In the Matter of

Council for Responsible Government, Inc. and	**)**	
Its Accountability Project	**)**	**MUR 5024**
Gary Glenn	**)**	
William "Bill" Wilson	**)**	
	)	
Sierra Club, Inc.	**)**	**MUR 5154**
	)	
Michigan Democratic State Central Committee	**)**	**MUR 5146**
and Alan Helmkamp, as treasurer	**)**	

STATEMENT OF REASONS

CHAIR ELLEN L. WEINTRAUB
COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

At issue in the above trilogy of cases recently decided by the Federal Election Commission was whether certain organizations violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), by using prohibited corporate money to expressly advocate the election of federal candidates in communications they issued prior to the 2000 general election.[1] The Act prohibits corporations from using treasury funds to make a contribution or expenditure in connection with any federal election. 2 U.S.C. § 441b. The Act also requires that ads containing express advocacy disclose who paid for the ads. Based upon applicable case law and the Commission's regulations, the Office of General Counsel concluded the communications at issue contained express advocacy and were made in violation of the Act. We agreed with the legal analysis and recommendations of the Office of General Counsel. This statement explains our views.

I.

In creating the express advocacy standard in the context of independent communications, the Supreme Court sought to draw a distinction between issue advocacy and partisan advocacy focused on a clearly identified candidate. The Court

[1] These cases arose under FECA before it was amended by the Bipartisan Campaign Reform Act. The Commission decided these cases prior to the Supreme Court's decision in *McConnell v. FEC*, No. 02-1674, 2003 WL 22900467 (U.S. Dec. 10, 2003).

upheld as constitutional certain reporting requirements on expenditures made by individuals and groups that were "not candidates or political committees," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) ("*Buckley*"), but expressed concern these reporting provisions might be applied broadly to communications discussing public issues which also happened to be campaign issues. To ensure expenditures made for pure issue discussion would not be reportable under the Act, the *Buckley* Court construed these reporting requirements "to reach only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate." *Id.* (emphasis added).

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

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

On October 5, 1995, the Federal Election Commission promulgated a regulation designed "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates."[2] The Commission promulgated this regulation only after a lengthy rulemaking proceeding in which the Commission received literally thousands of comments.[3] The new regulation, which has been codified at 11 C.F.R. § 100.22, provides:

> *Expressly advocating* means any communication that—
>
> (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"

[2] 60 Fed. Reg. 52,069 (1995).
[3] 60 Fed. Reg. 35,292 (1995).

> 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
>
> (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—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (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.

11 C.F.R. § 100.22 (emphasis added). In the Explanation and Justification to the regulation, the Commission stated that subsection (b) of the regulation reflected the analysis of *Buckley's* express advocacy requirement articulated by the Ninth Circuit in *FEC v. Furgatch*, 807 F. 2d 857 (9th Cir.), *cert denied*, 484 U.S. 850 (1987) ("*Furgatch*").[4] The Commission transmitted these regulations to Congress,[5] and after thirty days passed without any resolution disapproving the express advocacy rules, the Commission implemented the regulation.

Whether a communication contains express advocacy is an important element in two statutory provisions at issue here. First, under the Act, corporations and labor organizations may not make contributions or expenditures from their treasury funds in connection with federal campaigns. 2 U.S.C. § 441b. In *MCFL*, the Supreme Court interpreted § 441b to mean expenditures for communications not coordinated with a candidate's campaign must constitute "express advocacy" to be subject to the § 441b prohibition. As a result of *MCFL*, independent corporate or labor union communications that do not contain express advocacy are allowed under the Act.

Second, the Act and Commission regulations provide that whenever any person makes an expenditure to finance communications expressly advocating the election or defeat of a clearly identified candidate, and does so through various types of mass media (*e.g.,* a broadcasting station) or through "any other type of general public political advertising," the communication is required to include a statement of sponsorship or disclaimer. 2 U.S.C. § 441d, 11 C.F.R. § 110.11. The disclaimer must state clearly

[4] *See* 60 Fed. Reg. 35,292, 35,295 (1995) *discussing Furgatch*.
[5] *See* 2 U.S.C. § 438(d).

whether the communication has been paid for by a candidate, or the candidate's authorized political committee. If the communication is paid for by other persons but authorized by a candidate (including the candidate's committee or its agents), the disclaimer shall clearly state that the communication is paid for by those other persons and authorized by the candidate or the candidate's committee. On the other hand, if the communication is not authorized by a candidate (including the candidate's committee or its agents), the disclaimer shall clearly state the name of the person who paid for the communication and state that it is not authorized by any candidate or candidate's committee. 2 U.S.C. § 441d; *see* 11 C.F.R. §§ 110.11(a)(1) and 110.11(a)(5).

II.

After reviewing the applicable case law, the Commission's regulations, the text of the advertisements, and the circumstances surrounding their broadcast, we agreed with the General Counsel's conclusion that the communications at issue in the three MURs described below contained express advocacy. As a result, we supported the General Counsel's recommendation to find reason to believe the Council for Responsible Government, Inc. (MUR 5024) and Sierra Club, Inc. (MUR 5154) violated § 441b when they used corporate funds to run certain communications before the 2000 general election. In addition, the advertisement run by the Michigan Democratic State Central Committee should have informed the voting public who paid for the ad and whether it was authorized by any federal candidate. By not including such a disclaimer on the advertisement, we agreed with the General Counsel's recommendation to find reason to believe the Michigan Democratic State Central Committee violated § 441d.

A.

On June 8, 2000, Kean for Congress filed a complaint with the Commission alleging that the Council for Responsible Government violated § 441b by using corporate monies to fund and mail brochures expressly advocating Tom Kean Jr.'s defeat in the weeks before New Jersey's June 6, 2000 Republican Primary election. Superimposed against a photograph of Mr. Kean wearing a "Tom Kean Jr. for Congress" campaign button, the first brochure attacked candidate Kean in this manner:

TOM KEAN, JR.
No experience. Hasn't lived in New Jersey for 10 years.
It takes more than a name to get things done.

The second page of the first brochure stated:

> **NEVER.** Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean Jr. may be a nice young man and you may have liked his dad a lot--but he needs more experience dealing with local issues and concerns. For the last 5 years he has lived in Boston while attending

> college. Before that he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean Jr. . . . **New Jersey Needs New Jersey leaders.**

Complaint at Attachment 1 (emphasis in the original).

Superimposed against the same photograph of Mr. Kean wearing a campaign button, a second brochure not only attacked Mr. Kean but also praised one of his opponent's in the primary, Pat Morrisey:

> For the last 5 years Tom Kean Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress--Tom never paid property taxes. No experience. **TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey faces some difficult problems. Improving schools, Keeping taxes down, fighting overdevelopment and congestion. Pat Morrisey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**

Complaint at Attachment 2 (emphasis in the original). The second page of the brochure contained photographs of Larry Bird, formerly of the Boston Celtics; United States Senator Ted Kennedy from Massachusetts; what appears to be a statue of a Revolutionary War "minuteman"; and the same photograph of Tom Kean with the "Tom Kean Jr. for Congress campaign button." Superimposed over the photographs is this message: "What do all these things have in common? They all have homes in Massachusetts." *Id.* Mr. Kean lost the Republican primary by less than 3,400 votes.

The Office of General Counsel concluded that the anti-Kean brochures contained express advocacy, General Counsel's Report at 13, and recommended that the Commission find reason to believe the Council for Responsible Government violated 2 U.S.C. §§ 433, 434, 441b and 441d. On November 4, 2003, a motion to approve the General Counsel's recommendations split 3-3. Commissioners McDonald, Thomas and Weintraub supported the General Counsel's recommendations. Commissioners Mason, Smith and Toner opposed the recommendations. Having failed to garner the four votes necessary to proceed, the Commission voted to close the file.

We agreed with the General Counsel's recommendations and have no doubt that the brochures satisfy the tests for express advocacy laid out at both 11 C.F.R. § 100.22(a) and 100.22(b). With respect to § 100.22(a), the advertisements quite clearly contain "individual words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates." As the General Counsel's Report pointed out:

> Brochure 1 has the photograph and campaign button or sticker "Tom Kean Jr. for Congress" on the first page of the two page brochure, along with language charging that Kean has no experience and has not lived in New Jersey for 10 years. This display is followed by the highlighted word "**NEVER**.**"**

Id. There is little doubt that the message of this brochure is that Tom Kean should "**NEVER**" be elected to Congress.

Similarly, Brochure 2 also satisfies the definition of express advocacy found at § 100.22(a) ("Expressly advocating means any communication that uses phrases such as 'vote Pro-Life' or 'vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice"). As the General Counsel's Report explained:

> In short, Brochure 2 clearly identifies Kean as a candidate for Congress; it prominently describes him as being inexperienced, rather than a leader, and then tells the reader that "**NEW JERSEY NEEDS NEW JERSEY LEADERS**." This is no different than identifying Kean as "pro-choice" or "pro-life" and then telling the reader to "vote pro-choice" or "vote pro-life." 11 C.F.R. § 100.22(a).

Id. (emphasis in the original).

Not only do the brochures at issue satisfy § 100.22(a), but we also believe that the brochures "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates." 11 C.F.R. § 100.22(b). With language such as "**TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS"** and "**NEW JERSEY NEEDS NEW LEADERS"** and "until he decided to run for Congress . . .[Kean] never paid property taxes," we believe "[t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning." § 100.22(b)(1). Moreover, given the repeated charges of inexperience and out-of-state residency, "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates *or encourages some other kind of action*." § 100.22(b)(2) (emphasis added).

Significantly, there is none of the issue discussion present in these brochures that so concerned the Court in *Buckley* and led to the development of the express advocacy standard. These advertisements were not tied, for example, to any legislation or lobbying effort. It cannot credibly be claimed that these were "issue ads" because they discussed no issues. The only "issues" referenced in these ads are Tom Kean's inexperience and his residency. In our view, these brochures encouraged no other form of action other

than to vote against Tom Kean, Jr. For Congress. Accordingly, we voted for the General Counsel's recommendations.[6]

B.

On November 20, 2000, a complaint was filed with the Commission alleging that Sierra Club, Inc. violated the Act by expressly advocating the election of a candidate for federal office in a voter guide distributed prior to the November 7, 2000 general election. At the top of the voter guide was the statement: "Before You Vote on November 7 Know Their Record on the Environment." The voter guide then identified Senator Charles Robb as the incumbent and his opponent, George Allen, as a "candidate for Virginia Senate." The voter used checkmarks and "thumbs down" symbols to indicate whether a candidate supported or opposed what the Sierra Club considered the correct position on three environmental questions. The voter guide also provided a percentage rating for both candidates' environmental voting records during their time in Congress. At the bottom of the page, in large type, was the message: "Sierra Club. Protect Virginia's environment, for our families, for our future."

The Office of General Counsel concluded that the voter guide contained express advocacy and recommended that the Commission find reason to believe that the Sierra Club violated 2 U.S.C. § 441b(a) by making prohibited corporate expenditures. On October 21, 2003, a motion to approve the General Counsel's recommendation failed by a vote of 3-3. Commissioners McDonald, Thomas and Weintraub supported the General Counsel's recommendations. Commissioners Mason, Smith and Toner opposed the General Counsel's recommendations.

We voted for the General Counsel's recommendations because the Sierra Club voter guide contains "express advocacy" as defined by the United States Supreme Court. In *MCFL*, the Supreme Court considered a newsletter virtually identical to the Sierra Club voter guide. The MCFL "newsletter" explained the importance of the "pro-life" issue, urged readers to "vote-pro-life," listed on later pages the candidates' views on pro-life issues, and then used an asterisk to indicate incumbent officeholders who had maintained a " '100% pro-life voting record.' " 479 U.S. at 243-44. The Supreme Court found the newsletter constituted express advocacy even though it did not contain "magic words" such as "Vote for Pro-Life Candidate Smith":

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[6] We also supported the General Counsel's view that Council for Responsible Government failed to include an adequate disclaimer under § 441d and failed to register and report as a political committee with the FEC under 2 U.S.C. §§ 433 and 434. On this latter point, the General Counsel's Report persuasively explained:

> The available information indicates that, unlike the purpose of the non-profit corporation in *MCFL*, Respondent's major purpose was indeed to influence elections. The complaint cited to statements by one of Respondent's board members, Gary Glenn, that "[t]he very purpose of our group is to influence the outcome of elections." He is further reported to have said, "[t]he outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy." As important, there is no indication that respondent had engaged in any other type of activity.

General Counsel's Report at 17.

> The [newsletter] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides *in effect* an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its *essential nature*. The [newsletter] *goes beyond issue discussion to electoral advocacy*. The disclaimer of endorsement cannot negate this fact.[7]

479 U.S. at 249 (emphasis added).

Similarly, the Sierra Club voter guide "goes beyond issue discussion to electoral advocacy." *Id.* As with the *MCFL* newsletter, the Sierra Club voter guide urged voters to vote for a specific candidate who supported a specific position. Just as the *MCFL* newsletter explained the importance of the pro-life issue and urged voters to "vote pro-life," the Sierra Club voter guide explained the importance of the environment, identified through checks and "thumbs-down" symbols the candidate whose environmental views are consistent with those of the Sierra Club (Senator Robb), and then urged voters to vote on November 7 to protect the environment.

As in *MCFL*, the language of the Sierra Club guide is "marginally less direct than 'Vote for Smith,' " but it nonetheless constitutes express advocacy. The similarity between *MCFL* and the instant matter is unmistakable. We believe if the Commission had followed the Supreme Court's decision in *MCFL*, it would have found the Sierra Club pamphlet contained express advocacy.

Unlike the advertisements in MUR 5024 (Council for Responsible Government), the Sierra Club voter guide plainly contained a substantive discussion of environmental issues, making this case a closer call. In *MCFL*, however, the Supreme Court recognized that a communication might well contain both issue discussion and express advocacy. The Court found that the MCFL newsletter could not "be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians" and that it went "beyond issue discussion to express advocacy." 479 U.S. at 249. As a result, the Court concluded the newsletter "falls squarely within § 441b." *Id.* Similarly, in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), the District Court found that a mailing that identified Newt Gingrich as "a Christian Coalition 100 percenter" and encouraged the recipient to "take [the enclosed Congressional Score card] to the voting booth" constituted express advocacy. It is difficult to distinguish that case from this one, where the Sierra Club urged readers, "Before you vote on November 7," to know that one candidate had a 77% pro-environmental voting record while the other had a 13.5% record. The advocacy message is equally clear in both cases.

[7] The Sierra Club voter guide pamphlet asserted that "[t]his guide has been prepared to educate the public on the candidates' positions on environmental issues and is not intended to advocate the election or defeat of any candidate." As *MCFL* indicated, however, "the disclaimer of endorsement cannot negate" a statement of express advocacy. 479 U.S. at 249.

The Sierra Club voter guide also constitutes express advocacy under the Commission's regulations which are based, in part, upon the *MCFL* decision. The regulations define expressly advocating as meaning "any communication that uses phrases such as . . . 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice." 11 C.F.R. § 100.22(a). As described above, the Sierra Club voter guide fits within this definition of express advocacy.

For these reasons we supported the General Counsel's finding that the Sierra Club voter guide contained express advocacy.

C.

On November 9, 2000, the Michigan Republican State Committee filed a complaint with the Commission alleging, *inter alia*, that the Michigan Democratic State Central Committee violated 2 U.S.C. § 441d by failing to include a disclaimer on a newspaper advertisement expressly advocating the election of the Democratic candidate for President in 2000. The advertisement consisted of a letter signed by 32 individuals comparing the positions of Al Gore and George W. Bush on issues relating to Arab Americans. After discussing five issues, the advertisement states "we support the Democratic ticket because on the whole, we agree with it more than we disagree," and that "[w]e believe that the Democratic Party, more than the Republican Party is listening because the vast majority of our allies in Congress are Democrat." General Counsel's Report at Attachment 1. The advertisement concludes by saying "[w]e need to give our allies a President who will work with them to end profiling, to end secret evidence and to bring a just peace in the Middle East." *Id.*

The Office of General Counsel concluded that the newspaper advertisements contained express advocacy and recommended that the Commission find reason to believe the Michigan Democratic State Central Committee violated 2 U.S.C. § 441d.[8] The Commission approved that recommendation by a vote of 5-1 with Commissioner Smith dissenting. The Commission then failed to approve the General Counsel's recommendation to conduct discovery in this matter by a vote of 2-4 with Commissioners Mason and Toner voting approval and Commissioners McDonald, Smith, Thomas and Weintraub voting in opposition. The Commission then voted to approve a motion by Commissioner Thomas to take no further action on the reason to believe finding by a vote of 6-0.

We agreed with the General Counsel's conclusion that the newspaper advertisement contained express advocacy. Having just seen the Commission fail by 3-3 votes to pursue examples of express advocacy in MUR 5024 (Council for Responsible

[8] The Office of General Counsel recommended taking no action at this time on an allegation that the Michigan Democratic State Central Committee funded the advertisement with corporate or labor treasury money. The Office of General Counsel planned to address this issue in discovery requests. *See* General Counsel's Report at 12.

Government) and MUR 5154 (Sierra Club), however, we believed it would be unfair to single out the Michigan Democratic State Central Committee and pursue the express advocacy contained in the MUR 5146 advertisement. Accordingly, we supported the motion to find reason to believe the Michigan Democratic State Central Committee violated the Act, but could not support the motion to take further action.

12/16/03	/ s /
Date	Ellen L. Weintraub Chair
12/16/03	/ s /
Date	Scott E. Thomas Commissioner
12/16/03	/ s /
Date	Danny Lee McDonald Commissioner