



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Last Best Place PAC and David M. Lewis)	MUR 8216R
in his official capacity as treasurer)	
)	

**SUPPLEMENTAL STATEMENT OF REASONS OF VICE CHAIRMAN JAMES E.
“TREY” TRAINOR, III AND COMMISSIONER DARA LINDENBAUM**

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter was remanded to the Commission to further explain its dismissal vote.¹ In an effort to comply with the Court’s order, under unusual circumstances, we write this Supplemental Statement of Reasons to provide that explanation.²

The Complaint in this matter alleged that Last Best Place PAC, an independent expenditure-only political committee, violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by paying for an ad that expressly advocated

¹ Mem. Op., Case No. 1:24-cv-02585-SLS, (D.D.C. June 26, 2025); Order Case No. 1:24-cv-02585-SLS, (D.D.C. June 26, 2025).

² We presume familiarity with the initial Statement of Reasons. *See* Statement of Reasons of Cmmr’s. Cooksey, Dickerson, Lindenbaum, Trainor, MURs 8215 and 8216 (Last Best Place PAC) (Aug. 6, 2025), https://www.fec.gov/files/legal/murs/8215/8215_10.pdf (“SOR”). This Supplemental Statement explains in greater detail the reasoning behind the original vote, which the Court found “too conclusory,” and does not change any of its conclusions. However, we note that two of the four Commissioners who joined the initial SOR have departed the agency, and the Commission currently lacks a quorum. Letter from Allen J. Dickerson, Comm’r, FEC, to President Donald J. Trump (Apr. 23, 2025), <https://www.fec.gov/resources/cms-content/documents/Letter-from-Commissioner-Allen-J-Dickerson-to-President-Donald-Trump.pdf>; Letter from Sean J. Cooksey, Comm’r, FEC, to President Joseph R. Biden, Jr. (Jan. 13, 2025), [Letter-from-Commissioner-Sean-J-Cooksey-to-President-Joseph-Biden-Jan-13-2025.pdf](https://www.fec.gov/resources/cms-content/documents/Letter-from-Commissioner-Sean-J-Cooksey-to-President-Joseph-Biden-Jan-13-2025.pdf). Without a quorum, the Commission cannot appeal the Court’s decision or re-vote on the administrative complaint. 52 U.S.C. §§ 30106, 30107; *see also* Commission Directive 10(L)(3) (interpreting the Act to set forth a list of issues the Commission may address when it lacks quorum but still has bipartisan membership). It is our understanding of the remand that the Court seeks a supplemental explanation of the original vote – it has not required the Commission to reconsider its original vote or re-vote (which it cannot do). *See generally* Mem. Op. (requiring further explanation but not requiring reconsideration or re-voting); Order (same). Given these circumstances and that only two Commissioners from the original four controlling Commissioners remain, this Supplemental SOR is the only action that the Commission can currently take to comply with the Court’s remand order.

against U.S. Senate candidate Tim Sheehy without disclosing any payments for independent expenditures.³

The Complaint identifies an ad, “Shady Sheehy,” which appears to have started running on September 12, 2023, with an unknown end date.⁴ Below are still images of the video and transcription of the voiceover:



The voiceover in “Shady Sheehy” says:

They got a home loan and paid it back. She got a car loan and paid it back. But this multimillionaire got an over \$770,000 government loan and never paid it back. But Tim Sheehy doesn’t think he should be held accountable. Sheehy got rich off government contracts, walked away from his loan and now he and his campaign can spend millions trying to buy our Senate seat. Shady Sheehy. He’s just out for himself. Last Best Place PAC is responsible for the content of this ad.⁵

In response, Last Best Place PAC asserts that the ad does not expressly advocate Sheehy’s defeat and, therefore, did not have to be reported as an independent expenditure. Specifically, the Response argues that the ad brings awareness to issues of public concern, namely, money in politics and the Paycheck Protection Program.⁶ Further, the Response notes that the ad ran months before the relevant election and contends it lacked an express electoral exhortation.⁷

³ Compl. at 3, MUR 8216 (Feb. 14, 2024).

⁴ See *id.* at 3-4 (citing Ally Mutnick, *Nine Months Before the Montana GOP Primary, a Mysterious Super PAC Is on the Airwaves Attacking Tim Sheehy*, POLITICO (Sept. 12, 2023), <https://www.politico.com/live-updates/2023/09/12/congress/montana-senate-sheehy-pac-ads-00115276>).

⁵ Compl. at 4, MUR 8216; AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Shady Sheehy” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/36ffda2b-a32a-4a7d-84b5-e8363d3a96e6>.

⁶ Resp. at 1-2, MUR 8216 (Mar. 29, 2024).

⁷ *Id.*

The Commission voted to dismiss the Complaint.⁸ The Statement of Reasons (“SOR”) explaining the vote reasoned that the character attack ad at issue ran nine months before the relevant election and, therefore, could have had reasonable meanings other than electoral action.⁹ The ad thus did not satisfy the standard for express advocacy.¹⁰

The Complainant sued in federal court alleging that the Commission’s determination rested on an impermissible interpretation of law and was arbitrary and capricious.¹¹ In its Memorandum Opinion, the Court held that the SOR properly considered temporal proximity to the election as a factor in determining whether the ad contained express advocacy.¹² However, the Court held that the SOR erred in not identifying “any other factors that it considered” in reaching its conclusion.¹³ The Court ordered the Commission to conform to the decision within 30 days, stating that the “FEC will be free to provide . . . [an] explanation on remand.”¹⁴

II. LEGAL ANALYSIS

An “independent expenditure” is an expenditure “expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.”¹⁵

A communication expressly advocates under 11 C.F.R. § 100.22(b) if:

“[w]hen 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

⁸ Certification ¶ 2a (July 12, 2024).

⁹ SOR at 6 (quoting Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (“Express Advocacy E&J”).

¹⁰ *Id.*

¹¹ Compl. at 4, 23, Case No. 1:24-cv-02585-SLS (Sept. 9, 2024).

¹² Mem. Op. at 8-14.

¹³ *Id.* at 17.

¹⁴ *Id.*

¹⁵ 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16.

- (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.”¹⁶

We understand the Court’s decision may require consideration of “other factors” in this Supplemental SOR.¹⁷ On this point, we are mindful that other courts have warned (and the regulation itself states) that the words of the ads are to be interpreted with “limited reference to external events,” with “proximity to the election” being the one enumerated external event the Commission may consider.¹⁸ We do not understand the Court’s reference to “other factors” to require the Commission to analyze other external events, but rather is an indication that the Commission should more fulsomely analyze the words of the ad itself for context. The regulation’s limitation on the consideration of “external events” is a prophylactic against an unconstitutionally vague application of what it means to expressly advocate for the election or defeat of a clearly identified candidate.¹⁹

Turning to the merits, the original SOR concluded that (b)(2) was not satisfied. First, the language of the ad itself does not encourage electoral action. The phrase closest to suggesting electoral action is one that appeared on screen stating that Sheehy would “[s]pend millions trying to buy our Senate seat.” However, the ad does not follow up this observation with any language encouraging electoral action such as, for example, “don’t let Sheehy buy our Senate seat,” or any other similar phrase which could have been interpreted as an electoral exhortation.²⁰ As the *Christian Coalition* Court noted, the ad “must use an active verb” and “the verb or its immediate equivalent . . . must unmistakably exhort the reader/viewer/listener to take electoral action”²¹ The verbs here, “spend” and “buy,” can be understood as a criticism of a corrupt system in which a Senate seat can be bought, but these verbs do not unmistakably urge the listener to take any action, let alone electoral action.

¹⁶ 11 C.F.R. § 100.22(b).

¹⁷ Mem. Op. at 16.

¹⁸ 11 C.F.R. § 100.22(b); *see also* *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (proposing a standard for express advocacy that included speech “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” (emphasis added)).

¹⁹ *FEC v. Wisc. Right To Life, Inc.*, 551 U.S. 449, 473-74 (2007) (“Given the standard we have adopted for determining whether an ad is the ‘functional equivalent’ of express advocacy, contextual factors . . . should seldom play a significant role in the inquiry.”).

²⁰ *See, e.g.*, F&LA at 8, MUR 5831 (Softer Voices) (finding express advocacy where the ad stated “Can we really risk Bob Casey learning on the job?” and, from the context of the ad, the “job” was a Senate seat); *Furgatch*, 807 F.2d at 864-65 (concluding that an ad’s plea “don’t let him do it” constituted express advocacy where the ad “presented . . . an express call to action,” even though there was “no express indication of what action is appropriate” because “[r]easonable minds could not dispute that [the] advertisement urged readers to vote against” the clearly identified candidate).

²¹ *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 61 (D.D.C. 1999); *see also* *Furgatch*, 807 F.2d at 864-65 (“The words we focused on are ‘don’t let him.’ They are simple and direct. ‘Don’t let him’ is a command. The words ‘expressly advocate’ action of some kind.”).

Nevertheless, the Commission has identified a narrow path to finding express advocacy for character attack ads where the exhortation is not clear from the words of the ads themselves but can be inferred from context. In its 1995 Explanation and Justification accompanying 11 C.F.R. § 100.22(b), the Commission stated that “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.”²² We concluded in the original SOR that calling Sheehy “shady,” which we understood to mean untrustworthy, constituted commenting on a candidate’s character. While the Explanation and Justification does not further define “context,” the Commission’s regulation states that the ad must be analyzed with “limited reference to external events,” and thus the universe of what constitutes “context” the Commission may consider is circumscribed.²³ First, the remainder of the ad does not provide any helpful context for a finding that the ad amounts to encouraging electoral action. The ad states that Sheehy failed to pay back government loans, is shady, and now wants to use that money to buy a Senate seat. Whatever emotional response that evokes in the listener about Sheehy’s character, it does not amount to an electoral exhortation – a reasonable viewer could understand it as commentary on corruption in American politics writ large. Second, as we noted in the original SOR, we are not aware of a judicial or Commission decision that has found express advocacy in a character attack ad without also finding temporal proximity to the election as critical context.²⁴ The reason why proximity to the election matters is commonsense. If a voter is headed to the polls tomorrow, then one can infer that an ad denigrating the character of a clearly identified candidate could only be reasonably interpreted as an exhortation to vote against that candidate. If you take away that temporal proximity, however, then the ad merely denigrates the character of the candidate, and it is much more difficult to make the inference that the ad urged an electoral action.

This, of course, begs the question of what constitutes temporal proximity.²⁵ Although the regulation analyzes temporal proximity on a case-by-case basis, it is instructive that the Notice of Proposed Rulemaking proposed lookback periods of between 14 days to six months under which a character attack ad could be deemed express advocacy, which is obviously much shorter than the nine months at issue here.²⁶ The Commission did not ask for comment on a period of time as long as nine months, evidently believing that it was not even worth considering for a final rule. As we noted in the original SOR, we are unaware of any precedent in which the Commission has voted to proceed on a theory of express advocacy in a character attack ad this long before the relevant election.²⁷ We thus had little trouble concluding that the ad here was not sufficiently proximate to the election to convey an electoral exhortation.

²² Express Advocacy E&J, 60 Fed. Reg. at 35,295.

²³ 11 C.F.R. § 100.22(b).

²⁴ SOR at 6.

²⁵ We do not understand the Court as questioning the SOR’s conclusion that an ad run nine months prior to an election is not proximate. Nonetheless, for the sake of thoroughness, we explain our reasoning in greater detail here.

²⁶ Express Advocacy E&J, 60 Fed. Reg. at 35,295 (setting forth the proposed alternatives).

²⁷ SOR at 6 (collecting matters).

Having concluded that the words of the ads themselves do not contain an electoral exhortation, that the ad ran nine months prior to the election, and that there is no other relevant context from the ad itself that would tend to indicate an encouragement to take electoral action, we concluded that the ad did not constitute express advocacy. We so found because the ad did not meet the very high bar of “hav[ing] no other reasonable meaning than to encourage actions to elect or defeat the candidate in question”²⁸ because the ad could be reasonably interpreted as framing the issues of the election around corruption, honesty and character without encouraging the listener to take any electoral action given the very early stage of the election.

For the foregoing reasons, we voted to dismiss.²⁹

7/15/25

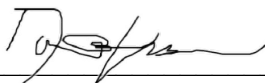
Date



James E. “Trey” Trainor, III
Vice Chairman

7/15/25

Date



Dara Lindenbaum
Commissioner

²⁸ Express Advocacy E&J, 60 Fed. Reg. at 35,295.

²⁹ Certification ¶ 2a (July 12, 2024).