IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL ELECTION COMMISSION Plaintiff-Appellant, v. CHRISTIAN ACTION NETWORK, INC., and MARTIN MAWYER, Defendants-Appellees.	No. 95-2600 OPPOSITION TO APPLICATION FOR ATTORNEY'S FEES

OPPOSITION TO DEFENDANTS-APPELLEES' APPLICATION FOR FEES

The Federal Election Commission ("Commission" or "FEC") hereby opposes the Defendants-Appellees' Application for Fees and requests that the application of Martin J. Mawyer and the Christian Action Network (collectively "CAN") for attorney's fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, be denied. In a separate response filed with this opposition, the Commission requests that this matter be determined in the first instance by the district court below.

Although CAN was the prevailing party on the major issue litigated in this case, see FEC v. Christian Action Network, Inc., No. 95-2600 (4th Cir. Aug. 2, 1996), 92 F.3d 1178 (table), aff'ing per curiam, 894 F. Supp. 946 (W.D. Va. 1995), the position of the FEC was substantially justified and was not in bad faith, thus prohibiting an award of fees under EAJA. Even if the

Court were to find that an award of fees is permissible or required, CAN's request includes excessive hours and billing rates that must be reduced (see infra pp. 14-29).

I. BACKGROUND

A. LEGAL

The Federal Election Campaign Act ("Act" or "FECA") prohibits corporations and unions from using general treasury funds to finance contributions and expenditures in connection with federal elections. 2 U.S.C. § 441b. The Supreme Court has "recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form,' " Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659 (1990) (quoting FEC v. National Conservative Political Action Comm., 470 U.S. 480, 500-01 (1985)), and has also long recognized the compelling governmental interests in the public disclosure of independent campaign expenditures, Buckley v. Valeo, 424 U.S. 1, 66-68, 80-82 (1976).

In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) ("MCFL"), the Supreme Court narrowed the prohibition on corporate expenditures to apply only to expenditures for communications that contain "express advocacy" of the election or defeat of a clearly identified candidate for federal office. For its narrowing construction of 2 U.S.C. § 441b, the Court relied upon its earlier decision in Buckley, which had "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." MCFL, 479 U.S. at 249. The purpose of the express advocacy standard was to avoid infringement of genuine issue discussion by limiting the statute's application to "spending that is unambiguously related to the campaign of a particular federal candidate." Buckley, 424 U.S. at 80. In its discussion, the Court gave examples of "express

words of advocacy," which included phrases "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Id. at 44 n.52.

B. FACTUAL

The underlying civil enforcement action concerns the Christian Action Network, Inc., a nonprofit corporation that expended corporate funds for television and newspaper advertisements that attacked the campaign of Bill Clinton in the 1992 presidential election. CAN's television ad, entitled "Clinton's Vision for a Better America," clearly identified candidates Clinton and Gore, and was aired at least 250 times in the weeks before the election. The ad begins with a picture of Clinton's smiling face superimposed over an American flag. As the district court explained, however, "as the narrator begins to describe Clinton's alleged support for 'radical' homosexual causes, Clinton's image dissolves into a black and white photographic negative." 894 F. Supp. at 948. The video then abruptly cuts to various clips of people, apparently gay men and lesbians, participating in a political march. As provocative, stereotyped images of homosexuals are shown, the announcer lists purported campaign proposals by candidates Clinton and Gore to expand homosexual rights, including proposals to "allow[] homosexuals in the armed forces" and to give homosexuals "special civil rights." While the scenes from the march continue, the announcer asks rhetorically, "Is this your vision for a better America?" See id. at 960-67 (scenes from video).

In addition to the television ad, CAN placed a full-page newspaper advertisement in the Richmond Times-Dispatch on October 15, 1992, the date of a presidential debate in Richmond, Virginia. The ad specifically refers to the presidential campaign and that evening's nationally televised presidential debate in Richmond, and it identifies itself as a "Paid Political Advertisement." In part, the ad states, "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 [job quotas and special civil rights] for homosexuals.... When 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." J.A. 62.[1] CAN placed another full-page newspaper advertisement in the Washington Times on October 26, 1992, eight days before the election, which was nearly identical to the prior ad. J.A. 63.

The Commission found probable cause to believe these advertisements violated 2 U.S.C. § 441b and, after conciliation attempts failed, voted to authorize a civil suit in federal district court against CAN. The complaint alleged, inter alia, that CAN violated the statutory prohibition against corporate expenditures in connection with federal elections by using general corporate treasury funds to pay for advertisements that expressly advocated the defeat of Bill Clinton.

On June 28, 1995, the district court dismissed the Commission's action. The court found that the "advertisements at issue do not contain explicit words or imagery advocating electoral action.... Therefore, the advertisements are fully protected as 'political speech' under the First Amendment. Their financing is not governed by FECA and the FEC lacks jurisdiction to bring this suit." 894 F. Supp. at 948. The court concluded that the advertisements "clearly identified" the 1992 Democratic presidential and vice-presidential candidates, and that they were "openly hostile to the proposals believed to have been endorsed by the two candidates." Id. at 953. The court held, however, that "[w]ithout a frank admonition to take electoral action, even admittedly

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[1] Citations to "J.A." refer to the Joint Appendix filed with the Fourth Circuit on December 4, 1995.

negative advertisements such as these, do not constitute 'express advocacy' as that term is defined in Buckley and its progeny." Id.

The court found "suspect" the Commission's argument that unambiguous imagery, and not only words, could satisfy the constitutional requirement of "express advocacy." 894 F. Supp. at 955 n.12. Without citation, the court stated that "messages conveyed by imagery are susceptible to even greater misinterpretation than those that are conveyed by the written or spoken word," and the court thus refused to "accept the FEC's invitation to delve into the meaning behind an image." Id. at 958. The court also declined to give any weight to the context provided by the timing of the advertisements, i.e., shortly before the presidential election and in conjunction with the presidential debate in Richmond. Id. Although the district court attempted to distinguish (id. at 958-59), rather than repudiate, the Ninth Circuit's decision in FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987), it clearly rejected certain key points in Furgatch, including the Ninth Circuit's willingness to give significance to the temporal context of a communication when interpreting its meaning.

On August 2, 1996, the Fourth Circuit affirmed the district court decision in an unpublished, per curiam decision. The appellate court found "no error in the thorough opinion of the court below," and "affirm[ed] on the reasoning of the district court." Slip op. at 3-4.

II. THE FEC'S POSITION WAS SUBSTANTIALLY JUSTIFIED AND SPECIAL CIRCUMSTANCES MAKE AN AWARD OF FEES UNJUST

In 28 U.S.C. § 2412(d)(1)(A), EAJA authorizes an attorney's fees award against the government "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." As a "partial waiver of sovereign immunity," EAJA "must be strictly construed in favor of the United States." Ardestani v. INS,

502 U.S. 129, 137 (1991). The determination of whether the FEC's position was substantially justified involves a "separate and distinct [standard] from whatever legal standards governed the merits phase of the case." FEC v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986). See also Griffon v. United States Dep't of Health & Human Servs., 832 F.2d 51, 52 (5th Cir. 1987). The mere fact that the government lost on the merits does not mean that its position was not substantially justified, because that presumption "would virtually eliminate the 'substantially justified' standard from the statute." United States v. Paisley, 957 F.2d 1161, 1167 (4th Cir.) (citation and quotation marks omitted), cert. denied, 506 U.S. 822 (1992).

> The standard ... should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing.

H.R.Rep. No. 1418, 96th Cong., 2d Sess. 11, 1980 U.S.C.C.A.N. 4953, 4989-90 (quoted in Griffon, 832 F.2d at 52); see also FEC v. Rose, 806 F.2d at 1090.

The government's position is "substantially justified" for EAJA purposes if it is "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988).

> [A]s between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main" — that is, justified to a degree that could satisfy a reasonable person.

Id. Accord Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 137 n.4 (4th Cir.), cert. denied, 510 U.S. 864 (1993). Indeed, it is possible for government action to be reversed as "arbitrary and capricious" and yet still be "reasonable in fact and law" under EAJA. Abernathy v. Clarke, 857 F.2d 237, 239 (4th Cir. 1988) (citations omitted). This standard authorizes an award of attorney's fees only "in a very small category of cases." Pierce, 487 U.S. at 574.

The Equal Access to Justice Act "redresses governmental abuse" and "it was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong." Roanoke, 991 F.2d at 139. In addition, the courts

> are mindful in this regard that the "special circumstances" provision of section 2412(d)(1)(A) was in part designed to " 'insure that the Government is not deterred from advancing in good faith ... novel but credible ... interpretations of the law that often underlie vigorous enforcement efforts.' "

Griffon, 832 F.2d at 53 (citation omitted); H.R.Rep. No. 1418, 96th Cong., 2d Sess. 11, 1980 U.S.C.C.A.N. 4953, 4990. In lawsuits involving first-impression interpretations of statutes, many circuits, including the Fourth Circuit, have found that the United States is presumptively substantially justified within the meaning of EAJA if its position is a reasonable legal position and the question is being addressed for the first time in the circuit. See Hyatt v. Shalala, 6 F.3d 250, 256 (4th Cir. 1993) ("The Secretary was justified in litigating the issue on appeal because it was still one of first impression in this circuit."); TKB Int'l, Inc. v. United States, 995 F.2d 1460, 1468 (9th Cir. 1993); Stebco, Inc. v. United States, 939 F.2d 686, 688 (9th Cir. 1990); De Allende v. Baker, 891 F.2d 7, 12-13 (1st Cir. 1989); Griffon, 832 F.2d at 52-53. See also Boudin v. Thomas, 732 F.2d 1107, 1116 (2d Cir. 1984); Spencer v. NLRB, 712 F.2d 539, 559 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984).

Here, the Commission's action against CAN involved a novel set of facts and an issue of first impression for this Circuit. The Commission's interpretation of "express advocacy" embraces the standard adopted by the Ninth Circuit in Furgatch, and it had never been addressed by the Fourth Circuit before this case. Although the First Circuit has recently created a split in the circuits by directly rejecting the Commission's interpretation of express advocacy and the

Ninth Circuit's approach, see Maine Right to Life Comm. v. FEC, 98 F.3d 1 (1st Cir. 1996) (per curiam), that decision was handed down after the Fourth Circuit had already ruled in this case. No other circuit has directly addressed this standard. Contrary to CAN's suggestion (Br. 4-5), in the twenty years since the Supreme Court adopted the express advocacy requirement in Buckley, there has been little litigation about the meaning of this term. And in the only case in which the Supreme Court itself has applied the express advocacy test to a specific set of facts, the Court agreed with the Commission that a somewhat "less direct" communication nonetheless contained express electoral advocacy "squarely" within the meaning of section 441b, even though the message had been combined with issue advocacy. MCFL, 479 U.S. at 249.

CAN's television advertisement involves the first and only lawsuit the Commission has ever brought in which the Commission found express electoral advocacy consisting not of words alone, but of the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film editing, photographic techniques, and music, involving highly charged rhetoric and provocative images which, taken as a whole, sent an unmistakable message to oppose Bill Clinton's election. Although the district court declined to "accept the FEC's invitation to delve into the meaning behind an image," 894 F. Supp. at 958, it nevertheless agreed with the FEC that "it is beyond dispute that the advertisements [in this case] were openly hostile to the [alleged] proposals ... by the two candidates," id. at 953. In light of the indisputable impact of the ad's non-verbal message, the Commission was certainly reasonable in asking the courts in this Circuit to consider — as a matter of first impression before any court — whether such imagery combined with words could constitute "express advocacy."

A critical point under EAJA is that the government's position must be judged "not [by] what the law now is" as a result of the decision in the case, "but what the Government was

substantially justified in believing it to have been" at the time it adopted and defended its position. Pierce, 487 U.S. at 561. Since, as the Supreme Court noted, this is an "entirely historical" inquiry, id., the issue before this Court is limited to whether it was reasonable for the Commission to allege that CAN's advertisements constituted express advocacy under the precedent then in existence. Given that Furgatch was the only appellate decision that had ever set out a framework for analyzing what constitutes express advocacy, the Commission was substantially justified in basing its decision on the Furgatch approach: whether a reasonable person would understand CAN's advocacy to be an unambiguous exhortation against Clinton's candidacy.[2]

Under Furgatch, the Commission was substantially justified in believing that a reasonable person would find CAN's advertisement to be such an exhortation, in part because its imagery and provocative quality are more expressive and forceful than mere words. In the ad, CAN is self-identified as a group espousing Christian, heterosexual, and traditional family values, and Bill Clinton is depicted as having a "vision for America" supporting the agenda of the radical wing of the gay rights movement. Clinton's image is "negated" through photographic techniques, and his alleged agenda was important only because he was a candidate for president. When the ad was aired, Clinton was not an incumbent president but the governor of Arkansas, and he had no authority to implement his agenda in the viewers' jurisdictions. The video refers explicitly to national concerns that were relevant only to Clinton's candidacy for president, such

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[2] In addition, the Supreme Court has suggested that pictures could constitute express advocacy. In Buckley, the Court recognized that a candidate can be "clearly identified" with a "photograph or drawing, or other unambiguous reference," 424 U.S. at 43 n.51, and the Court explicitly likened its requirement of express advocacy to the "explicit and unambiguous reference to the candidate" required by the Act to make a candidate "clearly identified." Id. at 43.

as his alleged commitment to permit homosexuals to serve in the armed forces. It was not unreasonable for the Commission to believe that any reasonable person would have understood that the ad's explicit focus was on Clinton's presidential campaign agenda, not on a discussion of gay rights that also happened to include a reference to the candidate.

The context and timing of the ads, which appeared shortly before the 1992 election, were ultimately afforded little, if any, importance by the district court, but it was not unreasonable for the Commission to follow the contrary approach of the Ninth Circuit in Furgatch, which was bolstered by the Supreme Court's reasoning in Buckley and MCFL. Given Furgatch's holding that "when and where speech takes place can determine its legal significance," 807 F.2d at 863, as well as the Supreme Court's own examples of "express advocacy," see Buckley, 424 U.S. at 44 n.52, the Commission was reasonable in believing that applicable precedent recognized that the timing of a political ad could be quite relevant in deciding whether it was sufficiently unambiguous to be "express advocacy." For example, the Supreme Court's illustration of "support" Smith, if published after an election, might be urging monetary, moral, or ideological support, but it certainly could not be urging a vote for Smith in the completed election. Since it is only the unstated but understood context of an election campaign that gives many of the Supreme Court's examples of express advocacy their unambiguous meaning, the Commission was justified in relying upon the understood context of CAN's advertisements.

Finally, CAN erroneously suggests (Br. 4-5) that the Commission's prior unsuccessful lawsuits are sufficiently on point to make the case against CAN unreasonable. In making these arguments, CAN ignores the cases that have agreed with the Commission's position on express advocacy, see supra pp. 7-8, and in contrast to MCFL and Furgatch, most of the cases relied upon by CAN are unreviewed district court decisions, which "have no weight as precedents, no

authority." Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995). See also Richardson v. Selsky, 5 F.3d 616, 623 (2d Cir. 1993) ("[A] district court decision does not 'clearly establish' the law, even in its own circuit.").

The other decisions relied upon by CAN were not only without binding authority in this Circuit, but also did not address the kind of facts present here. See Furgatch, 807 F.2d at 861 ("Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost sui generis, offering limited guidance for subsequent decisions."). None of those cases involved video or provocative imagery, and their facts are materially different. In FEC v. Central Long Island Tax Reform Immediately Comm. ("CLITRIM"), 616 F.2d 45, 53 (2d Cir. 1980) (en banc), which was decided before MCFL, the Second Circuit analyzed a printed leaflet that focused on incumbents' voting records, identified no electoral opponents, and contained "no reference anywhere ... to the congressman's party [or] to whether he is running for re-election." CAN's advertisements, on the other hand, specifically identified Bill Clinton as the "Democratic Presidential Candidate" (J.A. 61) and addressed issues that had nothing to do with his authority as the incumbent governor or Arkansas, but could only be relevant to the viewers if Bill Clinton became President. Of course, the leaflet in CLITRIM contained none of the imagery and charged rhetoric that led the Commission to conclude that the CAN television advertisement was an unambiguous exhortation against Clinton's candidacy.

The appellate decision in FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995), which CAN essentially ignores (Br. 4), specifically declined to affirm the district court's conclusion that the fundraising letters contained no express advocacy. The court stated that "the 'express advocacy' question [was] more difficult to resolve" and instead decided the case on

SEF's status as a nonprofit, ideological corporation. 65 F.3d at 290 n.2. On the other hand, in deciding whether the solicitation was subject to the disclosure requirements of 2 U.S.C. § 441d(a)(3), the court found that the solicitation left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." Id. at 295. The Second Circuit's opinion certainly did not undermine the Commission's position in this case or address the appropriate treatment of imagery or television advertisements.

Similarly, contrary to CAN's argument (Br. 5), the Commission in FEC v. AFSCME, 471 F. Supp. 315 (D.D.C. 1979), did not rely upon the kind of imagery at issue in this case.[3] Although the "Nixon-Ford" poster in that case included a picture, it was not a video and the picture conveyed less meaning than the poster's words quoting Mr. Ford's belief in Mr. Nixon's innocence. In any event, the court's opinion did not mention the role of imagery or the interpretation of express advocacy pressed by the Commission in this case; even if it had, one district court opinion from another circuit that preceded the MCFL decision could hardly be binding now on the Fourth Circuit.

Finally, Faucher v. FEC, 928 F.2d 468, 471 (1st Cir.), cert. denied, 502 U.S. 820 (1991), and Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986) are completely irrelevant here, for neither of these addressed the standard for determining whether a communication contains express

[3] In its brief on the merits, CAN did not argue that the AFSCME case was litigated or decided on the basis of whether its imagery constituted express advocacy. See CAN's Brief at 36-37 (4th Cir.).

advocacy.[4] The First Circuit in Faucher invalidated a Commission regulation on its face because it explicitly applied to issue advocacy; that case did not consider whether any particular communication constituted express advocacy, and the opinion cited Furgatch with approval. Likewise, the Orloski decision contains no discussion of whether particular communications constitute express advocacy, but instead gives great deference to the Commission's interpretation of the Act. 795 F.2d at 164 ("The Supreme Court has held that the FEC is 'precisely the type of agency to which deference should presumptively be afforded.' ") (quoting FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981)).

In any event, even if CAN could point to a string of losses on point — which it cannot — the Supreme Court has stated that it "cannot say that this category of objective indicia is enough to decide" whether the government's position is substantially justified. Pierce, 487 U.S. at 569. As the district court aptly noted, 894 F. Supp. at 959, it must be remembered that the "FEC is in the precarious position of attempting to thwart the misuse of corporate funds to back or discredit candidates, while at the same time attempting to avoid undue government regulation of protected political speech." Especially given that "[m]ore and more ... [political] advertisements are disseminated for the purpose of stirring emotion rather than provoking lucid political discussion" (id.), the Commission was reasonable in pursuing a "novel but credible ... interpretation[]" (1980 U.S.C.C.A.N. at 4990; Griffon, 832 F.2d at 53 (citation omitted)) to clarify the law and to

[4] Similarly irrelevant is FEC v. Colorado Republican Federal Campaign Comm., 59 F.3d 1015, 1023 & n.10 (10th Cir. 1995), rev'd on other grounds, 116 S.Ct. 2309 (1996), in which the court's brief mention of "express advocacy" appears in a footnote and is dictum. It is noteworthy that the Commission did not allege that the advertisement in Colorado Republican contained express advocacy, but litigated the case on an entirely different basis. The court of appeals found a violation as alleged by the Commission, without regard to express advocacy, and the Supreme Court decided the case on entirely different grounds without mentioning express advocacy. Thus, the express advocacy question was not even at issue in Colorado Republican.

guard against an unnecessarily restrictive interpretation of the Act — even if its position did not ultimately prevail.

III. EVEN IF THE COURT AWARDS FEES, CAN HAS FAILED TO DEMONSTRATE THAT THE STATUTORY CAP OF $75 PER HOUR SHOULD BE INCREASED

As applied in this case, EAJA would allow its statutory cap of $75 per hour to be increased only if (a) "the court determines that an increase in the cost of living or special factor ... justifies a higher fee" (28 U.S.C. § 2412(d)(2)(A)), or if (b) CAN demonstrates that the Commission acted in bad faith, which under the common law might allow for a higher fee (28 U.S.C. § 2412(b)). Each of these possibilities will be addressed in turn.

A. CAN Has Not Adequately Shown That An Increased Fee Is Warranted Due To Inflation Or Special Factors

Under section 2412(d)(2)(A), an increase in the statutory cap of $75 to account for inflation is not automatic, but "remains a decision to be made at the discretion of the district court." Payne v. Sullivan, 977 F.2d 900, 903 (4th Cir. 1992). To support its claim for fees above $75 per hour, CAN has done little (Br. 11-12) more than cite statistics about the increase in the Consumer Price Index since 1981, the year EAJA was enacted. But this Circuit has held that the "refusal to grant an upward adjustment, when presented with nothing except an increase in the Consumer Price Index, does not constitute an abuse of [the district court's] discretion." May v. Sullivan, 936 F.2d 176, 178 (4th Cir. 1991) (per curiam), cert. denied, 502 U.S. 1038 (1992). See also Payne, 977 F.2d at 903 n.1. To award an increase automatically because of general inflation "'would render the cap nothing more than advisory despite Congress' expressed intent to permit higher awards only in rare cases.'" May, 936 F.2d at 178 (quoting Pierce, 487 U.S. at

579-80 (Brennan, J., concurring)).[5] CAN, for example, has done nothing to meet its burden to present evidence about rates for attorney's fees and inflation in the "particular locale" where this case was litigated. Payne, 977 F.2d at 903 (citation omitted); see also Baber v. Sullivan, 751 F. Supp. 1542, 1544 (S.D. Ga. 1990).[6]

> [T]he burden is on the fee applicant to produce satisfactory evidence — in addition to the attorney's own affidavits — that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984) (emphasis added). "The applicant bears the burden of producing satisfactory evidence that the requested rate is in line with prevailing market rates." Norman v. Housing Auth. of City of Montgomery, 836 F.2d 1292, 1299, 1305 (11th Cir. 1988) (criticizing applicants for failure to present evidence of market rates in Montgomery).

Furthermore, the "special expertise" that some of CAN's attorneys claim to have in "Federal Election Commission matters" (CAN Br. 12) is not the kind of "special factor" that allows the statutory cap to be increased under section 2412(d)(2)(A). The Supreme Court has cautioned that this exception must be read narrowly to refer to some kind of "specialized skill ... as opposed to an extraordinary level of the general lawyerly knowledge." Pierce, 487 U.S. at 572. The examples the Court has given are "patent law, or knowledge of foreign law or language." Id. "In a sense, every attorney practicing within a narrow field could claim specialized knowledge," Perales v. Casillas, 950 F.2d 1066, 1078 (5th Cir. 1992), and the

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[5] While some circuits appear to award cost-of-living adjustments routinely, see, e.g., Wilkett v. ICC, 844 F.2d 867, 874-75 (D.C. Cir. 1988), the law of this Circuit is to the contrary.

[6] As CAN concedes (Br. 2 n.2), although EAJA was amended in 1996 to increase the cap on hourly rates to $125 per hour, that amendment only applies to actions commenced after its effective date, March 29, 1996, and is thus inapplicable here. See Jove Engineering, Inc. v. IRS, 92 F.3d 1539, 1559 n.15 (11th Cir. 1996).

exception cannot be allowed to swallow the rule. The test under Pierce is not whether an attorney has gained a specialized knowledge of an area of the law, but whether the individual case presents such an "unusual" situation that it requires someone of "specialized training and expertise unattainable by a competent attorney through a diligent study of the governing legal principles." Raines v. Shalala, 44 F.3d 1355, 1361 (7th Cir. 1995) (quotation omitted). The D.C. Circuit has noted that the "two instances cited by Pierce ... as 'identifiable practice specialt[ies]' justifying awards in excess of the [EAJA] cap, 'patent law, or knowledge of foreign law or language,' are both specialties requiring technical or other education outside the field of American law." Waterman S.S. Corp. v. Maritime Subsidy Bd., 901 F.2d 1119, 1124 (D.C. Cir. 1990).

While CAN's counsel may have experience dealing with the FEC, this case essentially centered on a First Amendment issue in the broader context of constitutional law. (The ACLU of Virginia filed an amicus brief on CAN's behalf.) Competence in this area does not require specialized knowledge in the same sense as patent or foreign law. Especially given the few published opinions involving express advocacy, it should not take long for most litigators to get up to speed on this case. See, e.g., Action on Smoking & Health v. Civil Aeronautics Bd., 724 F.2d 211, 218 (D.C. Cir. 1984) (challenge to regulations concerning smoking on airplanes did not require attorneys with expertise in the area of smoking regulation). In the absence of any evidence that CAN had trouble "secur[ing] representation" and that "by increasing the fee, the availability of lawyers for these cases will actually be increased," the statutory cap should not be increased based on the alleged special expertise of CAN's counsel. Perales, 950 F.2d at 1078.

B. THE COMMISSION DID NOT ACT IN BAD FAITH

CAN fails to demonstrate that the Commission acted in bad faith, so its claim for hourly rates (Br. 10) "without regard to the statutory cap" must be rejected. "The common law allows awards of attorneys' fees in only a few exceptional cases, such as when the losing party has wilfully disobeyed a court order or has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Hyatt v. Shalala, 6 F.3d at 254. The burden of proof in such exceptional cases rests with the party seeking attorney's fees. Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1117 (9th Cir. 1988), rev'd on other grounds, 893 F.2d 205 (9th Cir. 1989) (en banc).

As a starting point, the Commission is " 'entitled to the normal presumption of good faith that, in courts of law, government officials still enjoy, that must be refuted by well-nigh irrefragable proof.' " Marine Shale Processors, Inc. v. EPA, 81 F.3d 1371, 1385 (5th Cir. 1996) (quoting Starr v. FAA, 589 F.2d 307, 315 (7th Cir. 1979)), cert. denied, 65 U.S.L.W. 3205 (Jan. 6, 1997) (No. 96-430). "Unsubstantiated suspicions and allegations are not enough. The proof must be almost " 'irrefragable.' " Spezzaferro v. FAA, 807 F.2d 169, 173 (Fed. Cir. 1986) (citation omitted). See also, e.g., U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991) ("We generally accord Government records and official conduct a presumption of legitimacy."); Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994) ("agency actions ... are normally entitled to a presumption of good faith"); FTC v. Invention Submission Corp., 965 F.2d 1086, 1091 (D.C. Cir. 1992) ("As we have so often said, 'agencies are entitled to a presumption of administrative regularity and good faith ...' ") (citation omitted), cert. denied, 507 U.S. 910 (1993).

"Because an award of attorneys' fees is extraordinary and punitive, standards for bad faith for purposes of awarding attorneys' fees under the EAJA are stringent. The bad faith

inquiry turns on the party's subjective bad faith." Bergman v. United States, 844 F.2d 353, 357 (6th Cir. 1988) (citations omitted). Here, there was no such bad faith. Instead, the underlying action was brought pursuant to the Commission's normal procedures, and the mere fact that the Commission's position was rejected in court is not evidence that the Commission's motivation was anything other than to fulfill its obligation to enforce the statute as best it can. CAN has cited no evidence that suggests any irregularity in the way the case was investigated or pursued, or that otherwise impugns the motives of the Commission in deciding to bring a lawsuit against CAN. This case is wholly different from the situation in Hyatt v. Shalala, where the district court found that the "Secretary's position is not even marginally justifiable, and it may fairly be characterized as outrageous, at best, both before this case was filed and during the course of this suit." 6 F.3d at 255. In Hyatt, the Secretary repeatedly refused to follow circuit precedent, id., whereas here there was no applicable circuit precedent, let alone a precedent that was knowingly flouted. Even in Hyatt, this Court found the Secretary's position in conflict with Circuit precedent "valid" before the denial of his petition for a writ of certiorari, id. at 256, whereas here the entire litigation took place before any potential Supreme Court review could have been obtained.

Next, CAN suggests (Br. 4-6) that the mere fact that the Commission has lost a few cases involving express advocacy demonstrates that the Commission acted with bad faith in this particular case. First, as we have already explained (see supra pp. 10-13), none of the prior express advocacy cases was directly on point, and none represented binding precedent in this Circuit. Moreover, the only appellate decision which had established a general framework for analyzing express advocacy, Furgatch, was adopted as part of the Commission's position. Second, the Commission's prior "actions and complaints are not part of this litigation; the

[Commission's] conduct in [those] other matters is irrelevant to the question of bad faith in this lawsuit." Action on Smoking, 724 F.2d at 217-18.

Third, and perhaps most intolerable, CAN accuses (Br. 5) the Commission of an "improper quest to intimidate political speakers," without a shred of evidence about the Commission's intent other than a selective list of the Commission's litigation history and a "report" that CAN attempts to have "incorporated" in its brief as "argument." If a government agency could be found to have acted in bad faith merely because an outside interest group or independent commentator derides a few court losses and equates them with improper intimidation, it is hard to imagine an agency or government prosecutor that could escape such liability. The Commission has the "weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression." CLITRIM, 616 F.2d at 55 (Kaufman, C.J., concurring). As it strives to fulfill its congressional mandate, the Commission may well arouse strong criticism, but such responses should not be mistaken for bad faith on the part of this non-partisan agency.[7]

To the extent that CAN truly means to incorporate its more than 30 pages of attachments as additional legal argument, we respectfully request that such material be stricken or disregarded. These attachments are more than twice the length of CAN's own brief, they are based on and include much material that is outside the record in this case, they contain alleged

[7] CAN's claim is also undermined by the fact that no more than three of the six members of the Commission may be affiliated with the same political party, 2 U.S.C. § 437c(a)(1). Since the Commission must gather four votes to authorize any investigation or enforcement action, 2 U.S.C. § 437g(a), no such action can be taken unless support for it crosses political lines.

facts and argument that are overwhelmingly irrelevant to this action, and responding to their various accusations would unnecessarily expand this litigation.[8]

To the extent that CAN attempts to incorporate these attachments to provide additional factual evidence, we again request that such material be stricken or disregarded. Some of the facts contained in the attachments are untrue, and some of the mistaken conclusions drawn from these untruths are based on a misunderstanding of the Commission's actions and the legal issues at stake in certain cases. In any event, the attachments contain potential evidence that is not part of the record before this Court, and they should be disregarded under Fed.R.App.P. 10(a). See Aquino v. Stone, 957 F.2d 139, 144 (4th Cir. 1992) (supplemental evidence of alleged bias of investigator rejected as not part of record below); Paradis v. Arave, 20 F.3d 950, 958-59 nn.4-5 (9th Cir. 1994) (claims of judicial bias and ineffective assistance of counsel could not be evaluated based on statements published in a newspaper article not part of the record), cert. denied, 115 S.Ct. 915 (1995); Schino v. United States, 209 F.2d 67, 70 (9th Cir. 1953) ("the briefs refer to several newspaper articles not put in evidence, of which we cannot take notice"), cert. denied, 347 U.S. 937 (1954).

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[8] To give one example, the editorial and op-ed piece submitted by CAN have virtually nothing to do with the issues involved in the underlying litigation, and have absolutely no relevance to the Commission's alleged bad faith herein. The Commission's pending case against the Christian Coalition, FEC v. Christian Coalition, No. 96-1781 (JHG) (D.D.C. filed July 30, 1996), does not allege that the corporation's voter guides constituted express advocacy, but that the corporation's expenditures for the guides were in some instances impermissibly coordinated with certain federal candidates. Also, any comparison between that case and the alleged wrongdoings of the AFL-CIO is irrelevant and premature. CAN does not, and cannot, allege that the Commission has yet made any determination as to whether any action against that organization is warranted. The other criticism in these editorials can be rebutted as well, but little of it has any relevance to what is before this Court. If the Court concludes that any of the opinions expressed in these editorials is relevant to its deliberations, the Commission would request an opportunity to address those points the Court finds relevant.

In addition, CAN's attachments contain hearsay and should be stricken on that basis as well. Wilson v. Upjohn Co., 808 F. Supp. 1321, 1323 n.2 (S.D. Ohio 1992) ("[M]uch of what the Plaintiffs ... submit as 'evidence,' is clearly inadmissible hearsay. The Plaintiffs offer in support of their motion, newspaper and magazine articles, television show transcripts ..., and other such matter. This Court has been more than clear about the relevance of this material, as has been the Sixth Circuit.... It is unquestionably improper to consider such information...") (citation omitted). Finally, if "[a]rgument of counsel is not evidence ...," Morrissey v. William Morrow & Co., Inc., 739 F.2d 962, 967 (4th Cir. 1984), cert. denied, 469 U.S. 1216 (1985), then surely the arguments of outside interest groups not party to this litigation are likewise not evidence.

Finally, CAN notes (Br. 6) that during its investigation, the Commission sought information about CAN's contributors (see J.A. 145), but the conclusion CAN draws from this request is entirely unwarranted. The obvious reason for this request, which the district court recognized, was that the Commission was "anticipating a potential defense." 894 F. Supp. at 948 n.2. See CAN's Brief in Support of Defendants' Motion to Dismiss (filed Jan. 9, 1995; district court docket entry 8) at 10 n.2 ("MCFL judicially created an exception for nonprofit corporations formed for political advocacy, but the FEC will disputes CAN's qualifications for this exception."). Under the judicially created exemption from § 441b first enunciated in MCFL, certain nonprofit, ideological corporations are not prohibited from making independent expenditures from their corporate treasuries. To qualify for this exemption, a nonprofit corporation must show that it does not accept contributions from business corporations or labor unions. See MCFL, 479 U.S. at 264. Thus, the Commission's lawful purpose was to investigate whether CAN might qualify for this exemption. Moreover, if the Commission were truly

motivated to abuse the discovery process to intimidate CAN's contributors, it is unlikely that the Commission would have forgone subpoena enforcement when CAN refused to supply this information, as it did.

In sum, CAN has not demonstrated why inflation, its counsel's alleged special expertise, or the Commission's alleged bad faith would justify an increase in the statutory cap on attorney's fees of $75 per hour, even assuming an award of fees is appropriate.

IV. EVEN IF CAN IS ENTITLED TO SOME ATTORNEY'S FEES, ITS REQUEST INCLUDES WORK THAT IS NOT RECOMPENSABLE

A. CAN Is Not Entitled To Fees For Time Not Reasonably Expended

When computing which hours are compensable under EAJA, "counsel for a prevailing party should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " Hensley v. Eckerhart, 461 U.S. 424, 430 n.4 (1983) (quoting S.Rep. No. 94-1011, p.6 (1976), 1976 U.S.C.C.A.N. 5908, 5913) (other citations omitted).

> The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S.Rep. No. 94-1011, p.6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary .... "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."

Id. at 433-34 (citation omitted). See, e.g., Trimper v. City of Norfolk, 58 F.3d 68, 74 (4th Cir. 1995) ("time spent on conference with clients, although important, was not compensable because" attorneys failed to show how "those hours aided their preparation").

A " 'fee applicant bears the burden of ... documenting the appropriate hours expended ... and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.' " Action on Smoking, 724 F.2d at 220 (quoting Hensley, 461 U.S. at 437). Indeed, this Court has "frequently exhorted counsel to describe specifically the tasks performed," and has expressed "concern about the generalized nature of many billing entries that listed simply 'telephone call to Smith,' 'letter to client,' or 'legal research.' " Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 179-80 (4th Cir. 1994). See also Raton Gas Transmission Co. v. FERC, 891 F.2d 323, 331 (D.C. Cir. 1989) (inadequate description of "how much time was spent on each issue" led court to "trim [award] by 25 percent").

The billing records submitted by CAN with its request for fees include a number of items that appear to have no relevance to the underlying lawsuit, or that are very generalized. No fees should be awarded for time spent on irrelevant matters, and an overall percentage reduction is appropriate for the significant number of generalized entries. For example, the billing records include numerous entries such as "research," "call to D. Carroll," "review brief," and "meeting." More specifically, CAN has failed to demonstrate why time spent on the following matters was reasonably expended on this litigation (the invoices are listed in the order they appear in CAN's submission to the Court):

a. Invoice dated January 22, 1996, regarding 5.25 hours of work performed by Frank M. Northam for "draft opposition to DNC motion to participate in argument," "revise response to DNC motion," and "call from D. Carroll; revise response to DNC motion; letter to court."

The Commission did not support the DNC's request for participation in oral argument, and the government should not be required to pay for expenses incurred to respond to the arguments of outside parties not under the government's control, in which the government did not join. Cf. Rum Creek Coal, 31 F.3d at 178 ("intervention-related fees and expenses ... are not recoverable under 42 U.S.C. § 1988").

b. Invoice dated July 5, 1995, regarding 2 hours of work performed by Alan P. Dye, includes entries for "review Ohio FEC case," "telephone conference with David Carroll regarding West Virginia," and "conference regarding West Virginia." The same invoice includes .75 hours spent by Mr. Northam to review "articles of incorporation for CAN Foundation" and a "telephone conference with Martin Mawyer regarding West Virginia lawsuit."

   None of these entries appears to have any relevance to this case, which was filed in Virginia and did not involve the CAN Foundation.

c. Invoice dated April 5, 1995, includes work performed by Mr. Dye regarding "GOPAC order," "re West Virginia," "meeting regarding annual reports," and two entries stating "re Lynchburg." These entries appear to total approximately 1.3 hours. The same invoice includes 12 hours of Mr. Northam's time, expended on 8 different days, with the sparse description, "calls to D. Carroll; review FEC brief; call court regarding scheduling; research."

   These entries appear to be irrelevant and/or lacking in sufficient detail.

d. Invoice dated January 5, 1995, includes 3.1 hours for work performed by Mr. Dye regarding "search for affiliation contract," "re affiliation contract," and "meeting and review."

   The "affiliation contract" appears to have no relevance to this lawsuit.

e. Invoice dated November 1, 1994, includes .1 hours for work performed by David Carroll for "telephone conference T. Kilgannon re reporter inquiries."

   Media-related activity is not reasonably related to defending against a Commission enforcement action and is therefore not reimbursable under EAJA. See generally Rum Creek Coal, 31 F.3d at 176 ("legitimate goals of litigation are almost always attained in the courtroom, not in the media"); In re North (Haskell Fee Application), 74 F.3d 277, 282 (D.C. Cir. 1996) (media activity not reimbursable under Ethics in Government Act); American Petroleum Institute v. EPA, 72 F.2d 907, 913 (D.C. Cir. 1996) (media relations not a cost of litigation under Clean Air Act).

f. Invoice dated November 1, 1995, includes .2 hours for work performed by Mr. Carroll for "telephone conference with R. Hinkle re IRS questions."

   Tax issues under the Internal Revenue Code appear to have no relevance to this case.

g. Invoice dated December 5, 1995, includes 2.1 hours for work performed by Mr. Carroll for "telephone conference with R. Hinkle re IRS questions; work on respon[s]e to IRS."

   Again, tax issues are irrelevant.

h. Invoice dated June 5, 1996, includes approximately .3 hours for work performed by Mr. Carroll for "telephone conference with reporter for Lynchburg paper."

   Again, media activity is not compensable.

Together, these entries total approximately 28.4 hours, and no fees should be awarded for this time.[9] As noted above, these entries are either irrelevant to this lawsuit, inadequately explained, or legally not reimbursable. "If an application contains hours unreasonably expended, a court must make appropriate reductions." Action on Smoking, 724 F.2d at 221. In addition, in its brief CAN requests (Br. 10) $1,950 for time spent preparing its fee application, which includes time spent on such insubstantial arguments as: that EAJA authorizes an award of fees for the Commission's non-adjudicative administrative proceedings, that the $75 cap should be increased for counsels' special expertise, and that the Commission acted in subjective bad faith. This amount must also be reduced if any fees are awarded. Raton Gas, 891 F.2d at 331 ("presentation in regard to court costs [that] was a misadventure" resulted in fee reduction). Moreover, the inclusion of facially irrelevant hours and insubstantial arguments

[9] Hours inappropriately included in CAN's fee petition for work performed during the Commission's administrative proceedings have not been analyzed in detail because none of this work is reimbursable (see infra pp. 27-29).

shows an overall failure to exercise billing judgment, which warrants a percentage reduction in the amount of all fees claimed.

B. CAN Is Not Entitled To Fees For Time Spent On Unrelated Claims On Which It Was Not The Prevailing Party

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit ... counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Hensley, 461 U.S. at 434-35 (citation omitted). Here, CAN raised two defenses that neither the district court nor the Fourth Circuit ruled upon (see 894 F. Supp. at 947-48): (i) that CAN's advertisements qualified for the so-called "press exemption," 2 U.S.C. § 431(9)(B)(i), and (ii) that the FEC's composition at the time it first found "reason to believe" that CAN violated the Act was an unconstitutional violation of the separation of powers that prevented the Commission from maintaining the underlying lawsuit. See also FEC Reply Br. 11-20. Because CAN did not prevail on these entirely separate and distinct claims, its time spent on these unrelated defenses should not be compensated.

Although it is impossible to tell from CAN's billing records precisely how much research, writing, and other time was devoted to these unrelated defenses, one billing invoice dated January 5, 1995, specifically notes that Mr. Northam spent about 4.5 hours working on "review complaint; research regarding NRA case" and "review recent FEC cases and NRA

decision; letter to David Carroll."[10] At a minimum, fees should not be awarded for these hours, and an overall reduction of 10% of otherwise awardable fees is warranted unless CAN provides more detail about time spent on these unrelated defenses. See Hensley, 461 U.S. at 437 & n.12 (applicant has burden to "identify the general subject matter of his time expenditures").

C. NO FEES SHOULD BE AWARDED FOR TIME SPENT DURING THE ADMINISTRATIVE PROCEEDINGS THAT PRECEDED THE LAWSUIT

As CAN concedes (Br. 9), ordinarily EAJA does not authorize an award of attorney's fees for non-adjudicative administrative proceedings. Both § 2412(b) and § 2412(d)(1)(A) refer to a "civil action" involving the United States, and even the separate provision governing an administrative proceeding specifically applies only to an "adversary adjudication" before an agency. 5 U.S.C. § 504(a)(1). Such administrative adjudications are not covered by § 504 unless Congress required agencies to use formal adjudicatory procedures under 5 U.S.C. § 554. See, e.g., Ardestani, 502 U.S. at 134-35; Friends of the Earth v. Reilly, 966 F.2d 690 (D.C. Cir. 1992).

Here, the administrative proceedings which preceded the Commission's civil action against CAN were neither adversarial nor adjudicatory, nor otherwise within the scope of EAJA. The exception of Sullivan v. Hudson, 490 U.S. 877 (1989), upon which CAN relies (Br. 9-10) is plainly inapplicable. In Sullivan, the Supreme Court interpreted a "somewhat unusual" provision of the Social Security Act which contains "detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the

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[10] Presumably, the reference to the NRA case refers to FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 513 U.S. 88 (1994), the case which found the Commission's composition unconstitutional and which formed the basis of CAN's argument that the Commission was without proper authority to bring the underlying action. The D.C. Circuit has since ruled that the NRA decision does not apply in the circumstances of this case. See FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996).

court." Id. at 885. Specifically, under the SSA a court has the power to remand a case to the agency with instructions to address certain legal and factual issues. The court retains jurisdiction and its decision about whether a party has attained "prevailing party" status usually depends upon the outcome of the administrative proceedings; also, "there will often be no final judgment ... until the administrative proceedings on remand are complete." Id. at 886-87. In a later case, the Supreme Court emphasized the narrow scope of its holding in Sullivan:

> [Sullivan] thus stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level.

Melkonyan v. Sullivan, 501 U.S. 89, 97 (1991). Indeed, the Eighth Circuit recently held that "Hudson's holding is limited to cases in which there is a post-litigation remand for further administrative proceedings," and noted that the D.C. and Eleventh Circuits have also reached the same conclusion. Friends of the Boundary Water Wilderness v. Thomas, 53 F.3d 881, 887 (8th Cir. 1995) (citations omitted).

The Commission's administrative proceedings, unlike those in Sullivan, are completely distinct from the civil action. They consist of certain steps the Commission must take before it can file suit, including determinations of whether there is "reason to believe," and later, "probable cause to believe" a violation of the Act has occurred, as well as an investigation and an attempt to resolve the matter through conciliation. See generally 2 U.S.C. § 437g(a)(1)-(5). When the Commission files suit under 2 U.S.C. § 437g(a), it initiates a de novo lawsuit, and the courts owe no deference to the Commission's administrative findings or its decision to bring suit. "Under FECA, the FEC is not the final arbiter, but merely the vehicle chosen by Congress for conducting an investigation, finding probable cause, and conducting informal conciliation prior

to de novo review by the Court." FEC v. National Rifle Ass'n of America, 553 F. Supp. 1331, 1340 n.20 (D.D.C. 1983).[11] Far from being collateral adjuncts to litigation as in Sullivan, most Commission investigations do not result in any litigation.

CAN has cited no case or other authority applying Sullivan to an administrative investigation that precedes enforcement litigation; such an extension of Sullivan would dramatically extend the government's liability under EAJA, without congressional consent. Therefore, none of the fees ($12,768) allegedly incurred by CAN (Br. 10) during the administrative proceedings can be recovered under EAJA.[12]

CONCLUSION

For the foregoing reasons, CAN's application for attorney's fees should be denied. If the Court finds that CAN is entitled to some attorney's fees, the Court should nevertheless abide by EAJA's statutory cap on hourly rates, and decline to award fees for time spent on unrelated

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[11] Cf. Legi-Tech, 75 F.3d at 709 ("We must bear in mind that we have no statutory authority to review the FEC's decision to sue ...").

[12] Even if EAJA allowed an award of fees for work performed during the Commission's administrative proceedings, the Commission's position in those proceedings was certainly substantially justified. Most of the Commission's work during that time consisted of an investigation and an analysis of whether there was "probable cause" to believe the Act had been violated, so its "position" was essentially an effort to learn the facts and apply the law. Given the Commission's statutory mandate to investigate complaints it receives, it was clearly substantially justified in carrying out that mandate.

matters, inadequately documented work, and the administrative proceedings before the Commission.

Respectfully submitted,

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January 16, 1997

FEDERAL ELECTION COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL ELECTION COMMISSION,	)	
	)	
Plaintiff-Appellant,	)	No. 95-2600
	)	
v.	)	CERTIFICATE
	)	OF SERVICE
CHRISTIAN ACTION NETWORK et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1997, I caused to be served by U.S. Mail, postage prepaid, copies of the foregoing Opposition to Defendants-Appellees' Application for Fees of the Federal Election Commission in the above-captioned case on the following counsel for appellees:

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