JUL 0 3 2006

FEDERAL ELECTION COMMISSION
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

2006 JUL -3 A 9:33

In the matter of	)	
	)	MUR 5634
Sierra Club, Inc.	)	

GENERAL COUNSEL'S REPORT #2

SENSITIVE

Table of Contents

I. ACTIONS RECOMMENDED

Find probable cause to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a)

II. BACKGROUND

Just prior to the November 2, 2004 General Election, Sierra Club, Inc. ("the Sierra Club") created and mailed in Florida nearly 170,000 copies of a pamphlet entitled "LET YOUR CONSCIENCE BE YOUR GUIDE" ("Conscience"), at a cost of $69,771.45. Attachment 1. In large type, the exterior of the "Conscience" pamphlet prominently exhorts the reader to "LET YOUR CONSCIENCE BE YOUR GUIDE ... ," accompanied by pictures of gushing water, picturesque skies, a forest of tall trees, and people enjoying nature. The heading of the interior of the pamphlet exhorts the reader, "AND LET **YOUR VOTE** BE **YOUR VOICE**." (Emphasis in original).

Underneath that exhortation, the pamphlet compares the environmental records of President Bush and Senator Kerry and U.S. Senate candidates Mel Martinez and Betty Castor through checkmarks and written narratives. For example, in the category of "Toxic Waste Cleanup," it touts Senator Kerry as a "leader on cleaning up toxic waste sites" and credits him with co-sponsoring legislation that would unburden taxpayers and "hold polluting companies responsible for paying to clean up abandoned toxic waste sites." In contrast, the description of President Bush's record on the same subject charges that "President Bush has refused to support the 'polluter pays' principle, which would require corporations to fund the cleanup of abandoned toxic waste sites, including the 51 in Florida. Instead, he has required ordinary taxpayers to shoulder the cleanup costs." Similarly, under the subject of "Clean Air," Senator Kerry is praised for "support[ing] an amendment that would block President Bush's change to weaken the

Clean Air Act," and with co-sponsoring legislation "which would force old, polluting power plants to clean up." Again, in sharp contrast, President Bush's position on "Clean Air" is described as "weakening the law that requires power plants and other factories to install modern pollution controls when their plants are changed in ways that increase pollution." In each of three categories, the pamphlet assigns a "checkmark symbol" in one or two boxes next to either one or both candidates; of the two candidates, only Senator Kerry receives checkmarks in every box in all three categories (Toxic Waste Cleanup, Clean Air, and Clean Water), whereas President Bush receives only one checkmark in a single category (Clean Air), and in that category, there are two checkmarks for Senator Kerry.

To the right of the comparisons between Senator Kerry and President Bush, the "Conscience" pamphlet also compares U.S. Senate candidates from Florida, Mel Martinez and Betty Castor, in three categories: (1) Toxic Waste Cleanup, (2) Clean Air, and (3) Energy. Ms. Castor's environmental record in all three categories is presented favorably, with a checkmark in all three boxes next to her position, while Mr. Martinez does not receive any checkmarks.[1] The pamphlet concludes with: "Find out more about the candidates before you vote. Visit www.sierraclubvotes.org," then states that it was "[p]aid for by the Sierra Club."[2]

---

[1] For example, in the category of "Toxic Waste Cleanup," Ms Castor is praised for her support of the "'polluter pays' principle to make corporate polluters, not U S taxpayers, pay to clean up abandoned toxic waste sites " Likewise, in the category of "Clean Air," she is praised for "pledg[ing] to address air pollution by placing caps" on various emissions For Mr Martinez, the mailer states that there is "no stance on record" relating to "Toxic Waste Cleanup" or "Clean Air " In the area of "Energy," Ms. Castor purportedly "[s]upports a greater commitment to alternative energy," while Mr Martinez purportedly supports legislation "which gave millions in subsidies to the oil and coal industries, but made minimal investments in clean alternative energy technologies "

[2] In a footnote in its Brief, the Sierra Club clarified that its "Environmental Voter Education Campaign," which reimbursed the Sierra Club for the costs of the mailer, was another name for the Sierra Club Voter Education Fund ("Fund"), an entity organized under Section 527 of the Internal Revenue Code We are not addressing the status of the 527 entity in this matter If the 527 is a political committee, then the Sierra Club violated 2 U S C § 441b(a) by making a corporate advance to the committee If it is not a political committee, the transaction would be an internal one between corporate accounts, and makes no difference to the analysis

As discussed in the General Counsel's Brief, incorporated herein by reference, this pamphlet contains express advocacy under both 11 C.F.R. § 100.22(a) and (b), and thus constituted an independent expenditure. *See* 2 U.S.C. § 431(17). As a corporation, the Sierra Club was prohibited from paying for the pamphlet. 2 U.S.C. § 441b(a).

In its Response Brief, the Sierra Club does not dispute that it created and distributed the pamphlet at issue, or that the pamphlet was related to the 2004 general election, or that it paid for the pamphlet. Rather, the Sierra Club makes a number of legal arguments disclaiming liability. First, it argues that the "Conscience" pamphlet does not contain express advocacy under Section 100.22(a) because it does not contain any of the "magic words" found in a footnote in *Buckley v Valeo*, 424 U.S. 1, 44, n. 52 (1976) ("*Buckley*"), nor an express request to "vote for" a group of candidates who support a particular position along with a clear identification of which candidates support this position. Second, the Sierra Club contends that any reliance on Section 100.22(b) is barred by the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619 (2003) ("*McConnell*"), which, according to the Sierra Club, makes clear that express advocacy extends only to communications containing the so-called *Buckley* "magic words." Even if *McConnell* itself did not undercut Section 100.22(b), the Sierra Club argues, that section is unconstitutionally vague. And even if both of its legal arguments about Section 100.22(b) are incorrect, the Sierra Club asserts, the "Conscience" pamphlet does not constitute "express advocacy" as defined in that section. Finally, the Sierra Club concludes that it lacked notice of the Commission's position regarding the definition of "express advocacy" following *McConnell.*

As set forth below, the Sierra Club misconstrues the law both before and after *McConnell.* The "Conscience" pamphlet contains express advocacy as defined at Section 100.22(a) because it provides "in effect" an explicit directive to vote for Senator Kerry and Betty

Castor. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"). Moreover, Section 100.22(b) is consistent with *McConnell*, is not unconstitutionally vague, and the "Conscience" pamphlet falls within its parameters. Finally, the Sierra Club had notice that its conduct might violate the Act.

Accordingly, we recommend that the Commission find probable cause to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a).

III. ANALYSIS

A. The Conscience Pamphlet Contains Express Advocacy Under Section 100.22(a)

Section 100.22(a) provides that a communication "expressly advocates" the election or defeat of a candidate if it "uses phrases such as ... "vote Pro-Life," or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice." 11 C.F.R. § 100.22(a). This standard is derived from the Supreme Court's decision in *MCFL*. The "Conscience" pamphlet is similar to communications found to constitute express advocacy in *MCFL* and *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) ("*Christian Coalition*").

In *MCFL*, the Supreme Court considered a newsletter that urged readers to "VOTE PRO-LIFE," set forth the candidates' views on three issues, and then identified each one as either supporting or opposing what MCFL regarded as the correct position. MCFL indicated this through three symbols: (1) a "y," which indicated that a candidate supported the MCFL view on a particular issue; (2) an "n," which indicated that a candidate opposed the MCFL view; and (3) an asterisk, which was placed next to the names of incumbents who had maintained "a 100% pro-life voting record in the state house by actively supporting MCFL legislation." 479 U.S. at 243-44. The newsletter also included photographs of only those candidates who received a "y"

on all three issues, or were identified either as having a 100% favorable voting record or as having stated a position consistent with that of MCFL. *Id.* at 244. The Court reasoned that the newsletter could not "be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians." *Id.* at 249. Rather, the Court found that the newsletter provided "in effect an explicit directive" to vote for the candidates favored by MCFL, and stated that "[t]he fact that [a] message is marginally less direct than 'Vote for Smith' does not change its essential nature." *Id.*

As with the *MCFL* newsletter, the Sierra Club pamphlet urges voters to vote for specific candidates who support the Sierra Club's positions. The Sierra Club's statement "LET YOUR CONSCIENCE BE YOUR GUIDE ... AND LET **YOUR VOTE** BE **YOUR VOICE**" is similar to the *MCFL* newsletter's exhortation to "VOTE PRO-LIFE." And in the same manner in which the *MCFL* newsletter used symbols and photographs, "Conscience" uses checkmarks and narratives to identify the candidates for whom the reader should vote.

The pamphlet here even more closely resembles the "Georgia" mailing the Court found to contain express advocacy in *Christian Coalition*. There, the district court considered a mailing from the Christian Coalition that enclosed a "Scorecard" indicating whether candidates in various Congressional races supported the Christian Coalition's positions on a number of issues. The mailing stated that the recipient need not bring the Scorecard to the voting booth for the congressional primary election (as the recipient should for other races addressed in the scorecard), "because only one incumbent is being challenged, Newt Gingrich, and he is a '100 percenter.'" *See Christian Coalition*, 52 F.Supp.2d. at 65. In concluding that the "Georgia" mailing was express advocacy, the court reasoned that "[w]hile marginally less direct than saying 'Vote for Newt Gingrich,' the [mailing] in effect is explicit that the reader should take with him

to the voting booth the knowledge that Speaker Gingrich was a 'Christian Coalition 100 percenter' and therefore the reader should vote for him." *Id.* Similarly, the pamphlet at issue here shows Senator Kerry and Betty Castor as supporting the Sierra Club's positions on each and every issue presented, while simultaneously exhorting the reader to "LET YOUR CONSCIENCE BE YOUR GUIDE ... AND LET **YOUR VOTE** BE **YOUR VOICE.**" This is the equivalent of designating Senator Kerry and Betty Castor as the Sierra Club's "100 percenters." Just as with the Christian Coalition mailer, the mailer here in effect urges the reader to vote for Senator Kerry and Betty Castor.

The Sierra Club acknowledges in its Response Brief that its pamphlet is geared toward "encourag[ing] [voters] to rely on their own conscience's [sic] when they do vote...." Response at 4. Nonetheless, the Sierra Club attempts to dismiss "LET YOUR CONSCIENCE BE YOUR GUIDE ... AND LET **YOUR VOTE** BE **YOUR VOICE**" as neutral language that merely states "the obvious fact" that "people should think before they act" and "voting is a way of expressing one's views." Response at 2. However, the Sierra Club's claim of neutrality is undercut by the use of checkmarks and pointed narratives that work in combination with the exhortation to "LET **YOUR VOTE** BE **YOUR VOICE**" to unequivocally identify the candidates for whom the reader should vote (Senator Kerry and Betty Castor) and the candidates for whom they should not (President Bush and Mel Martinez). As in *MCFL*, even though the pamphlet's message is "marginally less direct than 'Vote for [Senator Kerry and Betty Castor],'" that "does not change its essential nature." *MCFL*, 479 U.S. at 249.

The Sierra Club also attempts to undermine the significance of the checkmark symbol by arguing that the checkmarks are not accompanied by any explanation of their significance, Response at 3, and "do not 'unmistakably' convey the organization's preferred position on such

issues, since a checkmark, far more than a plus/minus sign or a thumb-up/thumb-down symbol may equally connote support for or opposition to the position taken by the candidate." Response at 13. The checkmark's significance, however, is unambiguously explained in the accompanying written narratives. The written narratives that are not accompanied by a checkmark, such as "President Bush is weakening the law that requires power plants and other factories to install modern pollution controls," unambiguously indicate that the absence of a checkmark is unfavorable. In contrast, the written narratives including statements like "Senator Kerry has repeatedly advocated for increased enforcement of existing clean water laws" and "Senator Kerry has been a leader on cleaning up toxic waste sites," make clear that the accompanying checkmark is favorable, and that the reader's conscience should guide him/her to vote for Senator Kerry.

The Sierra Club argues that *Christian Coalition* actually supports its position, but its discussion is limited to two other Christian Coalition communications that were least like the one at issue here. Specifically, the Sierra Club compares "Conscience" to a particular speech by Christian Coalition Executive Director Ralph Reed and the so-called "Reclaim America" mailing, neither of which was, in effect, an explicit directive to take electoral action for or against a specific candidate. In his speech, Reed made predictions about the electoral outcome ("[w]e're going to see Pat Williams sent bags packing back to Montana in November of this year"), strongly implying a preference that Williams be defeated, but Reed did not exhort the reader to vote against Williams. *Christian Coalition*, 52 F. Supp. 2d at 63. Likewise, the "Reclaim America" mailer included a scorecard that informed the reader of members of Congress' votes on select bills and how the Coalition believed that member should have voted, *id.* at 63-64, but "the Scorecard [did] not identify which incumbents [were] candidates in the

[upcoming] elections, nor [did] it provide a baseline level of agreement indicating the Coalition's electoral endorsement." *Id.* By contrast, the Coalition's "Georgia" mailing, like the "Conscience" pamphlet here, identified Gingrich as 100% in agreement with the Coalition's positions, and urged the voter to connect that knowledge to the act of voting.

In a further attempt to diminish the significance of the checkmarks in its "Conscience" pamphlet, the Sierra Club claims that symbols "are susceptible to varied interpretations and cannot rise to the level of the 'magic words' required for express advocacy." Response at 3. To support this claim, the Sierra Club makes inapt comparisons between this matter and *FEC v. Christian Action Network*, 894 F.Supp. 946 (W.D.Va.1995) ("*CAN*"), *aff'd*, 92 F.3d 1178, (4th Cir.1996). In *CAN*, the sponsoring organization produced and distributed a communication containing photographic images and ominous music reflecting unfavorably on a federal candidate, but contained only one directive: "For more information on traditional family values, contact the Christian Action Network." *CAN*, 894 F.Supp. at 949. Thus, the central issue in *CAN* was whether the photographic images and ominous music, standing alone, constituted express advocacy.

That is not the case in this MUR. As noted above, "Conscience" contains written language—"LET YOUR CONSCIENCE BE YOUR GUIDE ... AND LET **YOUR VOTE** BE **YOUR VOICE**"—exhorting voters to vote for the candidates clearly favored by the Sierra Club, as expressed through the checkmarks and accompanying narratives. Unlike in *CAN*, where the sole focus was on the photographic images and music, the checkmarks in this pamphlet link the written exhortation to vote with the candidates favored by the Sierra Club, just as the photographs and symbols in *MCFL* linked the written directive "VOTE PRO-LIFE" with the candidates favored by MCFL.

Therefore, the pamphlet expressly advocates the election of Senator Kerry and Betty Castor within the meaning of Section 100 22(a).[3]

B. The Conscience Pamphlet Contains Express Advocacy Under Section 100.22(b), Which Must Be Applied to This Matter.

The Sierra Club claims that the Commission may not rely on the definition of "express advocacy" in 11 C.F.R. § 100.22(b) because the regulation is inconsistent with the Supreme Court's decision in *McConnell* and is unconstitutionally vague. Yet "it is elementary that an agency must adhere to its own rules and regulations." *Reuters Ltd v FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). As the D.C. Circuit has stated, the Commission's unwillingness to enforce its own regulations would in itself "establish that such agency action was contrary to law" in a suit under 2 U.S.C. § 437g(a)(8). *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995). Thus, the Commission must apply Section 100.22(b) to the facts of this matter. As we explain below, the Conscience pamphlet plainly contains "express advocacy" within the meaning of Section 100.22(b). We begin, however, by demonstrating that the Sierra Club's arguments about *McConnell* and vagueness are meritless and fall of their own weight.

1 Section 100 22(b) is Consistent with McConnell

Section 100.22(b) defines as "express advocacy" communications that, when taken as a whole or with limited reference to external events, "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" when (1) it contains an "electoral portion" that is "unmistakable, unambiguous, and

[3] The Sierra Club also contends that the "Conscience" pamphlet does not contain express advocacy because it does not contain any of the "magic words" found in *Buckley's* footnote 52 But "Conscience" does in fact contain one of *Buckley's* magic words "vote " Moreover, the Sierra Club does not appear to be arguing that even the marginal extensions of this concept contained in *MCFL* (which was after all a Supreme Court case) and *Christian Coalition* were incorrect Additionally, the Sierra Club argues that another aspect of 11 C F R § 100 22(a) – "communications of campaign slogan(s) or individual word(s)" – does not apply to this matter However, nowhere in our Brief did we argue that it did

suggestive of only one meaning;" and (2) "[r]easonable 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." 11 C.F.R. § 100.22(b). The second prong of this regulation is not limited to so-called "magic words." The Sierra Club notes that *McConnell* contains over a dozen instances where the Court refers to "magic words" when discussing express advocacy and, on that basis, argues that *McConnell* reaffirmed the holdings of *Buckley* and *MCFL* that express advocacy is limited to so-called "magic words." Response at 6-7.

The Sierra Club's argument misconstrues *Buckley, MCFL*, and *McConnell,* as none of those cases stands for the proposition that express advocacy must be limited to verbatim copying from a finite set of words. In *Buckley*, the Court prefaced its list of examples with the phrase "such as," demonstrating that the list is non-exhaustive. 424 U.S. at n.52. In *MCFL*, the Court made even more clear that it did not intend wooden literalism to define express advocacy. Instead, the Court stated that publications could provide "*in effect* an explicit directive" to vote for or against a candidate. *MCFL*, 479 U.S. at 249 (emphasis added). *MCFL* emphasized that the advocacy could be "marginally less direct" than "Vote for Smith," as long as its "essential nature" was clear. *Id.* In fact, the Court found that the publication at issue in *MCFL* fell "squarely within § 441b," thus indicating that advocacy even less direct than MCFL's might permissibly be regulated (*id.* at 249-50). Precisely how much more speech, though, remained an open question after *MCFL*.

McConnell shed no new light on how much more speech could be regulated under Section 441b. *McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than it did in *Buckley* In fact, *McConnell* did not address the validity of

Section 100.22, let alone cite the Commission's regulation for any purpose. Instead, the Supreme Court discussed express advocacy principally to afford context in evaluating the constitutionality of an alternative standard for regulating communications that influence voters' decisions.[4] In doing so, *McConnell* explicitly stated that *Buckley* provided "*examples* of words of express advocacy ... and those examples *eventually* gave rise to what is now known as the 'magic words' requirement." 540 U.S. at 191, 124 S. Ct. at 687 (emphasis added) (internal citations omitted). At one point, the *McConnell* Court even refers to "the concept of express advocacy and the concomitant class of magic words." 540 U.S. at 192, 124 S.Ct. at 688. By definition, "concomitant" means "accompanying especially in a subordinate or incidental way," according to the Merriam-Webster dictionary.[5]

In sum, neither *Buckley, MCFL,* nor *McConnell* held that express advocacy by definition is limited to "magic words." Section 100.22(b) is consistent with all three cases and must therefore be applied to the facts of this matter.[6]

---

[4] In discussing the constitutionality of the alternative standard, the Court stated that express advocacy is a statutory construction, not a constitutional boundary "that forever fixed the permissible scope of provisions regulating campaign-related speech " 540 U S at 192-93, 124 S Ct at 688 The Court further noted that the so-called "magic words test" has in practice become so easily evaded as to be "functionally meaningless " 540 U S at 193, 124 S Ct at 689 These propositions led the Court to uphold BCRA's electioneering communications provision, which regulated considerably more speech than express advocacy *Id*

[5] No court since *McConnell* has attempted to define the contours of express advocacy with any greater refinement, either *See, e g Alaska Right to Life Comm v Miles*, 441 F 3d 773 (9th Cir 2006), *Center for Individual Freedom v Carmouche*, 449 F 3d 655 (5th Cir 2006), *American Civil Liberties Union v Heller*, 378 F 3d 979 (9th Cir 2004), *Anderson v Spear*, 356 F 3d 651, 664-65 (6th Cir 2004), *Colorado Right to Life Comm v Davidson,* 395 F Supp 2d 1001 (D. Colo 2005) These courts, examining the constitutionality of state election laws that regulated speech beyond express advocacy, recognized the continued validity of express advocacy as a narrowing construction to cure an otherwise vague or overbroad statute *See Heller*, 378 F 3d at 985 (declining to take a position on the differing interpretations of express advocacy), *Anderson*, 356 F 3d at 665 (applying express advocacy as a narrowing construction to a Kentucky statute regulating electioneering near a polling place), *Carmouche*, 449 F 3d at 665 (applying express advocacy as a limiting construction to a statute requiring disclosure of certain expenditures and stating that it "adopt[s] *Buckley*'s definition of what qualifies as such advocacy").

[6] To be sure, *McConnell* stated that express advocacy encompasses only a "tiny fraction of the political communications made for the purpose of electing or defeating candidates during a campaign " 540 U S at 216, 124 S Ct at 702 Section 100 22(b), however, by its very terms "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate " *Buckley*, 424 U S at 80 As demonstrated *infra* at 16-17, it is an exacting standard that encompasses no more than *McConnell's* "tiny fraction "

2. Section 100.22(b) is Not Vague

The Sierra Club next argues that Section 100.22(b) is unconstitutionally vague, taking particular exception to the "reasonable person" test in the regulation, which finds express advocacy only if "reasonable minds could not differ" as to what action the speech advocates. The Sierra Club claims that this provision runs counter to the Supreme Court's caution in *Buckley* against putting a speaker at the mercy of the subjective "'varied understanding of his hearers.'" Response at 10 (*quoting Buckley*, 424 U.S. at 43 (*quoting Thomas v Collins*, 323 U.S. 516, 535 (1945))). The reasonable person test, however, remedies *Buckley's* concern by creating an objective test that does not bend upon the sensitivity or special ignorance of particular listeners. By definition, if there is genuine room for "varied understanding of [reasonable] hearers," a communication does not qualify as express advocacy under Section 100.22(b).[7]

Courts have upheld similar "reasonable person" or "ordinary observer" standards in analogous situations concerning the interpretation of communications. In examining the constitutionality of a holiday display, for example, the Supreme Court stated that the "constitutionality of [the holiday display's] effect must also be judged according to the standard of a 'reasonable observer.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989). In a libel case, when the Supreme Court rejected the argument that a figurative use of the word "blackmail" could constitute libel, the Court relied upon its evaluation of how readers would perceive the word in context. *Greenbelt Cooperative Publishing Ass'n v Bresler*, 398 U.S. 6, 14 (1970). Federal circuit courts have also held that using the reasonable person standard to determine whether a communication is a genuine threat to the President does not violate the First

[7] The Explanation and Justification for the express advocacy regulations specifies that the subjective intent of the speaker is not a relevant consideration under 100 22(b) because *FEC v Furgatch*, 807 F 2d 857 (9th Cir 1987), focuses the inquiry on the audience's reasonable interpretation of the message *See* Explanation and Justification, 60 Fed Reg 35,291, 35,295 (Jul 6, 1995)

Amendment's protection of political hyperbole, jokes, and other constitutionally protected speech. *See, e.g., U S v Fuller,* 387 F.3d 643, 647 (7th Cir. 2004). In short, Section 100.22(b) shares the same reasonable person standard that courts have repeatedly used to uphold other laws against First Amendment challenges.

There is likewise no merit to the Sierra Club's complaint that Section 100.22(b)'s reference to external events is unconstitutionally vague because it fails to specify any of the external events that may be relied upon to show that a communication constitutes express advocacy. *See* Response at 10. In fact, Section 100.22(b) mandates that only a limited reference to external events may be considered, such as the context and timing of a communication. *See* Explanation and Justification, 60 Fed. Reg. at 35,295. Such considerations are unavoidable. The phrase "Support President Bush," for example, would have had a very different meaning two days before Election Day than it would have had two days after.[8]

Although the Supreme Court has yet to address the constitutionality of Section 100.22(b), the Court has upheld BCRA's "promote, support, attack, or oppose" ("PASO") standard against a constitutional vagueness challenge. *See McConnell,* 540 U.S. at 170 n.64, 124 S.Ct. at 675 n.64. The PASO standard unquestionably covers more speech than Section 100.22(b), and its boundaries are no more definite; arguably, they are less so. Nonetheless, the Supreme Court found that the PASO standard "give[s] [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* (quoting *Grayned v City of Rockford,* 408 U.S.

[8] Indeed, even when vagueness is not at issue, the Supreme Court has avoided mechanical tests and has instead evaluated First Amendment protections by considering the context and nature of the expression at issue *See, e g , Miller v California,* 413 U S 15 (1973) (obscenity), *Chaplinsky v New Hampshire,* 315 U S 568 (1942) (fighting words), *New York Times Co v Sullivan,* 376 U S 254 (1964) (libel), *County of Allegheny v American Civil Liberties Union,* 492 U S 573 (1989) (religious expression) In *County of Allegheny,* for example, the Supreme Court painstakingly reviewed the context of a creche display with and without other seasonal activities, symbols, and flowers, as well as images from other religions *See* 492 U S at 598-601 (1989)

104, 108-109 (1972)). Similarly, the Ninth Circuit recently rejected a vagueness challenge to an Alaska campaign-finance statute that, unlike the PASO standard, regulated communications with "indirect" references to candidates. *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 783 (9th Cir. 2006).

Finally, the Sierra Club's argument about vagueness is further weakened by the Act's advisory opinion mechanism. In *McConnell*, the Court rejected a vagueness challenge in part because "should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification ... and thereby remove any doubt there may be as to the meaning of the law." 540 U.S. at 170 n.64, 124 S.Ct. at 975, n.64 (internal citations and quotations omitted). Likewise, the District of Columbia Circuit has concluded, "[w]hen a means like this one is available to reduce uncertainty or narrow the statute's reach . . . the chill induced by facial vagueness or overbreadth is *pro tanto* reduced." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 386 n.44 (D.C. Cir. 1980). In this case, the Sierra Club could have requested an advisory opinion, but it did not do so. For all of these reasons, Section 100.22(b) must be applied to this matter, and the Sierra Club's arguments are unavailing.

3. The Conscience Pamphlet falls within Section 100.22(b)

"Conscience" contains an unmistakable and unambiguous electoral portion. It refers to voting through the directive "LET YOUR CONSCIENCE BE YOUR GUIDE and LET **YOUR VOTE** BE **YOUR VOICE,**" and by identifying and comparing the purported positions of the major party nominees in two federal elections. And, for the reasons we have already set forth in discussing the application of Section 100.22(a), that portion is "suggestive of only one meaning" and reasonable minds could not differ as to the action urged. Senator Kerry and Betty Castor are presented as the only candidates who agree with the Sierra Club's position on 100% of the issues

addressed in the brochure, and, in light of that information, voters are urged to "let their vote be their voice." There is simply nothing else the pamphlet can be read as urging voters to do other than to vote for Senator Kerry and Betty Castor. Although the pamphlet concludes by directing the reader to "Find out more about the candidates before you vote. Visit www.sierraclubvotes.org.," this tag-line, viewed in the context of the whole communication, does not convert the pamphlet into a mere starting point for further information.[9]

In contending that this pamphlet does not contain express advocacy under Section 100.22(b), the Sierra Club attempts to do an end-run around the regulation's requirement that the communication be "taken as a whole" by isolating single/individual facts, such as the pamphlet's distribution before the election, and claiming the obvious: that that fact, by itself, is not dispositive of express advocacy. We agree. While the distribution of the pamphlet in close proximity to the election is an important contextual factor, it is the pamphlet's urging persons of conscience to "vote" for the candidates it has identified through checkmarks linked to favorable narratives that constitutes express advocacy. Even if a reader was unaware that the Sierra Club is a well-known environmental interest group, the checkmarks and accompanying written narratives in "Conscience" unmistakably convey the Sierra Club's express advocacy of Senator

[9] When accessed, the "sierraclubvotes" website contains the same type of information as the pamphlet, with a focus on President Bush's negative environmental record and Senator Kerry's favorable environmental stance

Kerry and Betty Castor. No reasonable person could interpret it otherwise or believe it encouraged any other action.[10]

Contrary to the Sierra Club's argument, Response at 11 n.14, a comparison of "Conscience" with the other three brochures complained of in this case demonstrates precisely why the brochure here contains "express advocacy." The "From one Friend of our environment to another" ("Friend") and "The Environment for Dummies" ("TED") pamphlets did not refer to voting or any election. Thus, neither contained an electoral portion that is "unmistakable, unambiguous, and suggestive of only one meaning." 11 C.F.R. § 100.22(b).

The "Friend" pamphlet emphasizes Senator Kerry's Senate record on environmental issues and directs readers to e-mail him at his Senate website "and ask him to continue protecting our environment." Since Kerry was a Senator, he was positioned to vote on or sponsor environmental legislation. Similarly, in TED, while portraying the President's environmental record negatively, the Sierra Club directs readers to email President Bush at the White House website and "[t]ell him to stand up to corporate polluters," an action he was also in a position to effect whether or not he was running for reelection. Hence, both pamphlets could be interpreted as encouraging readers to lobby Senator Kerry and the President in their positions as incumbent officeholders.

While the third pamphlet, "The Dirt," is similar to "Conscience" in that it pictures and identifies President Bush and Senator Kerry and contains similar narratives reflecting the Sierra

[10] The Sierra Club also attempts to use the truism set forth in our brief—that a communication that expressly advocates the election of a candidate on particular bases may encourage those adverse to those bases to support the opposing candidate—to claim that the electoral portion of the communication is not "unmistakable, unambiguous and suggestive of only one meaning " However, the inclusion of that truism in the brief was intended to forestall exactly the frivolous argument that Sierra Club makes in challenging it, according to the Sierra Club's logic, even the "in-effect" explicit directive of "VOTE PRO-LIFE" in *MCFL* coupled with the symbols and pictures of selected candidates could be construed as ambiguous and suggestive of more than one meaning, because pro-choice supporters could conceivably be encouraged to vote against the specifically identified pro-life candidates as a consequence of the explicit directive

Club's characterizations of the candidates' respective environmental records, the similarity ends there. Unlike "Conscience," "The Dirt" does not contain words or "in effect" explicit directives that in context can have no other reasonable meaning than to encourage action to elect or defeat Senator Kerry or President Bush. In contrast to "Conscience's" exhortation to "let your conscience be your guide and let your vote be your voice," "The Dirt" directs readers only to "Dig deeper for facts about the candidates for president," and to "CHECK THE FACTS." It also contains no symbols, percentages, or any other similar indication that a candidate agrees with the Sierra Club position 100% of the time. While the communication suggests to the reader that the Sierra Club views Senator Kerry's environmental record as better than President Bush's, it could reasonably be interpreted as encouraging readers simply to become better informed. Thus, because reasonable minds could differ as to the action it urges, "The Dirt" does not contain "express advocacy" as defined in Section 100.22(b). However, for the reasons set forth above and in our Brief at 6, "Conscience" does.

C. The Sierra Club Had Sufficient Notice Regarding the Act's Prohibition on Corporate Expenditures

From its inception over thirty years ago, the Federal Election Campaign Act has prohibited corporations like the Sierra Club from making expenditures in connection with federal elections. *See* 2 U.S.C. § 441b. In this matter, the Sierra Club is alleged to have violated Section 441b, and the Sierra Club does not—and indeed could not—argue that it lacked fair notice of this longstanding prohibition. Instead, the Sierra Club contends that it lacked notice of the Commission's position on the definition of express advocacy. This argument, however, is unavailing. Even if the regulatory standard is not precise, an organization that disregards Section 441b "acts at its peril." *Perot v FEC*, 97 F.3d 553, 560 (D.C. Cir. 1996). Here, Section 100.22(b) merely interprets a term in the Act; it does not prohibit any conduct nor set forth any

substantive or procedural rights. Thus, even "in the absence of the interpretation there would be an adequate regulatory basis for enforcement action." *Paralyzed Veterans of America v. D C. Arena*, 117 F.3d 579, 588 (D.C. Cir. 1997) (internal quotation omitted).

The crux of the Sierra Club's due process argument is that the Commission has infrequently applied Section 100.22(b) in enforcement matters and, thus, has provided inadequate notice that the Sierra Club must abide by the regulation. Yet the construction of Section 100.22(b) has been publicly available for many years, not only in the original Explanation and Justification of the regulation, but in subsequent rulemaking proceedings, advisory opinions, enforcement matters, and in campaign guides the Commission issues to the public. *See, e.g.*, Advisory Opinion 2004-33 (Ripon); Campaign Guides for Candidates and Party Committees. These are precisely the types of publicly available information that courts have previously cited to reject "fair notice" challenges. *See Federal Election Commission v Arlen Specter '96*, 150 F.Supp.2d 797, 813-14 (E.D. Penn. 2001).

In contending that it did not have fair notice, the Sierra Club relies upon *General Electric v EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995), which involved a substantive regulation that purportedly mandated certain conduct. In that case, the court concluded that, even though the EPA's ultimate construction of its regulation warranted deference, the EPA could not sanction a private party for acting to the contrary before the agency revealed its construction of the regulation. The conclusion in *General Electric*, however, applies only "in the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it." 53 F.3d at 1328. "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then

the agency has fairly notified a petitioner of the agency's interpretation." *Id* at 1329 (citation omitted). In other words, if the standards to which an actor is expected to conform are either nonexistent or vague, the actor has inadequate notice. Here, however, the standards applicable to the Sierra Club are set forth in the Act, 2 U.S.C. § 441b, as clarified by the Commission's regulations, 11 C.F.R. § 100.22. Furthermore, as we explained in the prior section, the regulation is not vague. Therefore, the Sierra Club had adequate notice regarding the Commission's position on corporate expenditures that expressly advocate the election or defeat of federal candidates.

Although the Sierra Club points to prior court decisions that held that the Commission could not apply Section 100.22(b), the alleged violations in this matter occurred outside the jurisdiction of those courts. Moreover, these decisions rested in part on a mistaken belief that the First Amendment prevented any regulation of speech beyond magic words. *See, e.g., Virginia Society for Human Life v FEC*, 263 F.3d 379 (4th Cir. 2001) (reasoning that the Supreme Court in *Buckley* and *MCFL* made a crucial constitutional distinction between express advocacy and issue advocacy); *see also Maine Right to Life v. FEC*, 914 F.Supp. 8, 12 (D. Maine 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996). *McConnell,* of course, corrected this misconception. *See McConnell*, 540 U.S. at 190-91, 124 S.Ct. at 687.

The Commission has provided repeated public notice that it intends to apply the regulation in jurisdictions that have not prevented the Commission from applying Section 100.22(b). First, the Commission refused to initiate a requested rulemaking to repeal that regulation. *See* 63 Fed. Reg. 8363 (Feb. 19, 1998). In doing so, the Commission stated that "the primary reason for the Commission's decision not to open a rulemaking [to repeal Section 100.22(b)] is its continued belief that the regulation is constitutional." *Id* at 8364. Second, the

Commission successfully persuaded the Fourth Circuit to vacate a nationwide permanent injunction on enforcing that regulation. *See VSHL*, 263 F.3d at 392-93. Third, the Commission issued a policy statement that it would forbear from applying Section 100.22(b) only in the First and Fourth Circuits. *See* Policy Regarding Express Advocacy, adopted Sept. 22, 1999. In this matter, the Sierra Club is headquartered within the Ninth Circuit, the court that issued the case on which Section 100.22(b) is based, *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), which remains binding precedent. Furthermore, the Sierra Club distributed the pamphlets within the Eleventh Circuit, which has never even addressed the definition of express advocacy.

The Sierra Club also relies on a 3-3 vote in MUR 5154 ("Sierra Club I") to argue that the Commission's position on express advocacy was unclear. However, the split vote to find reason to believe that the Sierra Club violated Section 441b in that matter placed it on notice to the possibility that the regulation could be applied to a mailer that borrows some of the same features. Indeed, the 3-3 vote in MUR 5154, rather than demonstrating that the Commission's position on express advocacy is unclear, is more indicative of the Sierra Club's attempt to test the limits of express advocacy. As the court observed in *Christian Coalition*, "no matter how bright the line, the incentives are considerable for those seeking to test the FECA's limits, which is why even under a bright-line standard an express-advocacy case may be 'a very close call.'" 52 F. Supp. 2d at 62 (quoting *Furgatch*, 807 F.2d at 861). *See also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969) (stating in a First Amendment case that a speaker "can easily make his views known without engaging in 'brinksmanship' when it is all too easy to 'overstep and tumble (over) the brink'").

In the 2004 election, the Sierra Club chose to test the limits again, and it should not be surprised at being held accountable for having overstepped. Furthermore, as previously noted,

the Sierra Club could have requested an advisory opinion for clarity, but did not do so. Accordingly, the Sierra Club cannot now claim a due process violation when it made an informed decision to assume the risk of proceeding with the expenditures. Therefore, the Sierra Club had sufficient notice of the Commission's position on enforcing the Act's prohibition on corporate independent expenditures.

D. Conclusion

Based on the above, this Office recommends that the Commission find probable cause to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a) in connection with the publication and distribution of the pamphlet entitled "Let your Conscience be your Guide."

V. RECOMMENDATIONS

1. Find probable cause to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a) in connection with the publication and distribution of the pamphlet entitled "Let your Conscience be your Guide."

3. Approve the appropriate letter.

7/3/06
Date

Lawrence H. Norton
General Counsel

Lawrence L. Calvert, Jr.
Deputy Associate General Counsel
for Enforcement

Susan L. Lebeaux
Assistant General Counsel

Roy Q. Luckett
Attorney

Brant S. Levine
Attorney

Julie K. McConnell
Attorney

Attachments:
1. Sierra Club "Conscience" Pamphlet
2.