



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
Cornerstone Action, *et al.* ) MUR 6346  
 )

**STATEMENT OF REASONS  
VICE CHAIRMAN DONALD F. McGAHN AND COMMISSIONERS CAROLINE C.  
HUNTER AND MATTHEW S. PETERSEN**

In this matter, the campaign committee of Bill Binnie filed a complaint against Cornerstone Action, Inc. ("Cornerstone") alleging that Cornerstone impermissibly coordinated an advertisement run in the state of New Hampshire with Binnie's opponent.<sup>1</sup> Successfully rebutted by the respondent, the Office of the General Counsel ("OGC") recommended, and all six Commissioners voted in favor of, finding no reason to believe that such impermissible coordination occurred.<sup>2</sup> Although not alleged in the complaint,<sup>3</sup> OGC further recommended, and three of our colleagues voted in favor of, finding reason to believe that Cornerstone failed to file the proper 48-hour independent expenditure reports for the advertisement in question, asserting that the advertisement constituted express advocacy.<sup>4</sup> Cornerstone was not afforded an opportunity to respond to this additional OGC-generated allegation.

<sup>1</sup> See MUR 6346 (Cornerstone Action), Complaint.

<sup>2</sup> *Id.*, Certification of Supt. 15, 2011. See MUR 6346 (Cornerstone Action), First General Counsel's Report ("FGCR").

<sup>3</sup> OGC acknowledges that this accusation was "not specifically alleged in the complaint." MUR 6346 (Cornerstone Action), FGCR at 2. See also *id.* at 11 ("[The Complaint] did not specifically allege a section 434(f) or section 434(g) reporting violation."). As a result, Cornerstone had no reason to suspect that independent expenditure reporting was at issue and was not afforded an opportunity to respond to such allegations as contemplated by the Act. See 2 U.S.C. § 437g(a)(1) ("Before the Commission conducts any vote on [a] complaint, other than a vote to dismiss, any person [notified that there is a complaint alleging their wrongdoing] shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint."); Notice 2009-18: Agency Procedure for Notice in Non-Complaint Generated Matters, 74 Fed. Reg. 38617 (Aug. 4, 2009) (providing respondents with notice in non-complaint generated matters).

<sup>4</sup> The advertisement, entitled "The Feeling is Mutual," is narrated by voiceover, and states:

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We disagreed with OGC's conclusion for the following reasons. First, because the advertisement in question does not contain the sort of language contemplated by *Buckley v. Valeo*,<sup>5</sup> or *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>6</sup> it did not constitute express advocacy as defined in 11 C.F.R. § 100.22(a). Second, because 11 C.F.R. § 100.22(b) has been declared invalid by the Court of Appeals for the First Circuit in *Maine Right to Life Committee, Inc. v. FEC* ("MRLC"), and because the FEC has never rescinded its public statement announcing that section 100.22(b) would not be enforced in the First Circuit, section 100.22(b) cannot be enforced in that jurisdiction.<sup>7</sup> Finally, even assuming *arguendo* that section 100.22(b) is valid and enforceable, we do not believe the language in the advertisement at issue constitutes express advocacy under that section.

## I. LEGAL BACKGROUND

The concept of express advocacy was introduced by the Supreme Court in *Buckley v. Valeo*.<sup>8</sup> In *Buckley*, the Court considered the constitutionality of the term "expenditure," which the Act defined as "a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of influencing the nomination for election, or the election, of any person to Federal office . . . ."<sup>9</sup> The Court held that "in order to preserve [the Act's definition of expenditure] against invalidation on vagueness grounds, [it] must be construed to apply only to expenditures for communications that in express terms advocate for the election or defeat of a clearly identified candidate for federal office."<sup>10</sup> The Court explained, "[t]his construction would restrict the application of [the Act's expenditure provisions] to

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Bill Binnie portrays himself as a conservative. Truth is he's shockingly liberal. Binnie supports abortion to avoid the expense of disabled children. He's excited about imposing gay marriage on New Hampshire. He's praised key elements of Obama's healthcare bill. He's even said that he's open to imposing a European-style value added tax on working families. With these shockingly liberal positions, it's no wonder Bill Binnie says he doesn't like the Republican Party. Now New Hampshire Republicans can tell Binnie the feeling is mutual. *Id.*, FGCR at 4.

<sup>5</sup> 424 U.S. 1 (1976).

<sup>6</sup> 479 U.S. 238 (1986).

<sup>7</sup> See *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) ("conclud[ing] that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (*per curiam*), *cert. denied*, 522 U.S. 810 (1997). See also *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 382 (4th Cir. 2001) ("[T]he FEC voted 6-0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has in effect been found invalid' by the Fourth Circuit.").

<sup>8</sup> 424 U.S. 1 (1976).

<sup>9</sup> 18 U.S.C. § 591(f) (1974).

<sup>10</sup> 424 U.S. at 44.

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communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"<sup>11</sup>

Following the Court's ruling, Congress amended the Act in 1976 to "reflect the Court's opinion in the *Buckley* case"<sup>12</sup> by defining the term "independent expenditure" to mean "an expenditure by a person advocating the election or defeat of a clearly identified candidate . . .,"<sup>13</sup> where "expenditure" was in turn defined to mean communications that included "express advocacy." The Commission subsequently promulgated a regulation that reflected this change.<sup>14</sup>

These post-*Buckley* legislative amendments occurred before the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL").<sup>15</sup> In *MCFL*, the Court reaffirmed *Buckley's* finding that express advocacy "depended upon the use of language such as "'vote for,' 'elect,' 'support,' etc.," holding the language at issue constituted express advocacy where it was "marginally less direct," but still provided "in effect an explicit directive: vote for these (named) candidates."<sup>16</sup> The Court went on to conclude that an advertisement that was headlined, "Everything You Need to Know to Vote Pro-Life," admonishing readers that "[n]o pro-life candidate can win in November without your vote in September," had "Vote Pro-Life" written in "large bold-faced letters on the back page," and contained a detachable voter guide "to be clipped and taken to the polls to remind voters of the name of the 'pro-life' candidates" contained express advocacy.<sup>17</sup>

<sup>11</sup> *Id.* at 44 n.52.

<sup>12</sup> Federal Election Campaign Act Amendments of 1976, Report to Accompany H.R. 12406 (Report No. 94-917), 94<sup>th</sup> Cong., 2d Session, at 82 (Minority Views). *See also* Federal Election Campaign Act Amendments of 1976, Report to Accompany S. 3065 (Report No. 94-677), 94<sup>th</sup> Cong., 2d Session (Mar 2, 1976) at 5 (Congress specifically "define[d] 'independent expenditure' to reflect the definition of that term in the Supreme Court's decision in *Buckley v. Valeo*"); Joint Explanatory Statement of the Committee of Conference on the Federal Election Campaign Act Amendments of 1976 at 40 (Congress changed the independent expenditure reporting requirements "to conform to the independent expenditure reporting requirement . . . to the requirements of the Constitution set forth in *Buckley v. Valeo* with respect to the express advocacy of election or defeat of clearly identified candidates"); Cong. Rec. S6364 (May 3, 1976) (statement of Senator Cannon) (Sen. Cannon explained that the legislation was "codifying a number of the Court's interpretations of the campaign finance laws....").

<sup>13</sup> 2 U.S.C. § 431(17) (1976).

<sup>14</sup> The Commission promulgated a definition of "expressly advocating" as "any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' and 'Smith for Congress,' or 'vote against,' 'defeat,' 'or 'reject.'" 11 C.F.R. § 109.1(b)(2) (May 1, 1977); *see also* 41 Fed. Reg. 35947 (Aug. 25, 1976).

<sup>15</sup> 479 U.S. 238 (1986)

<sup>16</sup> *Id.* at 249.

<sup>17</sup> *Id.* at 243.

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In 1995, the Commission once again revised its express advocacy regulations, promulgating the current definition at section 100.22.<sup>18</sup> The revised regulation states that a communication contains express advocacy when it:

(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in 94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

(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.<sup>19</sup>

As the Commission explained at the time, the modifications to section 100.22(a) simply "reworded" the prior regulation "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates,"<sup>20</sup> and added "a somewhat fuller list" of the examples set forth in *Buckley*.<sup>21</sup> The current definition of express advocacy found at Section 100.22(a), therefore, is derived from *Buckley* and *MCFL*. Nothing in its promulgation history indicates this regulation was designed to capture anything more than what its plain regulatory language already does. According to the Explanation & Justification, the regulation provides "further guidance on what types of communications constitute express advocacy of

<sup>18</sup> See Notice 1995-10: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures ("Express Advocacy E&J"), 60 Fed. Reg. 35292.

<sup>19</sup> 11 C.F.R. § 100.22.

<sup>20</sup> Express Advocacy E&J, 60 Fed. Reg. at 35293.

<sup>21</sup> *Id.* at 35295.

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clearly identified candidates.”<sup>22</sup> It does not expand upon the construction of expenditure and express advocacy applied in *Buckley* and *MCFL*.

The definition of express advocacy at section 100.22(b), by contrast, is largely derived from the opinion of the Court of Appeals for the Ninth Circuit in *FEC v. Furgatch*.<sup>23</sup>

At issue in *Furgatch* was a newspaper advertisement criticizing then-President Jimmy Carter that ran one week before the 1980 presidential election. The ad was captioned “DON’T LET HIM DO IT.” It made a number of specific references to the upcoming election and the election process (e.g., “The President of the United States continues to degrade the *electoral process*”; “He [the President] continues to cultivate the fears, not the hopes of the *voting public*”; “If he succeeds the country will be burdened with *four more years* of incoherencies, ineptness and illusion, as he leaves a legacy of low-level *campaigning*”). The ad specifically mentioned current and former opponents of the President (e.g., “[The President’s] running mate outrageously suggested [former primary opponent] Ted Kennedy was unpatriotic”; “[T]he President himself accused Ronald Reagan of being unpatriotic”). The ad concluded by restating: “DON’T LET HIM DO IT.”

The court applied the standard to this communication, and concluded that an advertisement that “deplores [President] Carter’s ‘attempt to hide his own record,’ his ‘legacy of low-level campaigning,’ his divisiveness and ‘meanness of spirit,’ and his ‘incoherencies, ineptness, and illusion,’” and concluded with the phrase, “Don’t let him do it,” constituted express advocacy.<sup>24</sup> In reaching its conclusion, the court stated, “[r]easonable minds would not dispute that Furgatch’s advertisement urged readers to vote against Jimmy Carter” because “[t]his was the only action left open to those who would not ‘let him do it.’”<sup>25</sup> The court concluded, “speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”<sup>26</sup> According to the court:

This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is “express” for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed “advocacy” if it presents a

<sup>22</sup> *Id.* at 35293.

<sup>23</sup> 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). *See, e.g.* Express Advocacy E&J, 60 Fed. Reg. at 35294 (“The definition of express advocacy included in new section 100.22 includes elements from each definition, as well as the language in *Buckley*, *MCFL*, and *Furgatch* opinions emphasizing the necessity for communications to be susceptible to no other reasonable interpretation but as encouraging actions to elect or defeat a specific candidate.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 865.

<sup>26</sup> *Id.* at 864.

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clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be “express advocacy of the election or defeat of a clearly identified candidate” when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.<sup>27</sup>

The court went on to emphasize that “if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act’s disclosure requirements.”<sup>28</sup>

## II. ANALYSIS

### a. Cornerstone’s Advertisement Does Not Contain Express Advocacy Under Section 100.22(a)

OGC asserts that the advertisement at issue constitutes express advocacy under section 100.22(a) “because it uses individual words that in context can have no reasonable meaning other than to urge the defeat of Mr. Binnie in the upcoming Republican Senate primary.”<sup>29</sup> Since the ad does not contain express words of advocacy as set forth in *Buckley* and *MCFL*, the only possible argument that the ad constitutes express advocacy is that the phrase “tell Bill Binnie the feeling is mutual” comes within the reach of the third part of section 100.22(a) because it uses individual words that allegedly have no other reasonable meaning other than as an exhortation to vote against Mr. Binnie. Our colleagues who supported finding reason to believe point to at least six factors, none of which are listed in the regulation, to support the assertion that the advertisement at issue constitutes express advocacy:

- “The ad was exclusively about Binnie’s views”;
- “It exaggerated and mocked the policy statements Binnie made . . .”;
- Those statements were “made in the context of his race in the Republican Senate primary”;
- The ad “labeled his positions ‘shockingly liberal’”;
- “The ad was directed at New Hampshire Republicans”; and
- Binnie was a “non-incumbent primary candidate.”<sup>30</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> MUR 6346 (Cornerstone Action), FGCR at 14-15.

<sup>30</sup> *Id.*, Statement of Reasons of Chair Bauerly and Commissioners Walther and Weintraub at 3-4.

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OGC and some of our colleagues support this conclusion by focusing on the regulatory language asserting that an advertisement contains express advocacy if individual words “in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s),”<sup>31</sup> reading this as an invitation to broadly consider contextual factors beyond the four corners of the communication. Such a multi-factor, contextual approach ignores the language of the regulation, and disregards the Supreme Court’s clear holdings in *Buckley* and *MCFL*.

First, OGC’s analysis misconstrues that portion of the regulation by applying it as an expansion rather than a limitation on its reach. Since the phrase “in context can have no other reasonable meaning...” is followed by a list of examples “such as posters, bumper stickers, advertisements” it falls within the construction canon of *noscitur a sociis*. This canon provides that “words grouped in a list should be given related meanings.”<sup>32</sup> As Associate Justice Antonin Scalia and Bryan Garner note, “the most common effect of the canon is . . . to limit a general term to a subset of all the things or actions that it covers – but only according to its ordinary meaning.”<sup>33</sup> Thus, this canon serves to limit the broader universe of definitions of the general construct of “individual word(s)” to a subset of those that are similar in character to the specific enumerated examples: “posters, bumper stickers, advertisements, etc. which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’.”<sup>34</sup> Therefore, “individual word(s)” in section 100.22(a) is not an invitation for a broad-based contextual analysis. Rather, it is limited to instances where such words standing alone act as campaign slogans or the like.<sup>35</sup> Accordingly,

<sup>31</sup> 11 C.F.R. § 100.22(a) (emphasis added).

<sup>32</sup> *Third Nat’l Bank in Nashville v. Impact Ltd.*, 432 U.S. 312, 322 (1977). “Although most associated-words cases involve listings – usually a parallel series of nouns and noun phrases, or verbs and verb phrases – a listing is not a prerequisite. An ‘association’ is all that is required.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 197, Antonin Scalia & Bryan A. Garner (2012).

<sup>33</sup> Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 196, Antonin Scalia & Bryan A. Garner (2012).

<sup>34</sup> 11 C.F.R. § 100.22(a). In this way, the application of *noscitur a sociis* functions similarly to the narrower statutory canon of *ejusdem generis*, whereby general words are construed to encompass only objects similar to those enumerated by preceding specific words. Some courts have applied *ejusdem generis* directly to the phrase “such as,” while others apply it only in situations where general words or phrases follow specific words or phrases in statutory text, applying the broader canon of *noscitur a sociis* in other instances. Compare *Johnson v. Horizon Lines, LLC*, 520 F. Supp. 2d 524, 532 n.7 (S.D.N.Y. 2007) (“[T]he English phrase ‘such as’ in the regulation may without difficulty be read as having the same effect as the Latin phrase *ejusdem generis*” where the latter “is the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” (quoting *Wojchowski v. Daines*, 498 F.3d 99, 108 n.8 (2d Cir.2007))) with Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 204-205, Antonin Scalia & Bryan A. Garner (2012) (“The vast majority of cases dealing with the doctrine [of *ejusdem generis*] – and all the time-honored cases – follow the species-genus pattern. . . . In all contexts other than the pattern of specific-to-general, the proper rule to invoke is the broad associated-words canon, not the narrow *ejusdem generis* canon.”).

<sup>35</sup> There is no reason to think that if the Commission in 1995 meant for “individual word(s)” to mean “phrase,” it would not have actually used the word “phrase” instead. In fact, this very regulation itself uses the term “phrase” (uses phrase such as ‘vote for the President’ ...) elsewhere.

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the use of the phrase, "which in context can have no other reasonable meaning," like "campaign slogans" and "such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'," limits express advocacy from the almost infinite universe of a single word or two to a narrow subset of applications that "urge the election or defeat of one or more clearly identified candidate(s)."<sup>36</sup>

Chief Justice Roberts warned against using context without restriction when he stated, "Courts need not ignore basic background information that may be necessary to put an ad in context – such as whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future – but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns."<sup>37</sup> The court in *Furgatch* expressed similar concerns when it concluded that, "[c]ontext cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words."<sup>38</sup> Thus, whenever context is used in an analysis of political speech, great care must be taken to ensure that the contextual analysis does not overwhelm the analysis of the words themselves. As applied to section 100.22(a), context can only be used to ensure that "individual word(s)" are not being taken out of context to improperly convert phrases into regulable speech. That is the opposite of what OGC's analysis does.

In addition, this limited approach of applying section 100.22(a) is supported by prior Commission enforcement actions. In MUR 5549 (Adams), the Commission found a billboard containing the phrase "BushCheney04," which was the official campaign slogan of then-presidential candidate George W. Bush and vice presidential candidate Dick Cheney, was express advocacy under section 100.22(a).<sup>39</sup> Similarly, in MUR 5468R, the Commission found a visual image that included "George Moretz, Republican for Congress" constituted express advocacy because it was the candidate's campaign slogan.<sup>40</sup> By contrast, in MUR 4982 (Wyly Brothers), OGC concluded an advertisement contrasting the views of then-presidential candidates George W. Bush and John McCain on the issue of clean air that ended with the phrase, "Governor Bush. Leading. . . so each day dawns brighter," was not express advocacy,<sup>41</sup> because this language was not a slogan used by Governor Bush's presidential campaign.

<sup>36</sup> 11 C.F.R. § 100.22(a).

<sup>37</sup> *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*") (internal quotation marks omitted).

<sup>38</sup> *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

<sup>39</sup> MUR 5549 (Stephen Adams), FGCR at 4.

<sup>40</sup> MUR 5468R (Moretz for Congress), FGCR at 8.

<sup>41</sup> MUR 4982 (Wyly Brothers), FGCR at 21. The Commission split 3-3 on the matter, with 3 Commissioners agreeing with OGC that the ads did not constitute express advocacy, 2 Commissioners disagreeing with OGC's conclusion that the ad was not express advocacy, and 1 Commissioner disagreeing with other conclusions of OGC. *Id.* Certification (Jan. 23, 2002); Statement of Reasons of Chairman David M. Mason and Commissioners Bradley A. Smith and Darryl R. Wold; Statement of Reasons of Commissioners Danny L. McDonald and Scott E. Thomas; Statement of Reasons of Vice Chairman Karl J. Sandstrom.

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Finally, OGC's analysis conflates section 100.22(b) with section 100.22(a). Reliance on references to candidates, the date of the election, and supposed attacks on a candidate's character and fitness for office are hallmarks of section 100.22(b), not section 100.22(a). As the Explanation and Justification for the Commission's express advocacy regulations makes clear, "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy *under new section 100.22(b)* if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question."<sup>42</sup> Pursuant to the surplusage canon of statutory interpretation, "no provision should be construed to be entirely redundant."<sup>43</sup> OGC's interpretation of section 100.22(a) would render section 100.22(b) superfluous because the type of communications that section 100.22(b) was designed to encompass would be subsumed into section 100.22(a).<sup>44</sup> For the text of section 100.22(b) to be operative, section 100.22(a) is limited to the language of the sort identified in *Buckley* and *MCFL*, including campaign slogans or other similar individual words. The Cornerstone advertisement did not fall under any of these categories. Thus, this advertisement may be deemed express advocacy only if it comes within the reach of section 100.22(b).

**b. Section 100.22(b) Remains Unenforceable in the Circuit Where This Advertisement Aired**

OGC also asserts that Cornerstone's advertisement comes within the reach of section 100.22(b). But in *MRLC*, the Court of Appeals for the First Circuit explicitly held section 100.22(b) to be invalid, affirming the district court's ruling that Section 100.22(b) went beyond the limit of the Commission's statutory jurisdiction.<sup>45</sup> Thereafter, the Commission publicly stated that it would not enforce section 100.22(b) in the First Circuit<sup>46</sup> and has never made a public pronouncement to the contrary. Accordingly, the Commission may not apply section 100.22(b) in the First Circuit.

In spite of the controlling nature of the court's ruling in *MRLC*, neither OGC nor our colleagues addressed it in their writings on this matter. We can only assume that OGC failed to reference *MRLC* or the Commission's public statement because they (and some of our colleagues) believe that the FEC is no longer bound by those decisions. As we understand it, the

<sup>42</sup> Express Advocacy E&J, 60 Fed. Reg. at 35295 (emphasis added).

<sup>43</sup> *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 174-179, Antonin Scalia & Bryan A. Garner (2012) (discussing the surplusage canon).

<sup>44</sup> "[C]ourts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 174, Antonin Scalia & Bryan A. Garner (2012) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 58 (1868)).

<sup>45</sup> 98 F.3d at 1.

<sup>46</sup> "[T]he FEC voted 6-0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has in effect been found invalid' by the Fourth Circuit." *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 382 (4th Cir. 2001) (emphasis in the original).

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genesis of this argument is the belief that the First Circuit was overruled by the Supreme Court in *McConnell v. FEC*.<sup>47</sup> Although the argument seems to evolve depending on the circumstances,<sup>48</sup> the basic syllogism appears to be: (1) some courts held that section 100.22(b) is unconstitutionally vague and overbroad; (2) *McConnell* explained that the express advocacy construction of *Buckley* was not a constitutionally mandated test and upheld the electioneering communication statute that went beyond the line drawn in *Buckley*; and therefore, (3) *McConnell* *sub silentio* overruled any lower courts that had invalidated section 100.22(b) as unconstitutional.

There are several flaws in this approach. First, *MRLC* struck section 100.22(b) due to statutory infirmity, not abstract unconstitutionality. In the court's words, "11 C.F.R. § 100.22(b) is *contrary to the statute* as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC."<sup>49</sup> Thus, any holding by a sister or superior court that section 100.22(b) is constitutional has little, if any, bearing in the First Circuit. Only a judicial holding that section 100.22(b) is not contrary to the statute would have any persuasive authority. Certainly the Supreme Court has not revisited the construction of the Act on this point. In fact, it has made clear it has not revisited this issue.<sup>50</sup>

Second, the statutory text and legislative history of McCain-Feingold makes clear that Congress did not alter the *Buckley* and *MCFL* statutory construction of "express advocacy."<sup>51</sup> During the legislative process, McCain-Feingold's sponsors abandoned their efforts to redefine the term "expenditure" and instead proposed this "narrow[er]" regulation of "electioneering

<sup>47</sup> 540 U.S. 93 (2003).

<sup>48</sup> For a more detailed explanation of the various expansions, retractions and other assorted reading of section 100.22(b), see generally MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn.

<sup>49</sup> *MRLC*, 914 F. Supp. at 13, *aff'd per curiam*, 98 F.3d 1 (1st Cir.1996) ("After a careful evaluation of the parties' briefs and the record on appeal, we affirm for substantially the reasons set forth in the district court opinion."), *cert. denied*, 522 U.S. 810 (1997) (emphasis added). See also *Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding that section 100.22(b)'s definition of 'express advocacy' is not authorized by FECA as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley*). Even after *McConnell*, similarly vague state statutes have been held to the *Buckley* standard. See, e.g., *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008); *Center for Individual Freedom, Inc. v. Ireland*, 2008 WL 4642268 (S.D. W.Va. 2008), *superseded by* 2009 WL 749868 (S.D. W.Va. 2009); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. denied*, *Stambo v. Anderson*, 543 U.S. 956 (2004).

<sup>50</sup> See, e.g., *WRTL*, 551 U.S. at 474 n.7 (emphasizing that the Court's "test is only triggered if the speech meets the bright-line requirements of [the definition of electioneering communication] in the first place," and thus would not apply to the statutorily distinct category of independent expenditures); *McConnell*, 540 U.S. at 192 (focusing on whether McCain-Feingold was within Congress' constitutional authority while noting that the Court in *MCFL* had previously "confirmed the understanding that *Buckley's* express advocacy category was a product of statutory construction"). As the Court has previously noted, "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737 (1977); see also *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (*quoting id.*).

<sup>51</sup> Remarkably, the Commission itself relied upon this legislative history in *McConnell* in support of its justification of the electioneering communications provisions. See Brief of Defendants at 50-51, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003). (*quoting* 144 Cong. Rec. S906, S912 (Feb. 24, 1998)).

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communications.”<sup>52</sup> Responding in part to concerns raised by the bill’s opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold drawing a bright line between so-called “genuine” issue advocacy and a narrowly defined category of television and radio advertisements broadcast in proximity to federal elections “that constitute the most blatant form of electioneering.”<sup>53</sup> The earlier provisions of McCain-Feingold that sought to tinker with the meaning of “express advocacy” were dropped.<sup>54</sup> Although Congress had initially contemplated amending the Act’s definition of expenditure, it then chose *not* to do so.<sup>55</sup> Rather, it opted instead to create a new category of political discourse – electioneering communications – which regulate certain speech that does not contain express advocacy. Thus, Congress was clear that electioneering communications (even those that contain the functional equivalent of express advocacy) and express advocacy independent expenditures are mutually exclusive, and are separate concepts. Under 2 U.S.C. § 434(f)(3)(B) “the term ‘electioneering communication’ does not include . . . (ii) a communication which constitutes an expenditure or independent expenditure (i.e. an express-advocacy communication that is not coordinated with a candidate or party) under this Act.”

Third, the syllogism presumes that *McConnell* directly impacted the viability of section 100.22(b). It did not. As Commissioner Smith observed, “[t]he General Counsel’s office and a majority of the Commission appear to agree that *McConnell* does not change the applicable law [regarding section 100.22(b)].”<sup>56</sup> In the words of OGC itself, “*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*.”<sup>57</sup>

When McCain-Feingold reached the Court in *McConnell*, the Court repeatedly emphasized that the requirement in *Buckley* was “the product of statutory interpretation rather than a constitutional command,”<sup>58</sup> characterizing *Buckley* and *MCFL* as drawing a “bright”<sup>59</sup> line

<sup>52</sup> *Id.*

<sup>53</sup> 144 Cong. Rec. S912 (Feb. 24, 1998) (Statement of Senator Snowe).

<sup>54</sup> See Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003) (Early versions of McCain-Feingold “proposed to address electioneering issue advocacy by redefining ‘expenditures’ subject to FECA’s strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise; that a reasonable person would understand as advocating the election or defeat of a candidate for federal office.” (citing 143 Cong. Rec. S10107, 10108 (Sept. 29, 1997))).

<sup>55</sup> See, e.g. 147 Cong. Rec. S2713 (March 22, 2001) (Statement of Senator Snowe) (In response to “concern[s] about being substantially too broad and too overreaching,” Congress “became cautious and prudent in the Senate language that we included and did not include the *Furgatch* [language].”).

<sup>56</sup> MUR 5024R (Council for Responsible Government), Statement of Reasons of Commissioner Bradley A. Smith at 5.

<sup>57</sup> MUR 5634 (Sierra Club), General Counsel’s Report #2 at 10.

<sup>58</sup> *McConnell*, 540 U.S. at 192 (emphasis added) (noting that the Court in *MCFL* had previously “confirmed the understanding that *Buckley*’s express advocacy category was a product of statutory construction”).

<sup>59</sup> *Id.* at 126.

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that marked “an endpoint of *statutory* interpretation, not a first principle of constitutional law.”<sup>60</sup> *McCormell* did not change that statutory endpoint. The Court in *McCormell* focused on whether McCain-Feingold was within Congress’s *constitutional* authority. By contrast, there is nothing in either *McCain-Feingold* or *McCormell* that alters pre-existing *statutory* limitations on the scope of express advocacy.

*WRTL* confirms this reading of *McCormell*. In *WRTL*, the Court considered the constitutionality of McCain-Feingold’s electioneering communications provisions, specifically the prohibition against corporations and labor organizations funding electioneering communications. The Court ultimately held that the ban was unconstitutional as applied to communications that are not the “functional equivalent of express advocacy.”<sup>61</sup> Some have argued that the “functional equivalent of express advocacy” test rescues section 100.22(b) because the two tests are so similar.<sup>62</sup> The problem with this thinking is that the Court applied the *WRTL* test only to electioneering communications, which, by law, cannot constitute express advocacy. That raises, rather than resolves, doubts about the statutory legitimacy of section 100.22(b). As the Court emphasized, “this test is only triggered if the speech meets the bright-line requirements of [the definition of electioneering communication] in the first place.”<sup>63</sup> Thus, if the two tests are the same, then, under the Act, the Court’s test to determine which non-express advocacy electioneering communications may be regulated cannot simultaneously be used to identify express advocacy itself. Such conflation is contrary to the Act.<sup>64</sup>

<sup>60</sup> *Id.* at 190.

<sup>61</sup> *WRTL*, 551 U.S. at 469-70.

<sup>62</sup> See, e.g., Memorandum of Campaign Legal Center and Democracy 21 as *Amici Curiae* in Opposition to Plaintiff’s Motion for Preliminary Injunction, *Free Speech v. FEC*, Case No. 12-CV-127-S, (D.Wyo.) (No. 27-12) (Aug. 10, 2012), 10-19 (Section II: “The Definition of ‘Expressly Advocating’ at Section 100.22(b) Is Indistinguishable from the *WRTL* ‘Functional Equivalent’ Test and Is Constitutional;” concluding that “[t]here is no legal or practical difference between these tests.”)

<sup>63</sup> *WRTL*, 551 U.S. at 474 n.7.

<sup>64</sup> Conflating express advocacy and its functional equivalent also creates practical reporting issues. If express advocacy and its functional equivalent are conflated, speakers must guess which reporting regime they are subject to: expenditures or electioneering communications, each of which has separate and distinct triggers and reporting obligations.

Independent expenditures are reported on Form 5 and are subject to three separate reporting requirements. First, a report is required when independent expenditures aggregate in excess of \$250 in any quarterly reporting period. In addition to the quarterly report, a 48-hour report is required when independent expenditures aggregate \$10,000 or more any time during the calendar year up to and including the twentieth day before an election. Each time subsequent independent expenditures relating to the same election aggregate \$10,000 or more, a new 48-hour report is required to be filed. Each 48-hour report is due within forty-eight hours of when the communication is publicly distributed or otherwise publicly disseminated. Finally, a 24-hour report is required when independent expenditures aggregate \$1,000 or more, less than twenty days but more than twenty-four hours before an election. Each time subsequent independent expenditures relating to the same election aggregate \$1,000 or more, a new 24-hour report is required to be filed. Each 24-hour report is due within twenty-four hours of when the communication is publicly distributed or otherwise publicly disseminated. For purposes of determining whether 24- and 48-hour reports are required to be filed, aggregation is based on all independent expenditures during a calendar year that are made with respect to the same election for a Federal office. 11 C.F.R. § 109.10 (b), (c) & (d).

On the other hand, electioneering communications trigger the need to file Form 9. Political committees are not required to file these reports. Others are required to file a 24-hour report when one or more electioneering

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Whatever the veracity of these arguments in support of section 100.22(b) may be, there is nothing in *McConnell* or *WRTL* explicitly reversing *MRLC*. Thus, it is the prerogative of the Court of Appeals for the First Circuit to evaluate *McConnell* and determine if the logic of that case is sufficient to invalidate prior judicial proscriptions on the enforcement of section 100.22(b). Therefore, *MRLC* remains operative, notwithstanding whatever doubts were raised by *McConnell*. We know of no authority that permits us to disrupt binding precedent of the First Circuit. On the contrary, the Supreme Court has made clear that agencies cannot selectively enforce regulations without sufficient prior notice because of due process concerns.<sup>65</sup>

Given that *McConnell* made clear that (1) *Buckley* was a case of statutory construction, and (2) *McConnell* did not reconsider or otherwise modify that construction, there is no basis for questioning the First Circuit's statutory interpretation in *MRLC* in light of *McConnell* and its progeny. The Court in *McConnell* upheld McCain-Feingold's electioneering communication provisions—which, in certain instances, are broader than the express-advocacy regulatory regime—precisely because they do not apply to express advocacy. But upholding a statute that imposed a different standard on a new category of communications does not modify already-construed statutory language.<sup>66</sup> This is especially true because Congress explicitly said it was not revisiting the regulatory definition of express advocacy, and the Court made clear it was not revisiting *Buckley*.<sup>67</sup>

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communications aggregate in excess of \$10,000, thirty days before a primary election and sixty days before a general election. Each time subsequent disbursements for electioneering communications made by the same person or entity aggregate in excess of \$10,000, another report must be submitted. Each 24-hour report is due within twenty-four hours of when the communication is publicly distributed. For purposes of determining whether a 24-hour report is required to be filed, aggregation is based on the total electioneering communications made by a person during the calendar year. 11 C.F.R. § 104.20. See also Advisory Opinion 2012-11 (Free Speech), Statement of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 16-20 (discussing the reporting difficulties created by conflating the *WRTL* test and Section 100.22(b)).

<sup>65</sup> *FCC v. Fox Television Stations*, 132 S. Ct. 2307 (2012) (“*Fox II*”).

<sup>66</sup> In the *McConnell* case, at the District Court level, Judge Kollar-Kotelly reviewed the cases that held 11 C.F.R. § 100.22(b) unconstitutional, endorsing the results in those cases because the FEC has no authority to redefine a statutory test that only Congress or the Supreme Court could redefine. The express advocacy regulations that OGC is currently relying upon were found to be “plagued with vague terms” that place the speaker at the “mercy of the subjective intent of the listener.” *McConnell v. FEC*, 251 F. Supp. 2d 176, 601 (D.D.C. 2003) (Memorandum Op. of Kollar-Kotelly, J).

<sup>67</sup> That Congress modified the statute post-*Buckley* is of no consequence in light of *MCFL*, which imposed the identical *Buckley* construction on the current statute. This is further reinforced by the *McConnell* Court's repeated invocation of both *Buckley* and *MCFL*, treating them as synonymous and interchangeable. Because courts are the final authorities on issues of statutory interpretation, their decisions on such matters are binding regardless of the degree of deference owed to the implementing agency. See *Neal v. United States*, 516 U.S. 284, 295 (1996) (In rejecting an agency's interpretation of a statute that would have overruled the Supreme Court's prior interpretation of that statute, the Court was clear that, “[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.”).

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In *MRLC*, the First Circuit was explicit in holding that section 100.22(b) was "contrary to the statute" and "beyond the power of the FEC."<sup>68</sup> Since *McCormell* did not change the statutory meaning of "express advocacy," *MRLC* precludes the Commission from enforcing section 100.22(b) in the First Circuit.

**c. Even if Section 100.22(b) Were Enforceable, This Advertisement Does Not Contain Express Advocacy Under Section 100.22(b)**

Although section 100.22(b) is not enforceable in the First Circuit, we nonetheless address the claim that the Cornerstone advertisement comes within its reach. An examination of both the advertisement in question and the language of section 100.22(b) reveals that it does not. As noted above, a communication constitutes express advocacy under section 100.22(b) if:

When taken as a whole and with limited reference to external events, such as the proximity to the election, [it] 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.<sup>69</sup>

Thus, in order to come within the reach of section 100.22(b), a communication must satisfy two elements: it must (1) contain an "electoral portion" that is "unmistakeable, unambiguous, and suggestive of only one meaning," and (2) "reasonable minds could not differ" that that meaning "encourages actions to elect or defeat" a clearly identified federal candidate.

The *Furgatch* express advocacy test as incorporated by section 100.22(b) still sets a very high bar. For example, there are two other communications that, according to the Supreme Court, fall outside section 100.22(b). First, is the so-called "Bill Yellowtail ad":

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments -- then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.<sup>70</sup>

<sup>68</sup> *MRLC*, 914 F. Supp. at 13 ("11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"), *aff'd per curiam*, 98 F.3d 1 (1st Cir.1996) (per curiam) ("After a careful evaluation of the parties' briefs and the record on appeal, we affirm for substantially the reasons set forth in the district court opinion."), *cert. denied*, 522 U.S. 810 (1997).

<sup>69</sup> 11 C.F.R. § 100.22(b).

<sup>70</sup> *McCormell*, 540 U.S. at 193 n.78. The Court continued, "The notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.* See also MUR 4568 (Triad Management Services, Inc.),

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To both Congress and the Court in *McConnell*, this was the quintessential ad that was not express advocacy but was intended to influence the election. Critical to *McConnell*'s analysis was the fact that this ad did not constitute express advocacy. Had it, the ad could have already been prohibited under the then-existing ban on corporate independent expenditures. Thus, according to the Court, "Congress enacted [McCain-Feingold] to correct the flaws it found in the existing system."<sup>71</sup> As noted above, though, Congress did not revise the statutory definition of independent expenditure, which the Court had already narrowed, but created a new statutory construct – electioneering communications – to "correct the flaws."

The second communication is "Hillary – the Movie," which the *Citizens United* Court held was an electioneering communication that was the functional equivalent of express advocacy.<sup>72</sup> Critically, despite very clear electoral language, the film was not deemed to contain express advocacy. The movie began "by asking 'could [Senator Clinton] become the first female President in the history of the United States?' And the narrator reiterated the movie's message in his closing line: 'Finally, before America decides on our next president, voters should need no reminders of . . . what's at stake -- the well being and prosperity of our nation.'<sup>73</sup> In between, the Court observed that:

The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. . . . The movie comments on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton "Machiavellian," and asks whether she is "the most qualified to hit the ground running if elected President." The narrator reminds viewers that "Americans have never been keen on dynasties" and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House."<sup>74</sup>

Importantly, despite the clear electoral focus of the movie and its name of "vote," neither the majority nor the dissent considered the movie to be express advocacy. Thus, like the Bill Yellowtail ad described in *McConnell*, "Hillary – the Movie" was considered to be outside the definition of express advocacy.

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General Counsel's Brief at 66 (stipulating that the Bill Yellowtail ad amongst others "did not contain express advocacy").

<sup>71</sup> *Id.* at 194.

<sup>72</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 890 (2010).

<sup>73</sup> *Id.* (internal citations omitted).

<sup>74</sup> *Id.* (internal citations omitted); see also *Citizens United v. FEC*, 530 F. Supp. 2d 274, 279-280 n.12 (D.D.C. 2008) (providing additional excerpts of the movie).

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In sum, in order for a communication to fall within the boundaries of section 100.22(b), it must be more similar to the ad in *Furgatch*,<sup>75</sup> rather than the Bill Yellowtail ad or "Hillary – the Movie." These three ads serve as guideposts to understanding and applying the vague regulatory text of section 100.22(b).

OGC's analysis of the advertisement in this matter consisted solely of the following three conclusory sentences:

The advertisement also contains express advocacy under 11 C.F.R. § 100.22(b). The statement "Now New Hampshire Republicans [who are eligible to vote in the Republican Senate primary] can tell Binnie the feeling is mutual [*i.e.*, that they do not like him]" is an unmistakable and unambiguous reference to the upcoming New Hampshire Republican primary election. Because reasonable minds could not differ as to whether the exhortation to "tell Bill Binnie the feeling is mutual" encourages action to defeat Binnie by voting against him in the primary election, the advertisement constitutes express advocacy under section 100.22(b).<sup>76</sup>

Our colleagues elaborate further in five sentences, and appear to consider the following factors, taken together, as determinative:

- That "[t]he ad was exclusively about Binnie's views";
- That "[i]t exaggerated and mocked the policy statements Binnie made";
- That Binnie's policy statements were "made in the context of his race in the Republican Senate primary";
- That the ad "labeled his positions 'shockingly liberal'";
- That "[t]he ad was directed at New Hampshire Republicans";
- That Binnie was a "non-incumbent primary candidate"; and
- That the ad ran 41 days before a primary election.<sup>77</sup>

<sup>75</sup> The ad was captioned "DON'T LET HIM DO IT." It made a number of specific references to the upcoming election and the election process (*e.g.*, "The President of the United States continues to degrade the *electoral process*"; "He [the President] continues to cultivate the fears, not the hopes of the *voting public*"; "If he succeeds the country will be burdened with *four more years* of incoherence, ineptness and illucia, as he leaves a legacy of low-level *campaigning*"). The ad specifically mentioned current and former opponents of the President (*e.g.*, "[The President's] running mate outrageously suggested [former primary opponent] Ted Kennedy was unpatriotic"; "[T]he President himself accused Ronald Reagan of being unpatriotic"). The ad concluded by re-stating: "DON'T LET HIM DO IT."

<sup>76</sup> MUR 6346 (Cornerstone Action), FGCR at 15.

<sup>77</sup> *Id.*, Statement of Reasons of Chair Cynthia L. Bauerly and Commissioners Steven T. Walther and Ellen L. Weintraub at 3-4.

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Significantly, none of the cited passages contain words that expressly advocate the election or defeat of a clearly identified candidate for federal office, identify an "unmistakable" electoral portion of the advertisement, or show that "reasonable minds could not differ" on their meaning. And neither OGC's nor our colleagues' analyses mirror, in any way, the analysis undertaken by the Ninth Circuit in *Furgatch*. Rather, both undertake, at best, a cursory review of the communication under section 100.22(b) that fails to provide any reasoning behind their decisions.

OGC's analysis, which relied almost solely upon contextual inferences rather than the actual language of the advertisement, is not convincing. OGC presents the ad as saying: "Now New Hampshire Republicans [who are eligible to vote in the Republican Senate primary] can tell Binnie the feeling is mutual [*i.e.* that they do not like him]." But the ad says no such thing. The ad that actually aired merely said "Now New Hampshire Republicans can tell Binnie the feeling is mutual." It made absolutely no reference to eligible voters, the Senate primary, or what the "feeling" was that is supposed to be "mutual."

When Cornerstone's actual advertisement is analyzed under the proper rubric, it does not fall within the ambit of section 100.22(b). The ad that Cornerstone actually aired lacked a discernible "electoral portion," as mandated by the regulation. Although the advertisement mentions "the Republican Party" and "New Hampshire Republicans," such language is not in and of itself enough to trigger the application to section 100.22(b). As the regulation's Explanation & Justification makes clear, "the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action."<sup>78</sup> That Binnie himself said "he doesn't like the Republican Party" is at best a statement of either fact or opinion, not a call for electoral action. In contrast to the ad in *Furgatch*, the referenced individual, Bill Binnie, is never identified as a candidate and no election is mentioned. Rather, the ad focuses on numerous positions Binnie took in the past.

Nor does Cornerstone include in its advertisement an express "command" to the viewer that expressly advocates election or defeat of the sort found in *Furgatch*. Whereas the *Furgatch* advertisement included the command "don't let him," the Binnie ad merely states that viewers now have an opportunity to do something (*i.e.*, "Now New Hampshire Republicans *can* tell Bill Binnie"). And even if it were clear how one could "tell" Binnie, what he is to be told is also ambiguous. The ad says that Binnie "says he doesn't like the Republican Party," and then says that "[n]ow New Hampshire Republicans can tell Bill Binnie the feeling is mutual." Which feeling? That the Republican Party is bad? Or that Binnie is bad? The answer is not explicitly clear.

Similarly, if OGC's reading of the communication is accurate – that to "tell Binnie the feeling is mutual" means that the voters ought to tell him "that they do not like him" – then it clearly represents an alternative, non-electoral interpretation, specifically that Republicans should tell a candidate that they do not like him. But this is a far cry from saying vote against the

<sup>78</sup> See Express Advocacy E&J, 60 Fed. Reg. at 35295.

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candidate. After all, how could a portion of a communication be unmistakably electoral, as required by section 100.22(b), if OGC can only conclude that “tell Binnie the feeling is mutual” means “tell Binnie that they do not like him” rather than “vote against Binnie in the Republican primary”? This alone shows electoral ambiguity.

OGC’s recommendation presumes that these layers of inferences indicate that asking someone to express dislike towards Binnie is tantamount to advocating a vote against him. But the ad contains no such explicit directive. Instead, it leaves the action urged unresolved. One could place a telephone call to Binnie and tell him the feeling is mutual. Or send a letter. Perhaps show up at a public event and talk to him personally. Or call him and tell him that his policy preferences are giving New Hampshire Republicans a bad name, or giving “conservatives” a bad name in New Hampshire. In fact, the ad’s call to action could lead one to argue that the Cornerstone ad is more similar to the Bill Yellowtail ad, described above, which falls outside the definition of express advocacy. Both set forth policy positions of the candidate in question, while mentioning neither candidacy nor an election. Both asked the viewer to call the candidate with regard to the policy positions set forth in the communication. In fact, the Yellowtail ad contained more personal character attacks on, and fewer policy disagreements with, the candidate than Cornerstone’s ad did. Thus, considering that the advertisement was run outside the electioneering communication window, it cannot possibly be the case that Cornerstone’s ad is subject to greater Commission regulation than the Bill Yellowtail advertisement. Yet that is precisely what OGC and some colleagues are saying.

Interestingly, our colleagues highlighted the timing of the ad – that the ad ran 41 days before the election – as support for their view that the ad constituted express advocacy. But the temporal fact here seems to be evidence of just the opposite: that the communication’s request that state Republicans “tell Binnie the feeling is mutual” is actually just that – an admonition to contact Binnie.<sup>79</sup>

### III. CONCLUSION

The Court has already told the FEC that it may not force speakers to take their chances as to whether speech is subject to government regulation.<sup>80</sup> This is precisely the problem *Buckley*

<sup>79</sup> In fact, even Congress, in its efforts to go beyond the limitations imposed on the Act in *Buckley*, did not try and ban electioneering communications outside of 30 days of a primary election.

<sup>80</sup> See, e.g., *Citizens United*, 130 S. Ct. at 895, 896 (“[G]iven the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak . . . This is precisely what *WRTL* sought to avoid.”); *WRTL*, 551 U.S. at 469 (the proper First Amendment standards must “entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation . . . eschew ‘the open-ended rough-and-tumble of factors,’ which ‘invit[es] complex argument in a trial court and a virtually inevitable appeal.’” (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)); see generally *Doe v. Reed*, 130 S. Ct. 2811, 2822-2823 (2010) (Alito, J., concurring) (“To avoid the possibility that a disclosure requirement might chill the willingness of voters to sign a referendum petition (and thus burden a circulator’s ability to collect the necessary number of signatures[]) . . . voters must have some assurance at the time when they are presented with the petition that their names and identifying information will not be released to the public.”) (internal citations omitted) (emphasis in the original).

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sought to avoid. So too Congress, when it chose to leave the narrow definition of expenditure alone and impose instead a new, bright-line reporting regime for electioneering communications.

Therefore, we could not vote to approve OGC's recommendation in this matter. Cornerstone's advertisement does not contain words that expressly advocate the election or defeat of a clearly identified federal candidate and, thus, Cornerstone did not need to file an independent expenditure report. No amount of searching for hidden meaning in the advertisement's "context" through the same sort of multi-factor inquiry the Court lampooned in *Citizens United* can change that.<sup>81</sup>

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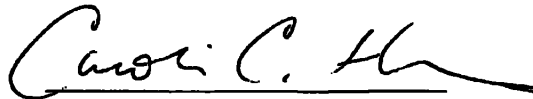
<sup>81</sup> See *Citizens United*, 130 S. Ct at 895-96.

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9/19/13  
Date

  
\_\_\_\_\_  
Donald F. McGahn II  
Vice Chairman

9/19/13  
Date

  
\_\_\_\_\_  
Caroline C. Hunter  
Commissioner

9/19/13  
Date

  
\_\_\_\_\_  
Matthew S. Petersen  
Commissioner

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