat of one or more clearly identified candidates. 11 C.F.R. § 100.22(a).  
9 In particular, both brochures prominently display a photograph of Tom Kean Jr. with his  
10 campaign button or sticker stating "Tom Kean Jr. for Congress." The photograph and the words  
11 on the campaign button or sticker on Kean's jacket clearly identify Kean as a congressional  
12 candidate. Brochure 1 has the photograph and campaign button or sticker "Tom Kean Jr. for  
13 Congress" on the first page of the two-page brochure, along with language charging that Kean  
14 has no experience and has not lived in New Jersey for 10 years. This display is immediately  
15 followed by the highlighted word "NEVER." on top of the following page.

16           The photograph of Kean wearing the campaign button or sticker, which contains words  
17 expressly advocating Kean's election, when read in conjunction with the highlighted word  
18 "NEVER." (followed by a period) in context has no other reasonable meaning than to advocate  
19 Kean's defeat. Seen in close juxtaposition to the picture of Kean wearing his own campaign  
20 button or sticker, "NEVER" can be read as the equivalent of drawing an "X", or a circle with a  
21 slash, over the campaign button or sticker, thereby urging the defeat of Kean in the upcoming  
22 primary election.

23           Similarly, Brochure 2 contains words and phrases which have no other reasonable  
24 meaning than to urge Kean's defeat. See 11 C.F.R. § 100.22(a). Brochure 2 specifically refers

MUR 5024R  
Factual & Legal Analysis

to Kean's candidacy in stating, **"TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS,"** and later on the same page, in the same prominent typeface, it declares, **"NEW JERSEY NEEDS NEW JERSEY LEADERS."** In between these statements, Brochure 2's 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." After identifying certain issues facing New Jersey (schools, taxes, overdevelopment, congestion), Brochure 2 compares Kean's asserted lack of experience unfavorably to the experience of one of Kean's opponents in the primary election by stating, "Pat Morrissey has experience dealing with important issues."

In short, Brochure 2 clearly identifies Kean as a candidate for Congress; it prominently describes him as not being from New Jersey and as being inexperienced, rather than a leader, and then uses the campaign slogan, **"NEW JERSEY NEEDS NEW JERSEY LEADERS."** This is no different than identifying Kean as "pro-choice" or "pro-life" and then telling the reader to "vote pro-choice" or "vote pro-life." 11 C.F.R. § 100.22(a). In addition, the main text of Brochure 2 is superimposed on the same photograph of Kean wearing his own campaign button or sticker that was used in Brochure 1. Thus, this language is also the equivalent of drawing an "X" over the "Tom Kean Jr. for Congress" campaign button or sticker, urging the defeat of Kean in the upcoming primary election.

2. **The Brochures Are Express Advocacy Under 11 C.F.R. § 100.22(b)**

If the brochures are not express advocacy under 11 C.F.R. § 100.22(a), then they are express advocacy under 11 C.F.R. § 100.22(b). The brochures were distributed in Kean's congressional district after he announced his candidacy and during the months immediately preceding the primary election. With limited reference to these events, the electoral portions of the brochures are "unmistakable, unambiguous, and suggestive of only one meaning"—to vote

MUR 5024R  
Factual & Legal Analysis

1 against Kean. 11 C.F.R. § 100.22(b)(1). Both brochures also are subject to only one reasonable  
2 interpretation of their call to action—to vote against Kean. *See* 11 C.F.R. § 100.22(b)(2).  
3 Indeed, outside the context of the upcoming election, the brochures are virtually meaningless.

4 Brochure 1 does not even mention any public issues. It only criticizes Kean's  
5 qualifications to serve in office and places the boldfaced term "NEVER" directly after a picture  
6 of Kean wearing a campaign emblem stating "Tom Kean Jr. for Congress." Likewise, Brochure  
7 2 directly references Kean's campaign for Congress and attacks his lack of political experience.  
8 Due to these references to Kean's congressional campaign, combined with the lack of any other  
9 message, the brochures are exclusively and unmistakably electoral in content. In addition, both  
10 communications use words that effectively direct readers to vote against Kean. For example,  
11 after criticizing Kean's character and qualifications for federal office, the brochures tell people  
12 "NEVER" and "Tell Tom Kean Jr. ... NEW JERSEY NEEDS NEW JERSEY LEADERS."

13 These brochures represent the type of communications that the Commission envisioned  
14 when it promulgated section 100.22. *See* 60 Fed. Reg. 35292, July 6, 1995. In its discussion of  
15 then-newly promulgated section 100.22, the Commission stated that "communications discussing  
16 or commenting on a candidate's character, qualifications or accomplishments are considered  
17 express advocacy under new section 100.22(b) if, in context, they have no other reasonable  
18 meaning than to encourage actions to elect or defeat the candidate in question." *Id.* at 35295.  
19 Here, there is not even a pretense that the brochures are about anything other than Kean's fitness  
20 for Federal office; the only thing a reader can do to ensure that New Jersey *has* New Jersey  
21 leaders is to vote against Kean.

22 As discussed above, the Commission initially failed to find reason to believe to  
23 investigate the express advocacy allegations. The Commission now concludes that further



MUR 5024R  
Factual & Legal Analysis

1 investigation of these allegations, including additional consideration of the appropriate  
2 applicable legal standards, is warranted.

3 **3. Corporate Officers Consented to the Corporate Expenditures**

4 Just as the Act prohibits corporations from making expenditures in connection with  
5 elections for public office, it similarly prohibits officers of corporations from consenting to such  
6 expenditures. *See* 2 U.S.C. § 441b(a). Two of the Council's officers, Gary Glenn and William  
7 Wilson, may have consented to the apparent prohibited expenditures in this matter. Glenn and  
8 Wilson were members of the Council's Board of Directors at the time of the expenditures, and  
9 newspaper articles discussing the brochures at issue included statements from Glenn and Wilson  
10 that appear to support the distribution of the brochures.<sup>15</sup> These reported statements thus provide  
11 a basis for investigating whether Glenn and Wilson may have consented to prohibited corporate  
12 expenditures.

13 **D. Disclaimers**

14 If the Council distributed brochures that expressly advocated the election or defeat of  
15 clearly identified federal candidates, then in addition to failing to register and report as a political  
16 committee or making prohibited corporate expenditures, the Council also may have violated the  
17 Act's disclaimer requirements. The Act provides that any person making an expenditure for the  
18 purpose of financing communications expressly advocating the election or defeat of a clearly  
19 identified candidate through any outdoor advertising facility or any other type of general public  
20 political advertising, if not authorized by a candidate, an authorized political committee of a  
21 candidate, or its agents, shall clearly state the name of the person who paid for the  
22 communication and state whether the communication is authorized by any candidate or

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<sup>15</sup> *See supra*, pg. 6-8. Wilson is also quoted as stating, "All we have done is used our First Amendment right (to free speech) to inject our ideas into the debate."

MUR 5024R  
Factual & Legal Analysis

1 candidate's committee. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1). Here, however, neither of  
2 the brochures stated whether it was authorized by a candidate or candidate's committee. Instead,  
3 the brochures stated only that they were "Paid for by the Accountability Project of the CRG."

4 **E. Apparent Violations**

5 For the reasons stated herein, the Commission finds that there is reason to believe that  
6 that the Council for Responsible Government, Inc. and its Accountability Project violated  
7 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the  
8 Commission, by failing to report its contributions and expenditures, by knowingly accepting  
9 contributions in excess of \$5,000, and by knowingly accepting corporate and/or union  
10 contributions; or, in the alternative, that the Council for Responsible Government, Inc. and its  
11 Accountability Project violated 2 U.S.C. §§ 441b(a) and 441d(a) by making prohibited corporate  
12 independent expenditures that failed to contain a proper disclaimer and that William "Bill"  
13 Wilson and Gary Glenn, as corporate officers of the Council, violated 2 U.S.C. § 441b(a) by  
14 consenting to prohibited corporate independent expenditures.