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

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

# FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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## INTRODUCTION

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 ("Shady Sheehy")[1] that advocated for the defeat of U.S. Senate candidate Timothy Sheehy during the 2024 Montana Republican primary election. After duly considering plaintiff's allegations, the response from LBP PAC, and Commission precedent regarding "express advocacy," the Commission concluded that the long span of time between when the advertisement ran and the date of the primary election marked this case as an outlier, with the ad being run much further in advance of the election than ads in other matters in which the Commission has identified express advocacy, and therefore declined to find reason to believe a violation occurred and instead dismissed the complaint.

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[1] In its Motion for Summary Judgment as well as in its latest reply memorandum, CLC continues to reference "ads" in the plural form and suggests that multiple advertisements are it issue (*e.g.*, "As the administrative complaint explained, at least some of LBP PAC's ads contained the functional equivalent of express advocacy . . ."") (Pl.'s Combined Mem. of P. & A. in Opp'n to FEC's Cross-Mot. for Summ. J. and Reply in Supp. of Pl.'s Mot. for Summ. J. ("Reply") (ECF No. 15) at 1.). However, while LBP PAC ran multiple ads during the relevant period of time, plaintiff challenged only one ad in its administrative complaint and in the instant Complaint, and only that ad bears on the merits of plaintiff's claims here.

In 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 ("Reply"), Plaintiff argues that the Commission "myopically" focused on the timing of the Shady Sheehy ad while ignoring "all other significant relevant factors." (Reply at 2.) Plaintiff emphasizes that the Commission did not adopt the recommendation of the FEC Office of General Counsel ("OGC"), implying that failing to adopt OGC's recommendation itself indicates that the Commission reached an unreasonable legal conclusion. (*See Id*. at 1, 10.) Finally, plaintiff speciously argues that the Commission created a "temporal proximity" rule (*Id*. at 2, 5, 10, 14, 15,) despite the Commission's explicit articulation that "there is no bright line rule on timing" (Administrative Record ("AR") 00088.). As explained in the Commission's Motion for Summary Judgment (ECF No. 14) ("FEC Mot."), the Commission permissibly relied on the proximity of the Shady Sheehy ad to the Montana Republican Primary for the U.S. Senate to conclude that the ad was subject to more than one reasonable meaning, not merely encouraging the defeat of candidate Tim Sheehy in a primary election then nine months away. (FEC Mot. at 14-19.) Plaintiff has not demonstrated that the agency failed to engage in reasoned decision-making.

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.

**ARGUMENT**

The Court should deny plaintiff's motion and grant summary judgment in favor of the Commission because it reasonably determined that a character attack ad that also contains issue advocacy, running approximately nine months before a primary election, did not meet the

regulatory standard for express advocacy. The Commission correctly interpreted both the operative regulation and its own precedent, and properly applied the law to the facts of this case. A character attack ad may constitute express advocacy only if it has no other reasonable meaning than to urge the election or defeat of a candidate. But that high bar was not met here, where the Commissioners reasonably determined that the Shady Sheehy ad, viewed in relevant context, did not expressly advocate Tim Sheehey's defeat.

## I. The Commission's Consideration of the "Temporal Factor" Was Reasonable and Consistent with FECA and Its Accompanying Regulations

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 v. FEC*, 952 F.3d 352, 357 (D.C. Cir. 2020) (per curiam). 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).

Here, the Commission's determination that the Shady Sheehey advertisement did not meet the threshold for express advocacy was eminently reasonable, even if others could reasonably reach a different conclusion. As a result, plaintiff has not met its burden here. Commission regulations provide that express advocacy exists where a communication, "when taken as a whole and with limited reference to external events, such as the proximity to the

election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)[.]" 11 C.F.R. § 100.22(b); *see* AR 00086-87. As the Commission explained in its FEC Mot., the timing of an advertisement relative to an election is explicitly identified as a relevant factor under its controlling regulations. (FEC Mot. at 15-16 (citing 11 C.F.R. § 100.22(b) (providing that the communication should be "taken as a whole," and "with limited reference to external events" including "the proximity [of the communication] to the election").) The Commission further elaborated on the precedent it relied on in its statement of reasons, demonstrating that in numerous prior matters the "temporal factor" has played an important role in the agency's "express advocacy" determinations. (FEC Mot. at 16-19.)[2]

Plaintiff, which failed to address in its initial Motion for Summary Judgment agency precedent the Commission itself relied upon, now seeks to distinguish the cited cases by observing that those cases involved findings of express advocacy based on the ads' close proximity to elections, and states, without citation and in conclusory fashion, that "the converse of that proposition does not follow." (Reply at 10.) In other words, according to plaintiff, the Commission can consider an ad's close proximity to an election to reach a determination that it contains express advocacy, but it "does not follow" that the Commission could reach the opposite conclusion when an ad is run at some further distance from an election. This argument

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[2] Specifically, the Commission cited and quoted from the following decisions that relied in part on the temporal factor to identify express advocacy: Factual and Legal Analysis at 8, FEC MUR 7543 (Jefferson United, Inc.) (May 11, 2021), https://www.fec.gov/data/legal/matter-under-review/7543/; 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; 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; Factual and Legal Analysis at 8-9, FEC MUR 5831 (Softer Voices) (March 26, 2009), https://www.fec.gov/files/legal/murs/5831/10044282427.pdf.

makes no sense, as there is every reason to evaluate the relevant timeframe in other cases to determine whether the facts before the Commission represent an outlier or is within the timeframe where it has previously identified express advocacy. Plaintiff may disagree with how the Commission analyzed this precedent, but that evaluation is itself entitled to deference. *Campaign Legal Ctr. & Democracy 21*, 952 F.3d at 357 ("[W]e must give deference to an agency's interpretation of its own precedents.") (internal quotation marks omitted).

Ultimately, plaintiff has failed to demonstrate that the Commission's reliance on the temporal factor was unreasonable *in this case*. There is again no apparent dispute that the ad ran *nine* months before the Montana Republican Senate *primary* election, which itself precedes the general election (the time of maximum voter engagement) by *five* months. The Commission's cited precedent identified four cases where "express advocacy" was found within four months of a general election, making clear that the case before them was a clear outlier. The identification of this matter and these facts as clear outliers from other matters where the Commission identified express advocacy was eminently reasonable, and made no attempt to establish a "bright line rule on timing," instead explicitly disclaiming any such effort. (AR 00088.) The Commission's decision was clearly 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"). Plaintiff simply has not met its burden to demonstrate that the Commission's determination, that the ad had more than one reasonable meaning when it both attacked Sheehy's character and discussed the Paycheck Protection Program nine months prior to a primary election, was arbitrary or capricious.

It also bears repeating that the significance of the "temporal context" was established by the Ninth Circuit's decision in *Furgatch*, and cited by the Commission in support of its decision. *FEC v. Furgatch*, 807 F.2d 857, 865 (9th Cir. 1987) ("Our conclusion is reinforced by consideration of the timing of the ad. . . . Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed."). Indeed, section 100.22(b) was first adopted in part as a response to this decision. (*See* FEC Mot. at 16.) The dispositive question for the Court is not whether the Commission reached a decision to which plaintiff agrees, but rather whether the Commission properly exercised its authority to give significant weight to the temporal factor.[3] (AR 00088 (quoting *Furgatch*, 807 F.2d at 864 n. 31).) The significance of the ad's timing is established by the caselaw, Commission precedent, and the text of section 100.22(b) itself, and it was reasonable for the Commissioners to rely on it. 11 C.F.R. § 100.22 ("with limited reference to external events, such as the proximity to the election…").

Finally, plaintiff argues that the Commission's purported "temporal proximity" rule was previously rejected by the D.C. Circuit in *Shays v FEC* and therefore must be rejected here. (Reply at 5-7.) This reliance is unavailing both because the Commission's decision in no way established a bright-line rule and because *Shays* itself demonstrates that the ad at issue in this case is a clear outlier. In *Shays v. FEC*, the court rejected a regulation promulgated by the Commission that expressly stated a communication would be considered an electioneering communication only if it were published during the 120-day period prior to a general election. 414 F.3d 76, 98 (D.C. Cir. 2005). This holding forbidding such a "bright line" rule, however, necessarily requires the Commission to make a case-by-case determination as to the significance

[3] As the Commission's plain language makes clear, the Commission did *not* "treat[] it as 'axiomatic' that an ad's timing *alone* made it susceptible to more than one reasonable meaning." (Reply at 2.) (emphasis added)

of an ad's timing. That is what the Commission did here, expressly acknowledging *Shays*'s prohibition on any "bright line on timing," (Reply at 6,) while placing the ad before them in the context of Commission precedent. Moreover, while the Commission takes no issue with the *Shays* court's holding overturning a regulation that created a 120-day bright line rule, it is nonetheless noteworthy that when the Commission did seek to create such a bright line it drew that line at 120 days (or about four months) prior to an election, which stands in stark contrast to the *nine* months under the facts presented here.

## II. The Commission Reasonably Interpreted the FEC's Express Advocacy Regulations Under 11 C.F.R. § 100.22(b) to Conclude the Shady Sheehy Ad Did Not Meet the Definition of Express Advocacy

For the foregoing reasons, the Commission reasonably considered the Shady Sheehy ad's timing in relation to the election, recognized this case as a clear outlier in its "express advocacy" precedent, and rightly determined that the "temporal factor" should be given substantial weight in this case. In response, plaintiff's sole remaining argument is that the Commission relied *too much* on the ad's timing and did not sufficiently analyze the content of the ad. (*See* Reply at 10-15 (*e.g.*, "[T]he Commission's analysis focuses *solely* on the timing of the ad's publication relative to the election." (Reply at 11.) (emphasis in original); "[The Commission] points to no discussion of any *other* relevant factor in the Statement [of Reasons]." (Reply at 14.) (emphasis in original); "[T]he decision here rested *exclusively* on the 'temporal factor.'") (Reply at 15.) (emphasis in original.)).

This is simply incorrect. The Commission reviewed the ad's content to conclude that it did not contain any of the so-called "magic words" that constitute express advocacy under section 100.22(a). (AR 00087.) Plaintiff acknowledges as much. (Pl.'s Mot. for Summ. J. at 12.) (ECF No. 13) (describing the Commission's reasoning for not finding express advocacy

under section 100.22(a))). The Commission further assessed the ad's content to determine that it met the first part of the two-pronged test for express advocacy under section 100.22(b), because the "images and words [] unmistakably depict Sheehy as a Senate candidate [and] constitute the electoral portion of 100.22(b)(1)[.]" (AR 00088 and n. 25.) ("'Shady Sheehy' includes a depiction of Tim Sheehy on the campaign trail and accuses Sheehy and 'his campaign' of 'trying to buy our Senate seat.'").

The Commission's consideration of the ad's content is therefore evidenced by the plain language of the statement of reasons itself, and requires no speculation to determine that the content factored into the Commission's decision-making. Even assuming the relevance of this content given the great length of time between the Shady Sheehy ad and the primary election, this is not a case where the agency "entirely failed to consider an important aspect of the problem[.]" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

The Commission here considered the Shady Sheehy ad holistically, identified it as an outlier under Commission precedent, and rightly determined that reasonable minds could differ as to whether it unequivocally advocated for Sheehy's defeat. *See* 11 C.F.R. § 100.22(b). Pursuant to Commission regulations, themselves adopted in conformance with judicial precedent, there is indeed a "high standard" for finding express advocacy in such an ad. (AR00088.) At the very least, this decision met the "extremely deferential" standard of review, which "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167 (internal quotation marks omitted).

## CONCLUSION

For the reasons stated, the Commission's decision reflects a reasonable application of agency expertise regarding the Act and its implementing regulations, where the Commission examined the content of the ad in full and emphasized a "temporal factor" which the operative

regulation explicitly identifies as relevant, to conclude that an ad that ran approximately nine months before the Montana Senate primary election could be subject to more than one reasonable meaning in the minds of Montana voters. Because the Commission's reasoning readily satisfies the deferential standard of review applicable here, and because plaintiff has failed to demonstrate that the Commission's determination was arbitrary or otherwise contrary to law, the Court should find that the dismissal of the administrative complaint was proper, grant the Commission's Motion for Summary Judgment, and deny plaintiff's Motion.

Respectfully submitted,

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April 15, 2025

**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 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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