IN THE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Docket No. 95-2600

FEDERAL ELECTION COMMISSION,

Plaintiff-Appellant,

v.

CHRISTIAN ACTION NETWORK, INC.,
and MARTIN MAWYER,

Defendants-Appellees.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC., IN SUPPORT OF APPELLEES

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC., IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS*

The American Civil Liberties Union of Virginia, Inc., a Virginia non-profit corporation ("ACLU of Virginia"), is the Virginia affiliate of the American Civil Liberties Union, Inc., a non-profit, non-partisan citizen organization with about 300,000 members nationwide, founded in 1920 and dedicated to the preservation and furtherance of individual civil rights and liberties under law. The ACLU of Virginia has sponsored and conducted substantial litigation, legislative advocacy and public education on freedom of speech and on the integrity and openness of the voting process.

The ACLU of Virginia believes that only through continual reaffirmance of the strictest possible judicial standards will the federal Constitution's free speech guarantee be preserved for future generations. The concern of *amicus* in this appeal is that the First Amendment will be slighted or forgotten because of understandable, but inappropriate, sympathy with the Government's policy objective to control political "issue attack advertising" by subjecting it to stricter federal election campaign finance regulation than in the past. As explained in the brief which follows, *amicus* urges strict limitation of any review of the content or context of political messages to determine whether they "in express terms advocate" the election or defeat of identified candidates for federal office.

STATEMENT OF FACTS

Amicus relies on the statement of the facts contained in the brief of appellees Christian Action Network, Inc. ("CAN"), and Martin Mawyer.

SUMMARY OF ARGUMENT

This case tests when the Federal Election Commission ("FEC" or "Commission"), acting under the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"), may constitutionally treat independent private expenditures for issue-oriented advertising as "in express terms advocat[ing] the election or defeat of a clearly identified candidate for federal office." *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). The independent "issue attack ad" presents unique analytical problems not because of its negative thrust, which fits without difficulty into the existing statutory scheme, but (1) because of its independent rather than candidate or party origin and (2) because of its focus on an issue--in the present case an attempt to influence a candidate's position on an issue--rather than on a "pointed exhortation," *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), to vote for or against a candidate in a federal election.

Two of the Government's claims in this case pose particular threats to free speech. First is the contention that a regulator's inferences from the oblique or indirect language of a message, or from its external context, may be dispositive of whether the message is "express advocacy." The Government's position here purports to be derived from the reformulation of the *Buckley* test in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), which upheld FEC enforcement against political communications when, taken "as a whole [and] with limited reference to outside events," they unquestionably exhorted a vote for or against a particular candidate.

The three-pronged *Furgatch* unmistakability formulation, understood strictly, is not much more than an elaboration of *Buckley* for a small group of cases in which a clear and direct plea to vote for or against an identified candidate is uttered in terms other than the words suggested in *Buckley* or their close synonyms. However, by insisting here on a broad, indeed licentious "context" inquiry for issue advertising, the Government goes beyond *Furgatch* to assert, in effect, that ads attacking an identified candidate's political positions during a campaign will virtually always, if not *per se*, amount to "express advocacy" of that candidate's defeat at the polls. This purblind stumble into constitutionally forbidden territory should be squarely rejected in favor of the well-established rule that "express advocacy" means what it says: to be

regulable under FECA, advocacy of a candidate's election or defeat must be express, not veiled, hinted, or implied. It must be explicit as well as unambiguous, for the two concepts are distinct.

Second, and equally if not more pernicious, is the notion that even where negative print or radio references to a candidate's positions would fall short of "express advocacy" under *Buckley* and its progeny and be constitutionally protected from FECA constraints, a television ad containing negative imagery or image-sound juxtapositions, such as the unflattering photography or ominous-sounding music that so concerns the Government in this appeal, would rise to the level of "express advocacy" because of some supposedly greater power of motion pictures to communicate by innuendo.

Such a claim is extremely dangerous to free speech in general, since one incursion into inferential interpretation of speech content will lead rapidly to another in an era of fast diminishing distinctions among various forms and vehicles of expression. The "power of television" argument refutes itself, however, since to aver that real-time sound-and-image communications are subtler and more complex than words or pictures on a page, or words spoken over the radio, is to state precisely what makes interpreting such communications--especially when they are oblique or indirect to start with--so subjective an undertaking, and so perilous for a court.

ARGUMENT

I. The strict and settled standard for "express advocacy" respects free speech as it should, and needs no repair

The chief question presented in this appeal, as in many prior cases, is to what extent the First Amendment limits the FECA's definition of "express advocacy."[1] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court declared that speech regulation under FECA could have only the narrowest of ambits if the statute was to comport with free speech. To steer clear of constitutional quicksand, the Court knew it had to keep the matter simple, and to direct the avoidance of dangerous interpretive incursions into the content of political speech. *See, e.g., Chicago Police v. Mosley*, 408 U.S. 92, 95 (1972)("any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'")(citations omitted). Accordingly, the *Buckley* decision "limited [the scope of FECA's independent

[1] This brief confines itself to the relationship among the FECA, the "express advocacy" caselaw, and the enforcement action challenged here. *Amicus* does not directly address the Federal Election Commission's newly promulgated regulation purporting to define "express advocacy," Final Rule on Express Advocacy, 60 Fed. Reg. 35292 (1995), since it was enacted too late to apply to this case. The Court may find elsewhere the arguments against according deference to the FEC's "interpretation," whether found in its new regulation or otherwise, of the constitutional limits on its own enforcement power. *See* Brief for the Christian Action Network at 17-19.

expenditure provisions] to communications that include explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 44.

The stringent *Buckley* standard--sometimes mischaracterized as a "magic words" test, *see* Brief for the Federal Election Commission at 22--inspects the utterance for "elect," "defeat," "Smith for Congress," or *terms equally explicit*. It does not create a list of dispositive buzz-words, or--as *amicus* Democratic National Committee suggests, *see* Brief of *Amicus Curiae* Democratic National Committee at 1, 6, 9--allow campaign finance scofflaws to avoid FECA enforcement just by avoiding those words. It does, however, uphold free speech by requiring the FEC--for the agency bears the burden here--to demonstrate at the threshold that a piece of political propaganda explicitly, directly and specifically exhorts a vote for or against an identified candidate.

The reasoning of *Buckley* was an appropriate and successful effort to address precisely the problem that is now raised in this appeal, namely "the distinction between discussion of issues and candidates and advocacy of election and defeat of candidates." *Id.*, 424 U.S. at 42. The Court readily recognized that this distinction "may often dissolve in practical application," since "public discussion of public issues which are also campaign issues . . . tend[s] naturally and inexorably to exert some influence on voting at elections." *Id.*

It was for exactly this reason that the Court decided not to attempt the drawing of a constitutional line between issue advocacy and electoral advocacy,

but rather chose a bright line safely *inside* the electoral advocacy category, a line which distinguished between "express" voting advocacy and all other voting advocacy. The Court thus allowed regulation of *only a part* of the central set of occurrences the Government might originally have desired to control. Again, by mentioning specific terms the Court in *Buckley* was not, as it was careful to state, creating a definitive list of unacceptable words or removing the matter entirely from the discretion of the enforcing agency. Rather, it was simply drawing the line, as brightly and authoritatively as it could, to foreclose unconstitutional excursions by FECA enforcers into inference and semantic guesswork.

Guesswork, or personal or anecdotal speculation, about the meaning of disputed speech is hardly ever a sound basis for judicial decisions. The point is powerfully made in incitement cases like *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Hess v. Indiana*, 414 U.S. 105 (1973), which at the height of the modern American age of protest took care not to authorize guesses at the meaning of challenged communications, and wisely chose instead a minimalist rule that only speech presenting the most express, explicit and imminent of dangers could be suppressed or regulated based on a reviewing court's sense of its content.

This tradition of minimal regulatory incursion into the content of speech is as old as *Schenck v. United States*, 249 U.S. 47, 52 (1919), in which the Court

held, "The question in every case is whether the words used are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the evils that Congress has as right to prevent." Indeed, the many rules that have evolved since *Schenck* to constrain judicial discretion to examine and interpret speech content may have developed precisely because the Court has long understood that content judgments cannot be avoided altogether; that judges will inevitably resort to them at critical moments; and that decisionmakers will base their interpretations of fact or utterance on their own values, personal experiences and understandings, and prejudices large or petty. Ultimately, the constraint serves the venerated free speech principle that suppressions based on government interpretations of the content of speech will have a chilling effect on speakers "who do not advocate [the forbidden] but fear that their [speech] may be so construed." *Dennis v. United States*, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring).

Nothing in the progeny of *Buckley* suggests that the Court's original "express advocacy" framework was flawed or that it drew the line in the wrong place. The standard was reaffirmed in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), which held, citing the explanatory footnote in *Buckley*, that the statute's independent expenditure provisions had to be interpreted using the strict "expressness" test. Cases since *MCFL* have followed suit. *See Faucher v. Federal Election*

Commission, 928 F.2d 468 (1st Cir.), *cert. denied*, 112 S. Ct. 79 (1991)(anti-abortion voter guide); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980)(bulletin critizing congressman's voting record); *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989)(mailing attacking certain members of Congress for positions on abortion and the Equal Rights Amendment); *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979)(poster distributed to union members criticizing Ford's pardon of Nixon); *cf. Orloski v. Federal Election Commission*, 795 F.2d 156, 165 (D.C. Cir. 1986) ("a subjective test [for distinguishing permissible from impermissible corporate donations] based upon the totality of the circumstances would inevitably curtail permissible conduct").

II. Any "expressness" review of the content or context of political messages beyond their immediate words of action should be strictly limited

In its brief to this Court, as in its submissions below, the Government has shown an unseemly interest in the decision in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). In *Furgatch* the FEC challenged the financing of newspaper ads that disparaged

President Carter's campaign strategy as divisive and deceptive, and concluded. "'*If President Carter succeeds* [in this strategy] the country will be burdened with four more years of incoherencies, ineptness and illusion. . . . *Don't let him do it.*'" *Furgatch*, 807 F.2d at 858 (emphasis added). The question presented was whether the ad failed to constitute "express advocacy" for want of the words listed in *Buckley*, and the panel in *Furgatch* declined to impose such a formalistic requirement on the facts before it. Instead, it took as its duty to review whether the speech, "when read as a whole, and with limited reference to external events. . . . [is] susceptible of no other reasonable interpretation than an exhortation to vote for or against a specific candidate." *Id.*, 807 F.2d at 864.

The *Furgatch* opinion elaborated on its formulation as follows:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally it must be clear what action is advocated. Speech cannot be express advocacy of the election or defeat of a "clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id.

The *Furgatch* test, correctly understood and applied, is in its own way quite a strict standard. Political propaganda is "express" only if it is "unmistakable and unambiguous"; it is "advocacy" only if it "presents a clear

plea for action"; and it is "advocacy of the election or defeat of a clearly identified candidate" only if it "[makes] clear what action is advocated," *i.e.*, an election day vote for or against the candidate rather than some other action. *Id.* These elements, taken together, impose much the same stricture as does *Buckley*'s suggested word list, together with the key qualifier "such as." *Buckley*, 424 U.S. at 44 n.52. Furthermore, the *Furgatch* reformulation applies only to those cases, not likely to arise often, in which a political communication is "in effect an explicit directive," *MCFL*, 479 U.S. at 249, without using words on the *Buckley* list or their literal synonyms.

Despite its effort to arrive at a narrow and rigorous formulation, *Furgatch* is vulnerable to a number of criticisms. The test purports to allow at least some examination of the external context of a political communication as part of the "express advocacy" determination. It invites inference, even if only limited inference, concerning a communicator's intent, as for example on the question whether a message is "informative" rather than "a clear plea for action" and thus is shielded from regulation. And the opinion strains and perhaps misapplies its own test, since the phrase "Don't let him do it" is arguably too ambiguous, and not explicit enough, to qualify as an "unmistakable and unambiguous" voting exhortation if that criterion is properly applied.

If the advertisement in *Furgatch* satisfies the court's own test, it does so only because of the "if Carter succeeds" and "four more years" language

construed together with the "Don't let him do it" tag line. The court reveals just how speculative and subjective is its inquiry when, by way of explanation for its result, it opines that the attack was *ad hominem* rather than issue-oriented ("'the President of the United States continues degrading the electoral process and lessening the prestige of the office'", *id.* at 858). Here the court's interpretive exercise is probably at its lowest ebb of success. It ought to trouble this Court, and should not be persuasive guidance for the present appeal, that the court in *Furgatch* found it either necessary or sufficient to its holding to string together a series of such guesses as to the meaning of the ad.

The *Furgatch* opinion presents the further problem of whether or to what extent the timing of a communication, or other externalities, should be factors in the analysis. The strict *Buckley* test would seem not to permit such inquiries, for the simple reason that only through dangerously subjective inference could a court determine communicative intent from timing or other elements outside the text of the message. Accordingly, the *Furgatch* court's reliance on the close pre-election timing of the "Don't Let Him Do It" ad deserves closer attention, since in this appeal both the Government and *amicus* Democratic National Committee suggest that timing is a part of the "context" that ought to be examined in every "express advocacy" case--and that the timing of the Christian Action Network advertising at issue here helped establish that it was "express advocacy."

Let us assume, without conceding, that the *Furgatch* Court properly took at least minimal note of the timing of the message in dispute. In the view of *amicus*, consideration of anything outside the text of the message would only have been appropriate, if at all, as a confirming measure, to be employed after the court first found the text itself to be presumptively "explicit" under *Buckley* and *MCFL*. The newspaper advertisement in *Furgatch* disparaging President Carter's campaign rhetoric was published a week before the November 1980 general election. The court found clear and unambiguous the advertiser's election-eve argument for unpleasant consequences for "four more years" "if Carter succeeds" and found the admonition, "don't let him do it," to be "express advocacy" of his defeat, apparently on the basis that a week before the election no reasonable observer could suppose the advertiser meant to ask voters to plead for a change in Carter's campaign strategy, for instance, or to take some action other than simply voting against him on election day.

In *Furgatch* itself, then, because the timing of the challenged message was found to confirm explicit "action" words already located in the text, the court's brief look at timing did not do serious harm to the principle of non-excursion into inference. This "limited reference to external events" would have been more problematic in a case where the review of external events could only yield useful conclusions because of *further* inferences about underlying message intent *based* on the review of externalities. This is precisely what a context inquiry

would entail in the present case, since the appellee's advertisements contain not a word of encouragement--explicit or not--to vote a certain way, and indeed affirmatively urge on their viewers a different action, that of contacting the advertiser "for further information on traditional family values." *See* Brief for the Federal Election Commission at 41. In a case like the present one, then, the "external events" portion of the inquiry will be far riskier and should simply not be undertaken.

The present case itself illustrates the problems that flow from considering timing and other ingredients of the implications of a political message. The advertisements here, at least the print advertisements, were published before and during the week of a presidential *debate*, not a presidential election. Debate time is almost by definition a time to influence views of the candidates and the public; this is the more true where debates are held while there is still plenty of pre-election time to make such influences felt. The ads at issue here--both video and print, for the two should be considered together as they were designed to be perceived--appear to attempt, however quixotically, a dialog with the Clinton-Gore campaign on gay rights. Specifically, the ads appear to be trying to influence the candidates to modify or repudiate certain gay rights positions attributed to them.

The messages may have been intended to irritate or intimidate candidate Clinton into making statements during the Richmond debate of OCtober 15,

1992, or later in the campaign, that confirmed, modified or repudiated the gay rights positions the advertiser had attributed to him. Or the advertiser might have hoped to create the appearance that its constituency could use candidate Clinton's later campaign statements or pledges, if any were made in "response" to the ads, to influence or constrain his conduct as president if he won the election.

In any event, whether or not any of these were established or even pleaded below as the "actual" communicative intentions of the advertiser, such inferences about the ads are *possible*. Under the circumstances, any further inquiry about them should be foreclosed, and the ads deemed protected from FECA enforcement as a matter of law. This is the proper way to apply the "express advocacy" test by whatever formula it may be set out. The Government and *amicus* Democratic National Committee, by pressing their pet interpretations of the timing of the appellee's ads and various other external events in connection with them, make it appear simultaneously (a) that interpretation and inference are permissible bases for this Court's decision, and (b) that they are unnecessary to the decision because the speech in question is clear and express. The Government and its supporting *amicus* thus confuse and disrupt what should be a simple and straightforward inquiry, and in the process demonstrate the merit of the constitutional fears they claim to dispel.

An honest consideration of the "expressness" of political advocacy, under *Buckley* or under the reformulation in *Furgatch*, must conclude that no court has ever conferred on FECA enforcers a general license to delve beyond the text of a message into semantic or cultural inference from its external context in deciding whether the message is "express advocacy of the election or defeat of an identified candidate." This Court, if it purports to rely to any extent on *Furgatch*, at a minimum must construe that decision's chosen terms strictly. Above all, it must not conflate or collapse the prongs of the elaborate and conjunct *Furgatch* formula, which insulates protected speech with three distinct layers of protection.

Indeed, a proper general "express advocacy" standard should specify, as part of the definition of expressness, that "express" means not only "suggestive of only one meaning," but explicit or direct, rather than implied or by innuendo. It is true that, as the cases uniformly understand, the chief potential consequence of circumlocution or indirect expression is ambiguity of meaning. Ambiguity may be defined as susceptibility of a message to more than one interpretation that is plausible to someone on the receiving end. *Cf.* Brief of *Amicus Curiae* Democratic National Committee at 13 nn. 4, 5 (law and lay dictionary definitions of "express" and "advocacy"). However, the constitutional difficulty here arises not just from the potential an indirect statement presents for erroneous inferences--the danger on which the *Furgatch* court concentrated--but from the

very fact that circumlocution requires an inference in order to be understood at all. The *Buckley* Court grasped this important concept, which is why it drew the constitutional line so far into the "advocacy" category in its decision.

If "express" were not part of the test to begin with, and the *Buckley* formulation were simply "advocacy of the election or defeat of an identified candidate," the standard would allow considerably more room for inference than it does. The Government and *amicus* Democratic National Committee argue for just that latitude, and therefore can only be understood to be urging this Court to excise the word "express" from the *Buckley* standard.

If regulators are permitted the range of inferences the Government seeks to indulge in this area, the gates will be open to a flood of politically loaded interpretations of all kinds. Here, for instance, a Clinton partisan could argue that because candidate Clinton favored "job quotas" for no one, the ad was a deliberate and provocative exaggeration or misstatement in that respect, and must therefore be understood as a statement of intransigent opposition to Clinton's election rather than an attempt, which would arguably have had to be more civilized or discursive, to influence him to modify his views. Even from this brief illustration the danger of "reading in" in this area should be clear: Political innuendo, whether sound in factual basis or hearer inference or not, is as endless as the capacity of the political mind to devise it.

Put another way, the problem is this: if a regulation permits inquiry beyond explicit words of voting advocacy, to any area in which the regulator's judgment can have play, it effectively unbridles the discretion of a political arm of the government to make politically loaded decisions. Complaints against the FEC for enforcing against the political opponents of those in power are legion, and the number of such complaints suggests the institutional inadequacy of the mere requirement that both major American political parties be represented on the Federal Election Commission. Even if these grievances rarely if ever have merit, they reflect a public perception that FECA enforcers have the power to effectuate private censorial bias at least some of the time. The courts should stand as a bulwark against such appearances, not a further invitation to the public to obsess about them. This Court will make the Commission's job easier, not harder, and will make the underlying statutory scheme fairer in fact and in appearance, when it insists that all political speech controversies before the agency be decided on narrow grounds that are not subject to disagreement or confusion over semantics.

In this connection it is particularly ironic that both the Government and its *amicus* support with First Amendment symbolic expression cases their argument that the content inferences of the censors are no danger to the free speech guarantee. The fact that a particular form or act of non-verbal communication may itself be protected speech, *see, e.g., Spence v. Washington*, 418 U.S. 405

(1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *County of Allegheny v. Greater Pittsburgh Chapter, American Civil Liberties Union of Pennsylvania*, 492 U.S. 573 (1987); *Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990), does nothing at all to advance an argument that such communication is "express advocacy" for federal election law enforcement purposes. Simply put, an act of communication need not be direct, overt, or free of ambiguity to any particular degree to be deserving of constitutional protection. *Cf. Cohen v. California*, 403 U.S. 15, 26 (1971)("one man's vulgarity is another's lyric"); *Campbell v. Acuff-Rose Music, Inc.*, 508 U.S. ___ (1994)(parody does not infringe original's copyright protection since "commenting on and criticizing the original work" is an additional layer of meaning, and is independent expression in itself).

A court need not hold that a particular message is "in effect an explicit directive," *MCFL*, 479 U.S. at 249, or "suggestive of only one plausible meaning," *Furgatch*, 807 F.2d at 864, in order to recognize that the message *is expression*. The two propositions are apples and oranges. It is nonsense to suggest that constitutional protection of expression entails or requires a determination that the message involved has only one meaning.

Indeed, the most powerful communication--our great and enduring literature, for instance--is often that which conveys the greatest multiplicity of meanings or accommodates the greatest number of interpretations. Was Hamlet

truly deranged? If rational, did he postpone his revenge for political, moral, or Oedipal reasons, or all of these? Is Shakespeare's masterwork really an allegory to the life of Luther? That these and a thousand other questions persist about our greatest works of art attests to the enrichment we derive from their very complexity. A principal virtue of our constitutional framework is that it leaves to individual communicators the greatest possible freedom to convey their messages, and to mirror the human condition, regardless of the degree of clarity or subtlety intended or conveyed. One wonders how impoverished our national life and culture would be if only one-dimensional utterances were protected from government constraint.

In the specific context of this appeal, *Buckley*'s strict rule of expressness rests on the axiom that not all communications made during political campaigns are "pointed exhortation[s]," *MCFL*, 479 U.S. at 249, to vote for or against particular persons. The very fact that election campaigns are times of unusually excited political discourse suggests that more than one form of communication can and does take place at those times. The Constitution would protect a political advertiser's choice to wonder aloud what objectionable policies might be enacted if Clinton were elected president, just as it would protect his choice of a message that sought to intimidate the candidate into a change of position by making it appear that local religious conservatives could build opposition to his

views. Neither of these choices would be the same, or could constitutionally be regulated, as an express exhortation to vote against Clinton.

III. Television advocacy must not be judged by a more censorial standard than other political communications

The Government protests that the television advertisement in this case, by various production tricks, made presidential candidate Clinton's position on gay rights appear extreme or even ridiculous. Indeed the Government devotes extended portions of its brief to detailed and sneering descriptions of the techniques used to increase the persuasive impact of the appellee's television commercial. *See* Brief for the Federal Election Commission at 37-47. The argument proves only what is "beyond dispute," *i.e.*, that "the advertisements were openly hostile to the proposals" that the advertiser attributed to candidates Clinton and Gore. *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946, 952 (W.D. Va. 1995).

From these facts the Government argues, improbably, for some special power of video communications to advocate "expressly" without being "express." The Government first contends that images can be the equivalent of express words. By itself this assertion proves very little, since pictures that are the equivalent of express words ought not require a more deferential "express advocacy" standard than the original *Buckley* test.

The Government seems to contend further that sound, word and image moving together in real time can convey more than words or pictures on a printed page, or words spoken over the radio. As the Commission's brief puts it, "Video's sounds and images are mightier than the pen." Brief for the Federal Election Commission at 39. This proposition too is plausible as a matter of common sense, although hardly established on this record as a matter of social science. However, the statement does not lead anywhere close to the Government's favored conclusion, *i.e.*, that television advertisements are somehow "unique"--that they have *and inevitably exercise* a special ability, beyond messages in other media, to persuade, exhort or advocate in the manner contemplated by *Buckley* and its progeny. In other words, that TV *can* be especially powerful does not at all mean that it always *is* more "express" or "explicit" than words.

The sheer density of association and connotation that gives communicative power to pictures--or to complex real-time communications built from moving image and accompanying sounds--makes such communications *more*, not less, susceptible of multiple interpretations, and makes it at least *possible* to interpret a photograph or a film clip, for instance, in more ways than might be true for simpler messages or simpler media. The district court made the apt observation that visual imagery is harder to interpret because of its very density: "If the adage 'a picture is worth a thousand words' is accurate, then the difficulty in

interpreting a message conveyed by a picture is undoubtedly far greater than one conveyed by mere words." *Christian Action Network*, 894 F. Supp. at 958 n. 17. Assuming the "expert analysis" submitted by the FEC on this point was even properly before the district court on a motion to dismiss,[2] the court properly ignored the implication that any such analysis was necessary to its decision. *Id.*, 894 F. Supp. at 958 ("It takes little reflection to realize that messages conveyed by imagery are susceptible to even greater misinterpretation than those that are conveyed by the written or spoken word").

A candid look at the Government's favorite hypothetical should suffice. The Government contended in the district court, *see* 894 F. Supp. at 957 n.16, 968 (Photo 9), that a photograph of the face of a candidate overlaid with a bright red outline of the international "stop" symbol, a circle with a slash through it, would be the unmistakable visual equivalent of the words "Defeat This Candidate." The suggestion proves nothing, since such an image alone, without some other element or elements, would have literally no reference, and the other

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[2] *See* Fed. R. Civ. P. 12(b)("If, on a motion [to dismiss under Rule 12(b)(6)], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided under Rule 56"). The FEC's "expert analysis" was filed among the Government's voluminous exhibits in opposition to dismissal. All of these were technically beyond the initial pleading, and were consistent with a common litigation tactic to avoid dismissal by forcing extraneous factual matter on the court. While the district court did not specifically order the exhibits excluded, Judge Turk's opinion contains no mention of any exhibit save the "expert analysis." This, it appears, is mentioned precisely to make clear that the court did not rely on the "expert" material in considering the threshold legal question whether the Government had pleaded a viable claim of "express advocacy."

element or elements would have to be independently explicit for the total message to amount to "express advocacy."

A placard with the words "On Election Day," and below them the "stop" symbol laid over a clear close-up photo of a candidate's face, might be "express advocacy" of that candidate's defeat, but the words "On Election Day" would be critical to the communication and dispositive of its interpretation. Without such words or other express indicia, the Clinton-and-stop-signal image could mean all sorts of things: "Do not use this picture of Bill Clinton," "This is a picture of Clinton hindering his campaign message," "No Clinton delegates beyond this point," "If you run for office do not glare into the camera like this," "Ladies' Room--No Men," and an uncountable number of other messages. It is in the nature of pictures to be malleable and context-sensitive, as all metaphors are. Indeed, pictures in politics are arguably *always* metaphors. That they can in theory be "compelling," *see* Brief for the Federal Election Commission at 25, is by itself no proof of what *meaning* they convey so forcefully. The various alarms and indignations of the would-be enforcers in this case, therefore, do not advance their thesis, since only with additional information as a defining aid can even a "compelling" image be construed as "express advocacy" for federal election campaign finance purposes.

Even if one assumes that this same image unaccompanied by words could expressly advocate the defeat of the pictured candidate in some limited

circumstances, *e.g.*, when placed outside polling stations, alongside an array of other electioneering posters, on the day the pictured candidate is standing for election, the use of context in this narrow sense comports only with the strictest, most careful use of the "limited reference to external events" suggested in *Furgatch*, and certainly does not justify the deeper, inevitably subjective and prejudice-ridden foray into speculation and guesswork that the Government seeks permission to conduct in every FECA issue advertising case.

As noted *supra*, the Government has no greater prerogative to regulate or penalize less-than-explicit private speech under FECA than it has in any other setting where private speech is subjected to governmental intrusion because, in its most explicit form, it gives rise to harms the state has a compelling interest in preventing. Cf. *Terminiello v. City of Chicago*, 337 U.S. 11 (1949)(statute that punished speech that "stirs the public to anger, [or] invites dispute," was overbroad and void on its face); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing criminal syndicalism conviction for Ku Klux Klan leader's rally speech because it fell short of "direct incitement to imminent lawless action"); *Hess v. Indiana*, 414 U.S. 105 (1973)(protester's shout, "We'll take the f---ing street [again]," was no incitement).

Thus, whatever the import of what is said to be the unflattering photography in the CAN advertisement, or the ominous-sounding music, or the unpleasant juxtapositions of "extremist" gay rights images with images of or

references to candidates Clinton or Gore, the advertisement which incorporates these techniques is still no more than innuendo--no more than implication. The Government cannot subject that indirect expression to regulation under FECA any more than it could punish as syndicalism a Klansman's public declaration that Ohio had many angry Klan members, or prosecute as incitement an antiwar activist's vague threat of unrest.

Indeed, to constrain the utterance in this case by the use of a less stringent test would put free speech in peril generally. Courts have long recognized that their attempts to regulate by means of individual interpretation of the content of speech, even in order to make judgments about whether that speech is protected at all, are inherently subjective and dangerous exercises. *See, e.g., Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Court's difficulty in obscenity cases was "trying to define what may be undefinable"). Especially in today's world of rapidly waning distinctions among verbal, visual, printed and electronic communications, and among an ever-growing array of forms and vehicles of expression, one essay in content interpretation can lead all too quickly to others in fields too numerous to imagine. "A hierarchy of ever-proliferating intermediate categories [of speech protection] requires [courts] to assign relative values to different classes of expression, a task that is all but impossible to reconcile with the 'basic theory of the First Amendment.'" L. Tribe, American Constitutional Law 940 (2d ed. 1988), *quoting* T. Emerson, The System of Free Expression 326 (1970).

In sum, the essential problem in this case is the inherent subjectivity of the interpretive exercise urged by the Government. Nowhere is this danger more clearly spelled out than in *Buckley* itself:

> "[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as a clear invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Buckley, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945).

To ask a court applying FECA's "express advocacy" provision to approve conclusive regulation of political advocacy speech, based on inferences drawn from less-than-explicit message content, means a regulator will necessarily rely on personal interpretations of the meaning of words, or of the social significance of some image or sound, or some juxtaposition of the two. The process will artificially and arbitrarily elevate the personal predilections of the hearer in authority over the perceptions of anyone else, and will invite serious breaches of fundamental First Amendment teaching. It would be far better to subject all "express advocacy" disputes to the same clear rule that has served the nation and

its Constitution so well since *Buckley* was handed down two decades ago. The rule of *Buckley* is not broken; it does not need fixing.

CONCLUSION

For the reasons set forth above, *amicus* urges affirmance of the district court's order of dismissal in this case, and further urges that the Court specifically and unequivocally announce a text-based standard for "express advocacy" inspections that strictly limits any review of the content or context of political messages beyond their immediate words of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1996, I caused the foregoing brief *amicus curiae* to be mailed first class, postage prepaid, to David Wm. T. Carroll, Esq., Sellman & Boone, 50 West Broad Street, Suite 2800, Columbus, OH 43215, and Frank M. Northam, Esq., Webster, Chamberlain & Bean, 1747 Pennsylvania Avenue, Suite 1000, Washington, DC 20003, counsel for defendants-appellees; to David Kolker, Esq., Federal Election Commission, 999 E Street, N.W., Washington, DC 20463, counsel for plaintiff-appellant; and to Joseph E. Sandler, Esq., Democratic National Committee, 430 South Capitol Street, Washington, DC 20002, counsel for *amicus curiae* Democratic National Committee.