IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

FEDERAL ELECTION COMMISSION, Plaintiff, v. CHRISTIAN ACTION NETWORK, INC., et al., Defendants.	)	Civil Action No. 94-0082-L Honorable James C. Turk FEC's Opposition

PLAINTIFF FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PLAINTIFF FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

This suit involves television and newspaper advertisements by defendants Christian Action Network, Inc. ("CAN") and its president, Martin Mawyer, urging the defeat of Democratic presidential candidate Bill Clinton in the November 1992 general election.

The Federal Election Commission's ("Commission" or "FEC") complaint alleges that defendant CAN violated the statutory prohibition against corporate expenditures in connection with federal elections by using general corporate treasury funds, rather than funds contributed to a separate segregated fund established by the corporation, to finance its political advertisements. Complaint ¶¶ 21-37. Section 441b(a), a provision of the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA") (codified at 2 U.S.C. § 431 et seq.), does not actually prohibit airing such advertisements; it only regulates how they are paid for. Defendant Martin Mawyer

also violated section 441b by consenting to those corporate expenditures. Complaint ¶¶ 38-43.

The Commission's complaint also alleges that CAN violated 2 U.S.C. § 441d, another provision of the Act, because some of the political communications it financed failed to state whether they were authorized by any candidate for federal office or any committee of such candidate or its agents. Complaint ¶¶ 44-53. Finally, defendant CAN also violated 2 U.S.C. § 434(c) by failing to file the public disclosure statements regarding its independent expenditures required by that provision. Complaint ¶¶ 54-64.

Defendants have filed a motion to dismiss, primarily contending that their political advertisements did not expressly advocate the election or defeat of any candidate and thus are not governed by the Act. Defendants also claim that the Commission is unlawfully constituted and, therefore, lacks legal authority to bring this suit.

As the Commission will demonstrate, all of defendants' arguments are without merit and their motion to dismiss should be denied.

STATEMENT OF THE CASE

During the concentrated period of campaign activity immediately preceding the 1992 general election, CAN spent more than $63,000, exclusive of staff salaries and corporate overhead, to finance television and newspaper advertisements urging voters to defeat Bill Clinton, the Democratic candidate for president in the November 3, 1992 general election. Complaint ¶ 26.

Defendant Martin Mawyer participated in, and directed, the activities of CAN in connection with those advertisements (Complaint ¶ 40) and, as president of CAN, he consented to the expenditures of corporate treasury funds by CAN for the advertisements. Complaint ¶ 41.

1. **Television Advertisement.**

One of these advertisements, a 30-second television advertisement entitled "Clinton's Vision For A Better America," aired at least 250 times on broadcast television stations and cable television channels in at least twenty-four (24) cities nationwide beginning in late September 1992. These political advertisement aired until November 2, 1992, the day before the general election. Videotape copies of the advertisement also were sent by defendants to some CAN contributors. Complaint ¶¶ 26-27.[1/]

The 30-second video opens with a life-like full-color photograph of presidential candidate Bill Clinton's face superimposed upon color images of a rippling American flag. Complaint ¶ 28. Clinton is shown smiling and appears happy. In fact, the opening sequence, which contains only "bright positive" images of Clinton and the American flag (Photo 1), appears to be a pro-Clinton political advertisement. FEC Exhibit 5 at 17.[2/]

1/ A copy of the video was filed with the Commission's complaint as FEC Exhibit 1.

2/ Photos 1-8, scenes from the video which were professionally transferred from videotape, are attachments to FEC Exhibit 5.

However, when the voice-over announcer begins "Bill Clinton's vision for a better America includes . . .," the image of Clinton dissolves into a haunting black and white photographic negative, draining Mr. Clinton's face of all color and warmth. Complaint ¶ 28; FEC Exhibit 5 at 13. In sharp contrast with the American flag, which remains unchanged, Mr. Clinton's eyes and mouth turn black (Photo 2), giving him an "unflattering," "life-less" and even "threatening" appearance. FEC Exhibit 5 at 13-14 and 17. The accompanying music, which begins as a single high pitched tone or note, also shifts to a lower octave level thereby becoming more ominous and threatening. Id. at 14 and 17.

The commercial then abruptly cuts to various clips of people participating in an outdoor parade or march who are identified by the advertisement as gay men and lesbians demonstrating for homosexual rights. Complaint ¶ 28. As images of homosexuals are shown, the announcer lists purported campaign proposals by presidential candidate Clinton and his vice-presidential running-mate, Al Gore, to expand homosexual rights -- including a proposal to "allow[] homosexuals in the armed forces" -- which could only be implemented by Clinton and Gore if they were elected. This recitation is accompanied by short captions or subtitles summarizing the proposals which are superimposed on the screen. See Photos 3-7.

While the scenes from the march continue, the announcer asks the rhetorical question: "Is this your vision for a better America?" Complaint ¶ 28. The television advertisement then

concludes with the same full-color image of a rippling American flag that opened the commercial, but without the superimposed image of Clinton. Id. The threatening tones fade and disappear until only a single, steady low tone remains. FEC Exhibit 5 at 14-15. Some of the television advertisements stated that it was paid for by the Christian Action Network,[3/] but none stated whether or not it was authorized by any candidate or committee. Complaint ¶ 28.

2. Newspaper Advertisements.

After the television advertisement had been airing for approximately two weeks, including many appearances in the Richmond area,[4/] defendants placed a full page newspaper advertisement, FEC Exhibit 2, which appeared in the Richmond Times-Dispatch on October 15, 1992. Complaint ¶ 30.[5/] This was the same day that a presidential debate among the 1992 presidential candidates, including Bill Clinton, was scheduled to be held in Richmond, Virginia. Id.

The October 15th newspaper advertisement, which is entitled "An Open Letter To: Gov. Bill Clinton, Democratic Presidential

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3/ At least one station (WVEU-69 in Atlanta, Georgia) apparently refused to run the television advertisement because it did not state "Paid for By." FEC Exhibit 20 at 3.

4/ The 30-second television commercial was scheduled to air more than sixty times on two Richmond television stations on October 14 and 15, 1992 alone. Tyler Whitley, Group's Ad Attacks Clinton, Richmond Times-Dispatch, Oct. 15, 1992, at C8 (FEC Exhibit 16 at 1).

5/ Copies of the newspaper advertisements were filed with the Commission's complaint (and are attached hereto) as FEC Exhibits 2 and 3.

Candidate [and] Mr. Ron Brown, Democratic Party Chairman," specifically refers to the presidential campaign and that evening's nationally television presidential debate in Richmond. Complaint ¶ 31; FEC Exhibit 2. The newspaper advertisement, which identifies itself as a "Paid Political Advertisement," opens by stating:

> The Christian Action Network is now airing television ads in Richmond, VA informing the voting public of Gov. Bill Clinton's support of the "gay rights" political agenda.
>
> The voting public has a right to know that Gov. Bill Clinton's agenda includes (1) job quotas for homosexuals, (2) special civil rights laws for homosexuals and (3) allowing homosexuals in the U.S. Armed Forces.

Complaint ¶ 31; FEC Exhibit 2. After reciting what are described as Clinton campaign proposals to grant homosexuals special civil rights, including several actions that Clinton purportedly would take if elected President, the October 15th newspaper advertisement "call[s] upon Gov. Clinton to clearly state his position on gay rights" and tells Clinton, to whom the advertisement is addressed, that "[w]hen the Clinton/Gore campaign committee publicly and unequivocally retract their commitments to the 'gay rights' community, the Christian Action Network will halt its television campaign" against them." Id. The advertisement states that it was "paid for by the Christian

Action Network, Brad Butler, Treasurer,"[6] but does not indicate whether or not it was authorized by any candidate or committee. Id. Thus, neither the television advertisement nor the October 15, 1992 newspaper advertisement financed by defendant CAN state whether or not they were authorized by a candidate for federal office or any committee of such candidate or its agents. Complaint ¶ 52.

Defendants placed another full page newspaper advertisement, FEC Exhibit 3, in the Washington Times on October 26, 1992. Complaint ¶ 32; FEC Exhibit 3. This advertisement, which is a follow-up to the prior newspaper advertisement, is entitled "Since You Did Not Respond to Our Ad in Richmond; An Open Letter To: Gov. Bill Clinton, Democratic Presidential Candidate [and] Mr. Ron Brown, Democratic Party Chairman." Id. This advertisement is identical to the prior advertisement in all material respects, except that it contains a statement that it was not authorized by any candidate, and the advertisement is not denominated a "Paid Political Advertisement." Complaint ¶ 33.

Although defendant CAN thus spent much more than $250 on independent expenditures in connection with the television and newspaper advertisements during the 1992 calendar year (Complaint ¶ 61), and it also spent much more than $1,000 on independent expenditures in connection with the television and newspaper advertisements between October 15, 1992 and the general

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6/ According to news reports, this statement was added at the request of the newspaper's lawyers. Tyler Whitley, Group's Ad Attacks Clinton, Richmond Times-Dispatch, Oct. 15, 1992, at C8 (FEC Exhibit 16 at 1).

election on November 3, 1992 (Complaint ¶ 62), defendant CAN did not file any statements or 24 hour notifications regarding its independent expenditures as required by 2 U.S.C. § 434(c). Complaint ¶ 63.

ARGUMENT

I. DEFENDANTS HAVE FAILED TO SUSTAIN THEIR BURDEN ON THE PENDING MOTION.

It is well established that a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief. Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134 and n.4 (4th Cir. 1993), cert. denied, 114 S.Ct. 1307 (1994). In this regard, a court must accept as true all well-pleaded allegations and must view the complaint in the light most favorable to the plaintiff. Id.

A. Statutory Framework.

The Federal Election Campaign Act generally prohibits corporations from using corporate treasury funds to finance contributions and expenditures in connection with federal elections. Specifically, 2 U.S.C. § 441b(a) makes it "unlawful . . . for any corporation whatsoever . . . to make a contribution or expenditure in connection with any election" for Federal office. 2 U.S.C. § 441b(a). See also 11 C.F.R. § 114.3(a)(1). This prohibition serves compelling governmental interests by protecting the integrity of the political marketplace from the "corrosive influence of concentrated corporate wealth." FEC v.

Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("MCFL"). See also FEC v. National Right To Work Committee, 459 U.S. 197, 207 (1982). Pursuant to 2 U.S.C. § 441b, it also is unlawful for any corporate officer to consent to any contribution or expenditure prohibited by 2 U.S.C. § 441b(a).

Contrary to defendants' suggestion (Defendants' Memorandum ("Memo.") at 2), however, corporations are not totally precluded from making independent expenditures in connection with federal elections. A statutory exception to section 441b permits corporations to use corporate treasury funds to establish and administer a "separate segregated fund to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b).[7/] Such a separate segregated fund can solicit and receive voluntary contributions from corporate employees and stockholders, from members of a membership corporation, and from their families. 2 U.S.C. § 441b(b)(4)(A)-(C). Monies received by such a fund can be utilized both for contributions to federal candidates and for independent expenditures to communicate to the general public the corporation's views on candidates for federal office.

Like political communications financed by all other persons and entities, however, such political communications must contain

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7/ A separate segregated fund "may be completely controlled" by its sponsoring or connected organization. "The 'fund must be separate from the sponsoring union [or corporation] only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." National Right To Work Committee, 459 U.S. at 200 n.4 (quoting Pipefitters v. United States, 407 U.S. 385, 414-417 (1972); other citation omitted).

a statement indicating who paid for it and whether or not the communication was authorized by a candidate, a candidate's committee or its agents. 2 U.S.C. § 441d.[8/] In addition, if such a communication is not so authorized, the sponsor (unless it is a political committee already registered and reporting to the Commission), must file financial reports for public disclosure at the Commission. 2 U.S.C. § 434(c).[9/]

B. Express Advocacy Standard.

The Supreme Court has held that, for constitutional reasons, expenditures by corporations that are made independent of any coordination with a candidate are prohibited by section 441b only if they "expressly advocate the election or defeat of a clearly identified candidate." Massachusetts Citizens for Life, 479 U.S. at 248-49 (quoting Buckley v. Valeo, 424 U.S. 1, 80 (1976)). The Supreme Court originally used this express advocacy standard in Buckley to narrowly construe two provisions of the Act that did

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8/ 2 U.S.C. § 441d requires that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall clearly state the name of the person who paid for the communication and whether or not the communication was authorized by any candidate or any political committee of a candidate or its agents.

9/ 2 U.S.C. § 434(c) requires persons (other than political committees) who make independent expenditures totaling in excess of $250 during a calendar year to file statements containing certain information regarding those independent expenditures for disclosure to the public at the Commission. Section 434(c) also requires any persons that make independent expenditures aggregating $1,000 or more after the twentieth day, but more than 24 hours, before any election to report those expenditures ("24 hour notifications") within twenty-four (24) hours after such independent expenditure is made. The Act's definition of "person" explicitly includes corporations. 2 U.S.C. § 431(11).

not involve corporate expenditures in order to avoid problems of vagueness in regulating public political dialogue. Buckley, 424 U.S. at 39-44, 80-84. To ensure that those provisions would not be applied so expansively as to interfere with public discussion of issues in addition to covering "advocacy of a political result," Buckley, 424 U.S. at 79, the Court construed them "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80. In this regard, the Buckley Court listed several phrases as examples of "express words of advocacy," including "Smith for Congress," "vote against," "defeat," and "reject." Id. at 44 n.52, and 80 n.108.

The Court explained that:

> the 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.

Buckley, 424 U.S. at 42. The purpose of the express advocacy standard was to avoid these problems by limiting the statute's application to "spending that is unambiguously related to the campaign of a particular federal candidate." Id. at 80. The express advocacy concept thus was designed to ensure that communications devoted to issues that are closely associated with particular politicians who are also candidates are not subject to the Act's requirements simply because discussion of such issues

may include reference to those politicians. 424 U.S. at 42.

While the specific examples discussed in the Supreme Court's decision in Buckley involved written or spoken communications, the Court explained that the express advocacy standard it was adopting was like the statutory definition of "clearly identified," which "requires that an explicit and unambiguous reference to the candidate appear as part of the communication." Buckley, 424 U.S. at 43. In a footnote, the Court noted that this analogous "clearly identified" standard would be satisfied not only by an unambiguous written reference, but also by "the candidate's . . . photograph or drawing." Id. at 43 n.51. The Court thus makes it clear that unambiguous imagery, and not only words, could satisfy the constitutional requirements it had identified.

In fact, it is well established that even simple still images, such as the American flag which opens and closes the CAN video, can communicate complex messages that are as explicit as spoken ones. In Spence v. Washington, 418 U.S. 405 (1974), for example, the appellant sought to communicate his opposition to the invasion of Cambodia and the killings at Kent State University, events which had occurred a few days before his arrest for flag-desecration. Rather than articulate his views through printed or spoken words, Spence chose to display an upside-down American flag upon which he had affixed a "peace symbol" (a circle enclosing a trident) made of black adhesive

tape. The Supreme Court held that Spence's activity constituted speech:

> The Court for decades has recognized the communicative connotations of the use of flags. * * * In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . .," and "a short cut from mind to mind." * * * On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Spence, 418 U.S. at 410 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 632 (1943); other citations omitted).

As the Supreme Court has recognized, the American flag is a "uniquely universal" symbol. Spence, 418 U.S. at 413. While the flag is capable of conveying different messages in different contexts,

> [f]or the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.

Id. "[A]t some irreducible level the flag is emblematic of the Nation as a sovereign entity." United States v. Eichman, 496 U.S. 310, 316 n.6 (1990).

The Supreme Court found that the "context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. Spence, 418 U.S. at 410. Just as the "wearing of black armbands in a school environment"

previously had been found to "convey[] an unmistakable message about a contemporaneous issue of intense public concern -- the Vietnam hostilities," Spence, 418 U.S. at 410 (citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 505-514 (1969)), the Court found that such a message was conveyed in Spence:

> A flag bearing a peace symbol and displayed upside down by a student today [1974] might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time he made it.

Spence, 418 U.S. at 410.[10/]

"Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'" Texas v. Johnson, 491 U.S. 397, 405 (1989). Thus, official pictures of the President traditionally include

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10/ Cf. Texas v. Johnson, 491 U.S. 397, 406 (1989) ("political nature of [demonstration that coincided with convening of 1984 Republican National Convention and renomination of Ronald Reagan for President] was both intentional and overwhelmingly apparent").

Other decisions have also recognized the ability of symbols to effectively communicate messages. See Students Against Apartheid Coalition v. O'Neil, 671 F.Supp. 1105, 1106 (W.D.Va. 1987) ("Shanties, as structures, have come to symbolize the poverty, oppression and homelessness of South African blacks and have been used by student groups throughout the United States to convey this same message"), aff'd, 838 F.2d 735 (4th Cir. 1988) (quoting University of Utah Students Against Apartheid v. Peterson, 649 F.Supp. 1200, 1205 (D.Utah 1986)). See also Dunn v. Carroll, 40 F.3d 287, 291 (8th Cir. 1994) (wearing a flag during time of war constitutes expressive speech); Maynard v. Wooley, 406 F.Supp. 1381, 1386 (D.N.H. 1976) (three-judge court) (use of red reflective tape to mask state motto "Live Free or Die" on license plate clearly was intended to call attention to fact that the motto had been obscured and thereby to communicate plaintiffs' disagreement with it), aff'd on other grounds, 430 U.S. 705 (1977).

the American flag in the background as a symbol of the nation and the national office of the person standing before the flag, and American flags are "prominently placed" in federal courtrooms, including that of the Supreme Court. Texas v. Johnson, 491 U.S. at 426 (Rehnquist, C.J., dissenting). For the same reason, the flag is frequently used in campaign advertisements to make a candidate appear "presidential" by associating the candidate with the office in the viewer's mind.

C. The Television And Newspaper Advertisements Expressly Urge The Public To Vote Against Bill Clinton.

In this case, there can be no dispute that presidential candidate Bill Clinton and his vice-presidential running-mate, Al Gore, are "clearly identified" in all the political advertisements financed by defendants. Clinton's picture prominently appears in the opening scenes of the video, and Clinton and Gore, who was well-known to be Clinton's running mate, are mentioned by name in both the video and the newspaper advertisements. Complaint ¶¶ 28, 31 and 33; FEC Exhibits 2 and 3. See Buckley, 424 U.S. at 43 n.51.

The opening scene of the commercial, with its photograph of candidate Clinton superimposed on the American flag, coupled with the subsequent reference to Clinton's vice-presidential running mate, Al Gore, and discussion of actions Clinton could only take if he were elected President, unambiguously tells viewers that the commercial is about the 1992 presidential contest. In fact, the newspaper advertisements, which defend and publicize CAN's ongoing "television campaign" (FEC Exhibits 2 and 3), explicitly

acknowledge that the television advertisements were aired to "inform[] the voting public of Gov. Bill Clinton's support of the 'gay rights' political agenda." FEC Exhibits 2 and 3 (emphasis added).[11/] Thus, contrary to defendant's suggestion (Memo. at 7-8), CAN's communications are materially different than those in FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) (en banc) ("CLITRIM"), which contained no such references. Id. at 49, 51 and 53.

However, the Commission's claims against defendants are not based exclusively upon either the television or newspaper advertisements. Although it is the Commission's view that the video alone constitutes express advocacy (Complaint ¶ 29), Count 1 of the Commission's complaint also alleges that, "[w]hen taken as a whole," the video and print advertisements "expressly advocated" the defeat of presidential candidate Bill Clinton in the 1992 general election." Complaint ¶ 35. Thus, defendants'

11/ According to published accounts, defendant Martin Mawyer, president of CAN, reportedly also said the television advertisement was aired to "inform[] voters across the land of the Clinton/Gore position on homosexual rights." Douglas Freelander, Warner Pulls Ad On Clinton's Gay Rights Stance, Houston Post, Oct. 3, 1992, at A1 (FEC Exhibit 13 at 1) (emphasis added). "We hope to educate the American public on what Bill Clinton has promised the homosexual community." Michael Isikoff, Gays Mobilizing For Clinton As Rights Become an Issue, The Washington Post, Sept. 28, 1992, at A1 (FEC Exhibit 10 at 2). Another CAN spokesman, Tom Killgannon, reportedly said that CAN "wanted to educate voters our there, because [CAN founder and president Martin Mawyer] felt that many voters were not aware of Gov. Clinton's support of the gay rights agenda." Mark Horvit, Anti-Gay Commercial Stirs Cable Controversy, Houston Post, Oct. 1, 1992, at A1 (FEC Exhibit 12 at 2) (emphasis added).

In addition, a document obtained from the media firm that placed the television advertisements for defendants refers to the effort as "CAN's Voter Education Campaign." FEC Exhibit 18 at 1.

contention that the television advertisement does not contain any references to the campaign or the election, even if true, is inadequate to sustain their burden of demonstrating that the Commission can prove no set of facts which would support its more general claim and which would entitle it to relief. Mylan Laboratories, Inc., 7 F.3d at 1134.

Defendants' other principal argument is that neither the television advertisement nor the accompanying newspaper ads financed by defendants contain "explicit words of electoral advocacy," such as those listed in Buckley as examples of express advocacy. Memo. at 4 and 5-6. Although neither the television advertisements nor the accompanying newspaper ads contain the precise words in Buckley, 424 U.S. at 44 n.52, and 80 n.108, no such words are required. We have already shown that Buckley itself indicates that the constitutional standard can be satisfied by visual imagery alone, and subsequent decisions make clear that even when dealing only with textual communications, the words and phrases listed in the Supreme Court's decision are only illustrative.

In Massachusetts Citizens For Life, 479 U.S. at 249, the Supreme Court explained that a communication can constitute express advocacy even if it is "less direct" than the examples listed in Buckley, if the "essential nature" of the message goes "beyond issue discussion to express electoral advocacy." Id. In that case, the Court held that a communication, which urged readers to "vote for 'pro-life' candidates" and elsewhere identified "specific candidates fitting that description,"

constituted express advocacy. 479 U.S. at 249.

Similarly, in FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir.), cert. denied, 484 U.S. 850 (1987), the United States Court of Appeals for the Ninth Circuit held that a pre-election advertisement, which accused President Carter of "attempt[ing] to hide his own record or lack of it" during the campaign and admonished the reader "Don't Let Him Do It," constituted express advocacy. As in Massachusetts Citizens For Life, the court of appeals rejected the suggestion that express advocacy is limited to communication using certain key phrases:

> The short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. 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.

Furgatch, 807 F.2d at 863. These decisions refute defendants' suggestion (Memo. at 1) that no court has ever found express advocacy present without the words and phrases listed in Buckley.

In fact, the Ninth Circuit warned that:

> Although we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. We must read section 434(c) so as to prevent speech that is clearly intended to

> affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act.

807 F.2d at 862. The court of appeals therefore refused to isolate individual words or phrases and analyze them separately, instead holding that the "proper understanding of the speaker's message can best be obtained by considering speech as a whole."

> Comprehension often requires inferences from the relation of one part of speech to another. The entirety may give a clear impression that is never succinctly stated in a single phrase or sentence. Similarly, a stray comment viewed in isolation may suggest an idea that is only peripheral to the primary purpose of speech as a whole.

Furgatch, 807 F.2d at 863.

In addition, like the Supreme Court in Spence, the court of appeals recognized that the context in which the communication occurs is also relevant. While "context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words,"

> the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers. [Courts] should not ignore external factors that contribute to a complete understanding of speech, especially when they are factors that the audience must consider in evaluating the words before it.

Furgatch, 807 F.2d at 863-864.

Therefore, rather than turning on the presence of particular words or phrases, the express advocacy determination turns on whether the communication as a whole conveys "an unambiguous statement in favor of or against" an identified candidate.

See Furgatch, 807 F.2d at 864; CLITRIM, 616 F.2d at 53.

Defendants' emphasis upon the references in prior decisions to "words" of advocacy (Memo. at 4) also is misplaced because those cases all involved textual communications rather than television advertisements. In fact, Buckley was an abstract facial challenge to the statute that did not involve any specific communications at all.[12/] Massachusetts Citizens For Life and all of the other decisions cited by defendants involved only spoken or textual communications, and those decisions must be read in that context.[13/]

In contrast, the television advertisements financed by defendants are much more complex and sophisticated communications. In addition to the written and spoken text, the CAN video contains numerous non-verbal components, such as the changing visual images, the accompanying "music" and even the various video editing and production techniques utilized to create the commercial. In political advertising, each of these components or techniques "is carefully designed to capture viewer

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12/ Similarly, Faucher v. FEC, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991), relied upon by defendants (Memo. at 9-10), invalidated a Commission regulation on its face because it was not limited to express advocacy, and did not rule on whether any particular communication constituted express advocacy. 928 F.2d at 471.

13/ Massachusetts Citizens For Life (newsletter), CLITRIM (pamphlet), Furgatch (newspaper advertisement), FEC v. Survival Education Fund, Inc., No. 89-0347(TPG) (S.D.N.Y. Jan. 12, 1994), appeal filed, No. 94-6080 (2d Cir. argued Nov. 17, 1994) (letters).

FEC v. Colorado Republican Federal Campaign Committee, 839 F.Supp. 1448 (D.Colo. 1993), appeal docketed, Nos. 93-1433 and 1434 (10th Cir. argued Nov. 14, 1994), involved the spoken text of a radio advertisement.

attention and convey a particular message." FEC Exhibit 5 at 8.

1. The Television Advertisements Financed By Defendants Expressly Advocated The Defeat Of Clinton In The 1992 Election.

Defendants' television advertisements expressly advocated the defeat of Bill Clinton in the same way that the student in Spence conveyed his message, using symbolic imagery rather than words and phrases, and there is no reason why such symbolic speech cannot constitute express advocacy. To take an obvious example, if someone published a photograph of Bill Clinton upon which the international stop signal was superimposed (see illustration, FEC Exhibit 5 at 11), there could be little doubt that such imagery conveyed just the sort of unambiguous message opposing Clinton that the Supreme Court contemplated in Buckley, 424 U.S. at 43. In the context of the election campaign, such a photograph literally would tell viewers to reject or defeat Clinton. FEC Exhibit 5 at 11. The electoral message is just as clear as if the speaker had said "reject Clinton."

Although defendants used slightly different symbols here, the impact of the message is the same. Although the Commission has not yet had an opportunity to conduct any formal discovery in this litigation and therefore has not yet determined the entire context in which defendants' communications appeared,[14/] there

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14/ During the underlying administrative investigation, defendants refused to answer many of the Commission's requests asserting, inter alia, a Fifth Amendment privilege claim. See generally FEC Exhibits 22, 24 and 25. However, during subsequent conciliation negotiations, see 2 U.S.C. § 437g(a)(4)(A), defendants selectively provided some financial and other documents to the Commission.
(Footnote continued)

already is sufficient evidence to support the Commission's claim that, when taken as a whole, CAN's television and newspaper advertisements expressly advocated the defeat of presidential candidate Bill Clinton in the November 1992 general election. Complaint ¶ 35.

As one contemporaneous commentator pointed out, the CAN video "seems designed to tap into anti-gay bias and turn it against Clinton." Marc Gunther, Group Distorts Clinton Stand, Philadelphia Inquirer, Oct. 1, 1992, at A9 (FEC Exhibit 11 at 1). Indeed, as explained in detail in the accompanying report by Brown University Professor (and Director of the John Hazen White, Sr. Public Opinion Laboratory), Darrell M. West, an expert in political advertising and communication, the verbal and non-verbal components of the CAN video convey a message "expressly advocat[ing] the defeat of candidates Clinton and Gore in the upcoming presidential general election."

> It did so by employing the techniques of audio voice-overs, music, visual text, visual

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(Footnote 14 continued from previous page)
During discovery, the Commission will seek information regarding both the airing of the television advertisement and other contemporaneous actions by defendants which would provide additional context for these communications. For example, from news accounts, we already know that defendants conducted a press conference and issued at least one written statement in connection with their advertisements. Information regarding these actions and communications will provide additional context relevant to the Court's consideration in this case.
In addition, the Commission will seek documents and testimony regarding defendants' provision of copies of the video to prior contributors. Complaint ¶ 27. The Commission also will conduct discovery regarding defendants' communications with viewers who contacted CAN after viewing the video. Such follow-up communications, particularly any information regarding Clinton and the 1992 presidential election such viewers might have been given, certainly are relevant to the issues before this Court.

> images, color, codewords and editing. In their totality, these techniques said voters should defeat Clinton and Gore because these candidates favor extremist homosexuals and extremist homosexuals are bad for America.

FEC Exhibit 5 at 13.

The television advertisement, which aired immediately before the election, is "oppositional in nature and uses graphic imagery to grab the viewer's attention and convey a message" to vote against Clinton. FEC Exhibit 5 at 16. For example, the opening scene of the video features a life-like full-color photograph of presidential candidate Bill Clinton's face superimposed upon color images of a rippling American flag. Complaint ¶ 28. Clinton is shown smiling and appears happy. In fact, the opening sequence, which contains only "bright positive" images of Clinton and the American flag (Photo 1), appears to be a pro-Clinton advertisement. FEC Exhibit 5 at 14 and 17.

However, when the voice-over announcer begins "Bill Clinton's vision for a better America includes . . .," the image of Clinton quickly dissolves into a black and white photographic negative, draining Clinton's face of all color and warmth. Complaint ¶ 28; FEC Exhibit 5 at 13. In sharp contrast to the American flag, which remains unchanged, Clinton's eyes and mouth turn black (Photo 2), giving him an "unflattering," "life-less" and even "threatening" appearance. FEC Exhibit 5 at 13-14 and 17. The accompanying music, which began as a single high pitched tone or note, also shifts to a lower octave level thereby becoming more ominous and threatening. FEC Exhibit 5 at 14.

The visual imagery in the opening scenes of the

CAN television advertisement creates a "clear contrast" between the bright color images of the American flag and the black and white photographic negative image of Clinton. FEC Exhibit 5 at 14. This vividly conveys the point that "Clinton is different from you and me," and "tells viewers that Clinton is not to be seen favorably," and thus "Clinton is undeserving of viewer support." Id.

Defendants' television advertisement was not the only use of such a negative image of Clinton in the 1992 campaign. In fact, the negative image of Clinton in the CAN ad is very "similar[]" to what was described as an "unflattering,"[15/] "repellent,"[16/] even "garish, reverse-negative image"[17/] of Clinton on the cover of the April 20, 1992 issue of Time magazine (color photocopy attached as FEC Exhibit 4). That black-and-white image was surrounded by a contrasting red border, and was accompanied by the Time masthead (also in red) and the caption "Why voters don't trust Clinton." FEC Exhibit 4. As one commentator remarked, "Bill Clinton here resembles Boris Karloff at his ghoulish gruesomest."[18/] During the same time period that defendants' television advertisement was airing, this Time magazine cover

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15/ Lois Romano, The Reliable Source: The Empire Strikes Back, The Washington Post, Oct. 15, 1992, at C3 (FEC Exhibit 17 at 1).

16/ Charles Trueheart, Time Marches On: New Look For Magazine, The Washington Post, April 14, 1992, at B1 (FEC Exhibit 7 at 1).

17/ Howard Kurtz, 30-Second Politics, The Washington Post, Oct. 13, 1992 at A10 (FEC Exhibit 15 at 1).

18/ Trueheart, Time Marches On: New Look For Magazine, The Washington Post, April 14, 1992, at B1 (FEC Exhibit 7 at 1).

was used as the sole visual image in a 30-second television advertisement aired by the Bush-Quayle campaign itself. Charles Black, a senior Bush campaign advisor, said at the time, "You've been asking for negative ads. Here it is . . .. This one really does speak for itself."[19/] Thus, the CAN television advertisement uses the same visual symbols and techniques as the Bush-Quayle campaign used to urge voters to reject Bill Clinton.

Other portions of the CAN video reinforced this electioneering message. After the image of Clinton changes into the photographic negative, the television commercial abruptly cuts to footage of people participating in an outdoor parade or march. These people, who are identified as homosexual, are described as part of Clinton's "vision for a better America." Complaint ¶ 28; FEC Exhibit 5 at 15.

In the video, "[u]nflattering pictures and text[] are used to associate Clinton and Gore with extremist parts of the homosexual rights movement. Pictures of gay rights marches, gay men arm in arm, men wearing leather and chains, and men wearing T-shirts advocating rights for gay fathers are interspersed with text and audio voice-overs proclaiming Clinton and Gore's support for homosexual rights (see Photos 3, 4, 5, 6 and 7)." FEC Exhibit 5

19/ Ad Implies Clinton Lied About Draft[;] Bush's Black-White TV Spot Has Magazine Seeing Red, The Washington Post, Oct. 12, 1992, at A14 (FEC Exhibit 14 at 1).

at 16. Although the voices of march participants cannot be heard,

> [c]lose up photos of the marchers amplify the sight of their screaming, shouting, and general appearance (see Photos 5, 6 and 7). The quick editing cuts from scene to scene create a feeling that these individuals are threatening traditional American values of heterosexual relationships. The frenetic pace of the editing enhances the negative images of these scenes.

FEC Exhibit 5 at 17.[20/]

Through these images (and the accompanying voice-over and captions or titles), the CAN television advertisement portrays Clinton and Gore as "extremist" for supporting what defendants themselves characterize as "the militant gay agenda." Memo. at 2.

> These visual images are unfavorable to Clinton and Gore because they associate negative visual images of extremist homosexual rights with the candidacies of Clinton and Gore. Showing negative and extremist images of gay men while discussing Clinton's vision for a better America was an effort to undermine public support for the Democratic Presidential ticket. It conveys the message that Clinton and Gore are aligned with extreme

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20/ Once again, defendants' use of graphic imagery was not unique. During the 1992 primary campaign, Republican challenger Patrick Buchanan had used similar "arresting, slow-motion images of gay black men in chains and leather harnesses" to attack President George Bush in what was described as the "most daringly negative commercial of the 1992 campaign" to date. Howard Kurtz, Buchanan Ad Consultant Turns Tables On Bush[;] Attack Commercial Exploits Emotional Issues, The Washington Post, Feb. 28, 1992, at A1 (FEC Exhibit 6 at 1). The 30-second Buchanan television advertisement, which "exploit[ed] the hot-button issues of pornography, homosexuality and race," was characterized as "nothing less than an attempt to do to Bush what Bush did to Michael S. Dukakis in 1988." Id. One commentator found this ironic since Bush himself had "won election by turning Willie Horton and Boston Harbor into emotionally charged symbols of his opponent's weaknesses." Id.

> parts of society, and that viewers should vote against Clinton and Gore.

FEC Exhibit 5 at 15. "The message is don't vote for Clinton and Gore because their vision is bad for America." Id. at 17.

The announcer's voice-over provides an "audio road-map" which "knits together the audio and video aspects of this ad." FEC Exhibit 5 at 17. As the images from the march (which had already been identified as part of "Clinton's vision for a better America") conclude, the announcer asks, in a tone of voice unmistakably evincing a negative answer, the rhetorical question: "Is this your vision for a better America?" Complaint ¶ 28.

In this manner, the CAN video communicated the message

> that Clinton has a vision but that it is wrong for America, that Clinton's vision is not in keeping with traditional American values of heterosexual relationships, and that Clinton's vision should be defeated in the 1992 elections by voting against Clinton.

FEC Exhibit 5 at 18.[21]

21/ The use of the word "vision" in the CAN video clearly was not just coincidental. In fact, the "word vision [wa]s a codeword explicitly associated with the 1992 presidential campaign." FEC Exhibit 5 at 18. Such codewords are "short-hand communication[] devices" which permit speakers to quickly communicate complex messages with only a few words. See FEC Exhibit 5 at 12, and 18-19.

For example, there was much public discussion during the campaign regarding the "vision" of President George Bush, who was seeking re-election. FEC Exhibit 5 at 18.

> Bush was widely criticized for lacking vision and was the object of jokes about his "Vision Thing" (Newsweek, November/December 1992). This codeword was part of the 1992 campaign in that it became a sign of candidates not having a political agenda and not understanding what needed to be done after the election.

(Footnote continued)

The television advertisement then makes its anti-Clinton message explicit by concluding with the same full-color image of a rippling American flag as opened the commercial -- but without the superimposed image of Clinton. Complaint ¶ 28; Photo 8. By graphically removing Clinton's superimposed image from the presidential setting of the American flag, the advertisement visually conveys the message that Clinton should not become president. This "reiterates the message that Clinton's vision for America is not consistent with traditional family values" and says "that America would be better off if Clinton were not elected president. Like the international stop sign urging the defeat of a candidate during an election campaign, this . . . is a powerful visual image telling voters to defeat Clinton." FEC Exhibit 5 at 19.

The timing of the television advertisement, which aired during the height of the fall campaign, further demonstrates that

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(Footnote 21 continued from previous page)
Id.

Clinton also became identified with the word "vision." During what was described as "perhaps the most comprehensive address to a gay and lesbian audience by any major presidential candidate," Clinton told a "predominantly gay crowd" in May 1992 that "I have a vision, and you are part of it." George Raine, Clinton Promises "Real War" on AIDS Increased Funding If He Is Elected, San Francisco Examiner, May 19, 1992, at A1 (FEC Exhibit 8 at 1). Clinton's statement was widely reported in the press, see, e.g., id.; Adam Nagourney, Clinton Reaches Out To Gay Community[;] I Have A Vision, You're Part Of It, USA Today, May 20, 1992, at 4A (FEC Exhibit 9 at 1), and was even quoted in the written materials defendants provided television stations to document the statements in the CAN video. FEC Exhibit 19 at 3.

CAN "was attempting to influence the national elections by encouraging voters to defeat Clinton and Gore."

> Television political ads which are broadcast right before an election are seen differently than those run at other times. When a presidential election is being contested, and competing candidates and independent groups are airing ads, viewers see ads with pictures of major presidential candidates and a narrator describing the vision of [those] candidates as political ads designed to tell citizens how to vote. The close proximity of the Christian Action Network ad to the national elections demonstrates the ad was designed to defeat Clinton and Gore.

FEC Exhibit 5 at 19-20.

In this regard, the television advertisement financed by defendants is similar to the print advertisement in Furgatch, where the ad referred to the election campaign and was "bold in calling for action, but failed to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in." Furgatch, 807 F.2d at 865. The Ninth Circuit stated that "[t]iming the appearance of the advertisement less than a week before the election left no doubt of the action proposed." Id. See also discussion supra at 13-14 and 18-20 (demonstrating the importance of temporal context to the meaning of symbolic speech).

Asking the Court to ignore all of this, defendants focus only on the final few words spoken by the announcer (and appearing on the screen), and contend that their television advertisements only "inform[ed] viewers of the candidate's positions" and "urge[d] the viewer to contact the Christian Action Network for more information about traditional family values." Memo. at 5.

At this point, of course, we do not know what this last statement refers to since defendants have refused on privilege grounds to provide the Commission even a sample copy of whatever information they sent to the viewers who contacted CAN. See, e.g., FEC Exhibit 24 at 3 (objection to document request 11b, seeking correspondence relating to television advertisement). But more importantly, section 441b applies to all communications that contain express advocacy; such a communication cannot be immunized from the reach of the statute merely by including another message as well. Indeed, in Massachusetts Citizens For Life the newsletter at issue contained not only discussion of issues in addition to express advocacy, but an explicit disclaimer that "[t]his special election edition does not represent an endorsement of any particular candidate." 479 U.S. at 243. Yet the Supreme Court held that even such a "disclaimer of endorsement cannot negate th[e] fact" that the newsletter "goes beyond issue discussion to express electoral advocacy." Id. at 249 (emphasis added). As we have shown above, defendants' communication, which contained no such disclaimer, also goes "beyond issue discussion to express electoral advocacy." Id.

As the foregoing discussion demonstrates, the allegations of the complaint are sufficient to conclude at this preliminary stage of the proceedings that the television advertisements financed by defendants expressly advocated the defeat of presidential candidate Bill Clinton in the November 1992 general election. The CAN advertisement presented a negative image -- including literally a photographic negative -- of Clinton,

portraying his "vision" as extremist and bad for America. Through its verbal and non-verbal components, the video vividly conveys the message that the viewer's own vision should not include Clinton in the presidency. Taken as a whole, the video, which was broadcast shortly before the November 1992 general election, thus constitutes an unmistakable message to reject Clinton in the imminent election. Since defendants have failed to sustain their burden, the motion to dismiss should be denied.

2. The Newspaper Advertisements Financed By Defendants Also Expressly Advocated The Defeat Of Clinton.

Defendants concede that the headlines in their newspaper advertisements refer to Clinton as the "Democratic Presidential Candidate." Memo. at 8; FEC Exhibits 2 and 3. In fact, the print advertisements also refer to the "Clinton/Gore campaign" generally and by its formal name, "Clinton/Gore '92 Committee," and quote from what the newspaper advertisements describe as a Clinton campaign "position paper." Complaint ¶ 34; FEC Exhibits 2 and 3. Those quotations list various actions which Clinton and the "Clinton/Gore Administration" purportedly would do if elected. FEC Exhibits 2 and 3. Furthermore, the October 15, 1992 advertisement in the Richmond Times-Dispatch explicitly refers to the nationally televised "debate" among the 1992 presidential candidates, including Bill Clinton, which was scheduled to be held in Richmond, Virginia on the same day.

Complaint ¶ 30; FEC Exhibits 2 and 3.[22/]

Though they lack the video's "graphic visual imagery," the two newspaper advertisements operate the same way as the television advertisements, "convey[ing] virtually virtually identical messages . . . and exhort[ing] the 'voting public' to defeat Clinton and Gore." FEC Exhibit 5 at 4.

> The newspaper ads identify Bill Clinton and Al Gore, Jr. with support for homosexual rights, name them as Democratic candidates, attack Clinton and Gore on homosexual rights that are bad for America, and urge 'the voting public' to oppose Clinton's agenda and defeat Clinton in the upcoming election.

FEC Exhibit 5 at 22. Furthermore, the October 15th advertisement in the Richmond Times-Dispatch was published while the CAN video was airing in the Richmond market, and coincided with the presidential debate in Richmond and "explicitly mentioned this campaign debate in its text. This ties the ad to the electoral discourse" and shows that CAN's advertisement "attempted to influence the outcome of the presidential election by defeating Clinton and Gore." Id.

In view of the unavoidable election nexus, the incorporation

22/ In a contemporaneous press release, defendant Martin Mawyer said:

> A presidential election is about more than who is the better candidate to hold down interest rates. * * * It is a referendum on who we are as a society, about what we believe and about where and how we want our president to lead us.

Tyler Whitley, Group's Ad Attacks Clinton, Richmond Times-Dispatch, Oct. 15, 1992 at C8 (FEC Exhibit 16 at 1) (quoting defendants' press release).

by reference of the television commercial that was running concurrently in the Richmond area, and their publication in the closing weeks of the presidential election campaign, the newspaper advertisements constitute a clear message to "[t]he voting public" to reject Clinton because of his position on these issues. In this manner, the newspaper advertisements also go "beyond issue discussion," MCFL, 479 U.S. at 249, to expressly advocate the rejection of Bill Clinton.

II. DEFENDANTS' OTHER AFFIRMATIVE DEFENSES ARE WITHOUT MERIT.

In addition to their express advocacy argument, defendants also raise several other affirmative defenses, none of which support their motion to dismiss.

A. Defendants Have Not, And Cannot, Demonstrate That CAN Qualifies For The Narrow Exception To Section 441b Recognized In Massachusetts Citizens For Life.

Defendants baldly assert (Memo. at 10 n.2) that CAN fits within the narrow exception to 2 U.S.C. § 441b(a) for certain small non-profit corporations recognized by the Supreme Court in Massachusetts Citizens For Life, 479 U.S. at 264. However, defendants do not appear to be urging this as a basis for their motion to dismiss, and do not even attempt to demonstrate that CAN possesses all three attributes the Court found "essential" to qualify for that exception. Id. Indeed, for the purposes of the present motion to dismiss, CAN cannot contest the Commission's allegation that "[d]uring the time in question, defendant CAN did not have any policy regarding the acceptance or nonacceptance of contributions from business corporations and labor unions." Complaint ¶ 4. This negates one

of the requirements for invoking the MCFL exemption, 479 U.S. at 264, for the burden lies squarely with defendants to prove that they come within the narrow constitutional exception, particularly in the context of a motion to dismiss.[23] See also Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 662-665 (1990) (corporation cannot qualify for the exemption if it does not possess all three of the essential characteristics set out in MCFL).[24]

B. Defendants' Paid Political Advertisements Do Not Qualify For The Act's Press Exemption.

Defendants also claim that their political advertisements are exempt from regulation pursuant to a narrow statutory exception from the Act's definition of expenditure merely because they "were 'distributed through the facilities of' broadcasting stations and a newspaper." Memo. at 10-11. However, the Act's so-called "press exemption," 2 U.S.C. § 431(9)(B)(i), is expressly limited to "[a]ny news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication" (emphasis

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23/ During the underlying administrative proceeding, defendants refused to respond to questions in a subpoena relating to CAN's MCFL defense, claiming Fifth Amendment and other privileges. See, e.g., FEC Exhibit 24 (objection to interrogatory 5 regarding CAN policy, if any, with respect to acceptance of contributions from corporations or labor unions). At a minimum, the Commission is entitled to an opportunity to conduct discovery on this factual issue in this litigation.

24/ We also note that the MCFL defense would only apply to the violations of section 441b in Counts 1 and 2 of the Commission's complaint, not to the violations of other statutory provisions alleged in Counts 3 and 4. Thus, even if proven, this purported defense would not support dismissal of this entire litigation.

added). Section 431(9)(B)(i) says nothing about paid political advertising. In fact, the legislative history makes clear that this provision does not apply to political advertisements, but was only intended to assure "the unfettered right to the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974), reprinted in, FEC, Legislative History of the Federal Election Campaign Act Amendments of 1974 at 638 (1977) (quoted in Austin, 494 U.S. at 667). Indeed, interpreting the exemption in the manner suggested by defendants would completely eviscerate the statute, since campaign advertisements are routinely disseminated in newspapers or broadcast on television. Accordingly, even if the language of this statutory provision were ambiguous, defendants have presented no basis for rejecting the Commission's construction, which is entitled to deference from the courts. See FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 45 (1981). In fact, the Supreme Court has already found it improper to construe the press exemption in a manner that, like defendants' reading, would undermine the compelling purposes of the restriction in section 441b. Massachusetts Citizens For Life, 479 U.S. at 251.

C. Section 441b Is Constitutional.

Defendants also raise two constitutional claims, contending that section 441b impermissibly restricts political speech without a compelling governmental purpose, and that limiting application of the press exemption to media corporations violates equal protection. Memo. at 11-12. Apparently, they have not

raised these issues as serious grounds for dismissal, but only "to preserve [them] for appeal and reconsideration by the Supreme Court." Memo. at 12. They explicitly acknowledge that the Supreme Court has already found that a state prohibition against corporate expenditures modeled on section 441b was justified by compelling governmental interests. Austin, 494 U.S. at 658. See also Massachusetts Citizens For Life, 479 U.S. at 251-252. The Supreme Court also rejected an equal protection argument identical to defendants in Austin, holding that

> [a]lthough the press' unique societal role may not entitle the press to greater protection under the Constitution . . ., it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

494 U.S. at 668 (citation omitted).

D. Defendants' Attack On The Constitutionality Of The Commission Lacks Merit.

Finally, relying on a decision by the United States Court of Appeals for the District of Columbia Circuit, defendants contend that the constitutional doctrine of separation of powers bars the Commission from bringing this suit. Memo. at 12-14. In that case, FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C.Cir. 1993) ("NRA"), cert. dismissed for want of jurisdiction, 115 S.Ct. 537 (1994), the D.C. Circuit held that the Commission, as then constituted with two non-voting ex officio members selected by Congress, see 2 U.S.C. § 437c(a)(1), violated the constitutional doctrine of separation of powers. 6 F.3d at 821. Specifically, the Court of Appeals held that Congress exceeded

its authority by placing the Secretary of the Senate and the Clerk of the House of Representatives, or their designees, on the Commission as ex officio members without the right to vote. 6 F.3d at 824. Thus, it concluded that the Commission, as then structured, lacked authority to prosecute an enforcement suit.

1. The Commission Has Already Been Reconstituted In Conformity With The NRA Decision.

As shown in section 2 below, the Commission was not unconstitutional when it had ex officio members. But even if the NRA decision were controlling here, the D.C. Circuit's opinion specifically held that the Act's severability clause permits the Commission to continue its administration of the Act in conformity with the NRA decision. Noting that the Act's "explicit severability clause" raises a "presumption that Congress would wish the offending portion of the statute -- creating the ex officio members of the Commission -- to be severed from the rest," the court concluded that no congressional action was required to reconstitute the Commission. 6 F.3d at 828.

> Congress is not even required after our decision, as it was after Buckley [v. Valeo, 424 U.S. 1 [1976)], to amend the statute. Since what remains of the FECA is not 'unworkable and inequitable,' id. at 252 (Burger, C.J., concurring in part and dissenting in part), the unconstitutional ex officio membership provision can be severed from the rest of the FECA.

Id.

Following the NRA decision, the Commission promptly voted on October 26, 1993 to reconstitute itself as a six-member

commission without ex officio members, thereby conforming with the court of appeals' decision. See FEC Exhibit 26. It was this six-member Commission that considered defendants' response to the General Counsel's Brief, see 2 U.S.C. § 437g(a)(3), and found that there was "probable cause to believe" defendants CAN and Mawyer violated the Act. Complaint ¶ 10-12; 2 U.S.C. § 437g(a)(4)(A)(i). This determination, not the prior "reason to believe" finding (which merely initiates an investigation, see 2 U.S.C. § 437g(a)(2)), is the jurisdictional prerequisite to filing an enforcement suit. FEC v. National Rifle Association, 553 F.Supp. 1331, 1344 (D.D.C. 1983). Furthermore, it was the same six-member reconstituted Commission which engaged in conciliation attempts, authorized the filing of this suit and which is the plaintiff before this Court. Complaint ¶¶ 10, 12-14.

Since the NRA decision dealt "not with [the court's] authority to consider the FEC's enforcement action, but with its authority to bring it," LaRouche v. FEC, 28 F.3d 137, 140 (D.C. Cir. 1994), the fact that the reconstituted Commission found "probable cause" and authorized this suit precludes any question regarding the Commission's authority in this case.

All the cases decided since NRA, although the reasons may be different, are consistent with denying the motion to dismiss. All held that NRA did not prevent the Commission from continuing with the enforcement proceedings at issue. FEC v. National Republican Senatorial Committee, Civil Action No. 93-1612(TFH), order at 1 (D.D.C. Feb. 8, 1994) (Commission actions to

reconstitute itself and ratify its prior decisions in underlying administrative action sufficient to avoid dismissal), and slip op. at 2 n.1 (D.D.C. June 27, 1994) (same) (FEC Exhibits 28 and 29)[25/]; National Republican Senatorial Committee v. FEC, Civil Action No. 94-332(TPJ), slip op. at 1-2 (D.D.C. May 11, 1994) (stating that the defendant's "reliance on the NRA case is misplaced") (FEC Exhibit 30), appeal filed, No. 94-5148 (D.C. Cir. May 31, 1994); FEC v. Williams, No. CV 93-6321-ER (Ex), slip op. at 2 (C.D.Cal. Jan. 31, 1995) (FEC Exhibit 31).

The one exception, FEC v. Legi-Tech, Civil Action No. 91-0213(JHG) (D.D.C. Oct. 12, 1994) (attached to defendants' motion), appeal filed, No. 94-5379 (D.C. Cir. Dec. 6, 1994), was dismissed solely because the old eight-member Commission had found probable cause and filed the lawsuit in that case. However, even that court explicitly noted that "[n]othing in this opinion precludes the [reconstituted] FEC from initiating new proceedings against Legi-Tech." Slip op. at 7 n.5. Accordingly, since it was the reconstituted Commission that instituted this action against defendants in the first place, there is no support for defendants' argument that the NRA decision requires dismissal of this case.

25/ Only one of the two decisions in FEC v. National Republican Senatorial Committee is referenced and attached to defendants' memorandum. See Memo. at 13 n.5 and attachments thereto.

2. The Commission Was Constitutional Even With Ex Officio Members.

Even if the Court were to consider the substance of defendants' separation of powers defense, it still does not support dismissal of this litigation. Indeed, other than citing NRA and Legi-Tech, the lone district court decision that has followed it, defendants make no attempt to establish why this Court should find the statute that established the ex officio members unconstitutional, "the gravest and most delicate duty that this Court is called upon to perform." Walters v. National Association of Radiation Survivors, 473 U.S. 305, 319 (1985) (citation omitted). Defendants have presented absolutely no argument as to why this Court should adopt the D.C. Circuit's admittedly unprecedented view that the separation of powers doctrine is violated by the mere possibility that the presidentially appointed FEC Commissioners, who alone are authorized to vote on the exercise of the Commission's executive powers, might be influenced by the views expressed by two Congressional employees who served at the Commission only in an ex officio capacity, without the right to vote. Instead, defendants simply assert that the NRA opinion mandates dismissal here.[26/]

Furthermore, it is well settled that the decisions of one circuit court of appeals are not binding upon courts in another

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26/ In fact, defendants' conclusory two page discussion does not require this Court even "to consider far-reaching constitutional contentions presented in so off-hand a manner." Hospital Corp. of America v. FTC, 807 F.2d 1381, 1392 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987).

circuit. Williams v. United States Court, 246 F.Supp. 968, 969 (E.D.N.C. 1965). In fact, the only court to reach this separation of powers issue outside of the D.C. Circuit has rejected the D.C. Circuit's view in NRA, concluding that "the Ninth Circuit's decision in Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988)[, rev'd on other grounds, 893 F.2d 205 (9th Cir. 1989) (en banc),] compels a different result." FEC v. Williams, slip op. (FEC Exhibit 31) at 2. In contrast to the D.C. Circuit, which found that the mere presence of the ex officio members was enough to render the Commission unconstitutional, see NRA, 6 F.3d at 826-827, the Ninth Circuit, in examining a similar separation of powers issue, has held that "the critical issue is whether Congress or its agent seeks to control (not merely to 'affect') the execution of its enactments with respect to the Article I legislative process." Lear Siegler, Inc., 842 F.2d at 1108. Only "[i]f Congress 'in effect has retained control,' [is] its action and the statutory provision on which it is based . . . unconstitutional." Id.

Following this precedent, the Williams court concluded that:

> Because the ex officio members do not vote, it does not appear Congress sought to usurp an executive function. Thus, the focus of the separation of powers inquiry must shift to whether their presence on the Commission "impermissibly undermines" the executive branch's role. Commodities Futures Trading Commission v. Schor, 106 S.Ct. 3245, 3261

(1986). Quite simply, it does not appear that this is the case.

Id. The Third Circuit's views of separation of powers is the same as the Ninth Circuit's. See Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979, 993 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988).

The view of the Third and Ninth Circuits is the correct one. The Supreme Court has "never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'" Morrison v. Olson, 487 U.S. 654, 693-94 (1988) (citation omitted). To the contrary, the "principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest." Mistretta v. United States, 488 U.S. 361, 408 (1989). Thus, while the Supreme Court has "invalidated attempts by Congress to exercise the responsibilities of other Branches" it has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." Id. at 381-82.

The essential requirement of the separation of powers doctrine is that "'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others,'" Mistretta, 488 U.S. at 380 (emphasis added) (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935)). Thus, "Congress has the authority" to permit an agent of the legislature "to influence the executive's execution of the laws

through the powers of public illumination and persuasion." Ameron, 809 F.2d at 993. See generally, DCP Farms v. Yeutter, 957 F.2d 1183, 1187-88 (5th Cir.), cert. denied, 113 S.Ct. 406 (1992). As the district court found in Williams, the statutory provision authorizing two officers of the Congress to serve in an ex officio role at the Commission does not violate this principle because the statute vests them only with an opportunity to advise the executive decisionmakers, but with no authority to determine how the Commission exercises any part of its executive powers. 2 U.S.C. § 437c(a) and (c). The NRA court found only that the ex officio members might influence the voting Commissioners, but the D.C. Circuit itself has noted that "influence is not control." Washington Legal Foundation v. United States Sentencing Commission, 17 F.3d 1446, 1451 (D.C. Cir. 1994). In fact, the Supreme Court has twice applied separation-of-powers analysis to federal commissions, including the Federal Election Commission, with ex officio members from another branch, but has never found the inclusion of such ex officio members relevant to the constitutional question.[27/] Accordingly, the Act does not violate the separation-of-powers doctrine.

27/ See Buckley v. Valeo, 424 U.S. at 113 (Commission "consists of eight members" including two "ex officio members without the right to vote"), at 137 ("the ultimate question is which, if any, of these powers may be exercised by the present voting Commissioners"); Mistretta, 488 U.S. at 368 ("Attorney General, or his designee, is an ex officio non-voting member" of the Sentencing Commission).

3. Defendants' Collateral Attack On Action Taken By The Commission Fails Under The De Facto Officer Doctrine.

Even if this Court were to adopt the D.C. Circuit's constitutional conclusion in NRA, the de facto officer doctrine provides an independent reason for rejecting defendants' argument that the Commission's initial "reason to believe" finding, since superseded by the Commission's "probable cause" finding, was invalid. It is "well settled" that "'where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto and binding upon the public.'" Glidden Co. v. Zdanok, 370 U.S. 530, 535 (1962) (quoting McDowell v. United States, 159 U.S. 596, 602 (1895)). See Waite v. Santa Cruz, 184 U.S. 302, 323 (1902); United States v. Hefner, 842 F.2d 731, 733 (4th Cir.), cert. denied, 488 U.S. 868 (1988).[28/] "The de facto officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles." EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 17 (2d Cir. 1981). "The de facto officer doctrine works to protect the public interest by validating prior acts of persons performing the

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28/ See also Franklin Savings Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1150 (10th Cir. 1991), cert. denied, 112 S.Ct. 1475 (1992); Andrade v. Lauer, 729 F.2d 1475, 1496 (D.C. Cir. 1984); National Association of Greeting Card Publishers v. United States Postal Service, 569 F.2d 570, 579 (D.C. Cir. 1976), vacated on other grounds sub nom., United States Postal Service v. Associated Third Class Mail Users, 434 U.S. 884 (1977).

duties of an office under color of title." Olympic Fed. S&L v. Office of Thrift Supervision, 732 F.Supp. 1183, 1195 (D.D.C.) (emphasis in original), vacated as moot, 903 F.2d 837 (D.C. Cir. 1990). See also United States v. Royer, 268 U.S. 394, 397-398 (1925).

In Buckley, 424 U.S. at 142-143, the Supreme Court ruled that, even though it had found the Commission's structure violated both separation of powers and the Appointments Clause, the national interest required not only that the Commission's past actions be treated as de facto valid, but that the Commission be permitted to continue to exercise its powers in its original form for a limited time during which Congress could act to correct the unconstitutional features. As the NRA court recognized, the separation of powers problems were far more egregious in Buckley than those presented in NRA. The Commission at the time of Buckley consisted of six voting members, of which two were appointed by the President, two were appointed by the Speaker of the House of Representatives, and two were appointed by the President pro tempore of the Senate. See Buckley, 424 U.S. at 113. This structure was stricken by the Supreme Court as violating the Constitution's separation of powers and the Appointments clause. Buckley, 424 U.S. at 140-141.[29/] Nonetheless, in Buckley, the actions taken by the Commission, which then had at least four voting members whose performance of

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29/ The Buckley Court also noted the ex officio members' inclusion on the Commission, but did not question their validity. Buckley, 424 U.S. at 113.

their duties violated the separation of powers doctrine, were held to be de facto valid.

It plainly follows that the prior actions of the six voting Commissioners here -- all of whom were de jure officers of the United States validly appointed by the President even before the elimination of the ex officio members -- were also de facto valid. In re Application of President's Commission on Organized Crime, 763 F.2d 1191, 1201-1202 (11th Cir. 1985) (Fay, J.). See also Metropolitan Washington Airports Authority Professional Firefighters Ass'n Local 3217 v. United States, 959 F.2d 297, 305 (D.C. Cir. 1992). Thus, as the Williams court concluded:

> The Supreme Court implemented this doctrine with respect to an earlier version of the Act in Buckley, and there appears to be no reason to depart from its reasoning. As a result, even if the Commission's actions were constitutionally defective, the de facto [officer] doctrine would permit them to stand.

FEC v. Williams, slip op. (FEC Exhibit 31) at 2.

4. The Reconstituted Commission Ratified The Prior Administrative Decision.

Even without the de facto officer doctrine, the Commission's actions in this case are valid because when this case reached the "probable cause to believe" stage of the administrative process, the reconstituted Commission, on April 19, 1994, reconsidered and ratified its preliminary finding that there was "reason to believe" defendants had committed violations of the Act before it proceeded to consider whether there was probable cause.

Complaint ¶ 10. See 2 U.S.C. § 437g(a)(2).[30] See, e.g., Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989); Bowles v. Wheeler, 152 F.2d 34, 40 (9th Cir.), cert. denied, 326 U.S. 775 (1945).[31]

It is clear that defendants' argument would do nor more than require the Commission to repeat its entire administrative proceeding from the beginning, thereby postponing defendants' day of reckoning. Defendants suggest that this is necessary "to protect innocent parties, such as Respondents, from ill-advised enforcement actions" (Memo. at 13), but they have provided no reason to think that a different result would occur if this matter were remanded to the Commission. The current six FEC Commissioners -- the same ones who were voting members of the agency during all the prior proceedings -- have already voted to ratify the preliminary reason to believe finding, to find probable cause to believe, and to file this law enforcement suit, all following the agency's reconstitution. The same reconstituted Commission has already unsuccessfully attempted to negotiate a settlement with defendants not once, but twice, during the statutory conciliation period. Complaint ¶¶ 10

30/ Contrary to defendants' assertion (Memo. at 13), the Commission's vote to ratify its reason to believe finding in this case was taken separately, just before its consideration of probable cause, and was not part of a "mass" ratification. FEC Exhibit 27.

31/ See also FEC v. National Republican Senatorial Committee (FEC Exhibits 28 and 29); National Republican Senatorial Committee v. FEC (FEC Exhibit 30). But see FEC v. Legi-Tech, Civil Action No. 91-0213(JHG) (D.D.C. Oct. 12, 1994), appeal filed, No. 94-5379 (D.C. Cir. Dec. 6, 1994).

and 12-13. See 2 U.S.C. § 437g(a)(4)(A)(i). Each time, however, the Commission's settlement efforts were quickly rebuffed. Under these circumstances, requiring the parties to go through the formalities again would mandate just the sort of futile acts that courts should not require. AFGE v. FLRA, 778 F.2d 850, 862 n.19 (D.C. Cir. 1985) ("remand would be [an] idle and useless formality 'because there is not the slightest doubt that the Board would simply reaffirm its order'") (quoting NLRB v. American Geri-Care, Inc., 697 F.2d 56, 64 (2d Cir. 1982), cert denied, 461 U.S. 906 (1983)). Moreover, the Commission has many other cases on its administrative docket. Requiring such repetition of all completed procedures in all those cases would seriously hamper the agency's ability to effectively enforce the Act. Nothing in the NRA decision requires such a result.

Conclusion

For the foregoing reasons, defendants' motion to dismiss should be denied.

Respectfully submitted,

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