



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of)
)
Christian Coalition and Ralph Reed,) MUR 3167
as Executive Director)

In the Matter of)
)
Christian Coalition and Ralph Reed,)
as Executive Director,)
American Family Association) MUR 3176
Foundation and Dan Wildmon,)
as Executive Director,)
Montana Family Forum and)
Ron Oberlander, as)
Executive Director)

STATEMENT OF REASONS

VICE CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD
COMMISSIONER JOHN WARREN MCGARRY

In Matter Under Review ("MUR") 3167 and MUR 3176, the Federal Election Commission ("the Commission") split 3-2 on whether certain direct mailings and a radio advertisement disseminated just before the 1990 general election constituted "express advocacy" under the Federal Election Campaign Act of 1971, as amended ("the Act"). We believe that the mailings and advertisement at issue contained express advocacy and were made in violation of two provisions of the Act.

I.

The Act provides that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through any type of general public advertising, such communication must contain a disclaimer

providing certain information. 2 U.S.C. §441d(a);¹ 11 C.F.R. §110.11(a)(1). The disclaimer must clearly identify the name of the person who paid for the communication and state whether the communication was authorized by any candidate or candidate's committee. Id.

In addition, 2 U.S.C. §441b prohibits corporations and labor organizations from using their general treasury funds to make any "contribution or expenditure in connection with any [federal] election." (emphasis added). In FEC v. Massachusetts Citizens For Life ("FEC v. MCFL"), 479 U.S. 238 (1986), the Supreme Court applied an "express advocacy" test to non-coordinated communications made by a non-profit ideological corporation that was not the "traditional corporation organized for economic gain." 479 U.S. at 259 quoting FEC v. National Conservative Political Action Committee, 470 U.S. 480, 500 (1985). The Court stated that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of §441b." FEC v. MCFL, 479 U.S. at 249.

Relying on FEC v. MCFL, supra, the court of appeals in Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991), cert. denied, 112 S.Ct. 79 (1991), likewise concluded that the application of §441b was limited to expenditures for "express advocacy." The Supreme Court denied the Commission's petition for certiorari to review that ruling. Id. Since then, the Commission has applied an express advocacy standard to non-coordinated expenditures made by corporations. In order to be prohibited under §441b, the corporate independent expenditure must contain express advocacy.

On November 5, 1990, the Democratic Congressional Campaign Committee filed a complaint with the Commission against the Christian Coalition and Ralph Reed as executive director. The

1. 2 U.S.C. §441d(a) provides, in pertinent part:

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication --

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

complaint stated that in the weeks just prior to the 1990 general elections, Christian Coalition paid for radio advertisements and distributed direct mail attacking four Members of Congress² in their home districts. The complaint further stated that "these advertisements and letters are aimed at promoting the defeat of the targeted individuals." November 5, 1990 Complaint at 2. The complaint alleged that Christian Coalition had made these advertisements and the mailings in violation of 2 U.S.C. §§441b and 441d. The complaint further alleged that Christian Coalition had failed to report the expenditure in violation of 2 U.S.C. §434 and had failed to register as a political committee under 2 U.S.C. §433. This matter was designated MUR 3167.

On November 16, 1990, the Montana Democratic Party also filed a complaint with the Commission against the Christian Coalition and Ralph Reed as executive director. The complaint stated that the Christian Coalition purchased a radio advertisement attacking Congressman Pat Williams. According to the complaint, "[t]he ad specifically names Congressman Williams five times in its text and would run from October 29 through November 5, 1990 on radio stations within the Congressman's district." November 16, 1990 Complaint at 1. The complaint alleged that the radio advertisement constituted an independent expenditure and that the Act required Christian Coalition to register as a political committee. This matter was designated MUR 3176.

On January 22, 1991, the Montana Democratic Party filed an amendment to their complaint in MUR 3176. The amended complaint alleged that the American Family Association Foundation and The Montana Family Forum "participated in mass mailings to influence the 1990 election against Congressman Williams." January 22, 1991 Amended Complaint at 1-2. The amended complaint also contained a partial transcript of the November 1, 1990, broadcast of Pat Robertson's "700 Club." The amended complaint asserted that "the conversation in which the director of the Christian Coalition, Ralph Reed, and Pat Robertson openly discuss congressional 'targets of the hit list' resulting in congressional 'career changes' clearly demonstrates the intent of their mail and radio campaigns." Id. at 1.

On March 25, 1992, the Commission considered the General Counsel's Report in MUR 3167 and MUR 3176. The General Counsel's Report recommended that the Commission find no reason to believe that the Christian Coalition and Ralph Reed, as executive director, violated 2 U.S.C. §§441b and 441d. The General Counsel's Report further recommended that the Commission

2. The four Members were: Congressman Ben Jones of Georgia; Congresswoman Jolene Unsoeld of Washington; Congressman Richard Stallings of Idaho; and Congressman Pat Williams of Montana.

find no reason to believe that American Family Association Foundation and Don Wildmon, as executive director, violated 2 U.S.C. §441b. The General Counsel's Report concluded that the Christian Coalition radio advertisements and direct mail letters as well as the American Family Association Foundation letter, did not contain express advocacy.

A motion was made to reject the General Counsel's recommendation and (1) find reason to believe that the Christian Coalition and Ralph Reed, as executive director, violated 2 U.S.C. §§441b and 441d; (2) find reason to believe that American Family Association Foundation and Don Wildmon, as executive director, violated 2 U.S.C. §441b; and (3) approve the General Counsel's recommendation to find reason to believe that the Montana Family Forum and Ron Oberlander, as state director, violated 2 U.S.C. §433, 434(b), 434(c) and 441d but take no further action in regard to these respondents. The motion failed with three Commissioners (the undersigned) supporting the motion and two Commissioners opposing it. A motion to approve the General Counsel's recommendation also failed. Two Commissioners supported the General Counsel's recommendation, and three Commissioners opposed the recommendation. A motion to close the file and send the appropriate letters then passed with five Commissioners supporting the motion.

II.

The central issue in these matters is whether the radio advertisements and mailings paid for by the Christian Coalition and the American Family Association Foundation constituted "express advocacy." If the advertisements and mailings contained express advocacy, they were prohibited by 2 U.S.C. §441b. After reviewing the text of the radio ads and the mailings, the circumstances surrounding their distribution and applicable case law, we have no doubt that the communications asked the general public to vote for or against specific federal candidates. Accordingly, we voted to find, *inter alia*, reason to believe that the Christian Coalition and the American Family Association Foundation violated 2 U.S.C. §441b for making prohibited corporate contributions.

A.

Congress included the "express advocacy" provision as part of §441d in response to the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976). See H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976). In Buckley, the Court upheld as constitutional certain reporting requirements on expenditures made by individuals and groups that were "not candidates or political committees." 424 U.S. at 80. The Court expressed its concern, however, that these reporting provisions might be broadly applied to communications which discussed public issues which also happened to be campaign issues. In order to ensure

that expenditures made for pure issue discussion would not be reportable under FECA, the Court construed these reporting requirements "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. (emphasis added).

In creating the express advocacy standard, the Buckley Court sought to draw a distinction between issue advocacy and partisan advocacy focused on a clearly-identified candidate. Thus, the Court explained that the purpose of the express advocacy standard was to limit the application of the pertinent reporting provision to "spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80 (emphasis added). See also 424 U.S. at 81. (Under an express advocacy standard, the reporting requirements would "shed the light of publicity on spending that is unambiguously campaign related...") (emphasis added). The Court, however, provided no definition of what constituted "spending that is unambiguously related to the campaign of a particular federal candidate" or "unambiguously campaign related." The Court only indicated that express advocacy would include communications containing such obvious campaign related words or phrases as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." 424 U.S. at 80 n.108 citing 424 U.S. at 44 n.52.

In FEC v. Massachusetts Citizens For Life ("FEC v. MCFL"), 479 U.S. 238 (1986), the Supreme Court clarified the scope of the express advocacy standard. The Court indicated that a communication could be considered express advocacy even though it lacked the specific buzzwords or catch phrases listed as examples in Buckley. The Court explained that express advocacy could be "less direct" than the examples listed in Buckley so long as the "essential nature" of the communication "goes beyond issue discussion to express electoral advocacy." 479 U.S. at 249.

Similarly, in FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir.), cert. denied, 484 U.S. 850 (1987), the Ninth Circuit concluded that "speech need not include any of the words listed in Buckley to be express advocacy under the Act." The court found that "'express advocacy' is not strictly limited to communications using certain key phrases." 807 F.2d at 862. Such a wooden and mechanical construction, the court recognized, would invite and allow for the easy circumvention of the Act:

A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the [Act]. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.

Id. (emphasis added).

Rather than rely on the inclusion or exclusion of certain "magic words" for determining whether a particular communication contained express advocacy, the court concluded that for a communication "to be express advocacy under the Act...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." 807 F.2d at 864. (emphasis added). In defining "express advocacy" under this standard, the court considered the following factors:

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 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..." 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.

Furgatch, 807 F.2d at 864.

B.

According to the complaint, the Christian Coalition paid for a radio advertisement attacking Congressman Pat Williams just before the November, 1990 election. A script of the radio ad reads:

People in the state of Montana work hard for their money, but Pat Williams wants to take it away by raising our taxes. And do you know why he wants to raise our taxes? He wants to raise our taxes to pay for pornography. It's shocking but true. Pat Williams chairs the committee that voted to give one hundred eighty million dollars of our taxes to the National Endowment for the Arts, to pay for photographs showing:

- a crucifix in a jar of urine;
- two men having sexual intercourse;
- a four year old girl with her genitals exposed.

All this paid for by our taxes. And then, Pat Williams voted to raise our taxes one hundred forty nine billion dollars over the next five years, or two thousand four hundred dollars for every family of four in America. You know where Pat Williams stands on taxes and pornography. Now, let him know where you stand. Call Pat Williams today at 443-7878 - that's 443-7878 - and tell him you're against his vote for higher taxes and pornography.

Paid for by the Christian Coalition.

(emphasis added).

We conclude that the radio advertisement does contain express advocacy. The advertisement is highly critical of a clearly identified candidate. In addition, the advertisement contains a clear "plea for action." Furgatch, supra, 807 F.2d at 864. The advertisement urges the listener "Now, let him know where you stand." Finally, we are persuaded that the advertisement constitutes express advocacy because of the timing of the advertisement. This radio advertisement ran just one week before the election.

In Furgatch, the court found that a newspaper ad denigrating Jimmy Carter constituted express advocacy partly because "[t]iming the appearance of the advertisement less than a week before the election left no doubt of the action proposed." Id. (emphasis added). In the instant matter, the

Christian Coalition ran a radio advertisement also approximately one week before the election. We believe that here, as in Furgatch, the timing of the advertisement leaves "no doubt of the action proposed." Id. (emphasis added).

It is argued that the advertisement was part of a lobbying effort to effect particular legislation. However, the legislative vote concerning funding for the NEA occurred before the radio advertisement at issue was aired. General Counsel's Report at 14-15. Moreover, the reference in the ad to "rais[ing] our taxes one hundred forty nine billion dollars over the next five years" has nothing to do with the lobbying effort of the Christian Coalition. In our opinion, the advertisement conveyed a message to the voting public that unmistakably urged the defeat of a clearly identified candidate. Accordingly, we would find reason to believe that the Christian Coalition radio advertisement violated 2 U.S.C. §441b.

The Christian Coalition also sent letters dated October 26, 1990, urging the defeat of Congressman Williams, Stallings and Jones and Congresswoman Unsoeld to individuals in their districts. The letter concerning Congressman Jones provided in pertinent part:

[o]n October 11 Ben Jones voted to spend your hard-earned tax dollars on pornography.

That's right. He voted to give \$180 million of your taxes to the National Endowment for Arts to pay for photographs depicting:

- Jesus Christ immersed in a vat of urine;
- Homosexuals engaged in sexual intercourse;
- A 4-year old girl with her genitals exposed;
- Jesus Christ shooting heroin in his arm. . . .

And then Ben Jones voted to raise taxes \$149 billion over the next five years, or an average of \$2500 a year for every family of four in America.

Ben Jones voted against an amendment offered by Congressman Dana Rohrabacher (R-CA) that would have prohibited the NEA from spending your taxes on obscenity, child pornography, and blasphemy. I am proud to say that 60 brave Democrats voted for this amendment. But Ben Jones and 57 Republicans voted against our position, causing the amendment to fail. . . .

Now you know where Ben Jones stands on tax-funded pornography.

Let Ben Jones know where you stand.

Call him today at 371-9910 and tell him you are against his votes to raise taxes and spend your dollars on pornography. . . .

I need your help to air radio spots in your community to inform Ben Jones's constituents so that they will tell him to oppose obscenity and blasphemy. Please send your gift of \$50, \$35, or \$25 today.

We must stop liberals like Ben Jones from supporting this outrageous assault on faith and family.

(emphasis added).

We believe that the letter constitutes express advocacy and is a prohibited corporate expenditure under §441b. Like the radio advertisement, the letter is highly critical of a clearly identified candidate. In addition, the letter contains an obvious call for action: "Let Ben Jones know where you stand" and "We must stop liberals like Ben Jones from supporting this outrageous assault on faith and family." Timing the mailing of the letter only a week before the election leaves little doubt of how the reader is to "stop liberals like Ben Jones." Like the radio advertisement discussed supra, there is no connection with a lobbying effort. We believe that the direct mail letter "when read as a whole", and with limited reference to external events, [can] be susceptible of no other reasonable interpretation but as an exhortation to vote . . . against a specific candidate." Furgatch, supra, 807 F.2d at 864 (emphasis added).

Our conclusion regarding the radio advertisement and letter is reinforced by public statements of the Christian Coalition regarding its purposes and goals. For example, a discussion between Ralph Reed and Pat Robertson on the "700 Club" just before the November 1990 election clearly indicates that the Christian Coalition intended to influence the federal election process through the radio advertisement and letter:

ROBERTSON: Ralph Reed is here with us from the Christian Coalition. The Christian Coalition is just up and running.

Ralph, you have some agenda items too. What is the Coalition doing?

REED: Well right now Pat we're distributing about four million voter guides in seven states to inform Christians where the candidates stand on the issues so that they can get out and vote.

If you look at the '88 election cycle, for example, there were eight-nine million votes cast for president. Twenty-five million people self-identified themselves in network exit polls as either evangelicals, born again or pro-life Catholics.

If we could get that kind of a turnout again, we can see people like Jesse Helms and Tom Tauke win.

ROBERTSON: Are you sending out copies of that salacious so-called art, the Mapplethorpe photographs?

REED: Well, yea we are (giggle). With some of these Congressmen, you read them their record back to them and they say that's a distortion, you know.

We're sending out the Mapplethorpe photographs, as we promised we would into seven states. And there are a number of congressmen that are in serious trouble because of that issue.

One of them is Ben Jones, a liberal freshman Democrat from Atlanta. Another is Jolene Unsoeld, who you mentioned in your piece. Another one is Richard Stallings who is in Idaho too.

So there are some congressmen in real trouble.

ROBERTSON: You're not going to tell the media who the targets of the hit list are?

REED: We want them to know with the rest of the American people, the day after the election when some of these members have career changes. (Both laughing).

ROBERTSON: But the Coalition essentially warned Congress that if they voted to refund the NEA, that there would be retribution.

REED: Well that's correct and we think that the taxpayers should be allowed to call the tune. And when their taxes are being used to fund homoerotic art, the voters in those districts have a right to know what their taxes are being used for.

We're also doing, by the way, thousand of get out the vote phone calls in North Carolina so Christians will get the polls next Tuesday.

ROBERTSON: So that kind of activity is with the Coalition. How many states is the coalition in?

REED: We now have chapters operating, Pat, about three hundred chapters operating in forty states all over the country.

ROBERTSON: This can be a very powerful political force.

REED: There's no question about it. As you have so eloquently said on this program if pro-family Roman Catholics and evangelicals will unite at the ballot box, there is almost no candidate anywhere in the country that we can't elect.

ROBERTSON: Where could somebody get in touch with you if they want to work more closely with the coalition?

REED: Well they can give me a call here in Chesapeake, Virginia at (804) 424-2630. And we will let them know how they can get their hands on those voter guides or we'll be glad to get them more information.

ROBERTSON: Well that's a tremendous service.

(emphasis added). More recently, Ralph Reed was quoted as saying:

"The political power of evangelicals and pro-family Catholics is vastly understated," said Reed, whose group claims 150,000 members and believes it can mobilize up to 30 million votes.

"The advantage we enjoy is that liberals and feminists don't generally go to church; they don't gather in one place three days before the election," Reed said. "We can print 25 million voter guides and insert them in bulletins of 10,000 churches across the country. We can mobilize the people; we can send the message. We have a sense this year of the inevitability of the pro-family movement, that things are moving in our direction.

The Seattle Times, January 31, 1992 (emphasis added).

C.

According to the complaint filed in MUR 3176, the American Family Association Foundation sent a letter the week before the election urging voter opposition to Congressman Pat Williams. In pertinent part, the letter states:

Dear Friend of the Family,

A government agency, the National Endowment for the Arts (NEA), is using your tax dollars to pay "artists" to create pornographic and anti-Christian "art." Its budget for this year is \$171,000,000.

Some members of Congress openly and whole-heartedly approve this abusive waste of your tax dollars. These Congressmen, led by Congressman Pat Williams of Montana, are attacking those who oppose the NEA's use of your tax dollars to fund hateful, obscene and blasphemous "art."

Congressman Williams, the powerful chairman of the House committee which oversees the NEA, calls those who oppose being forced to fund pornographic and anti-Christian "art" with their tax dollars "right-wing, evangelical cuckoos."

Are you a "cuckoo?" Do you like paying for works of "art"...

...which show Jesus nailed to the cross in a jar of urine?

...which depict Jesus as a drug addict complete with a syringe in his arm?

...which have a play featuring Jesus as a foul-mouthed bigot?

...which feature homosexual men performing sodomy?

...which feature children in sexual poses?

Well, you are already paying for such works of "art" through your tax dollars. Congressman Williams says anyone who disagrees with him and objects to such blatant misuses of tax dollars is a "right-wing, evangelical cuckoo."

I thought I'd give you the chance to see the kind of "art" Congressman Williams supports spending your tax dollars on. So I've enclosed a sheet of images contained in an NEA-sponsored "art" exhibit.

But BEWARE! The images are terribly offensive. They are so offensive that we put them inside a

sealed envelope. And your tax dollars help support their exhibition.

I'm writing you today to ask your help in ending this outrage. Specifically, I'm hoping you will take one major action:

Write Congressman Williams. Tell him you oppose the NEA's use of your tax dollars to fund pornographic "right-wing, evangelical cuckoos."

As I told you, Congressman Williams is Chairman of the House committee which oversees the NEA. If he wanted to stop government funding of this so-called "art," he could do it almost single-handedly.

But Congressman Williams refuses to do so. He supports the NEA's use of tax dollars for such "art."

Congressman Williams thinks that people in Montana also support spending tax dollars to support this kind of "art." Do you? If not, express yourself. Congressman Williams is still answerable to the people of Montana.

(emphasis added).

In our opinion, this letter constitutes express advocacy and should carry a public disclaimer as required by 2 U.S.C. §441d. The letter is highly critical of a clearly, identified candidate and contains a clear call for action: "Express yourself. Congressman Williams is still answerable to the people of Montana." Timing the mailing of the letter only a week before the election leaves no doubt as to how the voters are to express themselves -- at the ballot box. We can see no other purpose for this letter. The vote on funding the NEA had taken place already. Asking recipients to write to the Congressman does not obviate a conclusion that the overriding express message was that the Congressman should not be supported. We believe that the direct mail letter "when read as a whole, and with limited reference to external events [can] be susceptible of no other reasonable interpretation but as an exhortation to vote...against a specific candidate." Furgatch, supra, 807 F.2d at 864 (emphasis added).

The General Counsel's Report argues that the letter does not constitute express advocacy because the letter does not "make any reference to Congressman Williams' candidacy or to an upcoming election." General Counsel's Report at 30. By requiring the presence of specific words or phrases of exhortation in a communication, however, this argument would effectively create a new "magic" words test. Rather than

looking for the old magic words of "Vote for" or "Vote against," the General Counsel would look for new magic words such as "candidate" or "election."

We do not accept the argument that the Furgatch standard requires words or phrases referring explicitly to the election process in order for an advertisement to be considered express advocacy. Indeed, the Furgatch court recognized that an "entity may give a clear impression that is never succinctly stated in a single phrase or sentence." 807 F.2d at 863. In specifically rejecting a narrow and limited construction of its express advocacy standard, Furgatch clearly stated that "[T]he court is not forced under this standard to ignore the plain meaning of campaign-related speech in search of certain fixed indicators of 'express advocacy.'" 807 F.2d at 864 (emphasis added).


Likewise, the Commission should not ignore the plain meaning of the mailing simply because it avoids certain fixed words relating to elections. To accept such a standard is to invite clever political consultants and advisers to package hard-hitting partisan ads which nevertheless fall short of express advocacy because they easily avoid the use of certain magic words or phrases. Instead, as noted before, the Commission should follow the guidance of Furgatch that speech is considered express advocacy when the communication "read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Furgatch, 807 F.2d at 864 (emphasis added). Plainly, a test relying on the presence or absence of certain "magic" words or phrases is incompatible with the Furgatch standard.

3. See Furgatch, 807 F.2d at 863 ("A test requiring the magic words 'elect,' 'support,' etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. 'Independent' campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.") (emphasis added).

III.

For the reasons stated above, we voted to find reason to believe that the Christian Coalition, and Ralph Reed, as executive director, violated 2 U.S.C. §441b and 441d and that American Family Association Foundation and Don Wildmon, as executive director, violated 2 U.S.C. §441b.

27 April 1992
Date



Scott E. Thomas
Vice Chairman

4/27/92
Date



Danny L. McDonald
Commissioner

4/28/92
Date



John Warren McGaffey
Commissioner