



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7513
Community Issues Project)
)

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR, III**

The Complaint in this matter alleged that Community Issues Project, a § 501(c)(4) organization, violated the Federal Election and Campaign Act of 1971, as amended (the “Act”), by failing to register with the Commission as a political committee, failing to file 48-hour reports, and failing to include a proper disclaimer on public communications.¹ The Respondent denied the allegations, asserting that it did not cross the statutory threshold that would require it to register as a political committee, to file 48-hour reports, or to include a Federal Election Commission-compliant disclaimer on its communications, because none of its public communications were independent expenditures.²

We agree with the Respondent. Community Issues Project’s public communications do not contain any of the “magic words” of express advocacy, nor do they unambiguously advocate for or against the election of any clearly identified candidate for federal office. Thus, they are not independent expenditures, and Community Issues Project is not a “political committee” as defined by the Act.

Background

Under the Act, any group of persons that receives contributions or makes expenditures of more than \$1,000 is a political committee.³ In *Buckley v. Valeo*, the Court found that the Act’s definition of “political committee” was overly broad and limited the statute’s reach to only those groups “that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”⁴

¹ Complaint (Oct. 6, 2018), MUR 7513 (Community Issues Project).

² Response of Community Issues Project (Oct. 26, 2018), MUR 7513 (Community Issues Project).

³ 52 U.S.C. § 30101(4)(A).

⁴ *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)

This matter hinges on those statutory criteria, specifically, whether Community Issues Project made more than \$1,000 in “expenditures.” If they did not, then there is no need to evaluate the group’s major purpose.

The term “expenditure” means “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”⁵ The Court in *Buckley* held that in order to avoid vagueness concerns, the term “expenditure” was limited “to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”⁶ The Court further clarified that this construction would limit the definition of expenditures “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.’”⁷

As a result, to qualify as an independent expenditure and trip the statutory threshold for political-committee status, a communication must contain express advocacy. Commission regulations define express advocacy as any communication that:

(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.⁸

⁵ 52 U.S.C. § 30101(9)(A).

⁶ *Buckley*, 424 U.S. at 44.

⁷ *Id.* at 44 n.52.

⁸ 11 C.F.R. § 100.22.

At issue are three Community Issues Project communications that mention former Phoenix mayor Greg Stanton, who at the time had recently resigned from his mayoral office to run for the U.S. House of Representatives:

- A mailer that says, “Thank you Greg Stanton” over a picture of Stanton on a bicycle riding past a person with a cardboard sign reading “Work 4 Food,” “Arizona deserves better,” “Greg Stanton has let us down,” and “Greg Stanton promised to be a mayor for everyone, but only delivered for his millionaire friends;”
- An Instagram video that discusses rising homelessness during Stanton’s tenure as mayor of Phoenix and concludes: “Don’t let Greg Stanton ride away from his mess;” and
- A robocall that talks about rising homelessness during Stanton’s tenure as mayor of Phoenix and states, “Greg Stanton let us down. Don’t let Greg Stanton bike off into the sunset and leave us to clean up his mess.”⁹

The Complaint alleges the communications contain express advocacy. Respondents deny this and assert, “[t]hese messages were simply intended to motivate the citizen taxpayers of Phoenix to take a stand in opposition to the threat posed by these three public policy issues [homelessness in Phoenix, homelessness and fiscal responsibility by Phoenix decision makers, and fiscal irresponsibility previously and currently condoned by Phoenix policymakers] and to hold accountable any Phoenix decision maker who has failed to address these pressing issues in a fiscally responsible manner.”¹⁰

Analysis

Community Issues Project’s communications do not contain express advocacy. Therefore, Community Issues Project did not cross the statutory threshold for political-committee status and did not fail to properly register and report as a political committee.

In its First General Counsel’s Report, our Office of the General Counsel (“OGC”) concluded that “[n]one of the communications constitute express advocacy under 11 C.F.R. § 100.22(a).”¹¹ We agree. None of the advertisements contains magic words like “vote for” or “vote against the President,” nor do any of the advertisements contain “individual word(s), which

⁹ Complaint (Oct. 6, 2018), MUR 7513 (Community Issues Project). The Office of the General Counsel identifies two more communications on Community Issues Project’s YouTube page. First General Counsel’s Report at 4–5 (Sept. 18, 2019), MUR 7513 (Community Issues Project). These communications are not referenced in the Complaint. Both reference Greg Stanton’s opponent, Steve Ferrara. One notes that Ferrara is supported by former Senator John Kyl and states: “Like Senator Kyl, [Ferrara] is concerned about the ever-expanding problem of homelessness. And he will seek a sensible, common-sense solution to our homelessness problem.” *Id.* The other refers to Ferrara as a “proven leader” and states: “True leaders like Jon Kyl support Steve because he has real solutions for Phoenix.” *Id.*

¹⁰ Response of Community Issues Project at 3 (Oct. 26, 2018), MUR 7513 (Community Issues Project).

¹¹ First General Counsel’s Report at 10 n.32 (Sept. 18, 2019), MUR 7513 (Community Issues Project).

in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s),” like bumper stickers that say “Reagan/Bush” or “Mondale!”

The disposition of this matter turns on the interpretation and application of § 100.22(b). Section 100.22(b) is constitutionally suspect and has been the subject of significant litigation, with different courts coming to different conclusions.¹² Nevertheless, even assuming *arguendo* that § 100.22(b) is constitutional, the advertisements at issue do not meet the standard therein to be express advocacy.

To be express advocacy under § 100.22(b), a communication must have an “electoral portion” that is “unmistakable, unambiguous, and suggestive of *only one* meaning” (emphasis added) such that 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).”¹³ Community Issues Project’s communications do not include any electoral portion, let alone one that is “unmistakable, unambiguous, and suggestive of only one meaning.” Most discuss a local policy issue for which the Phoenix city government was responsible. And none of the communications at issue refer to voting, elections, or Election Day, or refer to any individual as a federal officeholder or candidate for federal office.¹⁴

Reasonable minds can differ about how to respond to Community Issues Project’s communications. Several of Community Issues Project’s communications do not include any call to action.¹⁵ The two that do call on the viewer not to “let Greg Stanton bike off into the sunset and leave us to clean up his mess” or not to let Greg Stanton “ride away from his mess.” According to the Respondent, “the stated purpose of all of these messages was simply to motivate our supporters and the public to contact the Office of the Mayor and the Office of the City Council in Phoenix and demand an accounting for the obvious failures in their leadership.”¹⁶ Nothing in Community Issues Project’s call to action is inconsistent with this stated purpose. Even once Stanton was out

¹² Compare *Me. Right to Life Comm. Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) (holding “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), *cert. denied*, 522 U.S. 810 (1997); *FEC v. Christian Action Network*, 894 F. Supp. 946, 958 (W.D. Va. 1995) (concluding that the FEC’s approach to express advocacy wrongly expanded the definition beyond that enunciated by the Court in *Buckley* and was “based on a misreading of the Ninth Circuit’s decision in *Furgatch*”), *aff’d*, 92 F.3d 1178 (4th Cir. 1996) (unpublished); *Va. Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (holding that § 100.22(b) “violates the First Amendment”); *Right to Life of Dutchess Cnty., Inc. v. FEC*, 6 F. Supp. 2d 248, 253–254 (S.D.N.Y. 1998) (finding that § 100.22(b) is beyond the statute), *with Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (holding that 11 C.F.R. § 100.22(b) is neither overly broad nor impermissibly vague); *The Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012) (holding that 11 C.F.R. § 100.22(b) is constitutional).

¹³ 11 C.F.R. § 100.22(b).

¹⁴ The closest any of the communications comes to having an electoral portion is referring to Ferrara as “not a career politician.” This reference, without more, is not enough to qualify as an “electoral portion” of a communication.

¹⁵ For example, the communications referencing Ferrara close by identifying him as someone who “has real solutions.” While this communication is complimentary of Ferrara, it does not unambiguously direct viewers to vote for him in a specific election. Viewers could support policies similar to those that Ferrara advocated without supporting Ferrara at the ballot box.

¹⁶ Response of Community Issues Project at 3 (Oct. 26, 2018), MUR 7513 (Community Issues Project).

of office as mayor, it was still possible to prevent him from “riding away from his mess” by asking questions about homelessness in Phoenix and his performance as mayor. Thus, even if “vote against Greg Stanton” was *one* reasonable interpretation of Community Issue’s Project’s communications, it was not *the only* reasonable interpretation.

This stands in contrast to the communication that the U.S. Court of Appeals for the Ninth Circuit determined was express advocacy in *FEC v. Furgatch*.¹⁷ The communication in *Furgatch* that the court found contained express advocacy repeatedly referred to the “President of the United States” or the “President,” referenced his “running mate,” talked about official acts (the spending of public funds to “buy” various groups), described the impact of his statements on the “voting public,” and concluded “[i]f 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. DON’T LET HIM DO IT.”¹⁸ The only “success” that would have resulted in “burdening the country with four more years” of the President’s asserted weaknesses was his reelection, and the only way to prevent his success would have been to vote against him.

In contrast, Community Issues Project’s communications contain none of these electoral references and no unambiguous call to action, and therefore, they are not analogous to the communications at issue in *Furgatch*.¹⁹

Conclusion

Community Issues Project’s communications do not contain express advocacy. Thus, based on the record before the Commission, the Respondent did not cross the statutory threshold to become a political committee and did not need to register and report as such.

¹⁷ *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

¹⁸ *Id.* at 858.

¹⁹ In its First General Counsel’s Report, OGC compares Community Issues Project’s communications to the advertisement in *Furgatch* and states: “The Instagram video and robocall contain the same type of command as in the *Furgatch* advertisement: ‘don’t let’ Stanton do something. With limited reference to external events, the only reasonable interpretation of these exhortations is that the reader should not ‘let’ Stanton escape a ‘mess’ by going to Washington as a Representative. Similarly, the mailer’s language has only one reasonable interpretation: Stanton wants to ‘ride away’ to Congress.” First General Counsel’s Report at 11 (Sept. 18, 2019), MUR 7513 (Community Issues Project). As noted above, this may be *one* reasonable interpretation, but it is not *the only* reasonable interpretation. Despite the superficial similarity of the phrase “don’t let him” do something, the surrounding textual context is vastly different. The communication in *Furgatch* clearly referenced federal office, official acts in office, voting, and the prospect of a second term in office. The Community Issues Project communications did not.



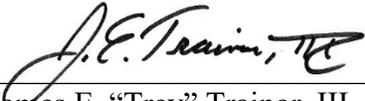
Allen Dickerson
Vice Chair

October 7, 2021
Date



Sean J. Cooksey
Commissioner

October 7, 2021
Date



James E. "Trey" Trainor, III
Commissioner

October 7, 2021
Date