UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2600

FEDERAL ELECTION COMMISSION,

Plaintiff-Appellant,

v.

CHRISTIAN ACTION NETWORK and
MARTIN MAWYER,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Virginia, Lynchburg Division

BRIEF OF DEFENDANTS-APPELLEES CHRISTIAN ACTION NETWORK and MARTIN MAWYER

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bc

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Richmond, VA

31 August 1995

No. 95-2600 Federal Election v. Christian Action

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

NOTE: ONLY ONE FORM NEED BE COMPLETED FOR A PARTY EVEN IF THIS PARTY IS REPRESENTED BY MORE THAN ONE ATTORNEY. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUALS AS WELL AS CORPORATIONS AND OTHER LEGAL ENTITIES. DISCLOSE PUBLICLY OWNED CORPORATIONS AND ENTITIES ONLY. EXCLUDE WHOLLY OWNED SUBSIDIARIES. COUNSEL HAS A CONTINUING DUTY TO UPDATE THIS INFORMATION.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christian Action Network (name of party) who is Appellee (appellant/appellee),

makes the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity? (check one) ( ) YES (X) NO

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

   (check one) ( ) YES (X) NO

   If the answer is YES, state the name of the entity and its relationship to the party:

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (see Local Rule 26.1(b))?

   (check one) ( ) YES (X) NO

   If the answer is YES, state the name of the entity and the nature of its financial interest:

David W. Cornell
(signature)

9-15-95
(date)

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Statement of the Issues

Did the District Court err by following every reported and unreported "express advocacy" decision in finding that neither Christian Action Network's video nor newspaper advertisement--neither of which contains words explicit words of express electoral advocacy--constituted express electoral advocacy.

If the District Court erred in finding that the advertisements in question did not constitute express advocacy, should the District Court dismissal of the complaint be upheld on any of the following alternative grounds raised in Christian Action Network's Motion to Dismiss before the District Court, but which were not decided by the District Court:

- Any expenditure for Christian Action Network's video and newspaper commentary was exempt from 2 U.S.C. §441b by 2 U.S.C. §431(9)(B)(I).
- If 2 U.S.C. §431(9)(B)(I) is interpreted to permit media corporations to have free political speech in newspapers and other media outlets, but to deny that right to others, 2 U.S.C. §431(9)(B)(I) constitutes an unconstitutional denial of equal protection of the laws.
- The Commission's investigation and all later action taken against Christian Action Network are fatally flawed, because of the Commission's unconstitutional composition.

Statement of the Case

A. Nature of the Case. In this case, contrary to the limits placed on the Federal Election Commision's authority by Congress, by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), and by every other court considering the issue, the Federal Election Commission (FEC or Commission) sought judicial punishment of issue-oriented speech made during the time of elections. Despite a string of judicial defeats on this issue, the FEC continues to subject peaceful political groups to litigation in a so-far futile quest for judges who will ignore the clear rule established by the Supreme Court in *Buckley* and who will judicially expand the FEC's jurisdiction to regulate protected speech.

In the Federal Election Campaign Act of 1971 as amended ("FECA"), Congress authorized the Federal Election Commission to regulate Federal election campaign expenditures by candidates, campaign committees, and by persons acting independently who spend money to

expressly advocate the election or defeat of a clearly identified candidate. Specifically applicable to this case, 2 U.S.C. §441b prohibits corporations[1] from making campaign expenditures; 2 U.S.C. §441d requires independent communications to disclose whether the communication was authorized by a candidate or political committee; and 2 U.S.C. §434(c) requires the filing of various reports of independent expenditures over a low threshold amount. However, the Federal Election Campaign Act cannot constitutionally regulate independent expenditures for speech unless there were "explicit words of advocacy of election or defeat of a candidate," *Buckley v. Valeo*, 424 U.S. 1 at 44, 46 L.Ed.2d 659 at 702, 96 S.Ct. 612 (1976). Congress recognized the express advocacy requirement in its later-enacted definition of "independent expenditure" in 2 U.S.C. §431(17).

B. Course of Proceedings. After exhausting the required administrative process before the FEC, the Commission brought this action in the District Court against Christian Action Network and Martin Mawyer seeking an injunction and seeking civil penalties. The United States District Court dismissed the case on motion after analyzing the extensive case law and finding that the video and newspaper advertisements did not contain explicit words of express electoral advocacy.

C. Statement of Relevant Facts. Christian Action Network ("CAN") is a non-profit Virginia corporation formed to educate and advocate on family values issues. J.A. at 8-9.[2] In 1992, Christian Action Network produced a video to promote itself addressing serious family values issues relating to the gay rights agenda. The full audio text of the promotional video was as follows:

> Bill Clinton's vision for a better America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and

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[1] This prohibition does not apply to certain nonprofit corporations pursuant to *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249, 93 L.Ed.2d 539, 551, 107 S.Ct. 616 (1986).

[2] Joint Appendix will be cited as "J.A. at ".

becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

J.A. Attachment (Videotape).

According to the complaint dismissed by the District Court, the Christian Action Network aired the video on various video media outlets from late September to November 2, 1992 (J.A. at 49), which was during a time of great public interest in issues raised by the presidential campaign. Copies of the advertisement were also sent to contributors to Christian Action Network. J.A. at 49.

After the Democratic National Committee sent letters to media outlets to stop the airing of the advertisements, Christian Action Network published two newspaper advertisements entitled, "An Open Letter to Gov. Bill Clinton, Democratic Presidential Candidate [and] Mr. Ron Brown, Democratic Party Chairman." (JA at 50-51, 62-63). These advertisements called upon then Governor Bill Clinton to repudiate his commitments to the "gay rights community" [JA at 62, 63

Summary of Argument

The advertisements at issue are protected by the First Amendment to the United States Constitution. Under the constitutional standard elucidated in all but one of the court cases (including two United States Supreme Court cases), the advertisements contain no "explicit words of express advocacy of election or defeat of a candidate" and therefore cannot be subject to regulation by the FEC, *i.e.*, *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 93 L.Ed.2d 539, 107 S.Ct. 616 (1986); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980); *FEC v. Colorado Republican Federal Campaign Committee*, 839 F.Supp. 1448 (D. Colorado 1993) *rev'd on other grounds* 59 F.3d 1015 (10th Cir. 1995) *petition for cert. granted*, ___ U.S. ___ (1/5/96); *Federal Election Commission v. Survival Education Fund, Inc. et al.*, unreported case no. 89 Civ. 0347, 1994 U.S. Dist. LEXIS 210 (U.S.D.C. S.D. N.Y. 1/12/94) *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995)(Copy of Dist. Ct. decision attached); *Faucher v. Federal Election*

Commission, 928 F.2d 468 (1st Cir. 1991) *cert. den. sub nom* ___ U.S. ___. 116 L.Ed.2d 52, 112 S.Ct. 79 (1991); *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979); *Federal Election Commission v. National Organization for Women*, 713 F.Supp. 428 (D.D.C. 1989); *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986).

Applying the standard set forth in the remaining case, *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) *cert. den.* 484 U.S. 850 (1987), the advertisements do not meet any of the prongs of the *Furgatch* court's three part test: (1) they are not "suggestive of only one plausible meaning," *i.e.*, advocacy of electoral defeat; (2) they present no "clear plea for [electoral] action"; and (3) it is not "clear what [electoral] action is advocated."

The Commission is entitled to no administrative deference in interpreting the United States Constitution. Certainly, no administrative regulations adopted in October 1995 can control Appellees activities undertaken three years before in 1992.

In the unlikely event that this Court finds the CAN promotional video and newspaper advertisement to be express advocacy, both communications were exempt from FECA as commentary "distributed through the facilities of" broadcasting stations and newspapers as provided in 2 U.S.C. §431(9). This being a penal action, 2 U.S.C. §431(9) must be strictly construed in Defendants-Appellees favor. Further, if 2 U.S.C. §431(9) were interpreted to permit some corporations (*i.e.*, media corporations) to have special rights to free speech that other corporations may not have, it would be a denial equal protection of the laws.

Furthermore, when it took actions that were a condition precedent to the bringing of this suit, the FEC was unconsitutionally constituted and thus, its actions then taken were void. This action therefore cannot validly be sustained.

Argument

I. The District Court correctly found that the promotional video and the newspaper advertisement did not constitute express advocacy.

A. The video and the newspaper advertisement in question are not expenditures that can constitutionally be regulated by the Federal Election Commission and are not statutorily regulated.

1. All reported Court decisions except one establish a bright line test for "express advocacy" which is a line the CAN advertisements do not cross.

In *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), the United States Supreme Court limited the term "expenditure" as used in the Federal Election Campaign Act to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80.

The *Buckley* Court specifically addressed the problem of issue advocacy during election times. The Court said,

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. *Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.* [Footnote 50 omitted.] In an analogous context, this Court in Thomas v. Collins, 323 U.S. 516, 89 L.Ed. 430, 65 S. Ct. 315 (1945), observed,
>
> "[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." Id., at 535, 89 L.Ed. 430, 65 S.Ct. 315.
>
> See also [Citations omitted].

The constitutional deficiency described in Thomas v. Collins can be avoided only by reading §608(e)(1) as limited to communications that include *explicit words*

> *of advocacy of election or defeat of a candidate....* We agree that in order to preserve the provision against invalidation, on vagueness grounds, §608(e)(1) must be construed to apply only to expenditures or communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.[52]

424 U.S. 1 at 42-44, 46 L.Ed.2d 659 at 701-702 (Emphasis added). Footnote 52 in *Buckley* reads,

> 52. This construction would restrict the application of §608(e)(1) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

After *Buckley*, Congress amended the Federal Election Campaign Act to limit FEC authority over independent expenditures to constitutional bounds:

> The term "independent expenditure" means an expenditure by a person *expressly advocating the election or defeat of a clearly identified candidate* which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. §431(17) (emphasis added).

The freedom to speak out on issues during campaigns without fear of prosecution is the very reason for the requirement that, to be regulated, the communication must contain explicit words of electoral advocacy. The CAN promotional video and the CAN newspaper advertisement address issues that are intertwined with the candidates. The promotional video informs about the candidates' views on an issue, but it contains no "explicit words of advocacy of election or defeat of a candidate." It urges only that people contact the Christian Action Network. The newspaper advertisement challenges the candidates to change their positions on the issues, but does not urge votes for or against the candidates. Therefore under *Buckley*, the Federal Election Commission has neither constitutional nor statutory authority over the CAN promotional video or the newspaper advertisement.

With one lonely exception discussed below, the FEC in its brief failed to discuss the rationale of any of the eight post-*Buckley* cases (including one Supreme Court case) that rule on express advocacy in the context of the Federal Election Campaign Act (although some were

cleverly cited for other propositions). The reason is simple: the rationale of those cases contradicts the FEC's desire to have this Court retreat from the bright-line test of *Buckley* and those later Supreme Court and lower court decisions.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 93 L.Ed.2d 539, 107 S.Ct. 616 (1986)("*MCFL*"), the Supreme Court emphasized the need for express words of advocacy to support the Federal Election Commission's regulatory jurisdiction. The Court specifically approved the *Buckley* requirement for the use of express words of advocacy:

> Buckley adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc. ....

38 at 249, 93 L.Ed.2d 539 at 551. In *MCFL*, the court found that a pamphlet that urges people to "vote for 'pro-life' candidates, but also identifies and provides photographs of specific candidates fitting that description" constituted express advocacy. 479 U.S. at 249, 93 L.Ed.2d at 551 (emphasis added).

Unlike the *MCFL* pamphlet, the CAN promotional video does not ask anyone to vote for or against the candidates mentioned. The video informs the viewer of the candidates' positions with which the viewer may agree or disagree. The promotional video urges the viewer to contact the Christian Action Network. Thus, the promotional video is precisely the type of free discussion of issues that the *Buckley* case approves--even during elections.

The newspaper advertisement is even further removed from advocacy for or against a candidate for election. The advertisement contains no words urging election or defeat of Messrs. Clinton and Gore. The newspaper advertisement challenges the candidates to dispute publicly any point made in the video and seeks a promise from the candidates to veto certain legislation if they get elected. The newspaper advertisement contained no "express words of advocacy of election or defeat," and was at most issue advocacy.

The CAN communications resemble the leaflet in *Federal Election Commission v. Central*

Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980). In that case, the Central Long Island Tax Reform Immediately Committee (CLITRI) published a leaflet criticizing the voting record of a local member of Congress. The leaflet did not refer to any Federal election or to the member's political affiliation or to his opponent. The court held that because the CLITRI leaflet did not expressly advocate the defeat or election of the Congressman, FECA did not apply to the leaflet. The court stated that the leaflet,

> contains nothing which could rationally be termed express advocacy ... there is no reference anywhere in the Bulletin to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambra.

616 F.2d 45 at 53.

Like the CLITRI leaflet, the CAN promotional video contains no reference to the party of Messrs. Clinton and Gore; to whether they are running for election; to the existence of an election; or to the act of voting; nor is there anything approaching an unambiguous statement in favor of or against the election of Messrs. Clinton and Gore. The CAN video simply is <u>not</u> express advocacy for or against candidates for federal election. The promotional video has the stated and obvious purpose of self-promotion, not electoral exhortation.

The same lack of words of electoral advocacy characterize the CAN newspaper advertisement. Although it identifies Mr. Clinton as the Democratic candidate for President, it also addresses Mr. Ron Brown of the Democratic National Committee, who was not running for any office. The newspaper advertisement pressures the Democratic party and the Democratic Presidential candidate to change positions on the <u>issues</u>. It does not ask the public either to vote for or against the candidate. Organizing public pressure for or against issues, as the advertisement does, is an activity over which the Commission has no constitutional authority.

In *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 839 F.Supp. 1448 (D. Colorado 1993) *rev'd on other grounds* 59 F.3d 1015 (10th Cir. 1995) *petition for cert. granted*, ___ U.S. ___ (1/5/96), the FEC brought suit against a political committee whose purpose was to advance the goals and values of the Republican party in

Colorado. The defendant committee had run a radio ad that said in pertinent part:

> ...I just saw ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapons system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts.

836 F. Supp. 1448 at 1451. The court found the advertisement to be a "coordinated expenditure" which is subject to regulation according to the Federal Elections Campaign Act if it is made "in connection with" a Federal campaign.[3] Analogizing to the "express advocacy" requirement for regulation of "independent expenditures" (at issue in the present case), the Court analyzed the advertisement as follows:

> The advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action. The advertisement concludes with the words, "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch*.
>
> . . .
>
> I do not believe this type of indirect urging constitutes "express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation.

839 F.Supp. 1448, 1455-1456 (D. Colo. 1993). Neither CAN advertisement contains a direct plea for electoral action.

In *Federal Election Commission v. Survival Education Fund, Inc. et al.*, unreported case no. 89 Civ. 0347, 1994 U.S. Dist. LEXIS 210 (U.S.D.C. S.D. N.Y. 1/12/94) *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995)(Copy of Dist. Ct. decision attached),

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[3] The FEC argued that the statutory "in connection with" language gave the FEC broader regulatory authority over "coordinated expenditures" than the express advocacy requirement for regulation of "independent expenditures." This was the basis for the Court of Appeals's reversal, but the Court of Appeals in a footnote stated that if it had not been a "coordinated expenditure," it would not have been express advocacy.

United States District Judge Thomas P. Grieza granted the defendants' motion for summary judgment dismissing the Commission's complaint. The Survival Education Fund (SEF) and the National Mobilization for Survival (NMS) sent out two letters during the 1984 presidential campaign that were highly critical of President Reagan on the U.S. involvement in Central America. One of the letters threatened retaliation at the ballot box unless President Reagan responded favorably to anti-war demands. The other contained a "1984 Election Survey" that started with the heading "Ronald Reagan: Four More Years?" and included a cover letter that stated that the expression of views "will help us understand the deep fears of the American People" about a second Reagan term. The letter promised protest events at the Republican political convention and up to election day. The FEC's suit alleged violations of §441b of the Federal Election Campaign Act based upon those letters. The Court in dismissing the FEC's case stated,

> It is clear from the cases that expressions of hostility to the positions of an official, implying that that official should not be reelected - even when that implication is quite clear - do not constitute the express advocacy which runs afoul of the statute. Obviously the courts are not giving a broad reading to the statute.

The CAN materials are much further from express advocacy than even the letters in *Survival Education Fund, Inc.*

The First Circuit Court of Appeals recently discussed the distinction between issue-oriented advocacy and express electoral advocacy. In *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991) *cert. den. sub nom* ___ U.S. ___, 116 L.Ed.2d 52, 112 S.Ct. 79 (1991), the Court held that a Commission regulation restricting corporate "issue advocacy" exceeded the Commission's statutory and constitutional authority. The court noted that the *Buckley* decision adopted a "bright-line test that expenditures must 'in express terms advocate the election or defeat of a candidate' in order to be subject to limitation." 928 F.2d 468 at 471. The court said,

> In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.

928 F.2d 468 at 472.

Neither the CAN promotional video nor the newspaper advertisement crossed this bright line. Neither said anything about electing or defeating candidates. The CAN video concludes with a request that the viewer contact Christian Action Network "for more information about traditional family values," Those words are preceded by, "Is this your vision for a better America?" Certainly the words "Is this your vision for a better America?" do not expressly advocate defeat. If the preceding content of the video had revealed the Clinton/Gore position on NAFTA (or any other issue), would those words have expressly advocated election or defeat? Certainly not. The viewer's reaction depends entirely on the viewer's preexisting preference, and no recommendation is urged by those words. The same is true of the newspaper advertisement. The words in neither cross the *Buckley* bright line. As a matter of law, neither constitutes express electoral advocacy.

Without belaboring the remaining express advocacy cases the FEC did not discuss, they may by summarized as follows: *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979)(Nixon-Ford poster with image of President Ford wearing "Pardon Me" button circulated to union members during 1976 campaign was not express advocacy.); *Federal Election Commission v. National Organization for Women*, 713 F.Supp. 428 (D.D.C. 1989)(Direct mail letters clearly identifying and criticizing candidates up for election without direct exhortation how to vote is not express advocacy).

In *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), the court upheld the FEC's finding that there were no impermissible corporate contributions where corporations sponsored a senior citizens picnic for a Congressman, saying

> Administrative exigencies mandate that the FEC adopt an objective, bright-line test for distinguishing between permissible and impermissible corporate donations....
>
> A subjective test based upon the totality of the circumstances would inevitably curtail permissible conduct.

795 F.2d 156 at 165.

Ironically, the Commission in *Oloski* successfully argued for a bright-line test and against

a totality-of-the-circumstances test--in sharp contrast to the present case.

2. The advertisements do not constitute express advocacy even under *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) *cert. den.* 484 U.S. 850 (1987)

In *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) *cert. den.* 484 U.S. 850 (1987), on which the Commission relies, Mr. Furgatch ran an advertisement during President Carter's reelection campaign that detailed President Carter's supposed continued transgressions against the public good and warned that "If he succeeds [to hide his record] the country will be burdened with four more years of" his transgressions. The advertisement exhorted the reader, "Don't let him do it." The Court found that the advertisement constituted express electoral advocacy. The Ninth Circuit articulated a three part test for express advocacy 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.

The express, "Don't let him do it" of *Furgatch* sharply contrasts with CAN's call to "Contact the Christian Action Network for more information on traditional family values" in the CAN promotional video. Neither CAN's video nor the newspaper advertisement contains an electoral "message that is unmistakable and unambiguous." Neither the CAN's video narration nor the picture mention any electoral action, much less a plea for electoral action. The CAN newspaper advertisement merely urges the candidates to retract their position on issues; it does not urge the voters to do anything with their votes. Neither the video nor the newspaper advertisement is "express advocacy" under the *Furgatch* decision.

Although the FEC wants to interpret the advertisements as electoral advocacy, there are other reasonable interpretations, such as: they mean exactly what they say they mean. The video informs the public about certain public issues and exhorts the viewer to contact the Christian

Action Network. The newspaper advertisement exhorted Bill Clinton to repudiate his stand on those issues. Neither exhorted the voter, unambiguously or ambiguously, to vote either for or against Bill Clinton.

Furgatch, if it does not exceed the bounds of the Supreme Court's explicit words test, at least struck the outer limit. The *Furgatch* court itself said about the Furgatch advertisement, "whether the advertisement expressly advocates the defeat of Jimmy Carter is a very close call." 807 F.2d 857 at 861. The CAN video and newspaper advertisements are much further from express advocacy, and the present case is not close.

The FEC's prosecution of CAN for civil penalties exceeds the limits of constitutional regulation of free speech. The District Court appropriately dismissed the action.

B. The FEC is not entitled to deference in its interpretation of the United States Constitution.

Both the FEC and *amicus* argue that the court should simply defer to the FEC's interpretation of express advocacy. They arrive at their argument circuitously. *Buckley* established the "explicit words of express advocacy" test to preserve the constitutional right of free speech. Congress then amended FECA, specifically the definition of "independent expenditure," to conform FECA to the Supreme Court's requirement. Now the FEC asks this court for deference in its interpretation of that amended statute, conveniently ignoring the fact that the right being protected is constitutional, not merely statutory.

The Supreme Court has consistently declined to defer to an administrative agency in the interpretation of a statute with the potential to encroach upon constitutional rights. In *Edward J. DeBartolo Corp v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988), the Court declined to defer to the National Labor Relations Board's (NLRB) interpretation of §8(b)(4) of the National Labor Relations Act (NLRA) that would have prohibited peaceful hand billing at a shopping mall, raising First Amendment concerns.

In *Lechmere, Inc. v. National Labor Relations Board*, 502 U.S. 527, 112 S.Ct. 841, 117

L.Ed.2d 79 (1992), the Supreme Court declined to defer to the NLRB's interpretation of §7 of the NLRA noting "we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning" quoting from *Maislin Industries, U.S., Inc. v. Primary steel, Inc.*, 497 U.S. ___, ___, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990). In *Lechmere*, the Court found that the Board too liberally failed to protect an employer's right to bar nonemployee organizers from the employer's premises, a right the Supreme Court had previously recognized subject only to a very limited exception.

Even more strongly in the present case, the FEC seeks to undermine three Supreme Court decisions supporting First Amendment rights to speak out on issues and permitting regulatory limitation only if "explicit words of electoral advocacy" are used. Not only is the FEC seeking deference on its interference with constitutional rights, it is seeking deference to promote a standard that conflicts (or at best differs) from the standard established by the Supreme Court. The FEC is not entitled to deference in this case.

In *Bell Atlantic Telephone Companies v. Federal Communications Commission*, 24 F.3d 1441 (D.C. Cir. 1994), the Federal Communications Commission adopted a regulation interpreting the Communications Act of 1934 to require local telephone companies to permit co-located equipment (competitor-owned equipment) in the local telephone company's facilities. The Court declined to defer to the regulation, because of the substantial constitutional questions raised.

Deference to the FEC in this case is neither required nor appropriate, because of the substantial constitutional question the FEC's position raises.[4]

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[4] As if to demonstrate just how irresponsibly this Court should expect the FEC to exercise any deference on First Amendment issues, the FEC's counsel cites an FEC advisory opinion that warns a commercial T-shirt vendor who wanted to sell election candidate t-shirts for profit, in the words of the FEC's brief, as follows:

> [T]he Commission warned that by "target[ing] the geographic area in which the referenced candidate is running," an advertisement that includes a phrase like "if you wish to support" along with a reference to where the purchaser lives would become an express invitation to support a particular candidate.

(continued...)

C. The FEC's October 1995 Regulation may not be applied to CAN's 1992 Advertisements.

This Court should not even consider the arguments to apply the later-enacted regulation retroactively, because the regulation could not apply to actions taken three years before and it intorduces issues of constitutionality collateral to the well-defined issues in this case. Furthermore, that regulation is currently the subject of a declaratory challenge to its consitutionality in the United States District Court for the District of Maine, Maine Right to Life Committee v. Federal Election Commission, Case no. 95-261-B, filed November 22, 1995.

The FEC's brief says that the FEC's position on the express advocacy issue has been consistent.[5] However, its position is one with which the courts have equally consistently disagreed. The FEC strives to blur the bright-line test established by the Supreme Court in *Buckley* and approved in *MCFL*. Only the *Furgatch* court in 1987 gave the FEC some of the totality-of-the-circumstances language that it wanted, while at the same time applying a very strict three-prong test (quoted above) that the FEC consistently ignores. Apparently in frustration over its lack of judicial success and unable to persuade any later court to agree with the FEC's partial *Furgatch* totality-of-the-circumstances test (and consistently refusing to acknowledge the *Furgatch* three-prong test), the FEC in October 1995 adopted a regulation to try to preserve the *Furgatch* language and administratively overrule *Buckley*, *MCFL*, *CLITRI*, *Faucher*, *Survival Education Fund*, *Colorado Republican Committee*, *National Organization for Women*, *American Federation of State, County and Municipal Employees*, and *Orloski*. To paraphrase Mr. Furgatch's

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[4](...continued)
FEC Brief at 21 discussing AO 1994-30, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶6129 (1994).

"'If you wish to support' candidate X, please buy our product," is clearly a commercial exhortation, not an electoral exhortation, thus demonstrating why the FEC cannot be trusted with deference to protect a constitutional right..

[5] The accuracy of this statement is questionable. See discussion of *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986) at page 11. The FEC's position in this case is the opposite of its position in *Orloski*.

advertisement: Don't let them do it!

Even assuming that the FEC may somehow amend Constitutional rights by regulation, the regulation adopted three years after the acts complained of cannot be enforced against CAN or Mr. Mawyer. The constitutionality of the regulation is currently the subject of a separate lawsuit pending in the District Court of the District of Maine. It is not an appropriate or necessary part of this case.

Even under the regulation if the court does consider it, the CAN promotional video and the newspaper advertisement fail to constitute express advocacy. The regulation uses a disjunctive test of (1) whether the *Buckley*-type words are present or (2),

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

11 C.F.R. §100.22.

The regulation silently rejects prongs two and three of the *Furgatch* three pronged test, each prong of which the *Furgatch* court required before a finding that speech was express advocacy. Prong 2 said that speech could only be termed advocacy if it presented a clear plea for electoral action. Prong 3 said that it must be clear what electoral action is advocated. 807 F.2d 857 at 864. So, the October 1995 regulation exceeds even the constitutional bounds set by the *Furgatch* court.

In Orwellian doublespeak, the FEC argues at page 35 of its brief that "a reasonable person standard creates an objective test that does not bend depending on the sensitivity or special ignorance of particular listeners." The reasonable man standard is an "objective" test only in comparison to a wholly arbitrary it-is-if-anyone-(no-matter-how-crazy)-thinks-it-is test. Compared to the bright-line test, the reasonable man standard is extremely subjective, failing to give clear guidance. The reasonable man standard is an invitation to litigation and would jeopardize free

speech--as warned against by the Supreme Court in *Buckley* (see quote at page 5 above).

In any event, even if the FEC were allowed to apply its 1995 regulation to 1992 conduct, the CAN promotional video and CAN newspaper advertisement do not constitute express advocacy under the 1995 regulation, because reasonable people could easily interpret the advertisements to be exactly what they purport to be. The CAN video is self-promotion, and the newspaper advertisement is an attempt to pressure a candidate on an issue.

D. The First Amendment cases in the FEC brief fail to address the issues in this case.

The First Amendment cases the FEC discussed in its brief address libel, flag burning, freedom of religion, and intellectual property (FEC Brief at 25-31, 32-33, 35-36), but except for *Furgatch*, the FEC ignores the many First Amendment express advocacy cases. Thus, the FEC's approach discloses the paucity of its argument. Under the test articulated in each of the many express advocacy cases decided by the courts, the CAN promotional video and the newspaper advertisement must remain unregulated.

E. The CAN promotional video and newspaper advertisement are not express advocacy.

Both the FEC brief and the *Amicus* brief give short shrift to the newspaper advertisement. The newspaper advertisement being unadorned by images is quite straightforward. There is no argument about reverse images, or ominous voices, or disturbing photos of gays on parade. It contains words only. Those words plainly disclose its purpose. It asks for then-candidate Clinton and then non-candidate Ron Brown to take action on issues. It contained no express (or for that matter, implied) exhortations to voters. It sought to pressure public political figures to action. Its speech was therefore wholly, squarely, and unequivocally issue-oriented speech entitled to the full protections of the First Amendment.

The FEC and *Amicus* bolster their arguments about the CAN promotional video in a way that they cannot with the newspaper advertisement, because the video includes visual and sound elements in addition to its words. Yet, it does contain words and those words explain the visual and sound. Those words communicate about important public issues that were admittedly

"intimately tied" to candidates, as foreseen by the *Buckley* Court. (See quote above at p. 5). Those words also plainly state the intent of the promotional video. After asking, "Is this your vision for a better America," the video exhorts the viewer to "Contact the Christian Action Network for more information on traditional family values." However unflattering the FEC believes the images were to Candidates Clinton and Gore, the words defined the purpose of the video, and that purpose was definitely not a "clear plea for [electoral] action" a la *Furgatch* nor did it contain "explicit words of express advocacy of election or defeat of a clearly identified candidate," as required by *Buckley*.

This court must therefore affirm the District Court's dismissal of the FEC's complaint.

II. Even if the promotional video and newspaper advertisement were express advocacy, the District Court's dismissal should be affirmed on other grounds raised in the motion to dismiss.

A. Any expenditure for Christian Action Network's video and newspaper commentary was exempt from 2 U.S.C. §441b by 2 U.S.C. §431(9)(B)(I).

2 U.S.C. §441b prohibits "any corporation" from making an "expenditure in connection with any election to any political office...." 2 U.S.C. §431(9)(A) exempts from the definition of "expenditure":

> "any ... commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication...."

In this case if the Court finds they contained electoral exhortations, both the video and the newspaper advertisement were "commentary" that were "distributed through the facilities of" broadcasting stations and a newspaper. Nothing in 2 U.S.C. §431(9) expressly limits the exemption to expenditures made by the corporation owning or operating the broadcasting or newspaper facilities.[6] If 2 U.S.C. §431(9) were so interpreted, it would be unconstitutional, as

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[6] In sharp contrast to Congress's language, the Michigan statute discussed in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 108 L.Ed.2d 652, 110 S.Ct. 1391 (1990), excludes from the definition of "expenditure" any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or (continued...)

discussed below.

Because CAN distributed its message "through the facilities of" broadcasting stations and a newspaper, any corporate expenditure was exempt from "expenditure" as used in 2 U.S.C. §441b and defined by 2 U.S.C. §431(9). The FEC therefore has no basis for suit, and the suit should therefore be dismissed.

The FEC sought civil penalties in this case. Therefore, this is an action under a penal statute and as such, the statute should be strictly construed. *Providence Steam-Engine Co. v. Hubbard*, 101 U.S. 188, 25 L.Ed. 786 (1879)(rule applied to state civil penal statute). Strictly construed, the statutory exemption means exactly what it says: that commentary "through the facilities of" the news media are exempt from the definition of expenditure and therefore exempt from the proscriptions the FEC seeks to enforce in this case.

B. If 2 U.S.C. §431(9)(B)(I) is interpreted to permit media corporations to have free political speech in newspapers and other media outlets, but to deny that right to others, 2 U.S.C. §431(9)(B)(I) constitutes an unconstitutional denial of equal protection of the laws.

As discussed above, 2 U.S.C. §431(9)(B)(I) excludes from FEC regulation expenditures for political speech "through the facilities of" media outlets. It is anticipated that the General Counsel will argue that 2 U.S.C. §431(9)(B)(I) protects only corporations that operate the media, not anyone else. Defendants-Appellees believe that it would be a denial of equal protection of the laws to afford the exemption from FEC regulation to only some, but not all corporations who communicate through printed or broadcast media. Although the Supreme Court rejected a similar argument under a state election law prohibition on corporate contributions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 108 L.Ed.2d 652, 110 S.Ct. 1391 (1990), by a 5 to 4 decision, Defendants-Appellees raise the issue in this court to preserve it for appeal and

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(...continued)
editorial in support of or opposition to a candidate for elective office... in the course of publication or broadcasting." *Austin*, 494 U.S. at 667, 108 L.Ed. 2d at 669 [emphasis supplied]. The Michigan statute thus creates an exempt class of spenders, as contrasted with the Federal Election Campaign Act's exemption of a manner of expenditure, *i.e.*, "through the facilities of...."

reconsideration by the Supreme Court, if necessary.

C. The Commission's investigation and all subsequent action taken against Christian Action Network are fatally flawed, because of the Commission's unconstitutional composition.

When the Commission made its "reason to believe" finding in 1992, it was constituted pursuant to 2 U.S.C. §437c(a)(1) which reads in part,

> The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

In *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 1993 U.S. App. LEXIS 27298 (D.C. Cir. 1993), *appeal dismissed for want of jurisdiction* ___ U.S. ___, 127 L.Ed.2d 206, 114 S.Ct. 1291 (12/6/94), the Court in which the FEC operates held that this composition violated the separation of powers doctrine, because the Secretary of the Senate and the Clerk of the House of Representatives sat on the Commission as *ex officio* members. Because its appeal was dismissed for want of jurisdiction, the order is final and binding on the FEC. The Federal Election Commission was thus unconstitutionally constituted when it issued its "reason to believe" finding and conducted its investigation in the present case.

The FEC argued to the District Court that its unconstitutional membership (the ex officio representatives from Congress) was severable from the constitutional membership, relying upon the severability statute and the decision of the D.C. Circuit. The severance in this case would involve the severance of words from a single sentence, not the severance of a statutory provision from the statutory scheme. In *Carter v. Carter Coal Co.*, 298 U.S. 238, 80 L.Ed. 1160, 56 S. Ct. 855 (1936), the Supreme Court considered consolidated appeals of several suits that challenged the constitutionality of the Bituminous Coal Conservation Act of 1935 ("BCCA"). The BCCA regulated coal prices and coal labor. After finding the labor provisions unconstitutional, the Court

found that, despite the severance clause of the BCCA, the coal price provisions were not severable, and were therefore invalid. Discussing application of the severability provision, the Court said.

> In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety--that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseverability, and create the opposite one of severability. ... But under either rule, the determination, in the end, is reached by applying the same test--namely, What was the intent of the lawmakers?
>
> Under the statutory rule, the presumption must be overcome by considerations which establish "the clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains," [citations omitted] or ... "the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part." [Citation omitted.]

298 U.S. 238 at 312-313, 56 S.Ct. 855 at 873.

Applying that test in this case, Congress expressed its discomfort with an Election Commission in which it had no voice (or at least, ear). The original enactment declared invalid in *Buckley* involved a Commission with two members appointed by the President with the advice and consent of the Senate and the House, and four members appointed by the President Pro Tempore of the Senate and the Speaker of the House. The *Buckley* Court stayed its decision 30 days to give Congress time to fix the problem. Congress responded by creating the unconstitutional Commission found in *NRA Political Victory Fund* that again included members (non-voting this time) representing Congress. Congress thus twice showed that it was very concerned about having a voice on the Commission and it seems likely that Congress would not be satisfied with a Commission on which it has no voice at all (as the Commission has supposedly "reconstituted itself").

Since *NRA Political Victory Fund*, the Federal Election Commission has argued that it "reconstituted itself"[7] by cutting the *ex officio* members out of the Commission's deliberations and

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[7] 58 Federal Register 59640 (November 10, 1993). This approach was suggested by the D.C. Court of Appeals *in dictum* in *NRA*.

(continued...)

process, in effect amending the Federal Election Campaign Act without benefit of Congressional action. It further claims to have ratified en mass all actions taken by the unconstitutionally constituted body. Although one District Court has agreed with the FEC in an unreported case, it makes little logical sense that an unconstitutionally constituted Federal Election Commission has the constitutional authority to reconstitute itself with membership that is contrary to 2 U.S.C. 437c(a)(1) as enacted by Congress. If Congress is willing to have an FEC without the *ex officio* members, that is Congress's prerogative (subject, of course, to the President's veto power). The Courts have no constitutional authority to amend legislation, just interpret it.

Assuming that the FEC could validly "reconstitute itself," the Federal Election Campaign Act has several procedural prerequisites to bringing suit. First, the Federal Election Commission must find "reason to believe" a violation of the Act occurred. 2 U.S.C. §437g(a)(2).* In this case, the Commission made that finding when it was unconstitutionally constituted.

The FEC argued to the District Court that the reason to believe finding is not a jurisdictional prerequisite to suit citing *Federal Election Commission v. National Rifle Association*, 553 F. Supp. 1331, 1334 (D.D.C. 1983)("*NRA 1983*"). That case stands for the opposite proposition. In *NRA 1983*, the NRA challenged the adequacy of the FEC's statutorily mandated conciliation efforts. The court said,

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(...continued)

* Which reads:

> If the Commission, upon receiving a complaint ... or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act ..., the Commission shall, through its Chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

[F]our steps are required under Section 437g of the Act, including:

(1) a determination that reasonable cause to believe a violation has occurred or is about to occur, and the provision of notice and an opportunity to comment to the respondent;

(2) investigation of the allegations by the FEC;

(3) a determination of probable cause that a violation has occurred or is about to occur after receiving a brief from general counsel and a response from the alleged violator; and

(4) an attempt for at least 30 days to correct or prevent the alleged violation by informal means of "conference, conciliation, and persuasion."

Then, *only after the FEC exhausts these steps*, and affirmatively votes, by at least 4 of its members, may the FEC "institute a civil action for relief...."

553 F. Supp. 1331 at 1332, 1333. Therefore, the failure of a "reason to believe" finding by an unconstitutional Commission destroys the jurisdiction for this action.

The FEC argued to the District Court that if the Motion were granted on this ground, the FEC may simply redo its process and bring the action again. Defendants hope that a second time around, someone on the Commission will exercise common sense and recognize that the FEC's case lacks merit, particularly on the express advocacy issues.[9]

In *Federal Election Commission v. Legi-Tech, Inc.*, case no. 91-0213 (U.S.D.C. D.C. 10/12/94)(copy attached), the Court held that *NRA Political Victory Fund* applied to pending cases. Legi-Tech, Inc. was a respondent in a pending case before the unconstitutional Commission.[10] 2 U.S.C. §437g requires the Commission to make a "reason to believe" finding as a condition precedent to conducting an investigation. As a matter of public policy, that procedure is designed to protect innocent parties, such as Respondents, from ill-advised enforcement actions. In this case, the Commission acted unconstitutionally with its improper *ex*

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[9] The FEC's brief suggests that there is no reason to believe that a different result would occur if the case were returned to the Commission. Is the exercise of common sense by the Commission really too much to hope for?

[10] The Complaint at paragraph 6 says that the "reason to believe" finding was made October 20, 1992, a year before *NRA* was decided. J.A. at 44.

officio members tainting the entire proceeding. This matter must therefore be dismissed, because the Commission lacks the standing to bring the action without validly following the statutory procedures for its investigation.

Furthermore, even if the Commission could somehow reconstitute itself without an Act of Congress, its wholesale ratification of all pending actions was deficient. Without a case-by-case evaluation of the ratified actions, it is doubtful that the blanket ratification cures the constitutional infirmity inherent in the previous actions. By its purported blanket ratification, the Commission simply thumbs its nose at the courts and fails to correct the problem, because all the allegedly ratified actions were already tainted by the unconstitutional make-up of the Commission when they were taken. Thus the Commission's blanket ratification is ineffective to make constitutional its unconstitutional actions.

Conclusion

The Court can properly come to only one conclusion in this matter: the case should be dismissed. Because the CAN video and newspaper advertisement contain no words of express advocacy for candidates' election or defeat, allowing this suit to continue would perpetuate the very evil the Supreme Court sought to avoid by its bright-line test established in *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976). The Federal Election Campaign Act does not, and constitutionally cannot, regulate CAN's advertisements. The Court should affirm and dismiss this case.

Even if CAN's speech were "express advocacy," because they were "commentary" that was "distributed through the facilities of" broadcasting stations and a newspaper pursuant to 2 U.S.C. §431(9)(B)(I).

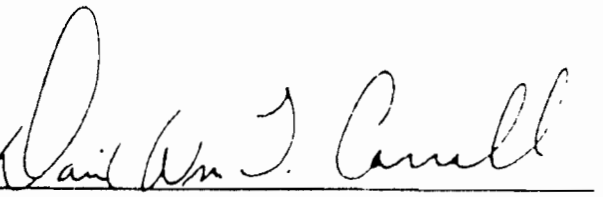
Furthermore, the FEC has no standing to bring this action, because the Commission at all relevant times was unconstitutionally constituted, as found by the United States Court of Appeals for the D.C. Circuit in *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 1993 U.S. App. LEXIS 27298 (D.C. Cir. 10/22/93). Thus, the Commission's "reason to believe" finding and subsequent investigation and filing of this action have been tainted by the

unconstitutional composition of the Commission. The Commission therefore lacks legal standing to bring this action, because the statutory prerequisites to the Commission's suit were invalid.

Defendants-Appellees respectfully request the Court to affirm the District Court's dismissal of the FEC's complaint with prejudice.

Dated January 16, 1996

Respectfully submitted,



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