KARAGANIS & WHITE LTD
ATTORNEYS AT LAW
414 NORTH ORLEANS STREET-SUITE 810
CHICAGO, ILLINOIS 60610
TELEPHONE
(312) 836-1177
TELEFAX
(312) 836-9083

JOSEPH V. KARAGANIS
A. BRUCE WHITE
BARBARA ANNE MAGEL
MARK D. ERZEN
JOHN W. KALICH
CHRISTOPHER W. NEWCOMB
JAMES P. GITZLAFF, JR.

June 9, 1999

VIA FEDERAL EXPRESS

Ms. Alva E. Smith
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Brent M. Christensen v. Suburban O'Hare Commission, et al.
Case No. MUR 4896

Dear Ms. Smith:

Enclosed please find our response in the above-captioned matter. Per our telephone discussion of last week, this Response is to be filed by June 10, 1999.

If you or the Commission need any other information regarding this matter, please contact me.

Sincerely,

Joe Karaganis

Joseph V. Karaganis

Enclosures
LJKSC128.DOC

BEFORE THE FEDERAL ELECTION COMMISSION
UNITED STATES OF AMERICA

BRENT M. CHRISTENSEN, Complainant, vs.	)	
SUBURBAN O'HARE COMMISSION, an unincorporated association of Illinois municipal corporations; VILLAGE OF BENSENVILLE, ILLINOIS; JOHN GEILS, individually and in his capacity as President of Village of Bensenville, Illinois; CITY OF PARK RIDGE, ILLINOIS; RONALD WIETECHA, individually and in his capacity as Mayor of City of Park Ridge, Illinois; CITY OF ELMHURST, ILLINOIS; THOMAS MARCUCCI, individually and in his capacity as Mayor of City of Elmhurst, Illinois; VILLAGE OF ELK GROVE, ILLINOIS; CRAIG JOHNSON, individually and in his capacity as President of Village of Elk Grove, Illinois; VILLAGE OF ITASCA, ILLINOIS; GIGI GRUBER, individually and in her capacity as President of Village of Itasca, Illinois; VILLAGE OF ROSELLE, ILLINOIS; GAYLE SMOLINSKI, individually and in his capacity as Mayor of Village of Roselle, Illinois; CITY OF DES PLAINES, ILLINOIS; PAUL JUNG, individually and in his capacity as Mayor of City of Des Plaines, Illinois; VILLAGE OF LISLE, ILLINOIS; RONALD GHILARDI, individually and in his capacity as Mayor of Village of Lisle, Illinois; CITY OF WOOD DALE, ILLINOIS; KENNETH JOHNSON, individually and in his capacity as Mayor of City of Wood Dale, Illinois; VILLAGE OF ADDISON, ILLINOIS; LARRY HARTWIG, individually and in his capacity as Mayor of Village of Addison, Illinois; DUPAGE COUNTY, ILLINOIS; and ROBERT SCHILLERSTROM, individually and in his capacity as Chairman of DuPage County, Illinois Board, Respondents.	)	MUR 4896

RESPONSE OF SUBURBAN O'HARE COMMISSION AND INDIVIDUAL RESPONDENTS TO "AMENDED COMPLAINT"

NOW come the Suburban O'Hare Commission and the undersigned individual respondents and state that the "Amended Complaint"[1] filed by Mr. Brent M. Christensen is without merit for the reasons stated below.

Summary of Respondents' Position

The advertisement challenged by Mr. Christensen was paid for by the Suburban O'Hare Commission – a governmental body organized under the Constitution and laws of the State of Illinois. Mr. Christensen appears to be arguing that an advertisement published by the Suburban O'Hare Commission violates Section 441d of the Federal Election Campaign Act (FECA), 2 U.S.C. §441d and the corresponding regulation of the Federal Election Commission, 11 CFR §110.11 – charging that the advertisement contained "express advocacy" expressly urging the election or defeat of a candidate and thus failed to contain a legally required disclaimer that the advertisement was not authorized by the candidate. If the advertisement did not contain "express advocacy", there is no requirement for such a disclaimer and this proceeding must be dismissed.

Mr. Christensen's complaint is without merit for the following reasons:

1. The Suburban O'Hare Commission is the only proper respondent. Preliminarily, the only proper respondent here is the Suburban O'Hare Commission. The Suburban O'Hare Commission is a "person" within the meaning of §441d and the only legal entity or person that paid for the advertisement within the meaning of §441d[2].

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1 Respondents were never served with the "original" complaint by Mr. Christensen.

2 The Suburban O'Hare Commission is a "person" within the meaning of §441d of the Federal Election Campaign Act (FECA), 2 U.S.C. §441(d). See 2 U.S.C. §431(11) and the corresponding regulation of the Federal Election Commission defining a "person" 11 CFR §110.11: "'Person' means an individual, partnership, committee, association, corporation, labor organization, and any other organization, or group of persons."

The Suburban O'Hare Commission is the person that made the expenditure to pay for the advertisement under challenge here. See affidavit of Ronald Wietecha, Treasurer of the Suburban O'Hare Commission enclosed herewith as Exhibit 1. None of the other respondents listed in the caption of the Amended Complaint made "an expenditure for the purpose of financing communications" under the terms of §441d and therefore are not proper parties to this proceeding. *Id.*

None of the other named respondents paid for the advertisement and none of the other respondents are proper parties in this proceeding.

2. The advertisement does not contain "express advocacy" – it does not contain explicit words (e.g. "Vote for", "Elect") that the federal courts have ruled are constitutionally required elements of "express advocacy". As to the advertisement itself, there is clearly no "express advocacy" in the ad – *i.e.*, no express language explicitly urging readers to vote for or against a candidate. As discussed below, the advertisement is classic issue communication and the federal courts have consistently ruled that -- absent express language urging the election or defeat of a candidate (e.g. "Vote For", "Elect", etc.) – issue communications such as the advertisement here is constitutionally protected by the First Amendment. This constitutional protection extends to communications that, as here, praise or criticize public officials or candidates – as long as the communication does not contain express words explicitly urging the reader to vote for or elect or defeat a candidate. Indeed, even Mr. Christensen concedes that the constitutionally required "magic words" are not present in the advertisement.

3. Mr. Christensen's attempt to argue implied advocacy is without merit. Mr. Christensen's attempt to argue *implied* advocacy under the so-called "reasonable person" test of the Federal Election Commission's regulation, 11 CFR §100.22(b), must fail for two reasons. First, federal courts have repeatedly ruled that the "implied" advocacy concept embodied in 11 CFR §100.22(b) – and indeed §100.22(b) itself – are unconstitutional as violative of the "express advocacy" requirements of the Constitution.

Second, Mr. Christensen's implied express advocacy argument misreads the requirements of §100.22(b). Even if this regulation had not been voided by the courts as unconstitutional, the advertisement would not be "express advocacy" within the meaning of §100.22(b).

Mr. Christensen appears to believe that the "reasonable person" standard means that an advertisement constitutes "express advocacy" if any "reasonable person" might construe the ad as advocating the election or defeat of a candidate – even though another "reasonable person" might not. Contrary to Mr. Christensen's apparent interpretation, section 100.22(b)'s test is not what one reasonable person might construe the language to mean. Such an approach would trigger "express advocacy" whenever one could hypothesize – as Mr. Christensen has here – a single "reasonable person" who might construe the advertisement to advocate the election of Mr. Hyde or the defeat of Mr. McCain.

On the contrary, section 100.22(b) requires a finding that no reasonable person could conclude other than that the advertisement was urging the election of Mr. Hyde and the electoral defeat of Mr. McCain. In other words, section 100.22(b) requires a finding that all reasonable persons would reach the same conclusion. Here the advertisement in question clearly praises and criticizes various Republican politicians for their positions on a substantive issue of great importance to the residents and communities of the Suburban O'Hare Commission – and asks Republican officials to take action on this issue. That is the intended meaning and purpose of the advertisement by the Suburban O'Hare Commission.

The fact that Mr. Christensen (as a self-appointed "reasonable person") might construe the implications of the advertisement as (in his mind) endorsing the election or defeat of a candidate simply does meet the requirements of §100.22(b). Where as here, there is room for debate – with Mr. Christensen having one opinion and the Suburban O'Hare Commission having another – the implied advocacy test of §100.22(b) is not satisfied. Here the Suburban O'Hare Commission contends that the advertisement brought substantive public policy issues to the attention of Mr. Hyde and Illinois Republican leaders and asking that action be taken on a substantive issue – *i.e.*, stopping

slot expansion at O'Hare. Mr. Christensen has a different view. The very fact that the issue is debatable means that it cannot constitute "express advocacy" under §100.22(b).

I. Background Summary

The Suburban O'Hare Commission is a governmental body organized under the Constitution and laws of the State of Illinois. As discussed below, the Suburban O'Hare Commission represents member communities which are located in the vicinity of O'Hare Airport – addressing concerns of the residents of those communities with problems of safety, noise, and toxic air pollution regarding O'Hare Airport[3].

As part of its activities over the last several years, the Suburban O'Hare Commission has engaged in a broad range of programs dealing with these problems including: 1) a school soundproofing program, 2) a research and education program on these problems, 3) the operation and maintenance of a radar and noise monitoring system, 4) community forums where public officials and candidates present their positions on these problems to the community, and 5) an extended program of "issue" advertising – whereby the Suburban O'Hare Commission has used newspaper advertisements to highlight various issues relating to O'Hare development and its impact on the community.

As part of its education and research program relating to O'Hare expansion, the Suburban O'Hare Commission became very concerned in 1998 over proposals in Congress to lift or relax a federal regulation that limits the number of planes that can operate at O'Hare. This rule is called the "High Density Rule", 14 CFR §93.123, and the numerical limits it places on aircraft operations are called "slots".

In 1998, the Suburban O'Hare Commission conducted an investigation of the slot expansion proposals and issued a report *The Shell Game With "Slots" At O'Hare*. The

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3 The current member communities of the Suburban O'Hare Commission are Addison, Illinois; Bensenville, Illinois; Des Plaines, Illinois; Elk Grove Village, Illinois, Elk Grove Township, Illinois; Elmhurst, Illinois, Harwood Heights, Illinois, Itasca, Illinois: Lisle, Illinois; Maine Township, Illinois: Park Ridge, Illinois; Roselle, Illinois, Schiller Park, Illinois; Wood Dale, Illinois; and DuPage County, Illinois.

investigation found that – contrary to political claims that a relaxation of the slot restrictions would help competition – the increased slots had actually helped expand the existing monopoly position of dominant carriers at "Fortress O'Hare" and that the proposed increase in slots would exacerbate the already severe problems with safety, toxic air pollution, and noise at O'Hare.

Based in part on that report and his own investigation, Congressman Henry Hyde – whose district includes almost all of the communities severely impacted by O'Hare operations – waged a vigorous and successful effort to defeat the slot expansion proposals pending in Congress in 1998.

In 1999, two related but different proposals were introduced in Congress to eliminate or relax the slot restrictions at O'Hare. Congressman Schuster (R-Pa.) has introduced HR 1000 which called for complete elimination of the slot rule. Senator McCain (R-Az.) has introduced S.82 which calls for lifting any slot restrictions on the use of "regional" jets at O'Hare – which could lead to hundreds of additional flights per day and a continuation of a game of "musical slots" whereby existing slots are opened up for additional heavy aircraft and the lighter traffic routes are moved to regional jets.

Following a long standing practice in which the Suburban O'Hare Commission had published a number of issue oriented advertisements relating to O'Hare, the Suburban O'Hare Commission in April of 1999 published a full page advertisement[4] in a number of suburban newspapers. The advertisement had two functions:

1) The ad called for "Republican Leadership" – asking specific leading Illinois Republican officials to join with Congressman Hyde and urge the Illinois Republican delegation to help block what are Republican proposals to lift the slot limits at O'Hare.

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4 The advertisement is attached as Exhibit 2 to this Response.

2) The ad praised Congressman Hyde for his courage in opposing the slot expansion proposals and urged him to "hang tough" – and not accept a compromise that would allow expansion at O'Hare.

II. The Legal and Historical Background of the Suburban O'Hare Commission

Contrary to the assertion by Mr. Christensen in Paragraph 4 of his complaint that "SOC is not a legally cognizable entity", the Suburban O'Hare Commission is a legal entity created under the express authorization of the Illinois Constitution and statutes. Further, the Suburban O'Hare Commission is a "person" within the meaning of FEC regulations[5].

The Suburban O'Hare Commission is a political entity authorized by the Constitution and the Statutes of the State of Illinois. Article VII, §10 of the Illinois Constitution expressly provides:

> Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and *to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance.* Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. *Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.* (emphasis added)

The constitutional authorization for intergovernmental organizations such as the Suburban O'Hare Commission is repeated several time in the Illinois statutes. 5 ILCS 220/2 identifies the governmental entities ("public agencies") that may enter into intergovernmental agreements:

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5 See footnote 2, *supra*. Therefore, since the Suburban O'Hare Commission is a legally cognizable entity and since the Suburban O'Hare Commission is the entity that paid for the ad, the other named respondents — who are not persons who paid for the ad — are not proper parties to this proceeding.

> The term "public agency" shall mean any unit of local government as defined in the Illinois Constitution of 1970, any school district, any public community college district, any public building commission, the State of Illinois, any agency of the State government or of the United States, or of any other State, any political subdivision of another State, and any combination of the above pursuant to an intergovernmental agreement which includes provisions for a governing body of the agency created by the agreement.

5 ILCS 220/3 states:

> § 3. Intergovernmental agreements. Any power or powers, privileges or authority exercised or which may be exercised by a public agency of this State *may be exercised and enjoyed jointly* with any other public agency of this State and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States do not prohibit joint exercise or enjoyment. (emphasis added)

65 ILCS 5/1-1-5 states:

> The corporate authorities of each municipality may exercise *jointly*, with one or more other municipal corporations or governmental subdivisions or districts, *all of the powers* set forth in this Code *unless expressly provided otherwise*. In this section "municipal corporations or governmental subdivisions or districts" includes, but is not limited to, municipalities, townships, counties, school districts, park districts, sanitary districts, and fire protection districts. (emphasis added)

Pursuant to this constitutional and statutory authorization under Illinois State Law, several of the communities surrounding O'Hare airport created the entity known as the Suburban O'Hare Commission in 1981. Protection of the citizens of their member communities from the problems created by O'Hare airport is the central focus of the Suburban O'Hare Commission and is reflected in the statement of purposes and objectives stated in Section Two of the 1981 intergovernmental agreement creating the Suburban O'Hare Commission:

"The purposes and objectives of the Commission shall be as follows:

"A. Study the effect of aircraft overflights over the corporate limits of the Parties on the quality of life within their territory.

"B. Study and recommend solutions to problems created by O'Hare International Airport affecting the lives of citizens of the Parties.

"C. Consult with other communities that are not members of the Commission on common objectives in improving the quality of life of all suburban communities adversely affected by O'Hare International Airport and its overflight operations.

"D. Retain counsel and expert consultants for purposes of studying the legal rights of the Parties and their citizens in relation to O'Hare International Airport; provided, however, no litigation shall be filed by the Commission in the name of any Party without the Party's prior written consent.

"E. Represent the Parties in administrative proceedings before the Federal Aviation Administration, or any other governmental body having jurisdiction in the affairs of O'Hare International Airport insofar as they might affect the Parties.

"F. Conduct an Information and Education Program for the citizens of the Parties on the operations of O'Hare International Airport, any contemplated expansion thereof and the effects of noise pollution and aircraft-caused pollutants in the atmosphere.

"G. Conduct a public relations campaign acquainting the general public of the adverse effects of O'Hare International Airport operations or any expansion thereof on the citizens of the Parties.

"H. Report to the Parties on a regular continuing basis on the performance of the Commission's duties and new developments in the operations of O'Hare International Airport."

Consistent with its organizational mandate, the Suburban O'Hare Commission has pursued a wide range of activities over the last 18 years – all designed to protect the citizens of the member communities from the adverse effects of expansion of O'Hare airport. Among the Suburban O'Hare Commission's activities have been:

1. **School Soundproofing.** The Suburban O'Hare Commission sponsored a long successful legal battle – won with the assistance of the DuPage County Board and the DuPage County State's Attorney – to obtain payment of soundproofing funds for more than 22 public schools in DuPage County to prevent injury to education from aircraft noise.

2. **Research and Education.** The Suburban O'Hare Commission has conducted research and education activities on major issues involving O'Hare airport and

proposals for airport expansion. By way of illustration, enclosed as Exhibit 3 is a report SOC published last year entitled *The Shell Game With Slots At O'Hare.* This report contains a detailed analysis of the slot exemption history and the problems of safety, noise, toxic air pollution, and passenger delay that will be created by increased operations at O'Hare – the very subject that is the basis of the advertisement criticized by Mr. Christensen. Also enclosed by way of illustration is a recent critique by SOC of a proposed air pollution permit for a United Airlines facility at O'Hare and the problems with toxic air pollution at O'Hare (Exhibit 4). Finally, also enclosed is a report by Congressmen Hyde and Jesse Jackson, Jr. entitled *Metropolitan Chicago's Airport Future – A Call For Regional Leadership.* (Exhibit 5) SOC provided the Congressmen with significant research assistance for this report.

3. Noise Monitoring System. The Suburban O'Hare Commission maintains and operates a sophisticated radar system and coordinated noise monitoring system in communities around O'Hare.

4. **Community Forums.** The Suburban O'Hare Commission has conducted a number of large town meetings and community forums where elected officials and candidates are asked to speak on issues relating to airport expansion.

5. Ad Campaigns Over the years the Suburban O'Hare Commission has used local newspapers to publish a number of advertisements in local and regional newspapers – discussing various issues relating to O'Hare Airport expansion. Enclosed as Exhibit 6 is a group of advertisements run in local or regional papers over the last several years on various issues. The advertisement of which Mr. Christensen complains is but the latest in a long series of related ads discussing these issues and either criticizing or praising public officials for their positions on issues of O'Hare expansion. The clear purpose of the advertisements is not to urge the election or defeat of any politician but to put pressure on political leaders to take action to protect their citizens.

III. Mr. Christensen's Complaint

A. The Legal Basis of the Complaint.

Though never stating the legal basis for his complaint – *i.e.*, the statute or regulation he claims has been violated – Mr. Christensen appears to be arguing that an advertisement published by the Suburban O'Hare Commission violates Section 441d of the Federal Election Campaign Act (FECA), 2 U.S.C. §441d and the corresponding regulation of the Federal Election Commission, 11 CFR §110.11[6].

Section 441d states in pertinent part as follows:

> § 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space
>
> (a) Whenever any person makes an expenditure for the purpose of financing communications *expressly advocating the election or defeat of a clearly identified candidate*, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication--
>
> ***
>
> (a)(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.
>
> (emphasis added)[7]

11 CFR §110.11 in pertinent part provides:

> **§ 110.11 Communications; advertising (2 U.S.C. 441d).**
>
> (a)(1) General rules. Except as provided at paragraph (a)(6) of this section, whenever any person makes an expenditure

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6 This Response by the Respondents is directed to the issue of whether the advertisement Mr. Christensen complains of violates §441(d) and 11 CFR §110.11. If there is any other statute or regulation to which Mr. Christensen's complaint is directed or which the staff of the Federal Election Commission is concerned, Respondents request specific notice of such statute or regulation and an opportunity to respond to specific detailed allegations specifying how such additional statute or regulation has been violated..

7 As the enclosed affidavit by the Treasurer of the Suburban O'Hare Commission (Exhibit 1) attests, the advertisement was not authorized by Mr. Hyde nor by an authorized political committee of Mr. Hyde, or its agents. Therefore subsections (a)(2) and (a)(3) are not relevant to this response.

for the purpose of financing a communication that *expressly advocates the election or defeat of a clearly identified candidate,* or that solicits any contribution, through any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or any other form of general public political advertising, a disclaimer meeting the requirements of paragraphs (a)(1)(i), (ii), (iii), (iv) or (a)(2) of this section shall appear and be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication.

***

(a) (1) (iii)

(iii) Such communication, including any solicitation, if made on behalf of or in opposition to a candidate, but paid for by any other person and not authorized by a candidate, authorized committee of a candidate or its agent, shall clearly state that the communication has been paid for by such person and is not authorized by any candidate or candidate's committee.

2. Mr. Christensen's Assertions As To "Express Advocacy".

Mr. Christensen's Amended Complaint and his April 26, 1999 letter to the Federal Election Commission make the charge that the advertisement constitutes "express advocacy" – apparently (though never stated) in violation of §441d and 11 CFR §110.11.

In paragraph 6 of the Amended Complaint, Mr. Christensen alleges that the advertisement "contains numerous statements of *express advocacy* for Henry John Hyde, a Republican Candidate in Illinois 6th Congressional District..." (emphasis added).

In paragraph 7 of the Amended Complaint Mr. Christensen states that the advertisement "also contains statements that *could be reasonably construed* as express advocacy opposing Presidential Candidate John McCain..." (emphasis added).

In a letter to the FEC dated April 26, 1999 Mr. Christensen stated as follows:

> ..[T]he ad seems to contain express advocacy for the reelection of Henry Hyde without any required disclaimer.
>
> Although the issue of magic words *is debatable*, if the reasonable person test is applied, it would appear that this

ad advocates the reelection of Mr. Hyde. Moreover, a reasonable person *might construe* the ad to contain advocacy against Senator John McCain with respect to his Presidential bid. (emphasis added).

IV. Mr. Christensen's Complaint is Without Merit

A. The advertisement does not contain express words explicitly urging election or defeat of a candidate in an election – the Constitutional requirement imposed by federal courts in order for the "express advocacy" prohibition of §441d to apply. Mr. Christensen acknowledges that the "magic words" are not present.

The federal courts have made it absolutely clear that for a statement to constitute "express advocacy" the statement must actually and literally urge the election or defeat of a candidate in an election – *e.g.* "Vote for Hyde", "Defeat McCain". Language from which someone might *infer* encouragement to elect or defeat a candidate is not enough to meet the constitutional standard. *See Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (awarding fees to advocacy organization against FEC for asserting implied advocacy test); *Maine Right To Life Committee, Inc. v. Federal Election Commission*, 98 F.3d 1 (1st Cir. 1996) (affirming and adopting the opinion of the district court at 914 F. Supp. 8 holding FEC implied advocacy test unconstitutional); *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir.1980); *FEC v. National Organization for Women*, 713 F.Supp. 428 (D.D.C.1989); *Right to Life of Dutchess County, Inc. v. Federal Election Com'n*, 6 F.Supp.2d 248 (S.D.N.Y. 1998) (holding FEC implied advocacy test unconstitutional) .

In the absence of express words calling for the reader of the communication to explicitly vote for or against a candidate, these federal courts have uniformly held that its is unconstitutional for the Federal Election Commission to prosecute a claim of "express advocacy" on the basis of the implied meaning of a communication. These constitutionally required words of express advocacy – actually and explicitly calling for a vote for or against a candidate in an election – are the so-called "magic words" that Mr. Christensen alludes to in his letter of April 26 to the FEC.

And even Mr. Christensen acknowledges that the advertisement does not contain the "magic words" necessary to rise to the level of express advocacy within the meaning of the constitutional case law cited above. As Mr. Christensen states:

> ..[T]he ad *seems* to contain express advocacy for the reelection of Henry Hyde without any required disclaimer.
>
> Although the issue of magic words *is debatable*, if the reasonable person test is applied, it would appear that this ad advocates the reelection of Mr. Hyde.
>
> letter of April 26 (emphasis added)(Exhibit 7 hereto)

Mr. Christensen acknowledges that express unmistakable language advocating that the reader vote for Mr. Hyde or that Mr. Hyde be elected – the so-called "magic words" that the federal courts have made the constitutional pre-requisite of "express advocacy" – is not present in the challenged advertisement. He states that as to Congressman Hyde, the "issue of magic words *is debatable*"; his very acknowledgement takes the advertisement out of the clear unequivocal express advocacy requirement the federal courts have imposed on §441d.

With regard to Senator McCain, Mr. Christensen does not even attempt to raise even a colorable claim that express unequivocal words of advocacy are present. His whole argument on McCain is based on the implied advocacy concept of what a "reasonable man" might construe the advertisement to mean:

> Moreover, a reasonable person *might construe* the ad to contain advocacy against Senator John McCain with respect to his Presidential bid.
>
> Letter of April 26 (emphasis added)

> [The advertisement] "also contains statements that *could be reasonably construed* as express advocacy opposing Presidential Candidate John McCain..."
>
> Paragraph 7 of the amended complaint (emphasis added).

In summary, Mr. Christensen concedes that the requisite explicit "magic words" urging voters to elect or defeat a candidate – explicit words that federal courts have repeatedly held are constitutionally necessary to constitute "express advocacy" within the meaning of §441d – are not present in the advertisement under challenge here. Nowhere in the advertisement is there any language expressly urging voters to vote for Henry Hyde or to vote against John McCain. Under the federal case law cited above, the advertisement challenged by Mr. Christensen cannot and does not constitute "express advocacy".

Mr. Christensen's complaint boils down to an argument – one that Respondents strongly dispute – that the *implied* message of the advertisement is that voters should vote for Henry Hyde and defeat John McCain. As shown in the next section, that argument is wholly without merit.

B. The advertisement does not meet the "implied" express advocacy test of 11 CFR §100.22(b).

Having admittedly failed to bring the Suburban O'Hare Commission advertisement within the constitutionally required explicit (or "magic") words test, Mr. Christensen is trying to invoke the Federal Election Commission's secondary definition of "implied" express advocacy contained in 11 CFR §100.22(b). Mr. Christensen relies on the argument that the constitutionally required express advocacy – *e.g.*, that the reader vote for Mr. Hyde or that Mr. Hyde be elected – is implied by the language of the ad and that therefore under a "reasonable person test" "it *would appear* that this ad advocates the reelection of Mr. Hyde". [The advertisement] "also contains statements that *could be reasonably construed* as express advocacy opposing Presidential Candidate John McCain..."

To make this argument, Mr. Christensen relies on the test of subsection (b) of the FEC's definition of express advocacy. Section 100.22(b) finds "express advocacy" by implication when both of the following conditions are met:

(b) 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) because--

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

(underscore emphasis added)

For the reasons discussed below, Mr. Christensen's attempt to invoke §100.22(b) to claim that the advertisement expressly advocates the election of Mr. Hyde necessarily fail. First, §100.22(b)' express advocacy by implication approach has been repeatedly declared unconstitutional by multiple federal courts as violative of the First Amendment and therefore unconstitutional. Mr. Christensen is therefore relying on a regulatory definition that has been repeatedly declared unconstitutional.

Second, even if the implied express advocacy test of §100.22(b) were constitutional, the facts of this advertisement do not meet the implied express advocacy test of §100.22(b). Nothing in the advertisement leads to the inescapable conclusion – a conclusion about which "reasonable minds could not differ" – that the communication was urging the election of Henry Hyde or the defeat of John McCain. The entire purpose of the advertisement is to 1) encourage Illinois Republican officials (i.e. Governor Ryan, Congressman Hastert, State Representative Daniels, State Senator Philip) to support Henry Hyde and to urge members of the Illinois Congressional delegation to vote against increasing flights at O'Hare, and 2) to encourage Henry Hyde to "hang tough" and continue his opposition to flight increases at O'Hare. The fact that the ad praises Congressman Hyde is simply encouragement to Congressman Hyde to remain tough on the slot expansion issue.

1. Section §100.22(b) has been repeatedly declared void and unconstitutional.

Section §100.22(b)'s attempt to finding such explicit words by implication – by a so-called "reasonable person's" interpretation from the implications of the language in the communication as opposed to the explicit exhortation to vote or elect a candidate – has been repeatedly rejected by the federal courts. The federal courts have repeatedly ruled that §100.22(b) is unconstitutional as violative of the First Amendment and that the only language that will meet the "express advocacy" requirement is explicit words telling the reader to vote for a candidate or to defeat a candidate. *See Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (awarding fees to advocacy organization against FEC for asserting implied advocacy test); *Maine Right To Life Committee, Inc. v. Federal Election Commission*, 98 F.3d 1 (1st Cir. 1996) (affirming and adopting the opinion of the district court at 914 F. Supp. 8 holding FEC implied advocacy test unconstitutional); *Right to Life of Dutchess County, Inc. v. Federal Election Com'n*, 6 F.Supp.2d 248 (S.D.N.Y. 1998) (holding FEC implied advocacy test unconstitutional).

Given the federal courts clear and repeated rejection of the Section §100.22(b) and the repeated holdings of unconstitutionality, Mr. Christensen's reliance on this regulation is clearly unlawful.

2. Mr. Christensen's interpretation of 11 CFR §100.22(b) is in error.

Mr. Christensen clearly misreads the "reasonable person" standard of §110.22(b). Mr. Christensen appears to believe that the "reasonable person" standard means that an advertisement constitutes "express advocacy" if any "reasonable person" might construe the ad as advocating the election or defeat of a candidate – even though another "reasonable person" might not. Thus his statements that "a reasonable person *might construe* the ad to contain advocacy against Senator John McCain" (letter of April 26th) and paragraph 7 of the Amended Complaint "[advertisement] contains statements that

could be reasonably construed as express advocacy opposing Presidential Candidate John McCain..." (emphasis added).

But §100.22(b) contains a much more rigorous standard. Language that is "debatable" or which "might" be construed differently by different reasonable persons does not fall within "express advocacy" as defined by §100.22(b).

Section §100.22(b) makes it clear that a communication such as the advertisement here does not meet the implied test of "expressly advocating" unless (1) "the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning", and 2) "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates". 11 CFR §100.22(b) (emphasis added).

In short, where as here, there is room for debate – with Mr. Christensen having one opinion and the Suburban O'Hare Commission having another – the implied advocacy test of §100.22(b) is not satisfied and there is no obligation to attach the notice. Here the Suburban O'Hare Commission contends that the advertisement brought substantive public policy issues to the attention of Mr. Hyde and Illinois Republican leaders and asking that action be taken on a substantive issue – *i.e.*, stopping slot expansion at O'Hare. Mr. Christensen has a different view. The very fact that the issue is debatable means that it cannot constitute "express advocacy" under §100.22(b).

Contrary to Mr. Christensen's apparent interpretation, section 100.22(b)'s test is not what one reasonable person might construe the language to mean. Such an approach would trigger "express advocacy" whenever one could hypothesize – as Mr. Christensen has here – a single "reasonable person" who might construe the advertisement to advocate the re-election of Mr. Hyde or the defeat of Mr. McCain.

On the contrary, section 122(b) requires a finding that no reasonable person could conclude other than that the advertisement was urging the re-election of Mr. Hyde and

the electoral defeat of Mr. McCain. In other words, section 122(b) requires a finding that all reasonable persons would reach the same conclusion.

Conclusion

The Suburban O'Hare Commission and the other respondents[8] respectfully urge the Federal Election Commission to dismiss Mr. Christensen's Amended Complaint and to close this case:

1. None of the respondents other than the Suburban O'Hare Commission paid for the advertisement under challenge by Mr. Christensen and are therefore not even proper parties under 2 U.S.C. §441d.
2. The advertisement challenged by Mr. Christensen does not (by his own acknowledgement) contain the express words explicitly urging the defeat or election of a candidate – *i.e.*, the "magic words" – constitutionally required to apply §441d's "express advocacy" provision. Issue communications such as the advertisement here are constitutionally protected even though the communication criticizes or praises an elected politician.
3. Mr. Christensen's implied advocacy requirement under 11 CFR §100.22(b) must fail for two reasons:
   a. The federal courts have repeatedly held that §100.22(b) – and the implied advocacy rationale on which it is based – are unconstitutional and void.
   b. Even, if §100.22(b) were constitutional, Mr. Christensen's argument – that a communication is express advocacy if a single reasonable person might construe the communication to urge election or defeat of a candidate – does not meet the requirements of §100.22(b).

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8 The authorizations of the individual respondents to be represented by the undersigned counsel are enclosed as Exhibit 8. It was not clear whether separate authorizations were needed in addition for individual municipal and county governments. If that is required, such separate appearances and authorizations will be provided.

Respectfully submitted,

Joseph V. Karaganis
Karaganis & White
414 N. Orleans
Chicago, Illinois 60610
Tel: 312-836-1177
Fax: 312-836-9083

General Counsel of the
Suburban O'Hare Commission
And counsel for the individual respondents