FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Unknown Respondents	)	MUR 6543
	)	

STATEMENT OF REASONS
VICE CHAIRMAN DONALD F. McGAHN

The complaint in this matter alleges certain unknown persons or entities violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by making automated pre-recorded telephone calls ("robocalls") that lacked proper disclaimers to voters in the 10th Congressional District of North Carolina. The complaint alleges that, on March 3, 2012, Complainant received a recorded message on his home answering machine.[1] While Complainant indicated "the quality of the recording (cheap machine) precludes [him] from sending a copy of the call," he provided an approximate transcript, which read:

> Hello, this is Betty, one of your neighbors. I'm calling to share some thoughts about voting on May 8th of this year. Let me tell you, I'm a Republican and my husband John is an Independent, and we agree on one thing – what are we doing sending Congressman McHenry back to Washington? McHenry is not one of us. McHenry's politics and personal life style is going to blow up in our face sooner or later. Remember Delay [*sic*] from Texas, Foley from Florida, and Senator Craig from Idaho. We are also voting for a marriage amendment in May and McHenry is not that kind of Conservative. McHenry is not one of us. Bye now.[2]

The Office of General Counsel ("OGC") recommended the Commission find reason to believe that unknown persons or entities violated the Act by making this call because it allegedly lacked a proper disclaimer and was not reported as an independent expenditures.[3] OGC further

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[1] MUR 6543 (Unknown Respondents), Complaint at 1.

[2] *Id* at 2.

[3] *See* MUR 6543 (Unknown Respondents), First General Counsel's Report.

recommended the Commission authorize the use of compulsory process to investigate this matter. On January 29, 2013, the Commission failed to approve OGC's recommendation by the requisite four votes and subsequently closed the file on this matter.[4]

OGC's recommendation in this matter was premised on the phone calls containing express advocacy. I disagreed with OGC's recommendations because these calls, which likely cost less than $3,500 and were thus *de minimis*, did not contain express advocacy under 11 CFR 100.22(a), and 11 CFR 100.22(b) was unenforceable in the Fourth Circuit at the time the calls were made. Therefore, whoever paid for the robocalls was not required to report them as an independent expenditure.

I. ANALYSIS

Before turning to the merits, some perspective is in order. The calls at issue took place on March 3, 2012, more than two months before the Republican primary in North Carolina's 10th Congressional District on May 8, 2012, in which roughly 81,000 registered Republicans voted.[5] North Carolina employs a semi-closed primary system, and while the calls in question were made prior to the state's April 13 registration deadline, the calls themselves included no information about registration. Thus, they appear to be focused on those already eligible to vote in the Republican primary.[6] Approximately 172,000 North Carolinians were registered to vote in that primary.[7] With political robocalls costing approximately 2 cents per call,[8] even if every Republican registered to vote in the primary received the call, the total cost would be

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[4] *See* MUR 6543 (Unknown Respondents), Certification. The Chair raises concerns about the length of time required to resolve this matter after it was circulated to the Commission. As this statement explains, the cursory, one-page express advocacy analysis set forth in the General Counsel's report was unacceptable and circulated five months after receipt of the complaint. As a result of discussion during Executive Session regarding the enforceability of section 100.22(b) in the Fourth Circuit, the matter was left open in order for the Office of General Counsel to research the question more thoroughly (attached hereto is their analysis). The Chair seems to have overlooked that discussion, as well as the resulting OGC memo in her selective timeline. MUR 6543 (Unknown Respondents), Statement of Reasons of Chair Ellen L. Weintraub. Such public statements regarding desired efficiency are in stark contrast to her actual behind-the-scenes conduct. For example, there are a number of enforcement matters that the Chair has refused to place on the Commission's agenda, despite repeated requests from other Commissioners. Many of these matters concern complaints filed during the 2010 election cycle, and OGC submitted their reports long ago. It has become clear to me that such unprecedented manipulation of the agenda is designed to avoid having these matters decided by the current Commissioners, in hopes somehow the predicted voting pattern will change in the future. *See* MUR 6540 (Rick Santorum for President). In other matters, OGC has failed to submit its first report in over two years – it has been difficult for Commissioners to even get a status report on these matters.

[5] *See* Ballotopedia, North Carolina's 10th Congressional District Congressional Elections, 2012, http://ballotpedia.org/wiki/index.php/North_Carolina%27s_10th_congressional_district_elections,_2012 (last accessed April 1, 2013).

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, http://www.sendcalls.com/pricing.php; http://republicanrobocalls.com/4.html.

approximately $3,400.[9] Therefore, the costs associated with the calls appear to be *de minimis*. Given that low dollar amount, the lack of information regarding the potential caller, that the Commission has traditionally dismissed matters involving such low dollar amounts, and in consideration of Commission resources, dismissal of this matter on the grounds of prosecutorial discretion would, in addition to the reasons set forth below, be appropriate.[10]

a. Express Advocacy

The concept of express advocacy was introduced by the Supreme Court in *Buckley v. Valeo*.[11] In *Buckley*, the Court considered the constitutionality of the term "expenditure," which the Act defined as "a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of influencing the nomination for election, or the election, of any person to Federal office . . . ."[12] The Court held that "in order to preserve [the Act's definition of expenditure] against invalidation on vagueness grounds, [it] must be construed to apply only to expenditures for communications that in express terms advocate for the election or defeat of a clearly identified candidate for federal office."[13] The Court explained, "[t]his construction would restrict the application of [the Act's expenditure provisions] 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.'"[14]

Following the Court's ruling, Congress amended the Act in 1976 to "reflect the Court's opinion in the *Buckley* case"[15] by defining the term "independent expenditure" to mean "an expenditure by a person advocating the election or defeat of a clearly identified candidate . . . ,"[16]

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[9] This estimate is almost certainly high, given that many households will have more than one registered Republican living in them.

[10] *See Heckler v. Chaney*, 470 U.S. 821, at 831-35 (1985) (noting both the expansive discretion that an agency has in determining when to advance an enforcement action and the "general unsuitability for judicial review of agency decisions to refuse enforcement").

[11] 424 U.S. 1 (1976).

[12] 18 U.S.C. § 591(f) (1974).

[13] 424 U.S. at 44.

[14] *Id.* at 44 n.52.

[15] Federal Election Campaign Act Amendments of 1976, Report to Accompany H.R. 12406 (Report No. 94-917), 94th Cong., 2d Session, at 82 (Minority Views). *See also* Federal Election Campaign Act Amendments of 1976, Report to Accompany S. 3065 (Report No. 94-677), 94th Cong., 2d Session (Mar. 2, 1976) at 5 (Congress specifically "define[d] 'independent expenditure' to reflect the definition of that term in the Supreme Court's decision in *Buckley v. Valeo*"); Joint Explanatory Statement of the Committee of Conference on the Federal Election Campaign Act Amendments of 1976 at 40 (Congress changed the independent expenditure reporting requirements "to conform to the independent expenditure reporting requirement . . . to the requirements of the Constitution set forth in *Buckley v. Valeo* with respect to the express advocacy of election or defeat of clearly identified candidates"); Cong. Rec. S6364 (May 3, 1976) (statement of Senator Cannon) (Sen. Cannon explained that the legislation was "modifying a number of the Court's interpretations of the campaign finance laws....").

[16] 2 U.S.C. § 431(17) (1976).

where "expenditure" was in turn defined to mean communications that included "express advocacy." The Commission subsequently promulgated a regulation that reflected this change.[17]

These post-*Buckley* legislative amendments occurred before the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*").[18] In *MCFL*, the Court reaffirmed *Buckley's* finding that express advocacy "depended upon the use of language such as "'vote for,' 'elect,' 'support,' etc."[19] The Court concluded that an advertisement that was headlined, "Everything You Need to Know to Vote Pro-Life," admonishing readers that "[n]o pro-life candidate can win in November without your vote in September," had "Vote Pro-Life" written in "large bold-faced letters on the back page," and contained a detachable voter guide "to be clipped and taken to the polls to remind voters of the name of the 'pro-life' candidates" contained express advocacy.[20]

In 1995, the Commission once again revised its express advocacy regulations, promulgating the current definition at section 100.22.[21] The revised regulation states that a communication contains express advocacy when it:

> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in 94," "vote Pro–Life" or "vote Pro–Choice" accompanied by a listing of clearly identified candidates described as Pro–Life or Pro–Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
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> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--

[17] The Commission promulgated a definition of "expressly advocating" as "any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'and 'Smith for Congress,' or 'vote against,' ' defeat,' 'or 'reject.'" 11 C.F.R. § 109.1(b)(2) (May 1, 1977); *see also* Establishment of Chapter, 41 Fed. Reg. 35947 (Aug. 25, 1976).

[18] 479 U.S. 238 (1986)

[19] *Id.* at 249.

[20] *Id.* at 243.

[21] *See* Notice 1995-10: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures ("Express Advocacy E&J"), 60 Fed. Reg. 35292.

> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
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> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[22]

As the Commission explained at the time, the modifications to section 100.22(a) simply "reworded" the prior regulation "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates,"[23] and added "a somewhat fuller list" of the examples set forth in *Buckley*.[24] The current definition of express advocacy found at Section 100.22(a), therefore, is derived from *Buckley* and *MCFL's* application of *Buckley*. Nothing in its promulgation history indicates this regulation was designed to capture anything more than what its plain regulatory language already does. According to the Explanation & Justification, the regulation provides "further guidance on what types of communications constitute express advocacy of clearly identified candidates."[25] It does not expand upon the construction of expenditure and express advocacy applied in *Buckley* and *MCFL*.

The definition of express advocacy at section 100.22(b), by contrast, is largely derived from the opinion of the Court of Appeals for the Ninth Circuit in *FEC v. Furgatch*.[26] In *Furgatch*, the court concluded, "speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[27] According to the court:

> This standard can be broken into three main components. 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

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[22] 11 C.F.R. § 100.22.

[23] Express Advocacy E&J, 60 Fed. Reg. at 35293.

[24] *Id.* at 35295.

[25] *Id.* at 35293.

[26] 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). *See e.g.*, Express Advocacy E&J, 60 Fed. Reg. at 35294 ("The definition of express advocacy included in new section 100.22 includes elements from each definition, as well as the language in *Buckley*, *MCFL*, and *Furgatch* opinions emphasizing the necessity for communications to be susceptible to no other reasonable interpretation but as encouraging actions to elect or defeat a specific candidate.").

[27] *Id.* at 864.

> "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.[28]

The court went on to emphasize that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements."[29]

In *Furgatch*, the court applied the standard to the communication at issue, and concluded that an advertisement that "deplores [President] Carter's 'attempt to hide his own record,' his 'legacy of low-level campaigning,' his divisiveness and 'meanness of spirit,' and his 'incoherencies, ineptness, and illusion,'" and concluded with the phrase, "Don't let him do it," constituted express advocacy.[30] In reaching its conclusion, the Court stated, "[r]easonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter" because "[t]his was the only action left open to those who would not 'let him do it.'"[31]

b. The Robocalls at Issue Do Not Contain Express Advocacy Under Section 100.22(a)

There is no question that the call in question does not contain the sort of language contemplated by *Buckley* and *MCFL*, and as delineated by the first two parts of section 100.22(a). OGC practically concedes as much and argues instead that the call comes within the third part of 100.22(a), which states:

> communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"

OGC concluded that the robocalls contained express because:

- They "indisputably concern voting in the May 8, 2012 primary election;"[32]
- They "clearly identify McHenry by name as the incumbent seeking re-election;"[33] and

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 865.

[32] MUR 6543 (Unknown Respondents), First General Counsel's Report at 6.

[33] *Id.*

- They question Congressman McHenry's character and fitness for office in a way that "amounts to an explicit directive urging voters to defeat McHenry through a "rhetorical question" that asks "what are we doing sending Congressman McHenry back to Washington?"[34]

Section 100.22(a), however, does not permit this type of factor-based approach.[35] Instead, it focuses solely on the language used in the communication. Turning to the actual language used, neither Complainant nor OGC claim that the phrase "what are we doing sending Congressman McHenry back to Washington?" is a campaign slogan of any candidate in the relevant congressional race, such as "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" Instead, OGC argues that the phrase – when combined with the sort of external context that is not contemplated by section 100.22(a) -- is the type of "individual word(s)" contemplated by that portion of 100.22(a). I disagree.

First, OGC's analysis misconstrues that portion of the regulation by applying it as an expansion rather than a limitation on its reach. Since the phrase "in context can have no other reasonable meaning..." is followed by a list of examples "such as posters, bumper stickers, advertisements" it falls within the construction canon of *noscitur a scosiis*. This canon provides that "words grouped in a list should be given related meanings."[36] As Associate Justice Antonin Scalia and Bryan Gardner note, "the most common effect of the canon is . . . to limit a general term to a subset of all the things or actions that it covers – but only according to its ordinary meaning."[37] Thus, this canon serves to limit the broader universe of definitions of the general construct of "individual word(s)" to a subset of those that are similar in character to the specific enumerated examples: "posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'."[38] Therefore, "individual word(s)" in section

[34] *Id.*

[35] In fact, the Supreme Court has warned that such multi-factor tests create problems when used in the context of the First Amendment. *Citizens United*, 130 S. Ct. 876, 896 (2010) ("If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.").

[36] *Third Nat'l Bank in Nashville v. Impact Ltd.*, 432 U.S. 312, 322 (1977). "Although most associated-words canons involve listings – usually a parallel series of nouns and noun phrases, or verbs and verb phrases – a listing is not a prerequisite. An 'association' is all that is required." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 197, Antonin Scalia & Bryan A. Garner (2012).

[37] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 196, Antonin Scalia & Bryan A. Garner (2012).

[38] 11 C.F.R. § 100.22(a). In this way, the application of *noscitur a scosiis* functions similarly to the narrower statutory cannon of *ejusdem generis*, whereby general words are construed to encompass only objects similar to those enumerated by preceding specific words. Some courts have applied *ejusdem generis* directly to the phrase "such as," while others apply it only in situations where general words or phrases follow specific words or phrases in statutory text, and to apply the broader cannon of *noscitur a scosiis* in other instances. *Compare Johnson v. Horizon Lines, LLC*, 520 F. Supp. 2d 524, 532 n.7 (S.D.N.Y. 2007) ("[T]he English phrase 'such as' in the regulation may without difficulty be read as having the same effect as the Latin phrase *ejusdem generis*" where the

100.22(a) is not an invitation for a broad-based contextual analysis. Rather, it is limited to instances where such words standing alone act as campaign slogans or the like.[39] Accordingly, the use of the phrase, "which in context can have no other reasonable meaning," like "campaign slogans" and "such as posters, bumper stickers, advertisements , etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'," limits express advocacy from the almost infinite universe of a single word or two to a narrow subset of applications that "urge the election or defeat of one or more clearly identified candidate(s)."[40]

Chief Justice Roberts warned of using context without restriction when he stated, "Courts need not ignore basic background information that may be necessary to put an ad in context – such as whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future – but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns."[41] The court in *Furgatch* expressed similar concerns when it concluded that, "[c]ontext cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words."[42] Thus, whenever context is used in an analysis of political speech, great care must be taken to ensure that the contextual analysis does not overwhelm the analysis of the words themselves. As applied to 100.22(a), context can only be used to ensure that "individual word(s)" are not being taken out of context to improperly convert phrases into regulable speech. That is the opposite of what OGC's analysis does.

In addition, this limited approach of applying 100.22(a) is supported by prior Commission enforcement actions. In MUR 5549 (Adams), the Commission found a billboard containing the phrase "BushCheney04," which was the official campaign slogan of then-presidential candidate George W. Bush and vice presidential candidate Dick Cheney, was

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latter "is the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (*quoting Wojchowski v. Daines,* 498 F.3d 99, 108 n.8 (2d Cir.2007))) *with* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 204-205, Antonin Scalia & Bryan A. Garner (2012) ("The vast majority of cases dealing with the doctrine [of *ejusdem generis*] – and all the time-honored cases – follow the species-genus pattern. . . . In all contexts other than the pattern of specific-to-general, the proper rule to invoke is the broad associated-words cannon, not the narrow *ejusdem generis* cannon.").

[39] There is no reason to think that if the Commission in 1995 meant for "individual word(s)" to mean "phrase," it would simply have used the word "phrase" instead. In fact, this very regulation itself uses the term "phrase" (nine phrase such as 'vote for the President' ...) elsewhere. It is a basic contextual canon of statutory interpretation that the text of a statute must be considered as a whole, thus "[i]n ascertaining the plain meaning of the statute, the [interpreting body] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 167, Antonin Scalia & Bryan A. Garner (2012) (*quoting K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (per Kennedy, J.)).

[40] 11 C.F.R. § 100.22(a).

[41] *FEC v. Wisconsin Right to Life* ("*WRTL*"), 551 U.S. 449 (2007) (internal quotation marks omitted).

[42] *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

express advocacy under section 100.22(a).[43] Similarly, in MUR 5468R (Moretz for Congress), the Commission found a visual image that included "George Moretz, Republican for Congress" constituted express advocacy because it was the candidate's campaign slogan.[44] By contrast, in MUR 4982 (Wyly Brothers), OGC concluded an advertisement contrasting the views of then-presidential candidates George W. Bush and John McCain on the issue of clean air that ended with the phrase, "Governor Bush. Leading. . . so each day dawns brighter," was not express advocacy,[45] because this language was not a slogan used by Governor Bush's presidential campaign.

Finally, OGC's analysis essentially conflates section 100.22(b) with section 100.22(a). Reliance on references to candidates, the date of the election, and supposed attacks on a candidate's character and fitness for office are hallmarks of section 100.22(b), not section 100.22(a). As the Explanation and Justification for the Commission's express advocacy regulations makes clear, "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy *under new section 100.22(b)* if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question."[46] Pursuant to the surplusage canon of statutory interpretation, "no provision should be construed to be entirely redundant."[47] OGC's interpretation of section 100.22(a) would render section 100.22(b) superfluous because the type of communications that section 100.22(b) was designed to encompass would be subsumed into section 100.22(a).[48] For the text of section 100.22(b) to be operative, section 100.22(a) is limited to the language of the sort identified in *Buckley* and *MCFL*, including campaign slogans or other similar individual words. The robocalls at issue do not fall under any of these categories of communications. Thus, these communications may be deemed express advocacy only if they fall under section 100.22(b).

[43] MUR 5549 (Stephen Adams), FGCR at 4.

[44] MUR 5468R (Moretz for Congress), FGCR at 8.

[45] MUR 4982 (Wyly Brothers), FGCR at 21. The Commission split 3-3 on the matter, with three Commissioners agreeing with OGC that the ads did not constitute express advocacy, two Commissioners disagreeing with OGC's conclusion that the ad was not express advocacy, and one Commissioner disagreeing with other conclusions of OGC. *Id.* Certifications (Jan. 23, 2002); Statement of Reasons of Chairman David M. Mason and Commissioners Bradley A. Smith and Darryl R. Wold; Statement of Reasons of Commissioners Danny L. McDonald and Scott E. Thomas; Statement of Reasons of Vice Chairman Karl J. Sandstrom.

[46] Express Advocacy E&J, 60 Fed. Reg. at 35295 (emphasis added).

[47] *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 174-179, Antonin Scalia & Bryan A. Garner (2012) (discussing the surplusage cannon).

[48] "[C]ourts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory."Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 174, Antonin Scalia & Bryan A. Garner (2012) (*quoting* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 58 (1868)).

c. Section 100.22(b) Was Unenforceable in the Fourth Circuit at the Time the Robocalls Were Made

In *FEC v. Christian Action Network* ("*CAN*"), the Court of Appeals for the Fourth Circuit struck down the application of an express advocacy standard similar to that enunciated in section 100.22(b) on constitutional grounds.[49] In response to this decision, and the First Circuit's decision in *Maine Right to Life Committee v. FEC* ("*MRLC*")[50], "the FEC voted 6–0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has *in effect* been found invalid' by the Fourth Circuit."[51] Subsequently, the Fourth Circuit explicitly ruled section 100.22(b) unconstitutional in *Virginia Society for Human Life v. FEC* ("*VSHL*").[52] At the time the robocalls were made, *VSHL* was a binding precedent within the Fourth Circuit, and thus precludes an application of section 100.22(b).[53]

Some have asserted that decisions subsequent to *VSHL* – particularly *McConnell v. FEC*[54] – undercut the reasoning of *VSHL*.[55] Whatever the veracity of these arguments may be, there is nothing in *McConnell* or *WRTL* explicitly reversing *VSHL* and *CAN*. Thus, it is the prerogative of the Court of Appeals for the Fourth Circuit, and not the FEC, to evaluate *McConnell* and determine if the logic of that case is sufficient to invalidate prior judicial proscriptions on the enforcement of section 100.22(b). The Fourth Circuit did not do so with finality until *RTAA*.[56] Therefore, *VSHL* and *CAN* remained operative, notwithstanding whatever doubts were raised by *McConnell*, until the court acted in *RTAA*. I know of no authority that

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[49] 92 F.3d 1178 (4th Cir. 1996) (unpublished opinion).

[50] 98 F.3d 1 (1st Cir. 1996) (per curiam), *cert. denied*, 522 U.S. 810 (1997).

[51] *Virginia Society for Human Life*, 263 F.3d 379, 382 (4th Cir. 2001) (emphasis in the original); Policy Regarding Express Advocacy Regulation at Issue in *Virginia Society for Human Life v. FEC*, No. 3:99CV559 (E.D. VA. Filed August 9, 1999), Certification, September 22,1999 (Vote of 6-0 "to formally confirm the Commission's position that because 11 C.F.R. § 100.22(b) has been found invalid by the United States Court of Appeals for the First Circuit, and has in effect been found invalid in the United States Court of Appeals for the Fourth Circuit, it cannot and will not be enforced in those circuits, unless and until the law of those circuits is changed or overruled.").

[52] *Id.* at 379.

[53] The calls were received in the 10th Congressional District of North Carolina, within the jurisdiction of the Court of Appeals for the Fourth Circuit, on March 3, 2012. This was three months prior to the court's June 12, 2012 ruling in *Real Truth About Abortion v. FEC* ("*RTAA*"). 681 F.3d 544 (4th Cir. 2012), *cert. denied*, – S.Ct. —, 2013 WL 57574 (2013).

[54] 540 U.S. 93 (2004).

[55] *See, e.g.* Brief for the Respondent at 15, *Real Truth About Obama v. FEC*, 130 S. Ct. 2371 (2010) ("[T]he *WRTL* standard is nearly identical to the test in Section 100.22(b).").

[56] We note that the First Circuit decision in *Maine Right to Life Committee, Inc. v. FEC* held 100.22(b) to be beyond the agency's statutory authority; a holding that appears entirely consistent with *McConnell*'s treatment of *Buckley* analysis of express advocacy as a product of statutory construction. 914 F. Supp. 8, 13 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (per curiam), *cert. denied*, 522 U.S. 810 (1997).

permits us to disrupt binding precedent of the Fourth Circuit. On the contrary, the Supreme Court has made clear that agencies cannot selectively enforce regulations without sufficient prior notice because of due process concerns.[57]

Moreover, regardless of whether section 100.22(b) was eventually enforceable in the Fourth Circuit or not, the Commission had previously announced it would not apply section 100.22(b) in the entirety of the Fourth Circuit—a policy statement that was never affirmatively reversed by four or more votes of the Commission.[58] Contrary to what some may claim, the 2007 Explanation and Justification on Political Committee Status ("2007 E&J") did not serve as sufficient notice to the public that the Commission had repudiated its policy regarding the Fourth Circuit. The 2007 E&J merely rehashes the Commission's prior enforcement decisions, and justified the Commission's decision to not promulgate new regulations.[59] It is hard to see how that could be deemed notice to the public that a regulation was being revived.

The significance of the 2007 E&J is further obscured by the Supreme Court's decision in *WRTL*. The E&J was passed prior to that decision, and after which then-Vice Chairman Mason, a member of the four-vote majority approving the 2007 E&J, issued a statement observing, "the United States Supreme Court brought the constitutional validity of 11 C.F.R. § 100.22(b) into grave doubt since with its opinion issued in *WRTL*."[60] According to Vice Chairman Mason, "[s]ection 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice because it endorses an inherently vague 'rough-and-tumble of factors' approach in demarcating the line between regulated and unregulated speech."[61] Thus, "[w]ith its focus on external events and what a reasonable person might interpret speech to mean, Section 100.22(b) rests on unsustainable constitutional premises . . . to the extent that 100.22(b) is broader or more vague than the *WRTL II* test, it is constitutionally impermissible. . . . If the test is identical, its application is impermissible under principles of statutory and judicial construction."[62]

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[57] *FCC v. Fox Television Stations* ("*Fox II*") 132 S. Ct. 2307 (2012).

[58] Policy Regarding Express Advocacy Regulation at Issue in *Virginia Society for Human Life v. FEC*, No. 3:99CV559 (E.D. VA. Filed August 9,1999), Certification, September 22,1999 (Vote of 6-0 "to formally confirm the Commission's position that because 11 C.F.R. § 100.22(b) has been found invalid by the United States Court of Appeals for the First Circuit, and has in effect been found invalid in the United States Court of Appeals for the Fourth Circuit, it cannot and will not be enforced in those circuits, unless and until the law of those circuits is changed or overruled."); *see VSHL*, 263 F.3d at 382 ("[T]he FEC voted 6-0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has in effect been found invalid by the Fourth Circuit.") (emphasis in the original); *see also* Opening Brief for the Federal Election Commission at 12-13, *VSHL*, 263 F.3d 379 (4th Cir. 2001); *Cf. Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082,1091 (D.C. Cir. 1992) (explaining the "serious statutory and constitutional questions" raised by intercircuit nonacquiesence).

[59] 2007 E&J, 72 Fed. Reg. at 5604.

[60] MUR 5874 (Gun Owners of America, Inc.), Statement of Reasons of Vice Chairman David M. Mason at 3.

[61] *Id.*

[62] *Id* at 4.

Further, reversing a previously announced policy and resurrecting a previously invalidated regulation without a formal Commission vote on the matter fails to provide notice sufficient to assuage due process concerns associated with a deviation from a previously announced policy. As the Court made clear in *FCC v. Fox Television Stations* ("*Fox II*"), "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[63] The Court further stated, "[i]n the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and 'show that there are good reasons for its new policy.'"[64] Therefore, due process requires the Commission to honor its declaration until it is publicly repudiated by four or more votes of the Commission, or there is a change in jurisprudence for the circuit as a whole. Given the Court's decision in *Fox II*, the muddled history of Commission action since *McConnell* regarding section 100.22(b) did not provide sufficient public notice of a shift in Commission policy.[65]

II. CONCLUSION

The robocalls in this matter lack the express words of advocacy of the sort enumerated by *Buckley* and *MCFL*, and do not otherwise fall within the ambit of section 100.22(a). And assuming *arguendo* section 100.22(b) is statutorily sound, and the robocalls at issue fall within that regulation, due process precludes the application of that regulation to these robocalls.[66] The Fourth Circuit has previously held section 100.22(b) was unenforceable, and the Commission publicly announced it would not enforce it. Neither decision was reversed as of March 3, 2012 – the date the robocalls allegedly were made. Therefore, for these reasons, I could not vote to approve OGC's recommendation in this matter.

[63] 132 S. Ct. 2307, 2317 (2012).

[64] *Id.* at 2315-16 (2012) (*quoting FCC v. Fox Television Stations*, 556 U.S. 502 at 515 (2009) ("*Fox I*")).

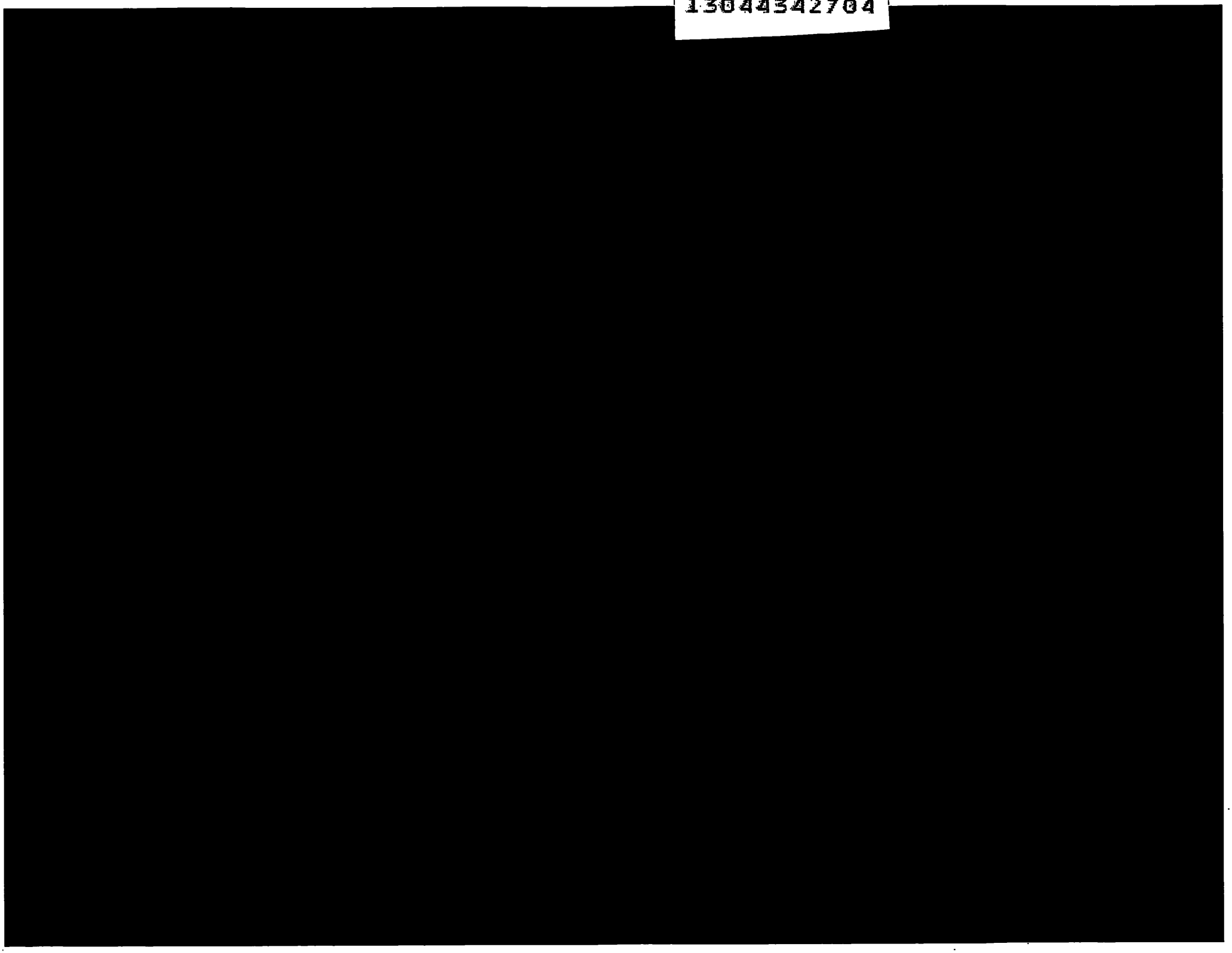
[65] [redacted] an internal OGC memo written soon after *WRTL* [redacted] Therefore, I have attached this memo. [Note, portions of this footnote, as well as the attached memoranda, have been redacted by OGC. I disagree with the necessity and propriety of these redactions.]

[66] *See MRLC*, 914 F. Supp. at 13 ("conclud[ing] that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (per curiam), *cert. denied*, 522 U.S. 810 (1997).

DONALD F. McGAHN II
Vice Chairman

9-16-13
Date

[redacted]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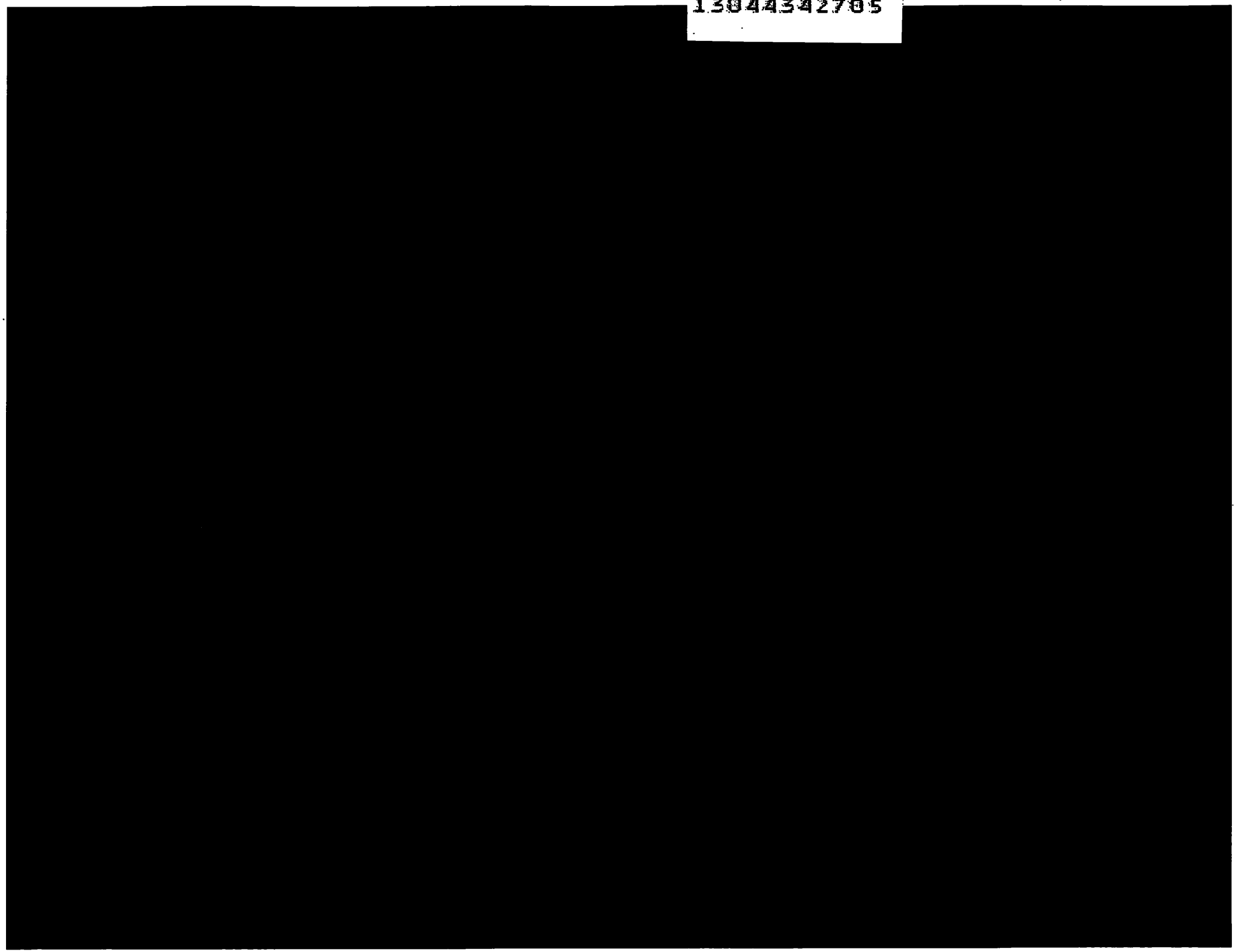
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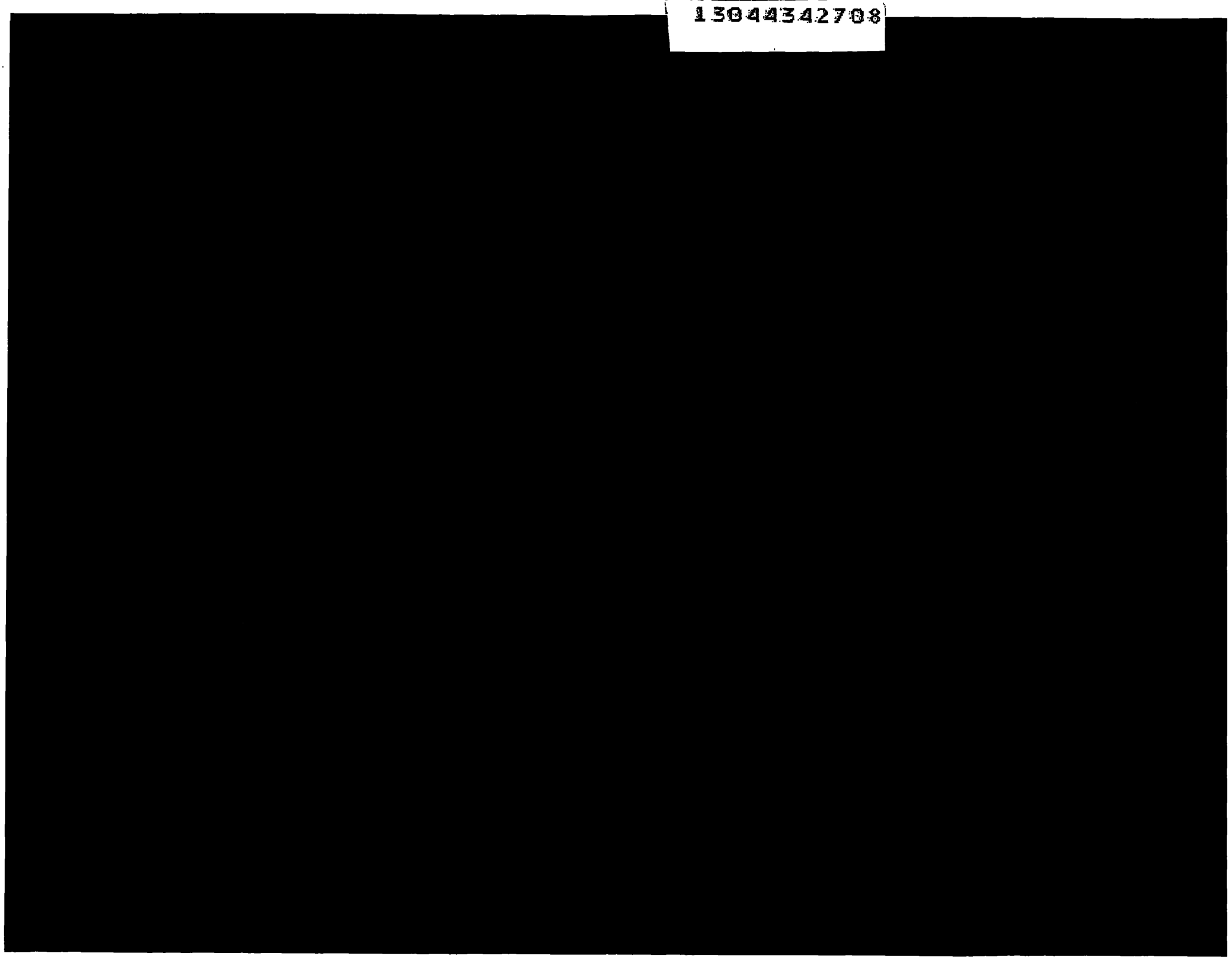
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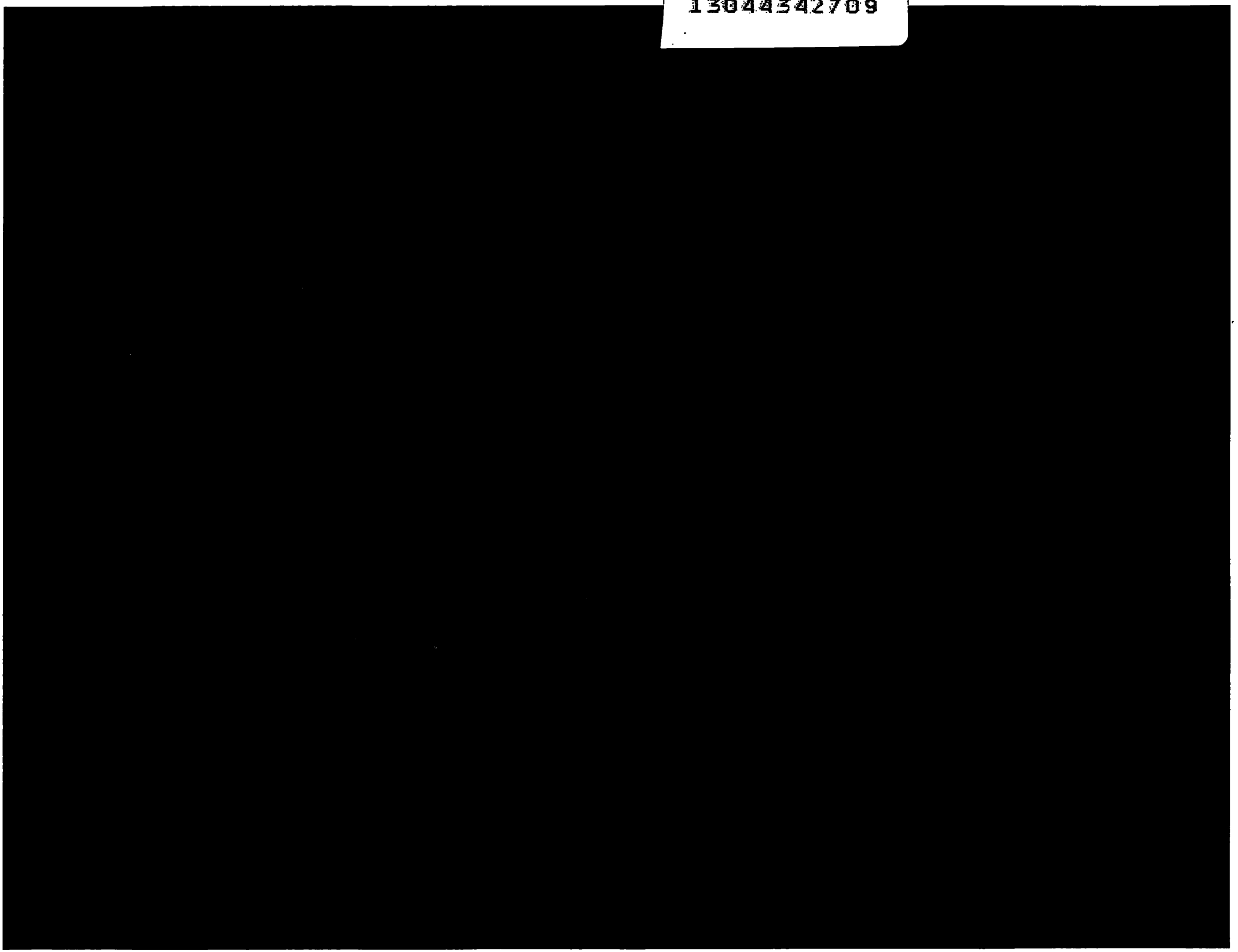
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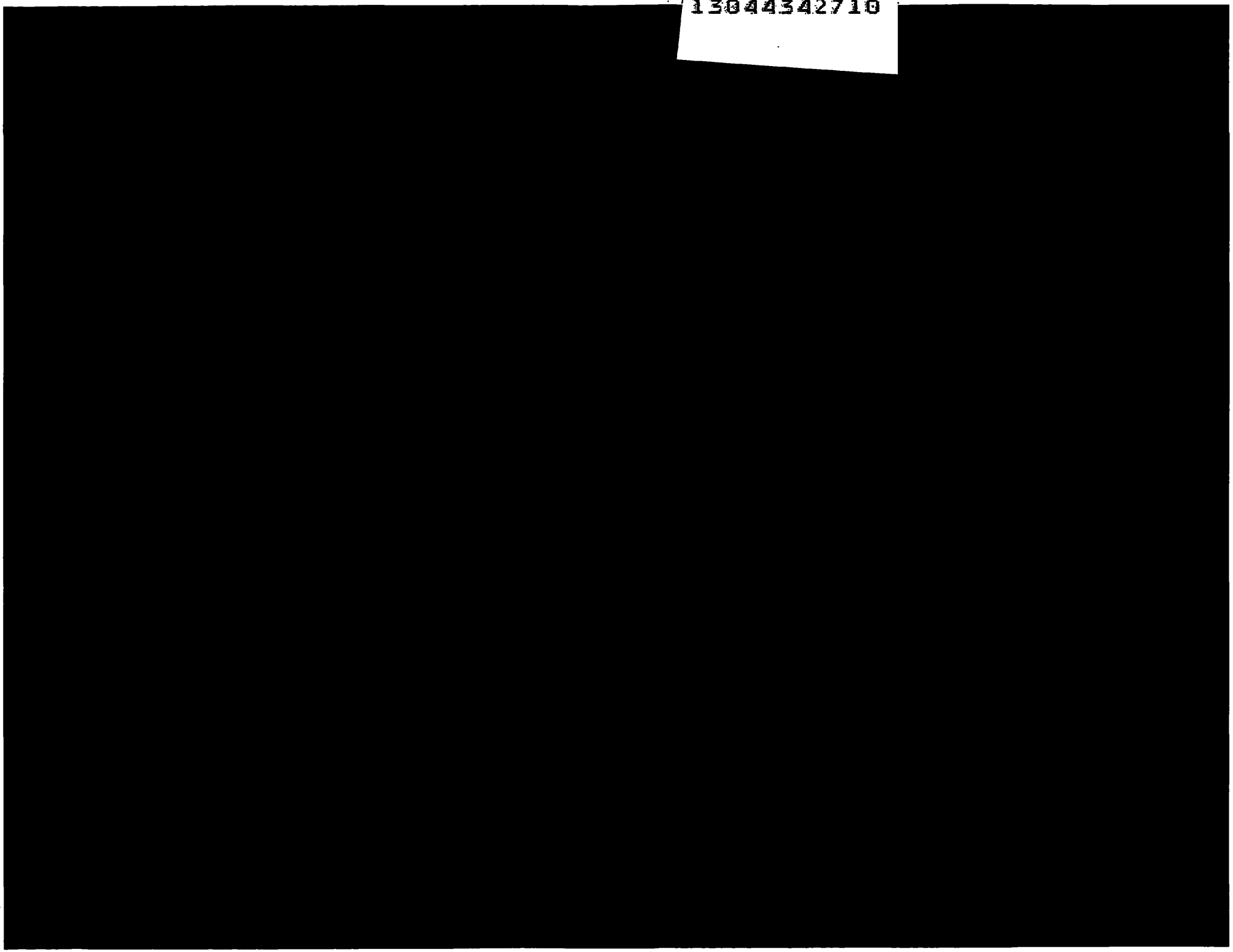
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