FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Unknown Respondent	)	MUR 7416
	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONER CAROLINE C. HUNTER

In *Buckley v. Valeo*, the Supreme Court construed the term "expenditure" in the Federal Election Campaign Act of 1971, as amended (the "Act"), to apply "only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office."[1] Congress subsequently codified that interpretation in the Act.[2]

This matter concerned a "Voting Guide" mailer that juxtaposed the positions of two candidates for a House seat in California's 49th District in the June 5, 2018, open primary election. The mailer described one candidate as having "led the charge against [a] statewide sanctuary law" and as a "[s]trong supporter of President Trump," and claimed he will "fight for additional tax cuts in Congress," and described the second candidate as having "failed to vote on a statewide sanctuary policy and questioned President Trump's call for a border wall," "[c]riticized Trump during the 2016 campaign," and "[b]roke his promise never to raise our taxes." The Commission's Office of General Counsel concluded that under Commission regulation 11 C.F.R. § 100.22(b) the mailer had an "unmistakable, unambiguous meaning: vote for [the first candidate] in the upcoming primary election, not [the second candidate]."[3]

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1 *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (emphasis added) (construing sections 608(e)(1) and 434(e) of the Act); *id.* at n.52 ("This construction would restrict the application of § 608(e)(1) to 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.' "); *id.* at 80 ("To ensure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way that we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate."). In *FEC v. Massachusetts Citizens for Life, Inc.*, the Court unanimously held that this limiting construction also applied to the statutory provision banning corporate and labor organization "expenditure[s]." *See* 479 U.S. 238, 248-49 (1986); *id.* at 249 ("The [communication] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an *explicit directive*: vote for these (named) candidates.") (emphasis added).

2 *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 102, § 301(p), 90 Stat. 475, 479 (1976) (adding definition of "independent expenditure").

3 MUR 7416 (Unknown Respondent), First Gen. Counsel's Rpt. ("FGCR") at 7 (citing the mailer's "timing," use of "an image of the U.S. Capitol," "references to Congressional candidates and voting," what a candidate would

We disagree. The mailer informs readers as to the candidates' positions on a variety of issues on which the American public hold differing views. This is precisely the sort of activity the express advocacy construct was meant to exclude from Commission jurisdiction.[4] Moreover, the mailer does not exhort the reader to take any electoral action. In fact, it does not direct readers to *do* anything. Nor is the mailer's message unambiguous. Can fighting against a statewide sanctuary law be interpreted only as a reason to vote for a candidate? What about favoring additional tax cuts? Or whether a particular candidate supports President Trump?

The answers to the above questions depend entirely upon each individual reader's own personal views. Accordingly, because the mailer puts the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning,"[5] we cannot support OGC's conclusion that the mailer "has an unmistakable, unambiguous meaning."[6]

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do "*in Congress*," and purported "positive comments" about one candidate and "negative comments" about another).

[4] Indeed, the express advocacy construct is intended to preserve the principle that political debate on public issues in this country should be "uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Because "public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct," the express advocacy limitation protects praise and criticism of officeholders and candidates. *See Buckley*, 424 U.S. at n.50 (quoting *Buckley v. Valeo*, 519 F.2d 821, 859 (D.C. Cir. 1975)). *See, e.g.*, *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995) (letters criticizing Reagan Administration's military involvement in Central America not express advocacy); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2nd Cir. 1980) (en banc) (bulletin criticizing congressman for his record on taxes and government spending not express advocacy); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (ads criticizing presidential candidate for positions on gay rights not express advocacy); *FEC v. Freedom's Heritage Forum*, 1999 WL 33756662 (W.D. Ky. 1999) (mailer comparing candidates' positions and which portrayed one candidate "in an unfavorable light" and the opposing "in a favorable one" not express advocacy because "the reader is left to draw her own conclusions"); *FEC v. Colorado Republican Federal Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993), *rev'd on other grounds* 59 F.3d 1015 (10th Cir. 1995) and *vacated on other grounds*, 518 U.S. 604 (1996) (radio advertisement criticizing candidate for positions on defense spending and balanced budget issues not express advocacy); *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) (mailings criticizing officeholders for their opposition to abortion rights and the Equal Rights Amendment not express advocacy); *FEC v. American Federation of State, County & Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979) (poster distributed to union members lampooning Gerald Ford's pardon of Richard Nixon not express advocacy).

[5] "'Such a distinction offers no security for free discussion. . . . It compels the speaker to hedge and trim.'" *Buckley*, 424 U.S. at 42-43 (quoting *Thomas v. Collins*, 323 U.S. 516 (1945)).

[6] *See* FGCR at 7. In *Real Truth About Abortion, Inc. v. FEC*, the Fourth Circuit rejected a challenge to the constitutionality of section 100.22(b) by claiming it is consistent with the Supreme Court's test for the "functional equivalent of express advocacy": "only if the [communication] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 681 F.3d 544, 551-53 (4th Cir. 2012) (quoting *Wisconsin Right to Life, Inc. v. FEC*, 551 U.S. 449 (2007)). It is evident from this matter that OGC and our colleagues continue to interpret section 100.22(b) quite differently.

Matthew S. Petersen
Vice Chairman

8/29/19
Date

Caroline C. Hunter
Commissioner

8/29/19
Date