

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CAMPAIGN LEGAL CENTER

Plaintiff,

v.

FEDERAL ELECTION COMMISSION

Defendant.

Civil Action No. 1:24-cv-2585

**PLAINTIFF’S COMBINED MEMORANDUM OF POINTS AND AUTHORITIES  
IN OPPOSITION TO DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT  
AND REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF ABBREVIATIONS**

<b>CLC</b>	Campaign Legal Center
<b>FEC</b>	Federal Election Commission
<b>FECA</b>	Federal Election Campaign Act
<b>LBP PAC</b>	Last Best Place PAC
<b>MUR</b>	Matter Under Review
<b>OGC</b>	Office of General Counsel (FEC)

## INTRODUCTION AND SUMMARY OF ARGUMENT

By applying a novel, impermissibly constrained temporal requirement for when unambiguous electoral advocacy will be regulated as “express advocacy” under the Federal Election Campaign Act (“FECA” or the “Act”), the FEC enforcement dismissal challenged here flouts the agency’s own regulations, undermines the transparency required by Congress, and is patently unreasonable.

In its administrative complaint, Plaintiff Campaign Legal Center (“CLC”) described advertisements that denigrated the character of then-candidate Timothy Sheehy and were disseminated in the run-up to Montana’s 2024 primary election for U.S. Senate by Last Best Place PAC (“LBP PAC”), a federally registered independent expenditure-only political committee or “super PAC.” As the administrative complaint explained, at least some of LBP PAC’s ads contained the functional equivalent of express advocacy and thus qualified as “independent expenditures” subject to the Act’s disclosure requirements, both under FECA and according to the FEC’s own regulatory standards for assessing character attack ads, set forth in relevant part at 11 C.F.R. § 100.22(b). But LBP PAC never reported any independent expenditures in connection with those ads.

For its part, the FEC’s Office of General Counsel (“OGC”) agreed that LBP PAC’s failure to report the ads as independent expenditures violated FECA’s disclosure provisions and recommended that the Commission find “reason to believe” the Act was violated. *See* AR 28-52. But the Commission, by a vote of 4-2, rejected OGC’s recommendation, AR 81-82, positing instead that LBP PAC’s ads could not be deemed the functional equivalent of express advocacy because they began running nine months before the Montana primary—which, the dismissing Commissioners theorized in conclusory fashion, was too far in advance of the election for the ads to evince the requisite express electoral purpose as opposed to some other purpose. *See* AR 88. In

explaining this conclusion, the Commissioners did not address any factors other than the ads' timing relative to the election, nor did they actually expound upon the one factor they considered dispositive. Instead, while ignoring other significant attributes of each ad including its content and context, they treated it as "axiomatic" that an ad's timing alone made it susceptible to more than one reasonable meaning. AR 88. But the Commissioners never identified what that possible other meaning might be.

The essential question posed here is not complicated. Did the Commission reasonably conclude that the "Shady Sheehy" ad identified in CLC's administrative complaint—an ad that disparaged the character of then-U.S. Senate candidate Tim Sheehy and explicitly referenced his campaign for federal office—was nevertheless *not* expressly advocating Sheehy's defeat, but potentially encouraging "some other kind of action"? The answer is equally clear: No. By focusing myopically on the timing of LBP PAC's character attack ads and disregarding all other significant relevant factors in the administrative record, the Commission's decision flouted its own standards defining "express advocacy," without providing any cogent explanation or support for that departure or considering its ramifications on the FEC's statutory mandate to ensure transparency with respect to federal campaign spending. In fact, the Commission did not even consider the possibility that its "temporal proximity" rule would facilitate rampant evasion of the Act's disclosure requirements. The dismissal was thus manifestly unreasonable, arbitrary and capricious, and contrary to law, and it cannot be sustained under any standard.

The FEC mounts a variety of feeble defenses in an attempt to justify the decision, but none succeed. In particular, the FEC implies that the Commission considered factors other than the timing of LBP PAC's ads in making its ultimate determination under 11 C.F.R. § 100.22(b)(2). That suggestion is flatly contradicted by the Commissioners' Statement of Reasons. Indeed, given

the Commissioners’ single-minded focus on timing and the conclusory nature of their analysis—the relevant discussion is set forth in a single paragraph of their Statement—it is hard to fathom what other “factors” the FEC is now claiming the Commissioners weighed. Regardless, unstated assumptions are not a basis for reasoned agency decisionmaking, and post hoc rationalizations from agency counsel cannot supplant the reasons the agency actually articulated (or failed to provide) at the time of its action. Nor do the FEC’s arguments seeking to justify the dismissal based on the First Amendment, principles of agency deference, or its supposed fidelity to FEC precedent remotely withstand scrutiny. The FEC’s post hoc attempts to recharacterize the decision or minimize its defects cannot excuse its foundational errors.

Accordingly, the Commission’s dismissal of the administrative complaint and consequent failure to enforce FECA’s transparency requirements has deprived CLC and the public of vital, statutorily required financial information about political communications seeking to influence the outcome of a hotly contested federal election. Because the dismissal relied on a regulatory construction of “express advocacy” that impermissibly and unreasonably constrains the Act’s core disclosure provisions, it was “contrary to law” under 52 U.S.C. § 30109(a)(8)(C), and should be set aside.

## ARGUMENT

### I. The Dismissal Was Contrary to Law.

#### **A. Appeals to agency deference or the First Amendment are no defense to the Commission’s unsupported and arbitrary decision that LBP PAC’s ads did not “expressly advocate” under 11 C.F.R. § 100.22(b).**

In defending the Commission’s dismissal of CLC’s administrative complaint against LBP PAC, the FEC places heavy emphasis on the “deferential standard” due agency decisions. *See, e.g.*, FEC Mem. Supp. Mot. for Summ. J. (“MSJ”) & Opp’n to Pl.’s MSJ at 1, 13 (ECF No. 14) (“FEC MSJ”). Along similar lines, the agency resorts to vague and misplaced First Amendment



arguments that supposedly permit the Commission to adopt a deregulatory posture in order to “avoid[] stifling speech.” FEC MSJ at 15 (citing *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”). But beyond the bare assertion that there is a “high standard” when applying FECA’s disclosure provisions to character attack ads, *see id.* at 15-16, the FEC provides no tenable argument for why the First Amendment even comes into play here. The fact that the FEC operates in an area of First Amendment sensitivity does not allow it to nullify provisions of the Act or frustrate its purposes. And, contrary to the FEC’s suggestion, principles of “judicial deference” do not dictate that courts “must defer” to FEC dismissals. FEC MSJ at 1, 13. Dismissals based on impermissible interpretations of the Act or FEC regulations, or that are arbitrary and capricious, an abuse of discretion, or otherwise reflect unreasoned agency decisionmaking, are “contrary to law” under FECA, and should be set aside.

Even affording due deference to the Commission, withstanding judicial review still “requires that agency action be reasonable and reasonably explained.” *F.C.C. v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). The dismissal here was neither.

The FEC’s dismissal was not reasonable because, as CLC has explained, *see generally* Pl.’s MSJ at 17-20, there is no question that the LBP PAC ads considered in the administrative proceedings below, including the “Shady Sheehy” ad, expressly advocated for Tim Sheehy’s electoral defeat under the standard set forth at 11 C.F.R. § 100.22(b), and therefore constituted independent expenditures under FECA. Specifically, the “Shady Sheehy” ad clearly satisfied both elements of the test in section 100.22(b): the ad contained an “unmistakable” and “unambiguous” electoral portion when it directly referred to Sheehy’s campaign for the U.S. Senate in Montana, and “reasonable minds could not differ” as to the fact that it encouraged Sheehy’s defeat as a political candidate by sharply criticizing his character and fitness to hold office in connection with

his political campaign. That conclusion is compelled not only by the administrative record evincing the ad's content and context, but also by the Commission's own Explanation and Justification accompanying its promulgation of section 100.22(b), and precedents applying it. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294 (Jul. 6, 1995). *See also infra* at 10-15.

Apart from being legally and factually unsustainable on this record, the Commission's explanation for its newly invented "temporal proximity" rule was plagued by yet more basic failures of reasoning and evidence, including reliance on "unsupported assumptions" without reasoned explanation. *National Gypsum Co. v. EPA*, 968 F.2d 40, 43-44 (D.C. Cir. 1992). The FEC attempts to justify the decision's paucity of reasoning and other defects by characterizing the Commissioners' exclusive focus on an ad's timing relative to an election as grounded on a "common-sense principle." FEC MSJ at 19. *See also* AR 88 ("[I]t is axiomatic that the further an ad is run from an election, the more likely that reasonable minds could differ about whether the ad constitutes an 'exhortation to vote for or against a specific candidate.'"). But even if the unsupported "axiom" the Commissioners assert is broadly true, insofar as timing may be a relevant factor in the analysis, that hardly explains why it should be *the dispositive factor here*—when both the factual record and Commission authorities cut sharply against that approach.

Indeed, in the report accompanying its reason-to-believe recommendation, the FEC's Office of General Counsel specifically observed that campaign ads are often "run long before an election . . . in order to frame the election and/or define opponents in the minds of voters as early as possible, when the cost of airtime is cheapest, and before the relevant market has been saturated with political ads." AR 47-48. The Statement of Reasons makes no mention of this significant fact in the record, despite placing dispositive weight on the hypothesis that nine months in advance of

an election was too early for an ad to qualify as express advocacy under section 100.22(b). Accordingly, even assuming there *were* any legal support for the presumption underlying the Commissioners’ rationale—that a candidate attack ad run shortly before an election is more apt to be viewed as electoral in nature than a similar ad run months before an election—the record flatly precluded any reliance on such a rationale in this case. The Commissioners’ decision “runs counter to the information before the agency, and was therefore arbitrary and capricious.” *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1194 (D.C. Cir. 2024) (citing *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Likewise absent from the Commissioners’ analysis is any explanation for their departure from prior agency decisions and guidance. When the Commission promulgated section 100.22(b), it explicitly stated that it was not establishing a time frame to delineate which communications would qualify as express advocacy under the rule, but provided that timing would “be considered on a case-by-case basis,” alongside an ad’s content and other contextual factors. *See* Explanation & Justification at 35,295. The Commissioners paid lip service to this authority, purporting to recognize that “there is no bright line rule on timing,” AR 88—even as, in the same breath, they described their own timing-based assumption as “axiomatic” and made it the singular focus of their analysis. AR 88. The FEC’s appeals to deference cannot justify a decision that fails to exhibit one of the bedrock requirements of reasoned agency decisionmaking: “articulat[ing] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The FEC’s constitutional arguments are equally unavailing.

First, the dismissal itself did not hinge on any constitutional rationale, and “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *State Farm*, 463 U.S. at 50. The Commissioners’ Statement of Reasons opined in general about “the high standard for finding express advocacy in a character attack ad,” AR 88, but unlike the FEC here, it did not explicitly raise any constitutional arguments, much less invoke the specter of “censorship” or “stifling speech.” FEC MSJ at 15, 19 (citing *WRTL*, 551 U.S. at 469-70, 482). The FEC’s constitutional defense amounts almost entirely to post hoc rationalization by agency counsel, and cannot serve as justification for the decision.<sup>1</sup>

Nor *could* the Commission justify an interpretation that compromises the Act’s core purposes by invoking generalized constitutional concerns. Indeed, in the context of the FEC’s regulatory regime addressing coordinated expenditures—*i.e.*, expenditures made “in cooperation, consultation or concert with, or at the request or suggestion of,” a candidate or political party, 52 U.S.C. § 30116(a)(7)(B)(i)-(ii)—the FEC tried, and failed, to defend a range of impermissible standards on similar First Amendment grounds and was twice rebuffed by the D.C. Circuit. *See Shays v. FEC*, 528 F.3d 910, 925-26 (“*Shays III*”) (“We applaud the Commission’s sensitivity to First Amendment values, but as we said in *Shays II*, ‘regulating nothing at all’ would achieve the same purpose, ‘and that would hardly comport with the statute.’”) (citing *Shays v. FEC*, 414 F.3d 76, 101 (D.C. Cir. 2005) (“*Shays II*”). Regardless of any constitutional considerations, the FEC still must exercise its interpretive authority to define “independent expenditures” subject to the

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<sup>1</sup> Indeed, if the dismissal had been premised on constitutional avoidance, the FEC’s pleas for “extreme deference” would be even more inappropriate. Dismissals grounded on the Commission’s interpretation of judicial precedent or constitutional issues are reviewed *de novo*, *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009)—because a decision “based on constitutional concerns” operates in “an area of presumed judicial, rather than administrative, competence.” *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

Act's disclosure requirements in accordance with the statutory language and purpose. It failed to do so here.

Moreover, the FECA provisions at issue here entail only disclosure—and disclosure requirements, as the Supreme Court has repeatedly held, place no ceiling on speech, but in fact promote First Amendment values. In the words of Justice Kennedy in *Citizens United v. FEC*, 558 U.S. 310 (2010): “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Id.* at 371. The FEC’s argument ignores the Supreme Court’s admonition that “[u]nhibited, robust, and wide-open” speech is unlikely to “occur when organizations hide themselves from the scrutiny of the voting public.” *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (citation omitted). Far from “stifling speech,” FEC MSJ at 15, the FECA independent expenditure disclosure requirements at issue here directly advance the “First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.” *McConnell*, 540 U.S. at 197 (citation omitted).

At a minimum, any First Amendment concerns are significantly attenuated as compared to laws that directly restrict campaign contributions or expenditures. In *Wisconsin Right to Life*, for example—which the FEC cites repeatedly in service of its constitutional arguments—the Supreme Court elucidated the criteria used to distinguish so-called “issue ads” from ads that are the functional equivalent of express advocacy. 551 U.S. at 470. But it did so in a context where, if the plaintiff’s communications were deemed the functional equivalent of express advocacy, they would have been subject to a direct prohibition on corporate electioneering expenditures. *Id.* at

482. No such restrictions are implicated here. The concerns aired in *WRTL* about possible “censorship” or speech suppression are therefore simply inapposite.

Even assuming *arguendo* that there is any area of First Amendment concern with respect to the application of FECA’s disclosure requirements, it would be limited to the possibility that regulation may extend beyond election-related speech to reach pure issue advocacy—*i.e.*, if the regulation fails to “separate[] election-related advocacy from other activity falling outside FECA’s expenditure definition.” *Shays II*, 414 F.3d at 102. But here there is no dispute that LBP PAC’s “expenditures” constituted “election-related advocacy.” LBP PAC is a registered federal political committee, whose activities are therefore “assumed to fall within the core area sought to be addressed by Congress.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (*per curiam*). “They are, by definition, campaign related.” *Id.*

Neither invocation of the First Amendment nor general appeals to judicial deference provide a basis upon which the Commission’s decision here can be sustained. As the record below amply established, LBP PAC’s ads expressly advocated for the defeat of a clearly identified candidate within the meaning of 11 C.F.R. § 100.22(b). Accordingly, because they were not made in concert or cooperation with any candidate, campaign, or political party committee, they constitute “independent expenditures” under FECA and should have been disclosed as such. 52 U.S.C. § 30101(17). The Commission’s determination to the contrary required ignoring the record evidence and fabricating an easily gamed timing requirement that clearly undermines FECA’s purposes and threatens to open “an immense loophole” in its disclosure requirements. *Shays II*, 414 F.3d at 98. A construction of “express advocacy” that would permit such blatant evasion of FECA plainly “frustrate[s] the policy that Congress sought to implement” and is

“inconsistent with the statutory mandate.” *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

**B. The Commission improperly treated the ads’ timing as dispositive and failed to support its decision with reasoning or evidence.**

None of the FEC’s arguments suffice to justify the unlawful decision here. In particular, the Commissioners’ arbitrary and unreasonable explanation for their decision cannot be salvaged because the Statement of Reasons cited a handful of past FEC matters in which the agency purportedly considered an ad’s proximity to an election as a relevant factor in assessing whether the ad expressly advocated under section 100.22(b)—for starters, because the FEC’s proffered precedent is all either inapposite or flatly contradicts the categorical approach taken by the Commissioners in this case. Indeed, where the matters cited in the Statement actually did give weight to an ad’s timing, it was only en route to the conclusion that an ad *was* express advocacy because of its *close* proximity to an election. But the converse of that proposition does not follow.

The dismissing Commissioners thus unreasonably rejected the claims in plaintiff’s administrative complaint, and in OGC’s recommendation and analysis, that the “Shady Sheehy” ad constitutes express advocacy under section 100.22(b). The Commissioners based that conclusion on an impermissible and arbitrary temporal proximity requirement for express advocacy, *see* AR 88, that is unsupported by FECA or prior FEC precedent. While the Statement of Reasons correctly acknowledges that the “Shady Sheehy” ad contains an “unmistakable” electoral portion under section 100.22(b)(1), it wrongly concludes that the ad fails to meet the section 100.22(b)(2) standard requiring that “reasonable minds could not differ as to whether [the communication] encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.” 11 C.F.R. § 100.22(b)(2).

To arrive at this errant conclusion, the Commission’s analysis focuses *solely* on the timing of the ad’s publication relative to the election, eschewing discussion of the ad’s content or, for that matter, any other factor. And, crucially, the Statement is also devoid of any discussion regarding what “other kind of action,” 11 C.F.R. § 100.22(b)(2), the Shady Sheehy ad could reasonably have been read to encourage, *see* AR 88. While the FEC notes that the Commissioners, in their Statement of Reasons, “acknowledged” a defense raised by LBP PAC itself in response to the administrative complaint, *see* FEC MSJ at 9 (citing AR 85), the cited portion of the Statement contains only a rote summary of LBP PAC’s administrative response. Even the FEC is hard-pressed to characterize that passing reference as factoring into the Commissioners’ legal analysis. The Statement thus relies exclusively on the fact that the Shady Sheehy ad ran nine months before the relevant election as its rationale for concluding that the ad did not constitute express advocacy under section 100.22(b).

To support its reliance on temporal proximity to the election, the Statement of Reasons cites to four prior Commission matters, which it misleadingly asserts indicate that “the Commission has relied on the proximity of the ad to the election, in part, to provide this critical context.” AR 88. But in MUR 7543 (Jefferson United), the most recent prior matter cited, the Commission determined that a mailer satisfied the standard at section 100.22(b)(2) based *both* on its content and timing relative to an election:

[T]he phrase “SHOULDN’T CHARACTER AND HONESTY MATTER?” when preceded by the statements “bad business deals,” “problem personal finances,” and “conflicts with law enforcement & courts,” is similar in nature to “JOHN KERRY CANNOT BE TRUSTED” and “unfit for command,” phrases the Commission found to have no other reasonable meaning other than to encourage Kerry’s defeat. Additionally, Commission regulations specify that the “proximity to the election” is a permissible external event to consider when determining whether a communication has a reasonable, non-electoral meaning. Here, the mailer was sent on



November 2, 2018, four days before the November 6 primary election. The statements in the mailer, along with its timing, have an unmistakable, unambiguous meaning: vote against Jesse Schmidt in the upcoming election.

Factual and Legal Analysis at 8, MUR 7543 (Jefferson United) (May 11, 2021), [https://www.fec.gov/files/legal/murs/7543/7543\\_05.pdf](https://www.fec.gov/files/legal/murs/7543/7543_05.pdf). The Commission likened the communication in MUR 7543 to those analyzed in MURs 5511/5525 (Swift Boat Veterans and POWs for Truth), which ran four months before the 2004 presidential election and used phrases unambiguously commenting on a presidential candidate's "character, qualifications and accomplishments" that "have no other reasonable meaning than to encourage actions to defeat" the candidate electorally. Conciliation Agreement ¶ 26, MURs 5511/5525 (Swift Boat Veterans and POWs for Truth) (Dec. 13, 2006), <https://www.fec.gov/files/legal/murs/5511/00005900.pdf>.

The Statement of Reasons, however, cites MUR 7543 solely for its discussion of temporal proximity, *see* AR 88 ("For example, the Commission has found reason to believe when the ad was disseminated 4 days before the election"), misleadingly omitting any mention that the ad's content was another—arguably more substantial—reason supporting the legal conclusion that reasonable minds could not differ as to whether the ad encouraged actions to elect or defeat a candidate, as opposed to encouraging some other kind of action, *see* 11 C.F.R. § 100.22(b)(2). The Commission's selective reading of MUR 7543 is thus at odds with the established standard in section 100.22(b).

Similarly, the Statement of Reasons also cites MUR 5819 (U.S. Chamber of Commerce), in which the Commission concluded that a communication expressly advocated because it "focuses on Rep. Case's character, qualifications, and accomplishments in a manner that has no other reasonable meaning than to encourage absentee voters to vote for Ed Case for Senator," and, further, that statements in the communication "center on the candidate's qualifications and

accomplishments, not issues, and are of the type contemplated when the Commission promulgated Section 100.22(b).” Factual and Legal Analysis at 3, MUR 5819 (U.S. Chamber of Commerce) (July 3, 2007), <https://www.fec.gov/files/legal/murs/5819/000066DF.pdf>. Indeed, the Commission made only a fleeting reference to the timing of the communications in MUR 5819: “Taken together, absentee voters receiving this message eight days before the primary election could not differ as to whether or not it was urging electoral action to elect Rep. Case.” *Id.* at 4. Yet the Statement of Reasons misleadingly cites MUR 5819 as support for its reliance on temporal proximity, *see* AR 88 (“For example, the Commission has found reason to believe when the ad was disseminated . . . 8 days before the election.”), eliding the fact that MUR 5819 delved far more deeply into the content of the relevant communication than into its timing relative to an election.

Like the communications at issue in MUR 5819, the Shady Sheehy ad “center[s] on the candidate’s qualifications and accomplishments, not issues, and [is] of the type contemplated when the Commission promulgated Section 100.22(b).” Factual and Legal Analysis at 3, MUR 5819 (U.S. Chamber of Commerce). Indeed, the Statement of Reasons points to no discussion of any issues of public interest in the Shady Sheehy ad—unsurprisingly, since the ad contains none—that might reasonably indicate that the ad “encourages some other kind of action” rather than encouraging Sheehy’s electoral defeat. 11 C.F.R. § 100.22(b).

The Statement’s citations to MUR 5487 (Progress for America Voter Fund) and MUR 5831 (Softer Voices) are of a piece: both are cited to show that the Commission “found reason to believe when the ad was disseminated . . . within 2 months of the election.” AR 88. Yet again, neither of those prior matters relied exclusively on temporal proximity. In MUR 5487, the Commission detailed the content of the ads at issue, which ran months before the 2004 presidential election and contrasted the leadership and qualifications of former President George W. Bush (then a candidate

for reelection) with that of his electoral opponent, Sen. John Kerry. Conciliation Agreement ¶¶ 27-28, MUR 5487 (Progress for America Voter Fund) (Feb. 28, 2007), <https://www.fec.gov/files/legal/murs/5487/00005AA7.pdf>. Likewise, in MUR 5831, the Commission evaluated ads that contrasted two candidates for the U.S. Senate, depicting one in a positive light and the other negatively; temporal proximity barely factored into the Commission’s conclusion that the ads contained express advocacy. Factual and Legal Analysis at 3-4, 8-9, MUR 5831 (Softer Voices) (Mar. 26, 2009), <https://www.fec.gov/files/legal/murs/5831/10044282427.pdf>.

The Commission precedents that the Statement of Reasons relies on to support its new, wholly fabricated temporal proximity requirement for express advocacy do not, in fact, provide any such support. In stark contrast to the blinkered focus on timing in this decision, each of the precedents it cites discussed the content of the relevant communication in detail, and referenced timing as an additional contextual factor under the section 100.22(b) express advocacy standard. The Statement of Reasons here simply does not follow that path. While the FEC now contends that “the Commission nowhere asserted that the timing of the ads was the only relevant factor,” FEC MSJ at 18, it points to no discussion of any *other* relevant factor in the Statement. Nor could it—because the Statement of Reasons is devoid of any such discussion. The FEC attempts to sidestep that glaring omission by recharacterizing the decision as one in which the Commission simply “gave *strong weight* to the temporal factor,” *id.* at 19 (emphasis added), suggesting there were other considerations underlying its analysis. But the Commissioners addressed no other factors, and “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *State Farm*, 463 U.S. at 50.

Instead, as the face of their Statement of Reasons makes clear, timing was not merely a “strong” or important factor in the Commissioners’ decision; it was the only one. In contrast to the

approach taken in every other prior matter cited in the Statement of Reasons, therefore, the decision here rested *exclusively* on “the temporal factor.” FEC MSJ at 19. That is an unreasonable and arbitrary approach to the standard under section 100.22(b), and unsurprisingly, it finds no support in FEC precedent or the record here.

The dismissing Commissioners thus plainly erred by fashioning, *sua sponte*, a legal requirement that exempts character attack ads disseminated months before an election from the “functional equivalent of express advocacy” standard.

\* \* \*

For these reasons and those explained in plaintiff’s opening summary judgment brief, the dismissal of CLC’s administrative complaint was contrary to law. The Commissioners’ rationale for the dismissal was based on an impermissible and arbitrary interpretation of the “express advocacy” standard that is facially inconsistent with FEC regulations, compromises the Act’s purposes, and “create[s] the potential for gross abuse.” *Orloski*, 795 F.2d at 165. Compounding these errors, the Commissioners’ unsupported “temporal proximity” standard “not only makes it eminently possible” that spenders will game the timing of their ad campaigns to evade disclosure and escape the scrutiny of the voting public, “but also provides a clear roadmap for doing so.” *Shays III*, 528 F.3d at 925 (citing *McConnell*, 540 U.S. at 177 n. 69). The decision thus threatens to eviscerate key FECA transparency requirements and ignores everything that Congress, the Supreme Court, and this Circuit have said about “lax regulation” in the context of the federal campaign finance laws: “The FEC’s claim that no one will take advantage of the enormous loophole it has created ignores both history and human nature.” *Id.* at 927-28.

## CONCLUSION

For all the foregoing reasons, the Court should find that the Commission's dismissal of plaintiff's administrative complaint was contrary to law, and the Court should remand this matter to the FEC with instructions to conform to the Court's order within thirty days.

**Dated: March 25, 2025**

Respectfully submitted,

/s/ Megan P. McAllen

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 25, 2025, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

/s/ Megan P. McAllen

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