IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Federal Election Commission,	
Plaintiff,	**Case No. 94-0082-L**
v.	
Christian Action Network, et al.,	**DEFENDANTS' MOTION TO DISMISS**
Defendants.	

Defendants move the Court for an order dismissing the Complaint for failure to state a claim, on the grounds that the speech the Plaintiff seeks to regulate is constitutionally protected, the speech is exempt from the Federal Election Campaign Act, and the Federal Election Commission is and was unconstitutionally constituted, as the accompanying brief more fully explains.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Defendants' Motion to Dismiss and the Brief in Support of Defendants' Motion to Dismiss were served upon the following attorney of record by depositing same in the United States mail, postage prepaid, this 5th day of January, 1995:

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IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

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Plaintiff,

v.

Christian Action Network, et al.,

Defendants.

Case No. 94-0082-L

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I. STATEMENT OF THE CASE

In this case, the Federal Election Commission (FEC or Commission) asks the Court to punish issue-oriented speech during the time of elections, contrary to the limits placed on the FEC's authority by Congress, by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), and by every other court considering the issue. Despite its string of judicial defeats, the FEC continues to subject peaceful political groups to the pain and expense of litigation in a so-far futile quest for judges who will ignore the clear rule set out by the Supreme Court in *Buckley* and will judicially expand the FEC's jurisdiction to regulate protected speech. Furthermore, the FEC is and was unconstitutionally constituted, and it thus defectively initiated and conducted this case.

II. THE FACTS

The FEC is a creature of statute, the Federal Election Campaign Act, 2 U.S.C. §431 *et seq.*, and is composed of "the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and 6 members appointed by the President with the advice and consent of the Senate." 2 U.S.C. §437c(a)(1).

The FEC has the statutory power to enforce violations of the Federal Election Campaign Act. Pertinent to this case, the Act contains certain requirements and prohibitions on "independent expenditures" which expressly advocate the election or defeat of candidates for Federal office: (1) Corporations (with a judicially created exception) may not make independent expenditures; (2) Those who make independent expenditures must report them to the FEC; and (3) advertisements must state whether they are candidate-authorized.

As the FEC complaint alleges, Christian Action Network (CAN) is a nonprofit Virginia Corporation. In 1992, CAN produced and aired a video that informed the public that Bill Clinton and Al Gore supported the militant gay agenda and asked the public to contact CAN about family values issues. The video made no reference to the election, contained no exhortation to vote for or against any candidate, and in fact, asked only that the viewers contact Christian Action Network for more information on family values. The full audio text of the video (which was attached to the Complaint) is,

> Bill Clinton's vision for a better America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

The video portion similarly contained no words urging either support or defeat of Messrs. Clinton and Gore as candidates for office.

Shortly after the video began airing, Ron Brown, Chairman of the Democratic National Committee, wrote letters to stations airing the video to intimidate them into discontinuing to air it. (See FEC Complaint Exhibits 2 and 3). In response, CAN published a full page open letter to Chairman Brown and Candidate Clinton, attached at Exhibits 2 and 3 to the FEC Complaint. The newspaper advertisements contained no words urging the election or defeat of Candidate Clinton or anyone

else. The advertisement addressed issues of concern and challenged Chairman Brown and Candidate Clinton to dispute the video, urged them to cease the threats and harassment, and urged them to retract their commitments to the gay rights community.

In essence, the FEC complaint accuses CAN and Martin Mawyer of (1) making prohibited corporate "independent expenditures" advocating the election or defeat of a candidate or candidates for federal office; (2) failing to file reports of independent expenditures; and (3) failing to include notices in the advertisements stating whether the advertisements were candidate-authorized.

III. ANALYSIS

A. The video and the newspaper advertisement in question are not expenditures that can constitutionally be regulated by the Federal Election Commission and are not statutorily regulated.

In *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), the United States Supreme Court limited the term "expenditure" as used in the Federal Election Campaign Act to "'reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' *Buckley*, 424 U.S. at 80."

The *Buckley* Court specifically addressed the problem of issue advocacy during election times. The Court said,

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. *Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.* [Footnote 50 omitted.] In an analogous context, this Court in Thomas v. Collins, 323 U.S. 516, 89 L.Ed. 430, 65 S. Ct. 315 (1945), observed,
>
> > "[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as a clear invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of his hearers and

> consequently of whatever inference may be drawn as to his intent and meaning.
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." Id., at 535, 89 L.Ed. 430, 65 S.Ct. 315.

See also [Citations omitted].

> The constitutional deficiency described in Thomas v. Collins can be avoided only by reading §608(e)(1) as limited to communications that include *explicit words of advocacy of election or defeat of a candidate....* We agree that in order to preserve the provision against invalidation, on vagueness grounds, §608(e)(1) must be construed to apply only to expenditures or communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.[52]

424 U.S. 1 at 42-44, 46 L.Ed.2d 659 at 701-702 (Emphasis added). Footnote 52 in *Buckley* reads,

> 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."

After *Buckley*, Congress amended the Federal Election Campaign Act to limit its authority over independent expenditures to constitutional bounds:

> The term "independent expenditure" means an expenditure by a person *expressly advocating the election or defeat of a clearly identified candidate* which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with, of at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. §431(17) (emphasis added).

The freedom to speak out on issues during campaigns without fear of prosecution is the very reason for the requirement that, to be regulated, the communication must contain explicit words of electoral advocacy. The CAN video and the advertisement address issues that are intertwined with the candidates. The video informs about the candidates' views on an issue, but it contains no "explicit words of advocacy of election or defeat of a candidate." It urges only that people contact the Christian Action Network. The newspaper advertisement challenges the

candidates to change their positions on the issues. Therefore under *Buckley*, the Federal Election Commission has neither constitutional nor statutory authority over the CAN video or newspaper advertisement.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 93 L.Ed.2d 539, 107 S.Ct. 616 (1986)("*MCFL*"), the Supreme Court emphasized the need for express words of advocacy to support the Federal Election Commission's regulatory jurisdiction. The Court expressly approved the *Buckley* requirement for the use of express words of advocacy:

> Buckley adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc. ....

479 U.S. 238 at 249, 93 L.Ed.2d 539 at 551. In *MCFL*, the court found that a pamphlet that urges people to "vote for 'pro-life' candidates, but also identifies and provides photographs of specific candidates fitting that description" constituted express advocacy. 479 U.S. at 249, 93 L.Ed.2d at 551 (emphasis added).

Unlike the *MCFL* pamphlet, the CAN video does not ask anyone to vote for or against the candidates mentioned. The video merely informs the viewer of the candidates' positions. The viewer may agree or disagree with the candidates' positions. The video urges the viewer to contact the Christian Action Network for more information on family values. Thus, the video is precisely the type of free discussion of issues that the *Buckley* case approves even during elections.

The newspaper advertisement is even further removed from advocacy for or against a candidate for election. The advertisement contains no words urging election or defeat of Messrs. Clinton and Gore. The newspaper advertisement challenges the candidates to dispute publicly any point made in the video and seeks a promise from the candidates to veto certain legislation if they get elected. The

newspaper advertisement contained no "express words of advocacy of election or defeat," and was at most issue advocacy.

From the parties' communications before this action was filed, Defendants expect that the FEC will rely on *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) *cert. den.* 484 U.S. 850 (1987). *Furgatch* involved an advertisement Mr. Furgatch ran during President Carter's reelection campaign that detailed President Carter's supposed continued transgressions against the public good and warned that "If he succeeds [to hide his record] the country will be burdened with four more years of" his transgressions. The advertisement exhorted the reader, "Don't let him do it." The Court found that the advertisement constituted express electoral advocacy. The Ninth Circuit explained its ruling as follows:

> 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 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.

The express, "Don't let him do it" of *Furgatch* sharply contrasts with CAN's call to "Contact the Christian Action Network for more information on traditional family values." Neither CAN's video nor the newspaper ad contains an electoral "message that is unmistakable and unambiguous." Neither the CAN's video narration nor the picture mention any electoral action. The CAN newspaper advertisement merely urges the candidates to retract their position on issues; it does not urge the voters to do anything with their votes. Neither the video nor the newspaper advertisement is "express advocacy" under the *Furgatch* decision.

Probably the most closely analogous case is *FEC v. Colorado Republican Federal Campaign Committee*, 839 F.Supp. 1448 (D. Colorado 1993). In *Colorado Federal*

Campaign Committee, the FEC brought suit against a political committee whose purpose was to advance the goals and values of the Republican party in Colorado. The defendant Committee had run a radio ad that said in pertinent part:

> ...I just saw ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapons system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts.

The court found the advertisement to be a "coordinated expenditure" which is subject to regulation according to the Federal Elections Campaign Act if it is made "in connection with" a Federal campaign.[1] Finding that the FEC cannot constitutionally regulate speech unless it constitutes "express advocacy", the Court analyzed the advertisement as follows:

> The advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action. The advertisement concludes with the words, "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch*.
>
> . . .
>
> I do not believe this type of indirect urging constitutes "Express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation.

839 F.Supp. 1448, 1455-1456 (D.Colo. 1993). Neither CAN advertisement contains a direct plea for electoral action.

The CAN communications also resemble the leaflet in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d

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1. The FEC argued that the statutory "in connection with" language gave the FEC broader regulatory authority over "coordinated expenditures" than the express advocacy requirement for regulation of "independent expenditures."

Cir. 1980). In that case, the Central Long Island Tax Reform Immediately Committee (CLITRI) published a leaflet criticizing the voting record of a local member of Congress. The leaflet did not refer to any Federal election or to the member's political affiliation or to his opponent. The court held that because the CLITRI leaflet did not expressly advocate the defeat or election of the Congressman, the Federal Election Campaign Act did not apply to the leaflet. The court stated that the leaflet,

> contains nothing which could rationally be termed express advocacy ... there is no reference anywhere in the Bulletin to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambra.

616 F.2d 45 at 53.

Like the CLITRI leaflet, the CAN video contains no reference to the party of Messrs Clinton and Gore; to whether they are running for election; to the existence of an election; or to the act of voting; nor is there anything approaching an unambiguous statement in favor of or against the election of Messrs. Clinton and Gore. The CAN video simply is not express advocacy for or against candidates for federal election.

The same is true for the CAN newspaper advertisement. Although it identifies Mr. Clinton as the Democratic candidate for President, it also addresses Mr. Ron Brown of the Democratic National Committee, who was not running for any office. The newspaper advertisement pressures the Democratic party and the Democratic Presidential candidate to change positions on the issues. It does not ask the public either to vote for or against the candidate. Organizing public pressure for or against issues, as the advertisement does, is an activity over which the Commission has no constitutional authority.

In *Federal Election Commission v. Survival Education Fund, Inc. et al.*, unreported case no. 89 Civ. 0347, 1994 U.S. Dist. LEXIS 210 (U.S.D.C. S.D. N.Y 1/12/94) (Copy

attached), United States District Judge Thomas P. Grieza granted the defendants' motion for summary judgment dismissing the Commission's complaint. The Survival Education Fund (SEF) and the National Mobilization for Survival (NMS) sent out two letters during the 1984 presidential campaign that were highly critical of President Reagan on the U.S. involvement in Central America. One of the letters threatened retaliation at the ballot box unless President Reagan responded favorably to anti-war demands. The other contained a "1984 Election Survey" that started with the heading "Ronald Reagan: Four More Years?" and included a cover letter that stated that the expression of views "will help us understand the deep fears of the American People" about a second Reagan term. The letter promised protest events at the Republican political convention and up to election day. The FEC's suit alleged violations of §441b of the Federal Election Campaign Act based upon those letters. The Court in dismissing the FEC's case stated,

> It is clear from the cases that expressions of hostility to the positions of an official, implying that that official should not be reelected - even when that implication is quite clear - do not constitute the express advocacy which runs afoul of the statute. Obviously the courts are not giving a broad reading to the statute.

The CAN materials are much further from express advocacy than even the letters in *Survival Education Fund, Inc.*

The First Circuit Court of Appeals recently discussed the distinction between issue-oriented advocacy and express electoral advocacy. In *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991) *cert. den. sub nom* ___ U.S. ___, 116 L.Ed.2d 52, 112 S.Ct. 79 (1991), the Court held that a Commission regulation that restricted corporate "issue advocacy" exceeded the Commission's statutory and constitutional authority. The court noted that the *Buckley* decision adopted a "bright-line test that expenditures must 'in express terms advocate the election or defeat of a candidate' in order to be subject to limitation." 928 F.2d 468 at 471. The court said,

> In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.

928 F.2d 468 at 472.

Neither the CAN video nor the newspaper advertisement crossed this bright line. Neither says anything about electing or defeating candidates.

The CAN video concludes with a request that the viewer contact Christian Action Network "for more information about traditional family values," Those words are preceded by, "Is this your vision for a better America?" Certainly the words "Is this your vision for a better America?" do not expressly advocate defeat. If the preceding content of the video had revealed the Clinton/Gore position on NAFTA (or any other issue), would those words have expressly advocated election or defeat? Certainly not. The viewer's reaction depends entirely on the viewer's preexisting preference, and no recommendation is urged by those words. The same is true of the newspaper advertisement. The words in neither cross the *Buckley* bright line. As a matter of law, neither constitutes express electoral advocacy.

The Federal Election Commission has no constitutional authority over CAN's advocacy of issues, even though candidates are mentioned. This suit attacking the exercise of free speech is precisely the evil the *Buckley* court sought to prevent by its bright line test. The Court should dismiss the FEC's improvident suit.

B. Any expenditure for Christian Action Network's video and newspaper commentary was exempt from 2 U.S.C. §441b by 2 U.S.C. §431(9)(B)(i).

2 U.S.C. §441b prohibits "any corporation"[2] from making an "expenditure in connection with any election to any political office...." 2 U.S.C. §431(9)(A) exempts from the definition of "expenditure":

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2. *MCFL* judicially created an exception for nonprofit corporations formed for political advocacy, but the FEC will dispute CAN's qualifications for this exception.

"any ... commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication...."

In this case, both the video and the newspaper advertisement were "commentary" that were "distributed through the facilities of" broadcasting stations and a newspaper. Nothing in 2 U.S.C. §431(9) expressly limits the exemption to expenditures made by the corporation owning or operating the broadcasting or newspaper facilities.[3] If 2 U.S.C. §431(9) were so interpreted, it would be unconstitutional, as discussed below.

Because CAN distributed its message "through the facilities of" broadcasting stations and a newspaper, any corporate expenditure was exempt from "expenditure" as used in 2 U.S.C. §441b and defined by 2 U.S.C. §431(9). The FEC therefore has no basis for suit, and the suit should therefore be dismissed.

C. If 2 U.S.C. §431(9)(B)(i) is interpreted to permit media corporations to have free political speech in newspapers and other media outlets, but to deny that right to others, 2 U.S.C. §431(9)(B)(i) constitutes an unconstitutional denial of equal protection of the laws.

As discussed above, 2 U.S.C. §431(9)(B)(i) excludes from FEC regulation expenditures for political speech "through the facilities of" media outlets. It is anticipated that the General Counsel will argue that 2 U.S.C. §431(9)(B)(i) protects only corporations that operate the media, not anyone else. Defendants believe that it would be a denial of equal protection of the laws to afford the exemption from FEC regulation to only some, but not all corporations who communicate through printed

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3. In sharp contrast to Congress's language, the Michigan statute discussed in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 108 L.Ed.2d 652, 110 S.Ct. 1391 (1990), excludes from the definition of "expenditure" any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office... in the course of publication or broadcasting." *Austin*, 494 U.S. at 667, 108 L.Ed. 2d at 669 [emphasis supplied]. The Michigan statute thus creates an exempt class of spenders, as contrasted with the Federal Election Campaign Act's exemption of a manner of expenditure, *i.e.*, "through the facilities of...."

or broadcast media. Although the Supreme Court rejected a similar argument under a state election law prohibition on corporate contributions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 108 L.Ed.2d 652, 110 S.Ct. 1391 (1990), by a 5 to 4 decision, Defendant raises the issue in this court to preserve it for appeal and reconsideration by the Supreme Court.

D. 2 U.S.C. §441b prohibits protected speech contrary to the First Amendment to the United States Constitution.

2 U.S.C. §441b prohibits corporations from making independent expenditures to expressly advocate the to election or defeat of candidates for Federal office. 2 U.S.C. §441b thereby restricts free political speech without a compelling interest to do so. Although the United States Supreme Court upheld the constitutionality of a similar state law in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 108 L.Ed.2d 652, 110 S.Ct. 1391 (1990), by a 5 to 4 decision, Defendant raises the issue in this court to preserve it for appeal and reconsideration by the Supreme Court.

E. The Commission's investigation and all subsequent action taken against Christian Action Network are fatally flawed, because of the Commission's unconstitutional composition.

When the Commission made its "reason to believe" finding in 1992, it was constituted pursuant to 2 U.S.C. §437c(a)(1) which reads in part,

> The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

In *NRA Political Victory Fund*, 6 F.3d 821, 1993 U.S. App. LEXIS 27298 (D.C. Cir. 1993), *cert. dismissed* ___ U.S. ___, 127 L.Ed.2d 206, 114 S.Ct. 1291 (12/6/94), the Court held that this composition violated the separation of powers doctrine because the Secretary of the Senate and the Clerk of the House of Representatives sat on the Commission as *ex officio* members. The Federal Election Commission was thus

unconstitutionally constituted when it issued its "reason to believe" finding and conducted its investigation in the present case.

Since *NRA*, the Federal Election Commission has argued that it "reconstituted itself"[4] by cutting the *ex officio* members out of the Commission's deliberations and process, in effect amending the Federal Election Campaign Act without benefit of Congressional action. It further claims to have ratified en mass all actions taken by the unconstitutionally constituted body. Although one District Court has agreed,[5] it makes little logical sense that an unconstitutionally constituted Federal Election Commission has the constitutional authority to reconstitute itself with membership that is contrary to 2 U.S.C. 437c(a)(1) as enacted by Congress. If Congress is willing to have an FEC without the *ex officio* members, that is Congress's prerogative (subject, of course, to the President's veto power). The Courts have no constitutional authority to amend legislation, just interpret it.

In *Federal Election Commission v. Legi-Tech, Inc.*, case no. 91-0213 (U.S.D.C. D.C. 10/12/94)(copy attached), the Court held that *NRA* applied to pending cases. This was a pending case before the unconstitutional Commission.[6] 2 U.S.C. §437g requires the Commission to make a "reason to believe" finding as a condition precedent to conducting an investigation. As a matter of public policy, that procedure is designed to protect innocent parties, such as Respondents, from ill-advised enforcement actions. In this case, the Commission acted unconstitutionally with its improper *ex officio* members tainting the entire proceeding. This matter must therefore be

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4. 58 Federal Register 59640 (November 10, 1993). This approach was suggested by the D.C. Court of Appeals *in dictum* in *NRA*.

5. *Federal Election Commission v. Republican Senatorial Committee*, Case No. 93-1612 (U.S.D.C Dist. Col. 2/8/94)(copy attached).

6. The Complaint at paragraph 6 says that the "reason to believe" finding was made October 20, 1992, a year before *NRA* was decided.

dismissed, because the Commission lacks the standing to bring the action without validly following the statutory procedures for its investigation.

Furthermore, even if the Commission could somehow reconstitute itself without an Act of Congress, its wholesale ratification of all pending actions was deficient. Without a case-by-case evaluation of the ratified actions, it is doubtful that the blanket ratification cures the constitutional infirmity inherent in the previous actions. By its purported blanket ratification, the Commission simply thumbs its nose at the courts and fails to correct the problem, because all the allegedly ratified actions were already tainted by the unconstitutional make-up of the Commission when they were taken. Thus the Commission's blanket ratification is ineffective to make constitutional its unconstitutional actions.

IV. CONCLUSION

The Court can properly come to only one conclusion in this matter: the case should be dismissed. Because the CAN video and newspaper advertisement contain no words of express advocacy for candidates' election or defeat, allowing this suit to continue would perpetuate the very evil the Supreme Court sought to avoid by its bright-line test established in *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976). The Federal Election Campaign Act does not, and constitutionally cannot, regulate CAN's advertisements. The Court should dismiss this case.

Even if CAN's speech were "express advocacy," the advertisements were exempt from the Federal Election Campaign Act, because they were "commentary" that was "distributed through the facilities of" broadcasting stations and a newspaper pursuant to 2 U.S.C. §431(9)(B)(i).

Furthermore, the FEC has no standing to bring this action, because the Commission at all relevant times was unconstitutionally constituted, as found by the United States Court of Appeals for the D.C. Circuit in *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 1993 U.S. App. LEXIS 27298 (D.C. Cir.

10/22/93). Thus, the Commission's "reason to believe" finding and subsequent investigation and filing of this action have been tainted by the unconstitutional composition of the Commission. The Commission therefore lacks legal standing to bring this action, because the statutory prerequisites to the Commission's suit were invalid.

Defendant respectfully requests the Court to dismiss the FEC's complaint with prejudice.

Dated: January 5, 1995

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