UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 24-2585 (SLS) MOTION FOR SUMMARY JUDGMENT

FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

In accordance with the Court's November 26, 2024 Order, defendant Federal Election Commission ("Commission") respectfully moves this Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h). In support of this motion, the Commission is filing a Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment and a Proposed Order.

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February 21, 2025

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CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 24-2585 (SLS) MEMORANDUM

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

PAGE

I. LEGAL BACKGROUND 2

A. FECA's Administrative Enforcement and Judicial Review Process 2

B. FECA Requires Disclosure of "Independent Expenditures" 5

II. FACTUAL AND PROCEDURAL BACKGROUND 7

A. Campaign Legal Center's Administrative Complaint 7

B. LBP PAC's Response and Commission Actions on CLC's Administrative Complaint 8

C. District Court Proceedings 10

ARGUMENT 12

I. STANDARD OF REVIEW 12

A. Summary Judgment 12

B. "Contrary to Law" 13

II. THE COMMISSION'S DISMISSAL OF MUR 8216 WAS NOT CONTRARY TO LAW 14

A. The Commission Reasonably Interpreted the FEC's Express Advocacy Regulations to Establish a "High Standard" for Finding Express Advocacy in a Character Attack Ad 14

B. The Commission Reasonably Determined that an Advertisement Run Nine Months Before a Primary Election Has More Than One "Reasonable Meaning" 15

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE(S)

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 13

Buckley v. Valeo, 424 U.S. 1 (1976) 2, 3

Campaign Legal Ctr. & Democracy 21 v. FEC, 952 F.3d 352 (D.C. Cir. 2020) 13, 18, 19

Carter/Mondale Presidential Comm., Inc. v. FEC,
775 F.2d 1182 (D.C. Cir. 1985) 13

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12

Common Cause v. FEC, 676 F. Supp. 286 (D.D.C. 1986) 4, 5

Defs. of Wildlife v. Dep't of Agric., 311 F. Supp. 2d. 44 (D.D.C. 2004) 12, 13

Diamond v. Atwood, 43 F.3d 1538 (D.C. Cir. 1995) 12

FEC v. Democratic Senatorial Campaign Committee,
454 U.S. 27 (1981) 5

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) 16, 19

FEC v. Nat'l Conservative Political Action Comm.,
470 U.S. 480 (1985) 5

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 13

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 15

Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986) 13

Pac. Coast Supply, LLC v. NLRB, 801 F.3d 321 (D.C. Cir. 2015) 18

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) 11, 12, 15, 19

Statutes

52 U.S.C. §§ 30101- 46 2

52 U.S.C. § 30101(17) 5

52 U.S.C. § 30104(b)(4)(G) 6

52 U.S.C. § 30104(b)(4)(H)(iii) 6

52 U.S.C. § 30104(g)(1)(A) 6

52 U.S.C. § 30104(g)(2) 6

52 U.S.C. § 30106(b)(1) 2, 3

52 U.S.C. § 30106(e) 2

52 U.S.C. § 30107(a) 2

52 U.S.C. § 30107(a)(6) 3

52 U.S.C. § 30107(a)(7) 2

52 U.S.C. § 30107(a)(8) 2

52 U.S.C. § 30107(e) 3

52 U.S.C. § 30108 ..... 2, 3

52 U.S.C. § 30109 2

52 U.S.C. § 30109(a)(1) 3, 7

52 U.S.C. § 30109(a)(2) 4

52 U.S.C. § 30109(a)(3) 4

52 U.S.C. § 30109(a)(4)(A)(i) 4

52 U.S.C. § 30109(a)(6)(A) 3, 4

52 U.S.C. § 30109(a)(8)(A) 5, 10

52 U.S.C. § 30109(a)(8)(C) 5, 13

52 U.S.C. § 30109(a)(12) 3

52 U.S.C. § 30111(a)(8) 2, 3

Rules and Regulations

Fed. R. Civ. P. 5(b)(2)(E) 21

Fed. R. Civ. P. 56 12

Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016) 5

Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292 (July 6, 1995) 6, 15

Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19,729 (Mar. 20, 2024) 4

11 C.F.R. § 2.4 3

11 C.F.R. § 100.16 ..... 5, 6

11 C.F.R. § 100.22(a) ..... 6, 9, 14, n. 2, n. 6

11 C.F.R. § 100.22(b) ..... *passim*

11 C.F.R. § 100.22(b)(1) 11

11 C.F.R. § 100.22(b)(2) 11, 19

11 C.F.R. § 104.4(b)(1) 6

11 C.F.R. § 104.4(b)(2) 6

11 C.F.R. § 111.16 4

11 C.F.R. § 111.20 3

11 C.F.R. § 111.21 3

Miscellaneous

Life after NCRL v. Leake: Can North Carolina's Disclosure Laws Survive a Constitutional Challenge, 87 N.C. L. Rev. 1252 (2009) 15

Tracking Quid Pro Quos: Some Practical Next-Steps in Campaign Finance Reform, 26 Tex. J. on C.L. & C.R. 257 (2021) 15

This matter represents a straightforward application of the Federal Election Commission's discretion to interpret and enforce federal campaign finance law, and should be affirmed by this Court. Plaintiff Campaign Legal Center ("CLC" or "plaintiff") challenges the Federal Election Commission's ("FEC" or "Commission") dismissal of its administrative complaint in which CLC alleged violations of the Federal Election Campaign Act ("FECA" or "the Act"). An affirmative group of four Commissioners dismissed that complaint based on a reasonable legal conclusion that the political advertisement in question did not contain express advocacy and therefore did not trigger certain disclosure obligations. Specifically, plaintiff alleged that Last Best Place Political Action Committee ("LBP PAC") failed to report independent expenditures for an advertisement ("LPB PAC Ad") that advocated for the defeat of U.S. Seante candidate Timothy Sheehy during the 2024 Montana Republican primary election. After duly considering plaintiff's allegations and the response from LBP PAC, the Commission relied on the long span of time between when the advertisements ran and the date of the primary election in question and therefore declined to find reason to believe a violation occurred, instead dismissing the complaint.

On the merits, the Commission is entitled to summary judgment because plaintiff cannot meet its heavy burden of demonstrating that the dismissal was contrary to law. Under longstanding precedent, Commission dismissals of administrative complaints are entitled to considerable judicial deference and need only reflect reasoned decision-making in order to be upheld. In this case, the Commission permissibly relied on the content of the ad in question, as well as its proximity to the election, to reach its legal conclusion that the LBP PAC Ad could reasonably be interpreted as having a meaning other than encouraging the defeat of candidate Tim Sheehy. Plaintiff strongly disagrees with this conclusion, arguing that the Commission has

improperly elevated the importance of the timing of a political advertisement to assess its meaning. However, the temporal factor that proved decisive in this case is explicitly identified as relevant in the operative regulation defining express advocacy, and the Commission has relied on the timing of an advertisement in relation to the election at issue in numerous prior matters, as the Commission's Statement of Reasons in this matter observed. Plaintiff therefore cannot demonstrate, as it must, that the agency failed to engage in reasoned decision-making, or was so implausible that it could not be ascribed to a reasonable difference in views. On the contrary, the Commission carefully considered the entire factual record, including the content of the LBP PAC Ad, and the context in which it ran.

The Commission's decision thus reflects a reasonable interpretation of the law by the Commissioners charged with its enforcement, and is consistent with court's repeated admonitions that the FEC interpret FECA with sensitivity to the First Amendment area in which the Commission regulates. Because the Commission's analysis is not contrary to law but rather readily satisfies the deferential standard of review applicable here, the Court should grant the Commission's motion for summary judgment and deny plaintiff's motion.

I. LEGAL BACKGROUND

A. FECA's Administrative Enforcement and Judicial Review Process

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 ("FECA"). *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.*

§§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (*per curiam*). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the statute. 52 U.S.C. § 30109(a)(1). Absent waiver, proceedings on such complaints are covered by confidentiality protections, 52 U.S.C. § 30109(a)(12); 11 C.F.R. § 111.21, until the Commission "terminates its proceedings," 11 C.F.R. § 111.20. Upon receipt of an administrative complaint, the Commission's Office of General Counsel ("OGC") is required to notify anyone alleged to have committed such a violation, referred to as a respondent, and to provide such persons with an opportunity to demonstrate in writing that no action should be taken. *Id*. OGC then prepares a report to the Commission known as a General Counsel's Report. The Report analyzes the allegations in the complaint, applies the relevant law to the facts alleged, and sets forth OGC's recommendations for Commission action. The first General Counsel's Report in an enforcement Matter Under Review ("MUR") usually includes a recommendation that the Commission take actions, or take no action, regarding the alleged violations.

Generally, if one or more Commissioners objects to a first General Counsel's Report after it has been circulated to the Commission, or if fewer than four Commissioners vote to approve or reject the report's recommendations by the voting deadline, the Commission considers the enforcement matter at an Executive Session. Executive Sessions are meetings that are closed to the public during which Commissioners consider pending enforcement matters and other items that must be kept confidential. *See* 11 C.F.R. § 2.4. During such meetings, the Commissioners

may, *inter alia*, discuss OGC's recommendations, and vote on potential actions like those described above, including whether there is "reason to believe" that a FECA violation has occurred. 52 U.S.C. § 30109(a)(2). Generally speaking, at the initial stage in the enforcement process, the Commission will take one of the following actions with respect to a MUR: (1) find ''reason to believe'' or (2) dismiss. *See* Federal Election Commission, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 89 Fed. Reg. 19,729 (Mar. 20, 2024).

If at least four members of the Commission vote to find "reason to believe" a FECA violation has occurred, the Commission must notify the respondent of the alleged violation and its factual basis, and the agency then investigates or conciliates with the respondent. 52 U.S.C. § 30109(a)(2). After an investigation is completed or initial conciliation attempts fail, OGC may recommend that the Commission find that there is "probable cause" to believe FECA has been violated. 52 U.S.C. § 30109(a)(3). Respondents are entitled to file a responsive brief, *id*., and OGC prepares a report to the Commission with further recommendations, 11 C.F.R. § 111.16. If at least four members of the Commission vote to find probable cause to believe that a violation has occurred, the Commission must first attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondents. 52 U.S.C. § 30109(a)(4)(A)(i). If informal methods of conciliation fail, the Commission may, "upon an affirmative vote of 4 of its members," file a *de novo* civil enforcement suit in federal district court. *Id.* § 30109(a)(6)(A).

If at least four members do not vote to find "reason to believe," no investigation or conciliation ensues, and the matter may be closed. In such cases, the Commission "must set forth clearly the grounds on which it acts[,]" whether via "staff reports" or "a separate statement

of reasons[.]" *Common Cause v. FEC*, 676 F. Supp. 286, 291 (D.D.C. 1986) (citing *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 38–39 n. 19 (1981)). Pursuant to agency policy, a vote to dismiss the matter and close the file becomes effective 30 days after the Commission Secretary certifies the Commissioners' vote. Disposition letters are sent to the complainants and respondents after the 30 days have elapsed and the file closes. This occurs simultaneously with notification to the administrative complainants and respondents and the public release of certain documents related to the matter on the FEC's website. *See* FEC, *Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702, 50,703 (Aug. 2, 2016) (listing documents in a closed enforcement file that are publicly disclosed by the Commission).

FECA provides that the administrative complainant may seek judicial review in this District pursuant to 52 U.S.C. § 30109(a)(8)(A) in the event that the Commission dismisses or is alleged to have failed to act on a complaint. If a court in a review action declares that a Commission dismissal or failure to act is "contrary to law," the court can order the Commission to conform to that declaration within 30 days. *Id.* § 30109(a)(8)(C). If the Commission fails to conform to the declaration within 30 days, the complainant may obtain a private right of action against the administrative respondent for the alleged violations. *Id.*; *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 488 (1985).

B. FECA Requires Disclosure of "Independent Expenditures"

An "independent expenditure" is an expenditure "expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such a candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17); *see also* 11

C.F.R. § 100.16. Communications constitute "express advocacy" when either of two circumstances apply. First, the communication uses so-called "magic words," such as "vote for," "re-elect," or "defeat," which in context can have no other reasonable meaning than to encourage the election or defeat of one or more clearly identified candidate(s). 11 C.F.R. § 100.22(a). Second, the communication, taken as a whole, with limited reference to external events, including "proximity to the election," is unmistakable, unambiguous, and suggestive of only one meaning, such that reasonable minds could not differ as to whether the communication encourages the election or defeat of one or more clearly identified candidate(s), or encourages some other kind of action. 11 C.F.R. § 100.22(b). Under section 100.22(b), commenting on a candidate's character *may* constitute express advocacy if, in context, it has no other reasonable meaning than to encourage the election or defeat of a clearly identified candidate. FEC, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) ("Express Advocacy E&J").

All political committees other than authorized committees that make independent expenditures must disclose these expenditures to the Commission as part of their regular reporting. 52 U.S.C. § 30104(b)(4)(G), (H)(iii). Additionally, political committees and other persons that make independent expenditures aggregating $1,000 or more made after the 20th day, but more than 24 hours before, the date of an election, must report the expenditures by filing a 24-hour notice. *See id.* § 30104(g)(1)(A); 11 C.F.R. § 104.4(b)(1). Political committees and other persons that make independent expenditures aggregating $10,000 or more for an election in any calendar year, up to and including the 20th day before an election, must report the expenditures by filing a 48-hour notice. 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Campaign Legal Center's Administrative Complaint

On February 14, 2024, CLC filed an administrative complaint with the Commission pursuant to 52 U.S.C. § 30109(a)(1). The Commission designated this complaint as MUR 8216. The complaint alleged that LBP PAC failed to report independent expenditures that it made advocating for the defeat of U.S. Senate candidate Timothy Sheehy during the 2024 Montana Republican primary election campaign. (Administrative Record ("AR") 00001.) CLC asserted that LBP PAC formed in September 2023, and that it ran at least one ad between September and December of 2023 expressly advocating for the defeat of Sheehy[1] that contained express advocacy and was therefore an independent expenditure. (AR 00001; AR 0009.) The LPB PAC Ad showed Sheehy smiling with a thumbs-up gesture and walking with the Capitol dome in the background. (AR 00031.) The ad contained the following voiceover:

> They got a home loan and paid it back. She got a car loan and paid it back. But this multimillionaire got an over $770,000 government loan and never paid it back. But Tim Sheehy doesn't think he should be held accountable. Sheehy got rich off government contracts, walked away from his loan and now he and his campaign can spend millions trying to buy our Senate seat. He's just out for himself. Last Best Place PAC is responsible for the content of this ad.

(*Id*.)

CLC contended that the LPB PAC Ad was "unmistakable, unambiguous, and suggestive of only one meaning" — the defeat of Sheehy — and that it constituted express advocacy pursuant to 11 C.F.R. § 100.22(b).[2] (AR 00009.) Therefore, according to CLC, LBP PAC

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[1] The complaint alleges that the ad began running in September 2023 but is silent as to when the ad stopped running.

[2] The First General Counsel's Report discussed below also analyzed the LBP PAC Ad under section 100.22(a), but the administrative complaint in MUR 8216 and the instant

violated Section 30104 of the Act by failing to report these disbursements as independent expenditures, either in a 48-hour independent expenditure report or in its 2023 Year-End report. CLC asked that the Commission find reason to believe a violation had occurred, conduct an investigation, and "seek appropriate sanctions for any and all violations[.]" (AR 00011-12.)

B. LBP PAC's Response and Commission Actions on CLC's Administrative Complaint

On April 5, 2024, after receiving notice of CLC's administrative complaint in MUR 8216, LBP PAC responded that the LBP PAC Ad was not an independent expenditure because it did not contain express advocacy. (AR 00022.) LBP PAC conceded that it began running the ad in September 2023 and that it was critical of Sheehy, but noted that the ad also brought awareness to, and comment on, the Paycheck Protection Program, a Covid-era government loan program, in that it benefitted wealthy corporations and had a corrosive impact on wealth in politics. (AR 00022-26.) LBP PAC noted that there was no direct call for voters to take any action regarding the election of Sheehy. (AR 00023.) Alternatively, LBP PAC asked that the Commission dismiss MUR 8216 using prosecutorial discretion because it reported the disbursements for this ad as operating expenditures in its 2023 Year-End Report. (AR 00025.)

The FEC's Office of General Counsel reviewed MURs 8215[3] and 8216 and produced a First General Counsel's Report ("FGCR") that addressed both matters, recommending that the Commission find reason to believe that violations of the law occurred. (AR 00027-53.) On July

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Complaint challenging dismissal of that MUR only allege a violation pursuant to section 100.22(b). (AR 00036-38.)

[3] While these matters were considered together, the instant lawsuit challenges only the dismissal of MUR 8216, which itself only challenges a single advertisement run by LBP PAC during the Montana Republican Senate primary in 2023-24, and does not challenge the dismissal of MUR 8215 which challenged other advertisements run by LBP PAC regarding that same election.

11, 2024, the Commission, by a vote of 2-4, declined to adopt the recommendations contained in the FGCR, with Commissioners Broussard and Weintraub voting for the resolution and Commissioners Cooksey, Dickerson, Lindenbaum, and Trainor voting against. (AR00081.) On that same day, the Commission then voted 4-2 to dismiss the complaints, close the files, and send the appropriate letters. (AR 00082.)

In a statement of reasons explaining its vote ("Statement of Reasons"), the Commission rejected OGC's argument regarding 11 C.F.R. § 100.22(a), concluding that the phrase "shady Sheehy" constituted a character attack that did not utilize the types of "magic word" phrases enumerated in that part of the regulation. (AR 00087.) The Commission then noted that it was a "closer call" as to whether the ad constituted express advocacy under section 100.22(b). (AR 00088.) The Commission acknowledged LBP PAC's argument that the ad did not contain express advocacy because it: (1) raised awareness "to issues of public concern, namely money in politics and the Paycheck Protection Program;" (2) ran months before the relevant election; and (3) lacked an "express electoral exhortation." (AR 00085.) The Commission recognized that the ad would contain express advocacy if it had no other reasonable meaning than to encourage the defeat of Sheehy. (*See* AR 00085-86.) However, the Commission also observed that proximity to the election is important context to determine whether an advertisement is expressly advocating for the election or defeat of a candidate. (*Id.*) Recognizing that this ad began running in September 2023, which was nine months in advance of the June 4, 2024, primary election, the Commission observed that: "[w]hile there is no bright line rule on timing, it is axiomatic that the further an ad is run from a given election, the more likely that reasonable minds could differ about whether the ad constitutes an 'exhortation to vote for or against a specific candidate.'" (AR 00088.) The Commission further observed that cases where the Commission had previously

found express advocacy in advertisements typically involved ads run much closer to the election at issue than the ads at issue in MUR 8216. (*Id.*) The Commission ultimately determined that the LBP PAC Ad did not meet the "high standard" for finding express advocacy in a character attack ad, and accordingly declined to find "reason to believe" a violation of FECA occurred and instead affirmatively dismissed the matter. (AR 00088.)

C. District Court Proceedings

CLC filed its Complaint for Declaratory and Injunctive Relief (ECF No. 1) ("Complaint" or "Compl.") on September 9, 2024, bringing a single cause of action alleging that the Commission's failure to find reason to believe a violation occurred and dismissing their administrative complaint was arbitrary, capricious, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(A). (Compl. ¶ 86.) In its Complaint CLC asserts that the Commission erred in applying a "timing-based rationale, which they applied in conclusory fashion without regard to substance or context," and that such action contravenes FECA and the definition of express advocacy under its regulations. (Compl. ¶ 11.) CLC further contends that the Commission relied on an "unlawful, arbitrary, and readily exploitable timing standard for defining when a communication qualifies as an independent expenditure" based "merely" upon the ad's temporal proximity to the election.[4] (Compl. ¶ 16.) Moreover, CLC asserts that the Commission considered the timing of the ad as "dispositive," and that it embraced a "rigid temporal test" that is sufficient on its own to defeat express advocacy. (Compl. ¶¶ 80, 82.)

[4] As noted *supra*, FN. 3, the administrative complaint in MUR 8215, filed by different administrative complainants, argued that a separate LBP PAC ad run during the Montana Republican Senate primary in 2023-24 constituted express advocacy, and should have been reported as independent expenditure. However, the instant Complaint concerns only the ad at issue in CLC's administrative complaint, MUR 8216. The other ads addressed in the FGCR and other agency administrative record materials, which were the subject of MUR 8215, are not before the court.

The Commission filed its answer to the Complaint on November 18, 2024, requesting that the Court deny that the administrative complaint in MUR 8216 established reason to believe that LPB PAC violated FECA's reporting obligations and that the dismissal of the administrative complaint was arbitrary, capricious, and contrary to law. (*See* Answer, ECF No. 8, ¶¶ 85-86.) On December 18, 2024, the Commission filed the Administrative Record for MUR 8216.

In its Motion for Summary Judgment, (ECF No. 13) ("Motion" or "MSJ"), CLC asserts that the decision to dismiss its administrative complaint was contrary to law because it (1) was grounded on an impermissible interpretation of express advocacy and (2) relied on an "unsupported and arbitrary 'temporal proximity' limitation." (MSJ at 16.) CLC repeated its contention that the LBP PAC Ad qualified as express advocacy pursuant to 11 C.F.R. § 100.22(b). (MSJ at 17-18.) CLC notes that there is no dispute that the ad satisfies the first prong of express advocacy in section 100.22(b)(1) because, as the Commission's Statement concedes, the ads "unmistakably depict Sheehy as a Senate candidate [and satisfy] the electoral portion of 100.22(b)(1)[.]" (MSJ at 18 (quoting AR 00088).) However, CLC argues that the ad satisfies the second prong of express advocacy at 100.22(b)(2) because reasonable minds could not differ as to whether the ad[5] encouraged the defeat of Sheehy rather than some other action. (MSJ at 18-19.)

CLC distinguishes the LBP PAC Ad from those in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"), where the Supreme Court found that those ads did not constitute express advocacy because they were issue-based advocacy. (MSJ at 19-20.) CLC contends that

[5] Initially, CLC argues that the LBP PAC Ad contained express advocacy, but later in its argument refers to "ads" plural. However, the only ad at issue in this action is the one described herein as the LBP PAC Ad, which CLC refers to as the "Shady Sheehy" ad.

the LBP PAC Ad does not qualify as issue advocacy under *WRTL* because it (1) does not focus on a legislative issue, (2) take a position on that issue, (3) exhort the public to adopt that position, and (4) urge the public to contact public officials. (*See Id*.) CLC further contends that the ads in *WRTL* differ from this case because those ads lacked "indicia of express advocacy," whereas the LBP PAC Ad identified Sheehy as a candidate and denigrated his character. (MSJ at 20.) As to the temporal factor that the Commission considered, CLC argues that it "effectively invented and applied a new legal requirement" for a communication to be express advocacy under section 100.22(b). (MSJ at 21.) CLC claims that this "categorical timing-based exception" creates an "obvious and unjustifiable loophole" in FECA's disclosure requirements that "blatantly nullifies Congress's objectives[,]" rendering the Commission's decision contrary to law. (MSJ at 25.)

ARGUMENT

The Court should deny plaintiff's motion and grant summary judgment in favor of the Commission because it reasonably interpreted the express advocacy regulations to establish a "high standard" for finding express advocacy in a character attack ad, and the LBP PAC Ad, which ran nine months before a primary election, did not meet that standard.

I. STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The court must "view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt

as to the existence of any genuine issue of material fact." *Defs. of Wildlife v. Dep't of Agric.,* 311 F. Supp. 2d. 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 157-59 (1970)).

B. "Contrary to Law"

The court reviews the Commission's dismissal of an administrative complaint to determine whether such dismissal was "contrary to law[.]" 52 U.S.C. § 30109(a)(8)(C). A dismissal is contrary to law if it is (1) based on an impermissible interpretation of the Act or (2) arbitrary, capricious, or an abuse of discretion. *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 357 (D.C. Cir. 2020) (*per curiam*).

Courts will not overturn agency decisions absent evidence that the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). With respect to the FEC, this is a deferential inquiry where the court asks only if the Commission's decision was "sufficiently reasonable to be accepted." *Campaign Legal Ctr. & Democracy 21*, 952 F.3d at 357. When determining whether an FEC decision was arbitrary, capricious, or otherwise an abuse of discretion, the Court must be "extremely deferential" to the agency's decision, which "requires affirmance if a rational basis . . . is shown." *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (internal quotation marks omitted). Courts must defer to the FEC unless the agency fails to meet the "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (internal quotation marks omitted).

II. THE COMMISSION'S DISMISSAL OF MUR 8216 WAS NOT CONTRARY TO LAW

Here the Commission correctly interpreted its own regulation and properly applied the law to the facts of this case. Specifically, the Commission recognized that a character attack ad may constitute express advocacy if it had no other meaning than to encourage the defeat of this candidate, but reasonably determined that the LBP PAC Ad itself, and viewed in relevant external context, could have more than one reasonable meaning.

A. The Commission Reasonably Interpreted the FEC's Express Advocacy Regulations to Establish a "High Standard" for Finding Express Advocacy in a Character Attack Ad

As discussed supra pp. 4-5, Commission regulations provide that express advocacy exists where a communication satisfies one of two prongs: (1) the use of so-called magic words, such as "vote for" or "defeat," (11 C.F.R. § 100.22(a)) or (2) "when taken as a whole and with limited reference to external events, such as the proximity to the election," the communication could only be reasonably interpreted as advocating for the election or defeat of a candidate (11 C.F.R. § 100.22(b)); *see also* AR 00086-87.) Here, the Commission reasonably determined that the phrase "shady Sheehy" does not constitute the kind of "magic words" that provide strong evidence of express advocacy and therefore had "little trouble concluding" that this phrase did not constitute express advocacy under section 100.22(a).[6] (AR 00087.)

However, the Commission's Statement of Reasons acknowledged that "[w]hether the ads satisfy section 100.22(b) is a closer call." (AR 00088.) Having previously determined that the phrase "Shady Sheehey" is best viewed as an attack on a candidate's character, the Commission referenced the FEC's Express Advocacy E&J, which explicitly provided that commenting on a

[6] The Commissioners unanimously found that no violation occurred pursuant to section 100.22(a), and plaintiff does not challenge the Commission's dismissal of its complaint with respect to section 100.22(a).

candidate's character may constitute express advocacy "if, in context, it has no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." (*Id.*) (citing Express Advocacy E&J, 60 Fed. Reg. at 35,295.) This, the Commission logically concluded, establishes a "high standard for finding express advocacy in a character attack ad[.]" (AR 00088.)

Notably, this standard is in conformity with the Supreme Court in *WRTL*, where the Court dictated that courts should find express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70 ("the proper standard" when reviewing restrictions on express advocacy "must give the benefit of any doubt to protecting rather than stifling speech") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–270 (1964)); *see also* P. J. Puryear, *Life after NCRL v. Leake: Can North Carolina's Disclosure Laws Survive a Constitutional Challenge*, 87 N.C. L. Rev. 1252, 1270-71(2009) (commenting that express advocacy requires a "high bar."); Jacob Carrel, *Tracking Quid Pro Quos: Some Practical Next-Steps in Campaign Finance Reform*, 26 Tex. J. on C.L. & C.R. 257, 271 n.99 (2021) (the Court "laid out a high standard for defining express advocacy" in *WRTL*).

B. The Commission Reasonably Determined that an Advertisement Run Nine Months Before a Primary Election Has More Than One "Reasonable Meaning"

11 C.F.R. § 100.22(b) provides that the communication should be "taken as a whole," and "with limited reference to external events[.]" The regulation provides only one example of "external events[,]" which is "the proximity [of the communication] to the election[.]" *Id.* Given that this "temporal factor" is explicitly identified as relevant, a communication's temporal proximity to an election has often served as a critical factor in FEC decision-making to

determine whether an advertisement constitutes express advocacy, and it was reasonable for the Commission to give that factor controlling weight in this case.

The "temporal context" of an ad's timing was established early in FECA's history, as endorsed by the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857, 858-59 (9th Cir. 1987). There the Commission brought suit against a citizen who ran ads that were critical of President Carter immediately before the 1980 election. The court recognized the importance of context, including "temporal context," as a critical factor in determining whether speech constitutes express advocacy under section 100.22(b). *Id*. at 863. It identified three main components of the express advocacy standard: (1) the "message is unmistakable and unambiguous, suggestive of only one plausible meaning;" (2) the message presents a clear plea for action (speech that is merely informational is not covered by the Act); and (3) the called-for action must be clear, meaning that the message explicitly encourages the election or defeat of a candidate rather than some other action. *Id*. at 864. The court emphasized: "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements." *Id*. In affirming the Commission's finding of express advocacy, the court specifically pointed to the temporal component, explaining that its "conclusion is reinforced by consideration of the timing of the ad," and observing that, in the case before it, "[t]iming the appearance of the advertisement less than a week before the election left no doubt of the action proposed." *Id.* at 865. Indeed, *Furgatch* would later provide justification for the Commission's promulgation of 11 C.F.R. § 100.22(b). *See* Express Advocacy E&J at 35295.

The Commission's subsequent precedent has accordingly emphasized the importance of the timing of a communication in relation to a pending election as a critical factor in determining the existence, or lack thereof, of express advocacy. And critically, the Commission's Statement

of Reasons here invoked that precedent explicitly. The Commission's Statement of Reasons identified four "prior express advocacy matters involving attacks on a candidate's character," and found that there "the Commission … relied on the proximity of the ad to the election, in part, to provide this critical context." (AR 00088.) (listing cases) In one such case, MUR 5819, the United States Chamber of Commerce ran advertisements that touted the candidate's character, accomplishments, and qualifications eight days before an election. (AR 00088 n.28 (citing Factual and Legal Analysis at 3-4, FEC MUR 5819 (U.S. Chamber of Commerce) (July 3, 2007), https://www.fec.gov/files/legal/murs/5819/000066DF.pdf.)) There the Commission found, via a unanimous vote of 5-0, that all these factors, "[t]aken together," with the voters receiving this message "eight days before the primary election" left no doubt that the communication was urging the election of this candidate, and met the definition of express advocacy under section 100.22(b). *Id.*

In another example cited in the Statement of Reasons, the Commission found that an advertisement constituted express advocacy when it ran less than two months before an election. (AR 00088 n.29 (citing Conciliation Agreement at IV. 27-28, FEC MUR 5487 (Progress for America Voter Fund) (Feb. 28, 2007), https://www.fec.gov/files/legal/murs/5487/00005AA7.pdf).) In MUR 5487, Progress for America Voter Fund (PFA-VF) ran ads in the months leading up to the 2004 Presidential election. One ad praised President Bush's record on national defense while criticizing Senator Kerry as being the "most liberal senator with a 30-year record of supporting defense and intelligence cuts." (*Id.*, Conciliation Agreement ¶ 28.) In the Conciliation Agreement reached with respondents, the Commission cited numerous factors for its conclusion that respondents engaged in express advocacy, including the language in its solicitations, the amount of its

contributions and disbursements, and the content of their ads. (*Id.*, Conciliation Agreement ¶¶ 29-36.) In addition, the Commission explicitly relied upon the timing of the ads in question, noting that one ran "less than two months before the General Election," and another ran "in July 2004[.]" (*Id.*, Conciliation Agreement ¶¶ 27-28.)

Thus, while acknowledging that its determination was a "close call" with respect to section 100.22(b), the Commission's Statement of Reasons correctly found that in prior matters "the Commission … relied on the proximity of the ad to the election, in part, to provide this critical context." (AR 00088) (listing cases). Plaintiff's Motion baldly asserts that the Commission's decision "has no basis in prior agency precedent[,]" (MSJ at 16,) but does not cite or discuss the agency precedents cited in the Statement, nor does it dispute their relevance. And even if it did, the Court "must give deference to an agency's interpretation of its own precedents." *Campaign Legal Ctr. & Democracy 21*, 952 F.3d at 357 (quoting *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015)) (finding FEC's dismissal of administrative complaints regarding corporate entities' alleged violations of FECA straw donor prohibition was reasonable).

Moreover, while the timing of the ads relative to the Montana primary election was clearly a decisive factor here, it does not follow that Commission has created a "new 'temporal limitation' carve-out from the express advocacy disclosure rules[.]" (MSJ at 25.) As explained *supra*, reliance on the "proximity to the election" is permitted by the regulation itself, 11 C.F.R. § 100.22(b), and consistent with numerous prior agency precedents cited in the controlling Statement. (AR 00086.) Nor does the Statement create a "carve-out" or "loophole[,]" (MSJ at 25,) as CLC contends, since the Commission nowhere asserted that the timing of the ads was the only relevant factor, (*id*. at 21,) and explicitly acknowledged that "there is no bright line rule on

timing[.]" (AR00086.) Rather, it took due notice of the common-sense principle that "the further an ad is run from a given election, the more likely that reasonable minds could differ about whether the ad constitutes an 'exhortation to vote for or against a specific candidate.'" (*Id.* (quoting *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987)).) The Commission reasonably determined that the ads in question were neither "unmistakable" nor "unambiguous[,]" 11 C.F.R. § 100.22(b)(2), and therefore did not clear the "high bar" for express advocacy in a candidate character ad. (AR 00088.) The Commission reasonably gave strong weight to the temporal factor, just as it has on numerous prior matters.

Here, the Commission declined to find "reason to believe" and rather dismissed MUR 8216 by relying in large part on the fact that the ads in question ran approximately nine months before the Montana Senate primary election, reasoning that this indicated these ads were not intended to sway votes. In doing so it relied on a factor (the only factor) that the FEC's regulatory definition of "expressly advocating" specifically identifies as relevant, and contrasted that nine month gap between the ads and the election to prior agency decisions that also relied on the temporal factor. This decision was reasonable, and well within the lawful discretion of the Commission to interpret federal campaign finance law, even if others could reasonably reach a different conclusion. *See Campaign Legal Ctr. & Democracy 21*, 952 F.3d at 357 (controlling Commissioners' decision need only be "sufficiently reasonable to be accepted"). Importantly, as the Supreme Court has specifically admonished, "when it comes to defining what speech qualifies as the functional equivalent of express advocacy … we give the benefit of the doubt to speech, not censorship." *See WRTL*, 551 U.S. at 482.

CONCLUSION

For the reasons stated, the Commission's decision reflects a reasonable application of agency expertise regarding the Act and its implementing regulations. It is also consistent with

courts' repeated admonitions that the FEC interpret FECA with sensitivity to the First Amendment area in which the Commission regulates. Because the Commission's reasoning readily satisfies the deferential standard of review applicable here, the Court should find that the dismissal of the administrative complaint was not contrary to law, grant the Commission's motion for summary judgment, and deny plaintiff's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2025, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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