UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2600

FEDERAL ELECTION COMMISSION,

Appellant,

v.

CHRISTIAN ACTION NETWORK, INC., and
MARTIN MAWYER

Appellees.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal from a final judgment of the United States District Court for the Western District of Virginia under 28 U.S.C. §§ 1291, 1294(1) and 2 U.S.C. § 437g(a)(9). The district court's jurisdiction was based upon 2 U.S.C. § 437g(a)(6) and 28 U.S.C. §§ 1331, 1345.

ISSUE PRESENTED

Whether the district court erred when it dismissed the Commission's complaint alleging a violation of 2 U.S.C. § 441b, finding that the appellees' political advertisements aired and published shortly before the presidential election of 1992 did not expressly advocate the defeat of William Jefferson Clinton.

APPLICABLE STATUTES AND REGULATIONS

Selected statutory provisions and regulations are

reproduced in an addendum bound with this brief.

STATEMENT OF THE CASE

A. The Statutory Framework

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States government empowered with exclusive jurisdiction with respect to the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-55. Congress empowered the Commission to "formulate policy with respect to" this statute, 2 U.S.C. § 437c(b)(1), gave it broad authority to administer it, see, e.g., 2 U.S.C. §§ 438(a), (b), and authorized it to make "such rules . . . as are necessary to carry out the provisions" of this statute, 2 U.S.C. §§ 437d(a)(8), 438(a)(8). With one very limited exception, the Commission has exclusive authority for initiating civil actions to enforce the Act. 2 U.S.C. § 437d(e). If the Commission finds reason to believe a violation of the Act has occurred, it investigates the alleged violation and, if it finds probable cause to believe a violation occurred and if conciliation fails, it is authorized to pursue civil enforcement litigation. 2 U.S.C. § 437g.

The Act generally prohibits corporations from using corporate treasury funds to finance contributions and expenditures in connection with federal elections. Specifically, 2 U.S.C. § 441b(a) makes it "unlawful . . . for any corporation whatsoever . . . to make a contribution or expenditure in connection with any election" for Federal office. 2 U.S.C. § 441b(a). Pursuant to 2 U.S.C. § 441b, it is also unlawful for any corporate officer to consent to any

contribution or expenditure prohibited by 2 U.S.C. § 441b(a).

The Act, however, allows corporations to make contributions and expenditures in connection with federal elections through a statutory exception to section 441b. This provision permits corporations to use corporate treasury funds to establish and administer a "separate segregated fund to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C).[1] Such a separate segregated fund, commonly known as a political action committee or "PAC," can solicit and receive voluntary contributions from corporate employees and stockholders, from members of a membership corporation, and from their families. 2 U.S.C. § 441b(b)(4)(A)-(C). These funds can be contributed to federal candidates or used to pay for independent expenditures to communicate to the general public the corporation's views on candidates for federal office.

Whenever any person, including a corporate PAC, makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication must clearly state the name of the person who paid for the communication and whether or not the communication was authorized by any candidate or any political committee of a candidate or its agents. 2 U.S.C. § 441d. In addition, if such a communication is not so authorized, the sponsor (unless it is a political committee already registered and reporting to the Commission), must file a

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1. A separate segregated fund "may be completely controlled" by its sponsoring or connected organization. "The 'fund must be separate from the sponsoring union [or corporation] only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." FEC v. National Right To Work Committee, 459 U.S. 197, 200 n.4 (1982) (quoting Pipefitters v. United States, 407 U.S. 385, 414-417 (1972)).

report on the financing of the expenditure with the Commission, for disclosure to the public. 2 U.S.C. § 434(c).[2]

B. Procedural History

On October 20, 1992, the Federal Election Commission found reason to believe, pursuant to 2 U.S.C. § 437g(a)(1), that the Christian Action Network, Inc. ("CAN") and Martin Mawyer had violated the Act, and initiated an investigation. Joint Appendix ("J.A.") 44. On October 27, 1992, the Democratic National Committee filed an administrative complaint with the Commission against CAN (id.), and the Commission merged this complaint into the first investigation. On April 19 and September 9, 1994, the Commission found probable cause to believe, pursuant to 2 U.S.C. § 437g(a)(4), that the appellees had violated the Act and thereafter attempted to resolve the matter through conciliation (J.A. 45-46).

After conciliation attempts failed, the Commission voted, pursuant to 2 U.S.C. § 437g(a)(6), to authorize the initiation of a civil suit for relief in federal district court against the appellees (J.A. 46), and the complaint was filed on October 18, 1994 (J.A. 41-62). The complaint alleged, inter alia, that CAN violated the statutory prohibition against corporate expenditures in connection with federal elections, 2 U.S.C.

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2. Section 434(c) requires persons (other than political committees) who make independent expenditures totaling in excess of $250 during a calendar year to file statements containing certain information regarding those independent expenditures for disclosure to the public at the Commission. Section 434(c) also requires any persons that make independent expenditures aggregating $1,000 or more after the twentieth day, but more than 24 hours, before any election to report those expenditures ("24 hour notifications") within 24 hours after such independent expenditures are made. The Act's definition of "person" includes corporations. 2 U.S.C. § 431(11).

§ 441b(a), by using general corporate treasury funds to pay for its advertisements advocating the defeat of Bill Clinton in the 1992 presidential election; that Mawyer violated the Act by consenting to those corporate expenditures; and that CAN failed to include the disclosure statements required by 2 U.S.C. § 441d on some of its advertisements and to file public disclosure information about its expenditures with the Commission that is required by 2 U.S.C. § 434(c) (J.A. 47, 53, 55-57).

C. CAN's Corporate Expenditures Against the Clinton Candidacy

As the district court found (J.A. 8-9), the Christian Action Network:

> is a nonprofit corporation created in 1990 under the laws of the Commonwealth of Virginia. CAN is a grassroots organization that seeks to inform the public about issues which it believes affect "traditional Christian family values." During the weeks leading up to the November 3, 1992 presidential election, CAN spent approximately sixty-three thousand dollars, ($63,000.00), from its general treasury fund to produce television and print advertisements. These advertisements assailed what the [appellees] believed to be the militant homosexual agenda of the Democratic candidates for president and vice-president. . .

Thus, CAN spent more than $250 on independent expenditures in connection with its television and newspaper advertisements during the 1992 calendar year (J.A. 56), and it also spent much more than $1,000 on independent expenditures in connection with the television and newspaper advertisements between October 15, 1992 and the general election on November 3, 1992 (J.A. 57). CAN did not, however, file any statements or 24 hour notifications regarding its independent expenditures as required for expenditures exceeding those amounts by 2 U.S.C. § 434(c) (id.).

1. Television Advertisement

The television ad was a 30-second video[3] entitled "Clinton's Vision For A Better America." As the district court found, the ad "'clearly identified' candidates Clinton and Gore and [was] negative of the positions they held with respect to homosexual rights" (J.A. 30). The negative ad aired at least 250 times on broadcast television stations and cable television channels in at least 24 cities nationwide beginning in late September 1992 and ending on November 2, 1992, the day before the presidential election (J.A. 49). Videotape copies of the advertisement also were sent by appellees to some CAN contributors (id.).[4]

The video opens with a life-like full-color photograph of presidential candidate Bill Clinton's face superimposed upon color images of a rippling American flag (J.A. 87, photo 1). As the district court found (J.A. 9):

> Clinton is shown smiling and the ad appears to be complimentary. However, as the narrator begins to describe Clinton's alleged support for "radical" homosexual causes, Clinton's image dissolves into a black and white photographic negative. The negative darkens Clinton's eyes and mouth, giving the candidate a sinister and threatening appearance. [J.A. 87-88, photos 1 and 2[5]]. Simultaneously, the music accompanying the commercial changes from a single high pitched tone to a lower octave.

The video then abruptly cuts to various clips of people,

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3. References herein to "video" signify a communication that includes both sound and moving pictures, as opposed to still images, radio ads, printed messages, etc.

4. A copy of the video has been filed with this Court as part of the Joint Appendix.

5. Photos 1 through 8 (J.A. 87-94) are snapshots from the video which were professionally transferred from videotape.

apparently gay men and lesbians, participating in a political march (J.A. 89-93, photos 3-7). As images of homosexuals are shown, the announcer lists purported campaign proposals by candidates Clinton and Gore to expand homosexual rights, including proposals to "allow[] homosexuals in the armed forces" and to give homosexuals "special civil rights" (J.A. 10). This narration is accompanied by short printed subtitles summarizing the proposals which are allegedly "Bill Clinton's vision for America" (J.A. 89-92, photos 3-6). The images include men wearing black leather and metal-studded clothing and accessories. One gay couple appears in the center of the image captioned, "Homosexuals in the Armed Forces" (J.A. 91, photo 5). The first man, naked from the waist up, is smiling and has a knotted rope around his neck. His companion is wearing a black leather vest, and has one arm around the first man's shoulder while his other hand holds the end of the rope below his waist (id.).

While the scenes from the march continue, the announcer asks rhetorically, "Is this your vision for a better America?" (J.A. 10). The television advertisement then concludes with the same full-color image of a rippling American flag that opened the commercial, but without the superimposed image of Clinton; instead, the name and address of the Christian Action Network appear over the flag (J.A. 94, photo 8). The threatening tones fade and disappear until only a single, steady low tone remains (J.A. 78-79). The narrator then states, "For more information about traditional family values, contact the Christian Action Network" (J.A. 10).

2. Newspaper Advertisements

After the video had been airing for approximately two weeks, including many appearances in the Richmond area, appellees placed a full page newspaper advertisement (J.A. 63), which appeared in the Richmond Times-Dispatch on October 15, 1992 (J.A. 50). This date coincided with a presidential debate among the 1992 presidential candidates, including Bill Clinton, in Richmond, Virginia (id).

The October 15 newspaper ad, entitled "An Open Letter To: Gov. Bill Clinton, Democratic Presidential Candidate [and] Mr. Ron Brown, Democratic Party Chairman," specifically refers to the presidential campaign and that evening's nationally televised presidential debate in Richmond. (J.A. 63). The newspaper advertisement, which identifies itself as a "Paid Political Advertisement," opens by stating:

> The Christian Action Network is now airing television ads in Richmond, VA informing the voting public of Gov. Bill Clinton's support of the "gay rights" political agenda.
>
> The voting public has a right to know that Gov. Bill Clinton's agenda includes (1) job quotas for homosexuals, (2) special civil rights laws for homosexuals and (3) allowing homosexuals in the U.S. Armed Forces.

J.A. 63. After reciting what are described as Clinton campaign proposals to grant homosexuals special civil rights, including several actions that Clinton purportedly would take if elected President, the advertisement "call[s] upon Gov. Clinton to clearly state his position on gay rights" and tells Clinton, to whom the advertisement is addressed, that "[w]hen the Clinton/Gore campaign committee publicly and unequivocally retract their commitments to the 'gay rights' community, the Christian Action Network will halt its television campaign"

against them. Id. The advertisement states that it was "paid for by the Christian Action Network, Brad Butler, Treasurer," but does not indicate whether or not it was authorized by any candidate or committee. Id. Thus, neither the video nor the October 15 newspaper advertisement financed by CAN states whether or not it was authorized by a candidate for federal office or any committee of such candidate or its agents (J.A. 55).

Appellees placed another full-page newspaper advertisement in the Washington Times on October 26, 1992, eight days before the election (J.A. 64). This advertisement is entitled "Since You Did Not Respond to Our Ad in Richmond; An Open Letter To: Gov. Bill Clinton, Democratic Presidential Candidate [and] Mr. Ron Brown, Democratic Party Chairman." Id. It is identical to the prior advertisement in all material respects, except that it contains a statement that it was not authorized by any candidate; the advertisement is not, however, denominated a "Paid Political Advertisement" (J.A. 52).

D. The District Court Decision

On June 28, 1995, the district court dismissed the Commission's action, finding that the "advertisements at issue do not contain explicit words or imagery advocating electoral action. . . . Therefore, the ads are fully protected as 'political speech' under the First Amendment. Their financing is not governed by FECA and the FEC lacks jurisdiction to bring this suit" (J.A. 8).

The court concluded that the advertisements "clearly identified" the 1992 Democratic presidential and vice-presidential candidates, and that they were "openly hostile

to the proposals believed to have been endorsed by the two candidates" (J.A. 18). The court held, however, that "[w]ithout a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute 'express advocacy' as that term is defined in Buckley and its progeny" (J.A. 19).

The court found "suspect" the Commission's argument that unambiguous imagery, and not only words, could satisfy the constitutional requirement of "express advocacy" (J.A. 23 & n.12). Without citation, the court stated that "messages conveyed by imagery are susceptible to even greater misinterpretation than those that are conveyed by the written or spoken word," and the court thus refused to "accept the FEC's invitation to delve into the meaning behind an image" (J.A. 27). The court also declined to give any weight to the context provided by the timing of the advertisements, i.e., shortly before the presidential election and in conjunction with the presidential debate in Richmond (J.A. 28-29).

SUMMARY OF ARGUMENT

Under § 441b of the Act, corporations are generally prohibited from using corporate treasury funds to finance federal campaign contributions and expenditures, although they can finance such contributions and expenditures with "separate segregated funds" made up of voluntary individual contributions other than corporate funds. To avoid constitutional concerns about possible vagueness and overbreadth, the Supreme Court has construed the prohibition on independent expenditures to be applicable only to communications that expressly advocate the election or defeat of a clearly identified candidate.

The Christian Action Network's television advertisement expressly advocated the defeat of Bill Clinton in 1992 and is therefore subject to regulation under the Act. This provocative video unmistakably exhorted viewers to vote against Clinton through words, graphic imagery, and other communication techniques. Although its message may have been less literal than "vote against Clinton," its express electoral message was more powerful and unambiguous. Therefore, under 2 U.S.C. § 441b, CAN could only finance this ad through a separate segregated fund, not with funds from its corporate treasury.

The Supreme Court devised the express advocacy standard in Buckley v. Valeo, 424 U.S. 1 (1976), to avoid constitutional concerns of vagueness and overbreadth, but those concerns have been greatly reduced by amendments to the Act and the Commission's longstanding interpretation of "express advocacy." Any person may now request an advisory opinion from the Commission about intended campaign activities, and the Commission has specifically explained its construction of express advocacy in response to such requests. The Commission's interpretation, which involves construing an ambiguous statutory term and is consistent with Supreme Court and other circuit precedent, is entitled to deference. That interpretation has recently been codified in a regulation. Besides phrases such as "vote for" or "defeat," express advocacy includes communications that, when taken as a whole and with limited reference to external events, unambiguously encourage the election or defeat of a clearly identified candidate.

A video advertisement in opposition to a candidate need not employ any specific set of "magic words." The Supreme Court

has not required the use of such words or limited express advocacy to any particular medium of expression. The Court's rulings have left ambiguity, but they clearly allow express advocacy to include indirect electoral communications as long as they are unambiguous. Under the First Amendment, figurative and symbolic speech can be synonymous with literal speech, and the courts have not hesitated to construe language and symbols according to their common understanding. In analogous contexts, the courts have even recognized that non-verbal visual associations can be more important, both factually and legally, than literal text.

Under the express advocacy test, messages must be taken as a whole with limited reference to external events. Words and symbols may have different meanings depending upon when and how they appear to their audience, and Buckley itself included examples of express advocacy that relied upon the unstated context of an election campaign. Consistent with Buckley and other First Amendment rulings, a communication must also be evaluated from the objective perspective of a reasonable person.

CAN's video unmistakably encouraged voters to defeat Bill Clinton in the upcoming election. In the video, CAN is self-identified as a group espousing Christian, heterosexual, and traditional family values, and Bill Clinton is depicted as having a "vision for America" supporting the agenda of the radical wing of the gay rights movement. Clinton's image is "negated" through photographic techniques, and his alleged agenda is relevant only to his status as a candidate for president. The video is highly provocative, and that quality is relevant because it constitutes a special kind of charged

rhetoric that overpowers the kind of message that mere words can convey. Ordinary viewers seeing that a "Christian" group has deliberately chosen to broadcast -- shortly before election day -- provocative images of gay men parading in black leather clothing, could not fail to understand that the video is espousing extreme measures to prevent Clinton from implementing his national agenda. Because that agenda could be implemented only if Clinton became president, the video unambiguously encouraged viewers to vote against him.

The video goes far beyond mere issue advocacy, and subjecting it to regulation under the Act treads upon none of the policy concerns underlying the Supreme Court's express advocacy requirement. When the ad was aired, Clinton was not an incumbent president but the governor of Arkansas. He had no authority to implement his agenda in the viewers' jurisdictions, and the video makes no direct or implied reference to referenda or other policy debates in the viewers' home states. Instead, the video refers explicitly to national concerns that were relevant only to Clinton's candidacy for president, such as his alleged commitment to permit homosexuals to serve in the armed forces. Its explicit focus was on Clinton's presidential campaign agenda, not a more general discussion of gay rights.

ARGUMENT

This case involves a provocative television ad aired shortly before the 1992 presidential election, instantly recognizable by any voter as a negative ad against the candidacy of Bill Clinton. As the district court noted, "[o]ver the past decade political advertising has taken on an increasingly derisive tone. More and more, at both the state and federal

levels, advertisements are disseminated for the purpose of stirring emotion rather than provoking lucid political discussion" (J.A. 30). Although CAN's video did not use any "magic" words or phrases such as "vote against," such literalism was unnecessary. This unmistakable, unambiguous communication expressly advocated the defeat of Bill Clinton through more powerful -- though marginally less direct -- words, images, and sounds. While the district court apparently recognized that this video "stirr[ed] emotion" rather than provoking genuine discussion of political issues, by applying an unduly rigid interpretation of the Supreme Court's holdings on "express advocacy," the court erred by disregarding the express electoral message that was unmistakable to any ordinary viewer who saw this ad during the few days or weeks leading up to election day.

I. STANDARD OF REVIEW

The district court's dismissal of the Commission's action is subject to de novo review before this Court. Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 & n.16 (4th Cir. 1992), cert. denied, 114 S.Ct. 93 (1993). Because the case was decided on a motion to dismiss, the governing standard is that the Commission's action should not be dismissed unless it appears certain that the Commission can prove no set of facts which would support its claim and would entitle it to relief. Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134 & n.4 (4th Cir. 1993), cert. denied, 114 S.Ct. 1307 (1994). In this regard, the Court must accept as true all well-pleaded allegations and must view the complaint in the light most favorable to the Commission. Id.; Republican Party, 980 F.2d at 952.

II. THE COMMISSION'S INTERPRETATION OF EXPRESS ADVOCACY IS CONSISTENT WITH THE REASONING AND HOLDING OF BUCKLEY, AND IS ENTITLED TO DEFERENCE

A. The Express Advocacy Standard Was Formulated to Avoid Unconstitutional Vagueness or Overbreadth

The Supreme Court has held that, for constitutional reasons, expenditures by corporations that are made independent of any coordination with a candidate are prohibited by section 441b only if they "expressly advocate the election or defeat of a clearly identified candidate." FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 248-49 (1986) (quoting Buckley v. Valeo, 424 U.S. 1, 80 (1976)). The Supreme Court originally used this express advocacy standard in Buckley to narrowly construe two provisions of the Act that did not involve corporate expenditures in order to avoid problems of vagueness in regulating public political dialogue. Buckley, 424 U.S. at 39-44, 80-84. To ensure that those provisions would not be applied so expansively as to interfere with public discussion of issues in addition to covering "advocacy of a political result," Buckley, 424 U.S. at 79, the Court construed them "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80.

The Court explained that:

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42. The purpose of the express advocacy standard was to avoid these problems by limiting the statute's

application to "spending that is unambiguously related to the campaign of a particular federal candidate." Id. at 80. The express advocacy concept thus was designed to ensure that communications devoted to issues that are closely associated with particular politicians who are also candidates are not subject to the Act's requirements simply because discussion of such issues may often include reference to those politicians. 424 U.S. at 42.

Of course, the "express advocacy" test is only relevant in this case because CAN paid for its advertisements with its corporate funds and has never established a separate segregated fund. On its face, section 441b of the Act broadly prohibits the use of corporate funds to make any "contribution or expenditure in connection with any [federal] election." The Act does not, however, actually preclude corporations from making contributions or expenditures, but instead requires that they be financed from a separate fund comprising voluntary donations for that purpose from stockholders or members of the corporation, rather than from the corporate treasury. 2 U.S.C. § 441b(b)(2)(C). The Act "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990). Thus, finding a violation of § 441b in this case would not mean that CAN would have been barred from airing its advertisement if it had followed the law; CAN could still have made independent expenditures for express advocacy if they had been financed through a separate segregated fund rather than its corporate treasury. The Supreme Court has

"recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.'" Id. at 659 (quoting FEC v. National Conservative Political Action Committee, 470 U.S. 480, 500-01 (1985)).

B. Subsequent Statutory and Administrative Developments Have Reduced the Potential Chilling Effects that Motivated the Decision in Buckley

After Buckley was decided, the FECA Amendments of 1979[6] removed a major impediment to the Commission's ability to eliminate unconstitutional vagueness in the Act's application. Buckley had rejected the suggestion that the Commission's advisory opinion mechanism would remedy any statutory ambiguity only "because the vast majority of individuals and groups subject to criminal sanctions for violating" the statute were outside the limited class of candidates and political committees that were then authorized to obtain such opinions. 424 U.S. at 40-41 n.47. In the FECA Amendments of 1979, however, Congress specifically broadened the provision to authorize the advisory opinion requests from any "person," 2 U.S.C. § 437f(a)(1), and as the District of Columbia Circuit has concluded, "[w]hen a means like this one is available to reduce uncertainty or narrow the statute's reach . . . the chill induced by facial vagueness or overbreadth is pro tanto reduced." Martin Tractor Co. v. FEC, 627 F.2d 375, 386 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980).[7] See also Seagram & Sons v. Hostetter, 384 U.S. 35, 49

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6. Pub. L. No. 96-187, § 107, 93 Stat. 1358 (1980).

7. The Martin Tractor court (627 F.2d at 386 n.44) explicitly addressed the Supreme Court's rejection of the Commission's advisory opinion mechanism as a "means of saving the Act's expenditure limitations from unconstitutional vagueness . . . . [T]he Supreme Court . . . not[ed] that

(1966); United States v. Sun and Sand Imports, 725 F.2d 184, 187 (2d Cir. 1984) (rejecting vagueness challenge where "the agency is willing to give pre-enforcement advice").

As discussed in detail below (infra pp. 23-24), the Supreme Court's own decision in MCFL made it clear that the constitutional concerns addressed in Buckley did not require the rigid application of the "express advocacy" test used by the district court. Indeed, as the Ninth Circuit indicated in FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir.), cert. denied, 484 U.S. 850 (1987), courts must take care to avoid an unnecessarily narrow application of express advocacy to prevent "eviscerating the Federal Election Campaign Act" (see discussion infra pp. 24, 30-31, 33).

Relying upon these precedents and others, the Commission's advisory opinions and recent regulation have clarified the express advocacy standard, and the Commission's construction is entitled to deference. As explained below (infra pp. 22-24), the Supreme Court's "express advocacy" interpretation of Section 441b's statutory prohibition on corporate expenditures is not unambiguous. In addition, the phrase "express advocacy" was added to the Act after Buckley was decided, and it now appears in the statutory definition of "independent expenditure." 2 U.S.C § 431(17); Pub. L. No. 96-187, § 101, 93 Stat. 1344-45. Thus, although the term "express advocacy" was initially "added by the Supreme Court as a means of interpreting the statutory

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(Footnote 7 continued from previous page)
advisory opinions were available only to a few specified individuals and groups and that they were not required to be issued except within a reasonable time. [424 U.S.] at 40 n.47. Both these aspects of the AO mechanism have been amended and the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced."

term 'expenditure' to avoid constitutional overbreadth difficulties" and is thus "not a matter of pure statutory construction," FEC v. Survival Education Fund, Inc., 65 F.3d 285, 290 n.2 (2d Cir. 1995) (emphasis added), nothing in Buckley or MCFL overrides the normal deference owed to the Commission's interpretation of an ambiguous statutory term, as long as the interpretation is constitutional.[8]

The recent decision in Akins v. FEC, 66 F.3d 348 (D.C. Cir. 1995), addressed a nearly identical situation and afforded deference to the Commission. In that case, the statutory term at issue was "political committee," which, like "expenditure" in § 441b, had a statutory definition that the Supreme Court significantly narrowed for constitutional reasons by creating a "major purpose test." In construing the term "political committee," the Commission interpreted the Supreme Court's "major purpose test" and the District of Columbia Circuit found that the Commission's application of that test was entitled to the usual Chevron deference (id. at 355).

Here, because the meaning of the statute remains unclear -- even with the addition of the Supreme Court's "express advocacy" test -- a "reviewing court should accord deference to the Commission's rationale." FEC v. National Republican Senatorial Committee, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (citing Democratic Congressional Campaign Committee v. FEC, 831

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8. Lechmere, Inc. v. NLRB, 112 S.Ct. 841, 847-48 (1992), is not to the contrary. The Commission's interpretation clearly must be judged against the Supreme Court's prior interpretations of the Act, but to the extent the Supreme Court's decisions have left questions unanswered, the statute remains silent or ambiguous regarding a precise question at issue and falls squarely within the area in which deference is required under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984).

F.2d 1131, 1135 n.5 (D.C. Cir. 1987)). The Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee ("DSCC"), 454 U.S. 27, 37 (1981). Accord Common Cause v. FEC, 842 F.2d 436, 448 (D.C. Cir. 1988) ("Deference is particularly appropriate in the context of the FECA").

The Commission's consistent interpretation of "express advocacy," evidenced inter alia by its successful position in Furgatch and its advisory opinions ("AOs"), has recently been codified in a final regulation. 60 Fed. Reg. 52069 (1995); 60 Fed. Reg. 35292-35306 (1995). In AO 1991-32, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6048 at p. 11,792 (1991) (citing Furgatch), the Commission explained that "[e]xpress advocacy . . . is not strictly limited to communications using certain key phrases. . . . Comments must not be considered in isolation; speech must be considered as a whole, and with limited reference to external events." Similarly, in AO 1992-23, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6064 (1992), the Commission reviewed several proposed radio and newspaper ads that satirically criticized Congressman Beryl Anthony. The ads did not contain literal exhortations to "vote against" or "defeat" Congressman Anthony, but "'when read as a whole, and with limited reference to external events, [were] susceptible of no other reasonable interpretation but as an exhortation to vote . . . against a specific candidate.'" Id. at p. 11,822 (quoting Furgatch, 807 F.2d at 864). Although the ads included discussion of public issues, they were not "simply issue discussion" because their content and timing made their advocacy of the defeat of Mr.

Anthony unambiguous (id.). The advertisements were run in "close proximity" to the election (id. at pp. 11,822-23), and the use of satire and metaphors effectively communicated an unmistakable message against the election of Mr. Anthony.

In AO 1994-30, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6129 (1994), the Commission found the context in which a commercial T-shirt vendor advertised its wares to be extremely important. Although advertising the mere sale of T-shirts that carried messages of express electoral advocacy would not by itself be an independent expenditure, the Commission warned that by "target[ing] the geographic area of the purchaser, i.e., to persons who are likely voters in the 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. Id. at p. 12,016. See also AO 1992-6, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6043, at p. 11,772 (1992) (noting the importance of the timing of a candidate's speech in relation to an upcoming presidential primary).

The Commission's new rule defining "express advocacy" became final on October 5, 1995. 60 Fed. Reg. 52069 (1995); 60 Fed. Reg. 35292-35306 (1995).[9] The rule does not strike new ground, but clarifies ambiguity and codifies prior advisory opinions and judicial interpretations, including Buckley, MCFL, FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S.

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9. This rule did not become final until after it was submitted to Congress for a thirty-day legislative review pursuant to 2 U.S.C. § 438(d). This is an "indication that Congress does not look unfavorably" upon the Commission's construction of the Act. DSCC, 454 U.S. at 34. See Sibbach v. Wilson, 312 U.S. 1, 14-15 (1941); FEC v. Ted Haley Congressional Comm., 852 F.2d 1111, 1114 (9th Cir. 1988).

850 (1987), and Faucher v. FEC, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991). See 60 Fed. Reg. 35293; see also 57 Fed. Reg. 33548, 33551 (1992) (notice of proposed rulemaking relying upon Furgatch). The rule makes clear the Commission's longstanding view that, in addition to communications that use phrases such as "vote for" and "support," "expressly advocating" includes any communication that (60 Fed. Reg. 35304-05):

> When taken as a whole and with limited reference to external events, such as the proximity of 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.

These principles, now formally codified in a regulation, summarize the Commission's consistent interpretation of "express advocacy" and are entitled to deference. See cases cited on pages 18-19, supra.

III. AN UNAMBIGUOUS VIDEO EXHORTATION AGAINST THE ELECTION OF A CLEARLY IDENTIFIED CANDIDATE CAN MEET THE EXPRESS ADVOCACY TEST WITHOUT USING ANY SPECIFIC SET OF WORDS

A. The Supreme Court's Express Advocacy Standard Is Ambiguous, But It Clearly Does Not Require Any Particular "Magic Words" or Medium of Expression

When the Supreme Court in Buckley narrowed the definition of independent expenditure, it stated that the term must be construed to apply only to "communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44. Although this requirement sharply narrowed the kinds of messages potentially subject to regulation

under the Act, it engendered a new area of ambiguity. From the start, however, the Supreme Court never suggested that communications can constitute express advocacy only if they include specific words from a special list.

"Communications" is clearly broad enough to encompass many different media, not just those using written or spoken words. "Terms" means "language or a mode of expression used"[10] and is not limited to expression through words. And "express" -- perhaps the most misinterpreted and important word in the Court's formulation -- means "clearly indicated" or "definite."[11] The word "express" does not require hollow literalism or verbatim copying from a finite set of words. Just as the Court recognized that a candidate can be "clearly identified" with a "photograph, drawing, or other unambiguous reference" (424 U.S. at 43 n.51), so too can "express advocacy" consist of a clear and unambiguous appeal through a multitude of media. Indeed, the Court explicitly likened its requirement of express advocacy to the "explicit and unambiguous reference to the candidate" required by the Act to make a candidate "clearly identified." Id. at 43.

When the Court revisited the express advocacy issue in MCFL, the Court was even more clear that wooden literalism is not what it meant. The publication at issue in MCFL did not literally state "vote for" particular candidates. It asked readers to "vote pro-life" and also, on later pages, identified

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10. Webster's II New Riverside University Dictionary 1194 (1988).

11. Random House Dictionary of the English Language (Unabridged) 503 (1983); see also Webster's at 455 ("express" defined as "particular: specific").

by name and photograph candidates that fit the "pro-life" description. The Court stated that the publication provided "in effect an explicit directive," thus emphasizing that the advocacy could be "marginally less direct" than "Vote for Smith," as long as its "essential nature" was clear (479 U.S. at 249; emphasis added).

By so holding without explaining how indirect the exhortation could be and still fall within the express advocacy standard, the Court left an area of ambiguity. Complicating matters further, the Court also found that the publication at issue in MCFL fell "squarely within § 441b" (id. at 249-50). The Court thus clearly indicated that advocacy even less direct than that presented in MCFL could fall within § 441b and therefore be regulated, but the Court did not describe the outer boundaries of § 441b and thus gave little guidance about how clear and direct advocacy must be to be "express." As the Second Circuit has noted, "we are dealing with a constitutional concept of 'express advocacy' that is itself not completely unsusceptible to interpretation. How hard, for example, does one have to hit another over the head to render him 'insensible'?" United States Defense Comm. v. FEC, 861 F.2d 765, 753 (2d Cir. 1988).

Additionally, even the Court's own non-exhaustive list of sample "advocacy" words includes the word "support" (424 U.S. at 44 n.52), a verb that covers far more action than "vote," including, for example, making contributions, talking to neighbors, publicizing issues that reflect well on the

candidate, etc.[12] And "Smith for Congress" includes no words of advocacy or reference to voting, although the implied message would be clear and unambiguous to any voter in the context of an election campaign in which Smith was a candidate. Thus, the Court's own examples of "express advocacy" establish that it is broader than a literal recommendation to vote for the candidate. Therefore,

> [w]e begin with the proposition that "express advocacy" is not strictly limited to communications using certain key phrases. The short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.

Furgatch, 807 F.2d at 862-863.

In fact, as explained above, no words of advocacy are necessary to expressly advocate the election of a candidate. As the Commission has noted in its recent regulation (60 Fed. Reg. 35305), a poster or bumper sticker that merely says "Mondale!" -- appearing shortly before the 1984 presidential election -- sends an unmistakable electoral message.

B. Under the First Amendment, Figurative and Symbolic Speech Can Be Synonymous with Literal Speech

Metaphorical and figurative speech can be more pointed and compelling, and can thus more successfully express advocacy,

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12. Likewise, a citizen could "reject" (defined in Webster's at 991 as "to refuse to accept, recognize, or make use of") a candidate by not voting at all, or by ignoring him or jeering at his speeches.

than a plain, literal recommendation to "vote" for a particular person. Metaphors and figures of speech are called "expressions" because they "express" ideas so well. Given that banal, literal language often carries less force, it would indeed be perverse to require FECA regulation to turn on the degree to which speech is literal or figurative, rather than on the clarity of its message. A negative radio ad that shouts, "Kill his agenda on election day!" is more evocative and just as clear as one that states calmly, "Vote against him." Nothing in Buckley, MCFL, or other analogous First Amendment holdings suggests that the figurative quality of the former instruction distinguishes it legally from the latter. Both figurative and symbolic speech have the capacity to be synonymous with literal expression.

Politics is strewn with unambiguous expressions the voting public fully understands. "Pro-life" means anti-abortion, not a call for medical care or procreation; "pro-choice" means pro-abortion rights, not a nebulous call for greater individual autonomy. Whether these expressions are called metaphors, buzzwords, or codewords (see J.A. 76), they are widely understood and often intensely packed with meaning and emotion,[13] especially in the current era when thirty-second "soundbites" have become the most common form of widely disseminated political speech.[14] Symbols, pictures, and images can have the

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13. To name a few: "welfare queen," "job quotas," "family values," and "bleeding heart."

14. In 1992, candidates "Bush and Clinton each spent about 60 percent of their overall general election budgets on televised campaign spots; Perot spent about 70 to 75 percent on television ads. . . . Television ads now are the major vehicle for political communications during electoral campaigns" (J.A. 71).

same potent communicative effect as these verbal expressions.

In other areas involving the First Amendment, the courts have repeatedly recognized the true nature of figurative speech and visual symbols. In United States v. Hunter, 459 F.2d 205, 215 (4th Cir.), cert. denied, 409 U.S. 934 (1972), which involved, inter alia, a First Amendment claim, this Court found that it was unlawful to advertise rental housing with the phrase "white home."

> Any other interpretation of the advertisements would severely undercut the objectives of the legislation. If an advertiser could use the phrase "white home" in substitution for the clearly proscribed "white only," the statute would be nullified for all practical purposes.

Id. Thus, even though the phrase "white home" was facially silent about who could rent vacant housing (as opposed to who was already occupying a portion of it), this Court refused to allow a commonly understood euphemism to circumvent the relevant statute's ban on prohibited speech.

Similarly, in the libel area, the Supreme Court has refused to ignore the common understanding of provocative insults. In Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), a prominent real estate developer engaged in hard bargaining and was accused of "blackmail" at a public meeting. After the accusation was reported by the press, the developer sued for libel and eventually lost before the Supreme Court. The Court found it

> impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal

offense.

Id. at 14. Thus, the Court recognized the true meaning of the "rhetorical hyperbole" (id.) and treated it accordingly. Accord Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1286 n.15 (4th Cir. 1987). See also Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974) (Court viewed insults to "scabs," calling them "traitors," in their "loose, figurative sense" and not as literal accusations of treason).

In another libel case, Freedlander v. Edens Broadcasting, Inc., 734 F.Supp. 221 (E.D.Va. 1990), aff'd, 923 F.2d 848 (4th Cir. 1991), this Court affirmed a district court decision explicating the "zone of truth," which was necessary to determine whether the "absolute defense" of truth was available to the defendant radio station. 734 F.Supp. at 227. The allegedly defamatory song included a line about the plaintiff that said, "Don't keep your Rolex, you better hock it . . ." Id. at 223. The court found that the plaintiff was wealthy and that truth was an adequate defense because

> although Mr. Freedlander may not in fact own a Rolex watch, references to such a watch and his mansion are metonymic allusions to his wealth. As such, they are figurative expressions of a known fact.

Id. at 227. The decision thus turned not on the literal truth of whether Freedlander owned a Rolex, but on the common understanding of the song's figurative speech.

Images and symbols without words can also convey unequivocal meaning synonymous with literal text. In fact, it is well established that simple still images of the American flag, which open and close the CAN video, can in context communicate complex messages that are as explicit as spoken

ones. In Spence v. Washington, 418 U.S. 405 (1974), for example, the appellant sought to communicate his opposition to the invasion of Cambodia and the killings at Kent State University, events which had occurred a few days before his arrest for flag-desecration. Rather than articulate his views through printed or spoken words, Spence chose to display an upside-down American flag upon which he had affixed a "peace symbol" (a circle enclosing a trident) made of black adhesive tape. The Supreme Court held that Spence's activity constituted speech:

> The Court for decades has recognized the communicative connotations of the use of flags. * * * In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . .," and "a short cut from mind to mind." * * * On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Spence, 418 U.S. at 410 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 632 (1943); other citations omitted).[15]

Similarly, in cases construing the Establishment Clause of the First Amendment, the courts have consistently held that symbols and visual associations can convey prohibited religious messages and government endorsements of religion. In County of Allegheny v. ACLU, 492 U.S. 573, 598 (1989), for example, the Supreme Court stated, "There is no doubt, of course, that the

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15. See also Students Against Apartheid Coalition v. O'Neil, 671 F.Supp. 1105, 1106 (W.D.Va. 1987) ("Shanties, as structures, have come to symbolize the poverty, oppression and homelessness of South African blacks and have been used by student groups throughout the United States to convey this same message"), aff'd, 838 F.2d 735 (4th Cir. 1988) (quotation omitted).

creche itself is capable of communicating a religious message." The Court found this conclusion to be self-evident even though a nativity scene by itself contains no words and relies upon the common knowledge of the story of the birth of Jesus to convey its religious message; one unacquainted with Christianity would not understand that the pastoral birth scene has any religious content. The Court also held that even a "floral decoration" including "traditional flowers of the season" would "contribute[] to, rather than detract[] from, the endorsement of religion conveyed by the creche." Id. at 599.

Relying on Allegheny, this Court in Smith v. County of Albemarle, 895 F.2d 953 (4th Cir.), cert. denied, 498 U.S. 823 (1990), explained that the government's endorsement of the religious message of a creche could also be communicated without words of support or favoritism. In Albemarle, the local Jaycees sought to place a nativity scene on the front lawn of the Albemarle County Office Building (id. at 955). The Court found that

> one could not readily view the creche without also viewing the trappings and identifying marks of the state. This visual association was in the district court's view, unmistakable and impossible to sever.
>
> * * * *
>
> Prominent in the background is the sign identifying the building as a government office structure. As in Allegheny County, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." [492 U.S. at 599-600].

895 F.2d at 955-56, 958 (emphasis added). The Court thus found that given the "compelling state interest" at stake, the creche (and thus the private parties' speech) had to be excluded from government property. Id. at 960. The Court so held despite the

fact that a disclaimer sign -- "Sponsored and maintained by Charlottesville-Albemarle Jaycees not by Albemarle County" -- accompanied the creche. Id. at 955 & n.2. The Court thus held that the literal words of a disclaimer did not counteract the unambiguous visual association that conveyed a government endorsement. The non-verbal message said more -- and was legally more important than -- the verbal one.

C. Under the Express Advocacy Test, the Speaker's Message Must be Taken as a Whole with Limited Reference to External Events as Interpreted by a Reasonable Person

1. A Communication Must Be Taken as a Whole and in Context

The Ninth Circuit has warned:

> Although we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. We must read section 434(c) so as to prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act.

Furgatch, 807 F.2d at 862. The court of appeals therefore refused to isolate individual words or phrases and analyze them separately, instead holding that the "proper understanding of the speaker's message can best be obtained by considering speech as a whole."

> Comprehension often requires inferences from the relation of one part of speech to another. The entirety may give a clear impression that is never succinctly stated in a single phrase or sentence. Similarly, a stray comment viewed in isolation may suggest an idea that is only peripheral to the primary purpose of speech as a whole.

Furgatch, 807 F.2d at 863.

In addition, like the Supreme Court in Spence, the court

of appeals recognized that the context in which the communication occurs is also relevant. While "context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words,"

> the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers. [Courts] should not ignore external factors that contribute to a complete understanding of speech, especially when they are factors that the audience must consider in evaluating the words before it.

Furgatch, 807 F.2d at 863-864. Therefore, rather than turning on the presence of particular words or phrases, the express advocacy determination turns on whether the communication as a whole conveys "an unambiguous statement in favor of or against" an identified candidate. See Furgatch, 807 F.2d at 864; FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (en banc); 60 Fed. Reg. 35305.

Other First Amendment cases confirm the propriety of this approach. In County of Allegheny (and cases discussed therein) the Supreme Court painstakingly reviewed the context of a creche display, with and without other seasonal activities, symbols, and flowers, as well as images from other religions. See 492 U.S. at 598-601 (majority), 613-18 (Blackmun, J.). Accord County of Albemarle, 895 F.2d at 956 ("A 'particular physical setting' is critical") (quoting Lynch v. Donnelly, 465 U.S. 668, 694 (1984)). In Spence (418 U.S. at 410), the Supreme Court found that the "context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." Just as the "wearing of black armbands in a school environment" previously had been found to "convey[] an unmistakable message about a contemporaneous issue of intense

public concern -- the Vietnam hostilities" (id. at 410, citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 505-514 (1969)), the Court found that such a message was conveyed in Spence:

> A flag bearing a peace symbol and displayed upside down by a student today [1974] might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time he made it.

Spence, 418 U.S. at 410.[16]

In a libel action, this Court analyzed a news article both statement-by-statement and as a whole. Chapin v. Knight-Ridder, 993 F.2d 1087 (4th Cir. 1993). After discussing each of the article's various statements, the Court stated:

> Notwithstanding the non-actionability, in isolation, of the various statements discussed [above], we would err if we did not consider the article as a whole. A magnifying glass is no aid to appreciating a Seurat, and the pattern of a complex structure is often discernable [sic] only at some distance. Our impression as readers of the entire article . . .

Id. at 1098. In another libel action concerning an allegedly defamatory cartoon, the Eleventh Circuit, following Supreme Court precedent, has stated that "the circumstances in which statements are expressed must play an essential role in arriving at a reasonable interpretation." Keller v. Miami Herald Publishing Co., 778 F.2d 711, 715 (11th Cir. 1985).[17]

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16. Cf. Texas v. Johnson, 491 U.S. 397, 406 (1989) ("political nature of [demonstration that coincided with convening of 1984 Republican National Convention and renomination of Ronald Reagan for President] was both intentional and overwhelmingly apparent").

17. Likewise, in the obscenity area, the Supreme Court has mandated that state statutes which regulate obscene materials must be "limited to works which, taken as a whole" meet the definition of obscenity. Miller v. California, 413 U.S. 15, 24 (1973).

Indeed, the examples of "express advocacy" used in Buckley, 424 U.S. at 44 n.52, confirm the role of context. An exhortation to "Support Smith" published after an election might be urging monetary, moral, or ideological support, but it certainly could not be urging a vote for Smith in the completed election. It is only the context of an election campaign that gives many of the Supreme Court's examples of express advocacy their unambiguous meaning.

2. A Communication Must Be Evaluated from the Perspective of a Reasonable Person

As explained in Furgatch, implied in Buckley, and widely employed in other First Amendment contexts, whether a communication expressly states a particular message must be evaluated from the objective standpoint of a reasonable person or ordinary observer. In Furgatch, the court of appeals recognized that a communication may "expressly advocate regardless of [the speaker's] intention" and rejected the idea that the courts should try to "fathom [the speaker's] mental state." 807 F.2d at 863. Rather, the context of the message had to be examined in consideration of "premises that are unexpressed but widely understood by readers or viewers." Id. at 864. As now codified in the Commission's regulation, a communication is express advocacy if a "reasonable person" would interpret it as such, "taken as a whole and with limited reference to external events." 60 Fed. Reg. 35305.

Buckley itself supports this interpretation. While the Supreme Court cautioned against putting a speaker at the mercy of the subjective "varied understanding of his hearers," (424 U.S. at 43, quoting Thomas v. Collins, 323 U.S. 516, 535

(1945)), a "reasonable person" standard creates an objective test that does not bend depending upon the sensitivity or special ignorance of particular listeners. More fundamentally, Buckley unequivocally found that the Act's primary purpose was to "limit the actuality and appearance of corruption." 424 U.S. at 26. A major focus of the opinion is on the effect that the appearance of corruption can have on our system of representative government (see generally id. at 26-28, 66-68). The appearance of corruption that the Court found to be the compelling basis for regulating election expenditures is something that occurs in the minds of the general public. It is, therefore, entirely appropriate to take this general audience into account in fashioning an objective standard for determining whether a particular communication constitutes express advocacy.

Similar "reasonable person" or "ordinary observer" standards have been adopted in analogous situations concerning the interpretation of language and images. This Court in County of Albemarle (895 F.2d at 957) quoted with approval Justice Blackmun's opinion in County of Allegheny (492 U.S. at 620), which stated that the "constitutionality of [the holiday display's] effect must also be judged according to the standard of a 'reasonable observer.'" In Greenbelt, when the Supreme Court rejected the argument that a figurative use of the word "blackmail" could constitute libel, it relied upon its evaluation of how readers would perceive the word in context. 398 U.S. at 14. See also Hunter, 459 F.2d at 215 (examining the "natural interpretation" an "ordinary reader" would have to the discriminatory housing ad for a "white home").

In intellectual property cases, which by definition can restrict speech if a violation is found, the courts also use similar tests. In Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 933 (4th Cir. 1995), this Court applied the standard for "likelihood of confusion" regarding trademark infringement. The standard examines whether the "ordinary consumer" is likely to be confused, and is informed by a series of seven factors (id.; citations omitted). Under copyright law, this Court has taken an even more refined approach, looking not just to the perceptions of the "ordinary observer," but also to the particular "intended audience" or subset of the general public when appropriate. Dawson v. Hinshaw Music Inc., 905 F.2d 731, 733-36 (4th Cir.), cert. denied, 498 U.S. 981 (1990). In short, as in other areas of the law, the express advocacy test does not require the Court to be "'"blind"' to what '"all others can see and understand."'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 486 (1985) (quoting United States v. Rumely, 345 U.S. 41, 44 (1953)).

Finally, when evaluating a communication from the perspective of the ordinary observer, the analysis must review the entirety of the message, which may include an identification of the speaker. Indeed, "the identity of the speaker is an important component of many attempts to persuade." City of Ladue v. Gilleo, 114 S.Ct. 2038, 2046 (1994) (citing Aristotle 2 Rhetoric, Book 1, ch. 2). And taking account of a speaker's known identity does not run afoul of Furgatch's warning not to rely upon the speaker's subjective intentions. See 807 F.2d at 863. When included as part of the message, the speaker's identity becomes part of the communication itself, and what

matters is not what the viewer or the courts will infer about the speaker's intent, but what a reasonable person, informed about the speaker's identity (and thus potential biases and passions), understands the communication to mean.

IV. THE CAN VIDEO EXPRESSLY ADVOCATES THE DEFEAT OF BILL CLINTON

To the ordinary viewer in 1992, the CAN video unmistakably encourages voters to defeat Bill Clinton. The video communicates the following:[18] A group explicitly aligning itself with Christian, heterosexual, and traditional family values graphically depicts a specific presidential candidate supporting homosexual men vividly asserting their sexual preferences; the message attacks Clinton's moral judgment and alleged policy agenda; those positions involve steps that only a federal elected official could take; the message is delivered to viewers who live in states where Governor Clinton has no contemporaneous authority to set policy; the message is televised shortly before the presidential election; and the message employs powerful symbolism and persuasive devices unique to the medium of video. Visually, the video literally makes Clinton vanish from the Presidential candidates' traditional spot in front of the American flag. Rhetorically, the video asks viewers to disassociate themselves from Clinton's vision for America, and then invites them to take action by contacting CAN for

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18. The Commission takes no position on the truth, value, or propriety of any aspect of CAN's advocacy, including its content, manner, and medium of expression. In the discussion that follows, however, we emphasize the controversial and provocative nature of the video because we believe these characteristics are an important factor in demonstrating that the communication has an unmistakable electoral message. While we do not believe our verbal descriptions of the video can capture its true impact, we have endeavored to try.

additional information. No reasonable viewer of this video, in the heat of the 1992 presidential campaign, could fail to understand that it unambiguously advocates Clinton's defeat.

The video is highly provocative (see J.A. 114-17), and that quality is relevant. The video admittedly contains no literal phrase such as "Defeat Bill Clinton." But it contains a special kind of charged rhetoric and symbolism that exhorts more forcefully and unambiguously than mere words. Like the pictures of emaciated, starving children who appear in magazines beneath captions like "Are you just going to turn the page?", the CAN video makes its message clear without saying "defeat," just as the children's captions do not need to say "send money." The CAN video has the same provocative quality as the famous anti-Goldwater ads from the 1964 presidential election. As described by Theodore H. White:[19]

> That same year saw, like a clap of thunder, the arrival of the adversary commercial. . . . Bernbach [Johnson's media manager] proceeded to savage Goldwater as no presidential candidate had been savaged before. The first slash of the Bernbach commercials was his Daisy Girl spot: A beautiful child, plucking petals, counting in a high trill, is overtaken in her count by a deep male voice in a missile countdown. The mushroom blast blots out the end of the commercial, with the unspoken message that Goldwater is for bombs, Johnson against them.

What common experience teaches is that such complex video communications are every bit as express, and far more compelling and memorable, than literal requests to "support" or "oppose." What people remember about the anti-Goldwater ads is the image of the nuclear explosion behind the little girl, and its ineluctable advocacy against Goldwater. Whatever the voiceover

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19. Theodore H. White, America in Search of Itself: The Making of the President 1956-1980 176 (1982).

said was unimportant.

Video's sounds and images are mightier than the pen; nearly alive, they provoke gut reactions, quickly breed new cultural icons, and call people to action. Would there have been riots in Los Angeles if the Rodney King incident had been described in court testimony but never captured on video? With the special qualities of video in mind,[20] we explain, in detail, why any reasonable person perceives express advocacy against Clinton when he or she watches the CAN advertisement.

A. The Video Symbolically Tells Viewers to Prevent Clinton from Obtaining National Authority

The video literally removes Bill Clinton from America's national symbol, the flag, and visually "negates" his image. As the video starts, he appears smiling, superimposed on a rippling American flag. His image, while still in front of the flag, is then photographically transformed into a ghoulish black and white negative image that, as the district court found, appears "sinister and threatening" (J.A. 9). At the end of the video, the flag reappears but Clinton has vanished entirely from this traditional presidential setting, as the flag is figuratively captured by the superimposed presence of the name and address of the Christian Action Network. The symbolic meaning is unavoidable: make CAN's preferences for national power a reality by keeping Clinton away from federal office.

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20. "If a court must consider the circumstances giving rise to the publication of a statement to determine how the statement must have been understood, then certainly it must take note of the medium through which the statement is expressed." Keller v. Miami Herald, 778 F.2d at 716.

B. The Video Provocatively Tells Viewers that Extreme Measures Are Appropriate to Stop Clinton's Radical Agenda

By the very example it sets, the video tells viewers that CAN believes extreme steps are necessary to stop the Clinton/Gore team from having an opportunity to implement its vision for homosexual people's rights. When watching the video, any reasonable person understands that CAN has chosen to broadcast sexually provocative images that CAN's own supporters would find offensive, and this aspect of CAN's communication adds an extra layer of intense electoral advocacy to its message.

The video verbally and visually associates Clinton with the radical wing of the gay rights movement, in clear opposition to CAN's view. The graphic message is that the viewer should be as alienated from and opposed to Clinton as mainstream America is from radical gays and lesbians. The video's text states that "Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces," and that "Al Gore supports homosexual couples' adopting children and becoming foster parents." The narrator's inflections and accompanying audio effects (see infra pp. 44-46) establish a menacing tone which, combined with the video's images, make it absolutely clear that CAN considers homosexual behavior and the support of additional rights for gay men and lesbians to be abhorrent. The only reasonable conclusion a viewer can draw is that CAN is asking others to join in its fight to defeat Clinton and thereby foreclose his asserted homosexual rights agenda. Verbally, the narrator asks, in a tone of voice unmistakably evincing a

negative answer, "Is this your vision for a better America?" and then invites people to contact CAN for more information about "traditional family values." The narration alone makes it clear that a self-described "Christian" organization that believes in "traditional family values" is seeking opposition to the implementation of Clinton's alleged "vision" for additional rights for gays and lesbians, which Clinton would only be in a position to pursue if elected President.[21]

But the images in the video bring a whole other dimension to the advocacy. They are images of people far outside America's mainstream society, and they are used vividly to paint Clinton as an extremist. As the narrator describes the Clinton/Gore agenda, gays and lesbians are pictured marching in a gay rights parade. In particular, several of the men appear in sadomasochistic clothing, such as black leather vests with metal studs over bare torsos. These images are obviously

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21. The use of the word "vision" in the CAN video clearly was not just coincidental. In fact, the "word vision [wa]s a codeword explicitly associated with the 1992 presidential campaign" (J.A. 82). Such references are "short-hand communication[] devices" which permit speakers to quickly communicate complex messages with only a few words. See J.A. 76, 82-83.

For example, there was much public discussion during the campaign regarding the "vision" of President George Bush, who "was widely criticized for lacking vision and was the object of jokes about his 'Vision Thing' (Newsweek, November/December 1992). This codeword was part of the 1992 campaign in that it became a sign of candidates not having a political agenda and not understanding what needed to be done after the election" (J.A. 82).

Clinton also became identified with the word "vision." During what was described as "perhaps the most comprehensive address to a gay and lesbian audience by any major presidential candidate," Clinton told a "predominantly gay crowd" in May 1992 that "I have a vision, and you are part of it." J.A. 104; see also J.A. 106, 111 (written materials appellees provided television stations to document the statements in the video).

selected to be alienating to the ordinary observer, and Clinton is described as their supporter. One gay couple appears in the center of the image captioned, "Homosexuals in the Armed Forces" (J.A. 91, photo 5). The first man, naked from the waist up, is smiling and has a knotted rope around his neck. His companion is wearing a black leather vest, and has one arm around the first man's shoulder while his other hand holds the end of the rope below his waist (id.). Any ordinary observer would understand that these men represent a lifestyle and behavior directly contrary to the sort of "traditional family values" promoted by CAN, and that the video condemns Clinton for seeking to give "special rights" to these men. The attack on Clinton's character and moral judgment could not be more patent.

Moreover, any ordinary observer would understand that CAN has deliberately chosen to make its point with extreme, sexually provocative images. The purposeful choice of offensive images to associate directly with Clinton in the video heightens the intensity of the negative communication. The very fact that an organization professing "traditional family values" chooses to broadcast images that they themselves plainly find offensive sends a powerful message about the measures that are appropriate to prevent Clinton's "vision" from becoming the policy of the United States.

The video, therefore, is equivalent to the print advertisement in Furgatch, where the ad referred to the election campaign and was "bold in calling for action, but fail[ed] to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in." Furgatch, 807 F.2d at 865. Broadcast in conjunction with the

presidential debates and in the final days and weeks before the election, the action called for to prevent Clinton's vision from becoming reality would have been plain to anyone.

C. The Video Goes Far Beyond Issue Advocacy and Sends an Unmistakable Electoral Message

The advertisement literally identifies the names of Bill Clinton and Al Gore, the Democratic presidential and vice-presidential nominees for the 1992 election. The ad was broadcast at least 250 times on broadcast television stations and cable television channels in at least 24 cities nationwide beginning in late September 1992 and ending on November 2, the day before the presidential election. Ordinary viewers know from experience that the reason why organizations buy expensive air time shortly before an election is to tell people how they should vote. "Timing the appearance of the advertisement [shortly] before the election left no doubt of the action proposed." Furgatch, 807 F.2d at 865.

As originally discussed in Buckley and reaffirmed in MCFL, the "express advocacy" requirement was adopted to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." MCFL, 479 U.S. at 249. In particular, the Court recognized that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Buckley, 424 U.S. at 42 (emphasis added). The MCFL decision made it clear, however, that this intimate tie did not mean that express advocacy could be shielded from FECA regulation merely by combining it with issue advocacy. The newsletter at issue in MCFL clearly contained both forms of speech, but was

nevertheless "squarely within § 441b" and not a "mere discussion of public issues" because it went "beyond issue discussion to express electoral advocacy." 479 U.S. at 249-50.

Here, CAN's video also goes beyond issue discussion and expresses campaign advocacy to oppose the election of Bill Clinton. The video is about Clinton and his vision for America; its sharp spotlight is on Clinton the candidate, not on Clinton's incidental role as an advocate in any particular or pending gay rights debate. Thus, subjecting CAN's video to FECA regulation treads upon none of the policy concerns underlying the "express advocacy" requirement. Bill Clinton was not an incumbent president who had put legislative proposals before Congress, but was the sitting governor of Arkansas. He would have no authority to affect legislative proposals or government actions where the viewers lived, unless he were elected president. It is hard to imagine how the video could be a "mere discussion of public issues" (479 U.S. at 249) when it was shown primarily to non-Arkansas citizens (J.A. 110) yet focused exclusively on the Governor of Arkansas's national policy positions on homosexual rights. Nothing in the video spoke to Clinton's record in Arkansas or what he proposed other states should do in the viewers' backyards; instead, it spoke pointedly of his "vision for a better America." It is simply not the kind of issue advocacy inextricably intertwined with sitting public officials that the Supreme Court was concerned would be chilled.

Furthermore, the particular issues raised in the video dealt with national concerns that Clinton could affect only if he became president. Only the Commander-in-Chief, not the governor or Arkansas, has the power to allow homosexuals to

serve in the armed forces. As the video made plain, Clinton -- as a presidential candidate -- had promised to take action in that direction if elected. Also, "special civil rights" and "job quotas for homosexuals" obviously refer to potential national legislation, not initiatives in Arkansas, yet the video is devoid of any express or implied reference to national legislative efforts that were pending at the time of the election. The viewer can only conclude that these are proposals that Clinton would put forward if he were elected president. Similarly, there is no indication that Bill Clinton's stand on gay rights issues was the subject of local referenda or otherwise relevant to the viewers' particular jurisdictions, except as it related to his presidential campaign. Subjecting the video to § 441b, therefore, in no way impinges upon CAN's ability to discuss public issues, only upon its ability to spend corporate treasury funds to use those issues to savage a federal candidate's campaign. While the video may have expressed CAN's position on rights for homosexuals in a highly general way, its "more pointed exhortation[]" (479 U.S. at 249) was to oppose Clinton's candidacy.

D. The Video's "Look and Feel" Added to the Clarity of Its Electoral Message

The CAN video contains numerous more subtle, non-verbal components that, taken as a whole with the rest of the communication, strengthens the clarity of the "vote against" Clinton message. As explained in detail in a report (J.A. 65-103) filed with the district court and written by Brown University Professor (and Director of the John Hazen White, Sr. Public Opinion Laboratory), Darrell M. West, an expert in political advertising and communication, the verbal

and non-verbal components of the CAN video convey a message "expressly advocat[ing] the defeat of candidates Clinton and Gore in the upcoming presidential general election."[22]

> It did so by employing the techniques of audio voice-overs, music, visual text, visual images, color, codewords and editing. In their totality, these techniques said voters should defeat Clinton and Gore because these candidates favor extremist homosexuals and extremist homosexuals are bad for America.

J.A. 77.

For example, the opening scene of the video features a life-like photograph of Clinton's smiling face superimposed upon a colorful American flag. In fact, this sequence, which contains only "bright positive" images of Clinton and the American flag, appears to be a pro-Clinton advertisement (J.A. 87, photo 1). However, when the voiceover announcer begins, "Bill Clinton's vision for a better America includes . . . ," the image of Clinton quickly dissolves into a forbidding black and white photographic negative, draining Clinton's face of all color and warmth (J.A. 77-78). In sharp contrast to the American flag, which remains unchanged, Clinton's eyes and mouth turn black (J.A. 88, photo 2), giving

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22. The district court stated that the "fact that an expert was needed to enlighten the court . . . strongly suggests that [the communications] did not directly exhort the public to vote" (J.A. 25 n.14). The Commission disagrees and has never argued that an expert was "needed" to understand the video's anti-Clinton electoral message. An expert in political communications can help explain the mechanisms of symbolic communication, i.e., why viewers understand an unambiguous message, not whether they do as a matter of law. As in the area of copyright law, when the court evaluates the communication's effect on the "ordinary observer," the determination can often be assisted by specialists "who possess expertise with reference to the tastes and perceptions of the intended audience." Dawson v. Hinshaw Music Inc., 905 F.2d at 736. See also Miller v. California, 413 U.S. at 31 n.12 (noting relevance of expert's testimony on "community standards" relating to obscenity offenses).

him an "unflattering," "life-less" and even "threatening" appearance (J.A. 78, 81). The accompanying music, which began as a single high pitched tone or note, also shifts to a lower octave level thereby becoming more ominous and threatening (J.A. 78). This vividly conveys the point that "Clinton is different from you and me," and "tells viewers that Clinton is not to be seen favorably" and "is undeserving of viewer support" (id.).

The video's editing also adds to the communication's negative electoral message. Although the voices of the march participants cannot be heard,

> [c]lose up photos of the marchers amplify the sight of their screaming, shouting, and general appearance (see Photos 5, 6 and 7). The quick editing cuts from scene to scene create a feeling that these individuals are threatening traditional American values of heterosexual relationships. The frenetic pace of the editing enhances the negative images of these scenes.

J.A. 81. Thus, these non-verbal effects intensify the ad's incitement to vote against Clinton.

E. The Newspaper Advertisements Financed by Appellees Also Expressly Advocated the Defeat of Clinton

Although it is the Commission's position that the video alone cortains express advocacy (J.A. 50), Count 1 of the Commission's complaint also alleged that, when "taken as a whole," the video and print advertisements "'expressly advocated the defeat of presidential candidate Bill Clinton in the November 3, 1992 general election" (J.A. 52). Thus, even if the video alone were not express advocacy, that fact would be inadequate to sustain the district court's judgment that the Commission can prove no set of facts which would support its more general claim and which would entitle it to relief. Mylan

Laboratories, Inc., 7 F.3d at 1134.

The headlines in the newspaper ads refer to Clinton as the "Democratic Presidential Candidate" (J.A. 63-64). In fact, the print advertisements also refer to the "Clinton/Gore campaign" generally and by its formal name, "Clinton/Gore '92 Committee," and quote from what the newspaper advertisements describe as a Clinton campaign "position paper" (id.). Those quotations list various actions which Clinton and the "Clinton/Gore Administration" purportedly would do if elected. Furthermore, the October 15, 1992 advertisement in the Richmond Times-Dispatch explicitly refers to the nationally televised debate among the 1992 presidential candidates, including Bill Clinton, which was scheduled to be held in Richmond, Virginia on the same day (J.A. 50, 63-64).

Though they lack the video's provocative visual images, the two newspaper ads operate the same way as the video, "convey[ing] virtually identical messages . . . and exhort[ing] the 'voting public' to defeat Clinton and Gore" (J.A. 68).

> The newspaper ads identify Bill Clinton and Al Gore, Jr. with support for homosexual rights, name them as Democratic candidates, attack Clinton and Gore on homosexual rights that are bad for America, and urge 'the voting public' to oppose Clinton's agenda and defeat Clinton in the upcoming election.

J.A. 86. Furthermore, the October 15 advertisement in the Richmond Times-Dispatch was published while the CAN video was airing in the Richmond market, and coincided with the presidential debate in Richmond and "explicitly mentioned this campaign debate in its text. This ties the ad to the electoral discourse" and shows that CAN's advertisement "attempted to influence the outcome of the presidential election by defeating Clinton and Gore." Id.

In view of the explicit election nexus, the incorporation by reference of the television commercial that was running concurrently in the Richmond area, and their publication in the closing weeks of the presidential election campaign, the newspaper advertisements constitute a clear message to "[t]he voting public" to reject Clinton because of his position on these issues. In this manner, the newspaper advertisements also go "beyond issue discussion," MCFL, 479 U.S. at 249, to expressly advocate the rejection of Bill Clinton.

In sum, CAN's advertisements -- through words, charged rhetoric and imagery, and sophisticated communication techniques -- did not need to rely on simpler, less powerful terms like "defeat" or "reject" to convey their unmistakably express message to vote against Bill Clinton.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of the case.

Respectfully submitted,

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ORAL ARGUMENT REQUESTED