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

Federal Election Commission,

Plaintiff,

v.

Christian Action Network, et al.,

Defendants.

Case No. 94-0082-L

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

> *Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for redress of grievances.*
>
> First Amendment to the United States Constitution

In our nation's history, First Amendment free speech rights have suffered many ignoble attacks, both legislative and administrative. Fortunately, the judiciary stands as a sentinel, guarding against encroachments on free speech. Sometimes the encroachments are large chunks of freedom bitten off as by a ravenous shark, and sometimes they are nibbles, as carnivorous rats nibble the flesh of their prey.

In this case, the Federal Election Commission (FEC) is nibbling at the flesh of the freedom of speech, but it is a nibbling well beyond the boundaries established by the Supreme Court and every court to consider the issue. By this case, the FEC seeks to expand its authority to regulate speech, even to become the arbiter of the intent behind

speech, whenever speech is uttered during a time that candidates run for office.[1]

What the FEC's Memorandum lacks in reason, it makes up in pounds. The sheer weight of its Memorandum cannot disguise the simple truth that the Christian Action Network's (CAN) video and newspaper advertisement, whether considered singly or together, do not expressly advocate the defeat of then-candidates Clinton and Gore under the tests mandated by the Supreme Court of the United States. The FEC's Memorandum makes no attempt to fit the CAN advertisements in the Supreme Court's test for express advocacy.

I. The Test to Be Applied to Determine Express Advocacy.

A. The Supreme Court's "Explicit Words of Electoral Advocacy" Test.

Neither the video nor the newspaper advertisement contain words that urge any electoral action. The video urges the viewer to "contact the Christian Action Network for more information on family values." The newspaper ad urges candidate Clinton to repudiate his previously stated positions on issues relating to homosexuals. The words of both advertisements are restricted to issues, and do not refer to elections.[2]

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[1] From current events, we can see that election times almost never end. The November 1994 elections are barely over as the candidates line up for 1996.

[2] In its argument about the newspaper advertisement, the FEC said at page 2 of its Memorandum, quoting the advertisement inaccurately:

> After reciting what are described as Clinton proposals to grant homosexuals special civil rights, including several actions that Clinton purportedly would take it elected President, the October 15th newspaper advertisement "call[s] upon Gov. Clinton to clearly state his position on gay rights" and tells Clinton to whom the advertisement is addressed, that "[w]hen the Clinton/Gore campaign committee publicly and unequivocally retract their commitments to

In its Memorandum, the FEC tries to minimize *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976)(declaratory judgment action broadly challenging several aspects of the Federal Election Campaign Act). In *Buckley*, the Supreme Court struggled with the Federal Election Campaign Act's restrictions on free speech, deciding that the government had a "substantial" interest in limited regulation of electoral speech, but only if electoral speech is narrowly defined. To save the Act from unconstitutional breadth, the electoral speech had to be "explicit words of advocacy of election or defeat," recognizing that

> "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates ... are intimately tied to public issues...."

424 U.S. 1 at 42[3]. The court warned that inquiry into the speaker's intent and meaning puts the speaker at the mercy of his listeners and "offers no security for free discussion." 424 U.S. 1 at 43. Yet, as discussed below, the FEC's proposed test would require just such a forbidden inquiry into intent.

To support its argument in this case, the FEC had to hire an expert to tell the

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> the 'gay rights' community, the Christian Action Network will halt its television campaign" against them."

[Quotation marks as in original.] Contrary to the FEC's Memorandum, the words "against them" are the FEC's editorial additions and are not part of CAN's advertisement. In fact, the campaign was a campaign on the issues. Further contrary to the FEC's Memorandum, the newspaper advertisement recites two issue *positions* taken by the Clinton/Gore campaign and *one* action (not several actions) that a Clinton/Gore position paper says that Mr. Clinton would take as president, and exhorts Clinton and Ron Brown to cease their censorship, harassment and threats against television stations who ran the video.

[3] A more complete quotation may be found at pages 3 and 4 of Defendants' Brief in Support of Motion to Dismiss.

court whether the ads expressly advocated Mr. Clinton's defeat. *If an expert is needed to interpret CAN's ads, the ads cannot be sufficiently explicit to meet the Constitutional test of express advocacy.* Furthermore, the so-called expert contended that the video (and to a lesser extent, the newspaper advertisement) constituted, in his opinion, "express advocacy," without ever referring to the test or standard by which he was making that judgment. It seems unlikely that such alleged expert testimony would be permissible under Rule 702 of the Federal Rules of Evidence.

The FEC essentially ignores the court decisions contrary to its position, failing to suggest any serious distinction except to say that the communications media were different in those cases. Those cases are *FEC v. Colorado Republican Federal Campaign Committee,* 839 F. Supp. 1448 (D. Colorado 1993), *Federal Election Commission v. Survival Education Fund, Inc. et al.,* unreported case no. 89 Civ. 0347, 1994 U.S. Dist. LEXIS 210 (U.S.D.C. S.D. N.Y 1/12/94)(copy attached to Brief in Support of Motion to Dismiss). These cases were thoroughly discussed respectively at pages 6-7 and 8-9 of the Brief in Support of Motion to Dismiss. Differences in the type of medium of communication furnish no rational distinction. Of those cases, the *Colorado Republican Federal Campaign Committee* is particularly important, because its advertisement far more closely resembled electoral advocacy than CAN's advertisements do.

The FEC, similarly ineffectively, attempts to distinguish *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980), on the basis that the communication in that case was a pamphlet (FEC Memorandum at 20, note 13) and that the pamphlet did not mention the "voting public." *Central Long Island*

Tax Reform Immediately Committee, too, is thoroughly discussed in the Brief in Support of Motion to Dismiss at 7-8. The CAN video never mentioned the voting public. The CAN newspaper advertisement used those words in the context of issue discussions, not exhortations to vote.

In its Memorandum, the FEC makes no attempt to fit either the CAN video or the CAN newspaper advertisement into the previously articulated *Buckley* test for express advocacy. It did not, because it cannot.

B. **Images are not "Explicit Words of Advocacy."**

Apparently conceding that the CAN video contains no words that urge voters to defeat then-candidates Clinton and Gore, the FEC argues that (1) images could constitute express advocacy and (2) that the images in the CAN video expressly advocates the defeat of Mr. Clinton.

It is difficult to imagine an image alone that is sufficiently explicit to be subject to regulation under the express advocacy test. The FEC's expert suggests that, theoretically, a photo of Bill Clinton inside the following "international stop" symbol might be express advocacy:

Of course, neither the CAN video nor the newspaper advertisement contained such a symbol. However, even that symbol if superimposed on President Clinton's

photo, although plainly anti-Clinton, would be ambiguous as to whether it refers to any election. It could refer to particular peccadillos of his (e.g., Gennifer Flowers, Paula Jones, troopergate, the draft, war protests on foreign soil, Whitewater, the health care plan, foreign policy, travelgate, Vince Foster's papers, or tax increases) or his general unpopularity. What about a button with simply a photo of Mr. Clinton? Would that expressly advocate election? What about a button with the *Time* magazine cover photo that FEC discusses in its Memorandum? Would that expressly advocate anything? What about a button photo of Senator Phil Gramm inside the circular negative symbol today, now that he has announced for the 1996 campaign? Does that mean someone is unhappy with Senator Gramm's opposition to Dr. Foster's confirmation as Surgeon General? Or does it necessarily refer to the 1996 presidential campaign?

The Supreme Court in *Buckley* said that to be express advocacy, there must be "explicit *words* of advocacy of election or defeat...." 424 U.S. 1 at 44 (emphasis added). The *Buckley* requirement for words appears to preclude the FEC's convoluted argument about wordless images. Even if images alone could be sufficiently explicit, CAN's video did not consist of images alone and the newspaper advertisement contained no images. The video images were accompanied by and explained by words that addressed issues of national interest. The video images and the words addressed issues related to homosexuality, not the election.

The FEC's expert report argues that the video images, by their colors and draining of colors and by photos of marchers, were negative to Bill Clinton. That does not make the images *electoral* advocacy. Such subtleties as colors and music could hardly qualify

under the Supreme Court's *explicit* words-of-advocacy test. Neither the video nor the newspaper advertisement contained images that referred specifically to the election.

C. The FEC's "Totality of the Circumstances Regardless of Lack of Explicit Words" Test.

The FEC proposes that this Court adopt a fundamentally different test[4] for express advocacy than "explicit words of advocacy of election or defeat" adopted by the Supreme Court in *Buckley*, 424 U.S. 1 at 44, and approved in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249, 93 L.Ed.2d 539, 551, 107 S.Ct. 616 (1986)("*MCFL*"). Instead, the FEC apparently proposes that this Court adopt a totality-of-the-circumstances test regardless of the lack of explicit words of advocacy. Using this test, the FEC proposes to examine the intent of the speech as much as the words, an approach *Buckley* specifically disapproved.

In its Memorandum, the FEC argues with subtly misleading partial quotations that *MCFL* permits regulation of speech that is less direct than explicit words of advocacy. The *MCFL* court did no such thing. In *MCFL*, the defendant had published a newsletter that urged voter in upcoming elections to "vote pro-life" and supplied the names and photos of pro-life candidates. The court said this was "marginally less

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[4] The FEC did not expressly articulate its proposed test in these or any other words, but this test has been gleaned from the arguments in the FEC's Memorandum. The FEC plainly seeks a rejection of the *Buckley* test, because neither the video nor the newspaper advertisement contain <u>any</u> words that the FEC can point to as urging electoral action. The FEC's Memorandum mostly argues from the conclusions of its expert that the video and newspaper advertisement expressly advocate the electoral defeat of Messrs. Clinton and Gore even though the advertisements never say that.

direct"[5] than the *Buckley* examples, but still was "in effect an explicit directive: vote for these (named) candidates." 479 U.S. 238 at 249, 93 L.Ed. 2d 539 at 551.

In support, the FEC relies upon a misreading of dicta from the 9th Circuit Court of Appeals in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) *cert. den.* 484 U.S. 850 (1987).[6] In *Furgatch*, the Defendant used explicit words of electoral advocacy, "Don't let him do it" specifically referring to Jimmy Carter continuing in office. The FEC's Memorandum at page 18 subtly misstates the advocacy, suggesting that the "Don't let him do it" referred merely to Mr. Carter allegedly hiding his record. The actual *Furgatch* advertisement said,

> It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low level campaigning.
>
> DON'T LET HIM DO IT.

Contrary to what the FEC argues to this Court about the *Furgatch* advertisement content, the FEC argued to the *Furgatch* court that the advertisement "contains an unequivocal message that Carter must not 'succeed' in 'burden[ing]' the country with 'four more years' of his allegedly harmful leadership." 807 F.2d 857 at 860.

The FEC omits from its Memorandum the *Furgatch* court's conclusion concerning the *Buckley* examples:

> We conclude that 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*

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[5] In its partial quotation, the FEC omitted the important qualifier "marginally".

[6] Which is discussed at page 6 of the Defendants' Brief in Support of Motion to Dismiss.

other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

807 F.2d 857 at 864 (Emphasis added). The continuation of this quote states a three part test which Defendants quoted and discussed in the Brief in Support of Motion to Dismiss.

Even using the *Furgatch* test, neither the CAN video nor the newspaper advertisements constitute express advocacy. Although the FEC wants to interpret the advertisements as electoral advocacy, there are other reasonable interpretations, such as: they mean exactly what they say they mean. The video informs the public about certain public issues and exhorts the viewer to contact the Christian Action Network.[7] The

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[7] The FEC disingenuously claims that CAN refused to supply it with the information given to viewers who contacted it. In fact, the FEC never asked to that information, except possibly buried in a much broader request that was objected to on the basis of *Federal Election Commission v. Machinists Non-Partisan League*, 655 F.2d 380 (D.C. Cir. 1981) *cert. den.* 454 U.S. 897, 70 L.Ed.2d 213, 102 S.Ct. 397 (1981), in which the court rejected just such a broad subpoena. In *Machinists Non-Partisan League*, the Commission issued a subpoena for internal memoranda and membership lists (among other things) of a group organized to draft Ted Kennedy for President. Holding that the FEC lacked jurisdiction over "draft candidate" groups, the court said that to protect first amendment rights, the FEC must first establish its jurisdiction as "an essential prerequisite" to enforcing such subpoenas. In a compelling footnote on the issue of the FEC's sweeping discovery request, the court said,

> 17. One can only imagine what the Founding Fathers would have thought of a federal bureaucracy demanding comprehensive reports on the internal workings and membership lists of peaceful political groups. It bears remembering that Elbridge Gerry, Oliver Ellsworth, Roger Sherman, Spencer Roane, Noah Webster, James Iredell, and others all sought anonymity while they conducted the most important political campaign of *their* lives, the campaign to ratify the federal constitution. [Citation omitted] In fact the *Federalist Papers*–the most important work in political science that has ever been written, or is likely ever to be written, in the United States"–was published anonymously by its authors, Hamilton, Madison, and Jay.

655 F.2d 381, 388, note 17. [Emphasis in original.]

If the FEC had specifically asked for information given to viewers who responded to CAN, CAN would have supplied that information.

newspaper advertisement exhorted Bill Clinton to repudiate his stand on those issues. Neither exhorted the voter, unambiguously or ambiguously, to vote either for or against Bill Clinton.

Furgatch, if it does not itself exceed the bounds of the Supreme Court's explicit words test, at least struck the outer limit. The *Furgatch* court itself said about the Furgatch advertisement, "whether the advertisement expressly advocates the defeat of Jimmy Carter is a very close call." 807 F.2d 857 at 861. The CAN video and newspaper advertisements are much further from express advocacy, and this case is not close.

On page 18 of its Memorandum, the FEC says that Defendants suggested in their supporting brief at p. 1 that "no court has ever found express advocacy present without the words and phrases listed in *Buckley*." The Defendants did not suggest that. The Defendants actually said that the FEC

> asks the Court to punish issue-oriented speech during the time of elections, contrary to the limits placed on the FEC's authority by Congress, by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), and by every other court considering the issue.

The Defendants' quoted statement is true. Even *Furgatch*, the only reported case that appears to depart somewhat from the *Buckley* "bright-line" test, refuses to agree that issue-oriented speech should be punished. Even *Furgatch* required that the political speech be unambiguously subject to "no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."

Thus the FEC's hoped-for test cannot be supported even by *Furgatch*. The FEC's prosecution of CAN for civil penalties exceeds the limits of constitutional regulation of free speech.

D. **The Video and Newspaper Ads under these tests.**

At page 16 of its Memorandum, the FEC argues that the video and newspaper advertisements taken together constitute express electoral advocacy. The FEC apparently thinks that helps its case. Defendants' suppose that is because the newspaper advertisement makes only an oblique reference to the election campaign, while the video makes none at all. However, the FEC apparently believes that the video, because of its use of non-verbal images, is more critical of Messrs. Clinton and Gore. The FEC's expert report spends 13 1/2 pages on the video and only 1 page on the newspaper advertisements. FEC Exhibit 5.

Considering them all as one speech seems strange, because the videos were broadcast to cable TV audiences and the newspaper ad went to newspaper readers of two newspapers. If, as the FEC suggests, they are electoral advocacy when considered together, isn't there an implicit assumption that the targets of the advocacy (TV viewers and newspaper readers) would have to have seen them both? If it is necessary to consider these widely disparate ads together to find a violation of the Act, then neither violates the Act.

As discussed above, neither the video nor the newspaper advertisement contain explicit words of electoral advocacy and they therefore cannot be regulated by the Federal Election Commission.

II. <u>Defendants Never Raised the MCFL Exception to §441b as a Ground for Dismissal in their Motion to Dismiss.</u>

The FEC inexplicably spends a page of its Memorandum arguing whether CAN

comes under the *MCFL* exception to 2 U.S.C. §441b. The Defendants did not raise the issue in their Motion to Dismiss. That issue would require some establishment of facts and may be appropriate for a motion for summary judgment, if necessary, later.

III. Exemption for Communications through the Facilities of the Press.

The FEC points out that the exemption in 2 U.S.C. §431(9)(B)(i) is limited to "[a]ny *news story, commentary,* or *editorial* distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication." [Emphasis as in FEC Memorandum at 34.] The video and newspaper advertisements are certainly *commentary* "distributed through the facilities of" the listed media. While the House report said that the exemption "assures the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns," contrary to the editorial additions in the FEC's Memorandum, the report did not say that was the *only* effect. Furthermore the Conference Committee report did not repeat the language of the House report, but merely said that the exemption applied to distribution of news stories, commentary and editorials through the facilities of these media (using the same language as the final statute).

The FEC is seeking civil penalties in this case. Therefore, this is an action under a penal statute and as such, the statute should be strictly construed. *Providence Steam-Engine Co. v. Hubbard,* 101 U.S. 188, 25 L.Ed. 786 (1879)(rule applied to state civil penal statute). Strictly construed, the exemption means exactly what it says: that commentary "through the facilities of" the news media are exempt from the definition of expenditure

and therefore exempt from the proscriptions the FEC seeks to enforce in this case.

IV. Constitutionality of the Commission.

The Federal Election Commission sits in Washington, D.C. The Circuit in which it operates has spoken as to the constitutionality of the Commission's composition in a case in which the Commission was a party. *NRA Political Victory Fund*, 303 U.S. App. D.C. 362, 6 F.3d 821, 1993 U.S. App. LEXIS 27298 (D.C. Cir. 1993), *appeal dismissed for want of jurisdiction* ___ U.S. ___, 127 L.Ed.2d 206, 114 S.Ct. 1291 (12/6/94). Because the Commission's appeal was dismissed for want of jurisdiction the order is final and binding on the FEC.

The FEC argues that its unconstitutional membership (the ex officio representatives from Congress) was severable from the constitutional membership, relying the severability statute and the decision of the D.C. Circuit. The severance in this case would involve the severance of words from a single sentence, not the severance of a statutory provision from the statutory scheme. In *Carter v. Carter Coal Co.*, 298 U.S. 238, 80 L.Ed. 1160, 56 S. Ct. 855 (1936), the Supreme Court considered consolidated appeals of several suit that challenged the constitutionality of the Bituminous Coal Conservation Act of 1935 ("BCCA"). The BCCA regulated coal prices and coal labor. After finding the labor provisions unconstitutional, the court found that, despite the severance clause of the BCCA, the coal price provisions were not severable, and were therefore invalid. Discussing application of the severability provision, the court said,

> In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety--that is to say, the

> rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseverability, and create the opposite one of severability. ... But under either rule, the determination, in the end, is reached by applying the same test--namely, What was the intent of the lawmakers?
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> Under the statutory rule, the presumption must be overcome by considerations which establish "the clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains," [citations omitted] or ... "the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part." [Citation omitted.]

298 U.S. 238 at 312-313, 56 S.Ct. 855 at 873.

Applying that test in this case, Congress expressed its discomfort with an Election Commission in which it had no voice (or at least, ear). The original enactment declared invalid in *Buckley* involved a Commission with two members appointed by the President with the advice and consent of the Senate and the House, and four members appointed by the President Pro Tempore of the Senate and the Speaker of the House. The *Buckley* Court stayed its decision 30 days to give Congress time to fix the problem. Congress responded by creating the unconstitutional Commission found in *NRA Political Victory Fund* that again included members (non-voting this time) representing Congress. Congress thus twice showed that it was very concerned about having a voice on the Commission and it seems likely that Congress would not be satisfied with a Commission on which it has no voice at all (as the Commission has supposedly "reconstituted itself").

Assuming that the FEC could validly "reconstitute itself," the Federal Election Campaign Act has several procedural prerequisites to bringing suit. First, the Federal Election Commission must find "reason to believe" a violation of the Act occurred. 2

U.S.C. § 437g(a)(2).[8] In this case, the Commission made that finding when it was unconstitutionally constituted.

The FEC argues that the reason to believe finding is not a jurisdictional prerequisite to suit citing *Federal Election Commission v. National Rifle Association*, 553 F. Supp. 1331, 1334 (D.D.C. 1983)("*NRA 1983*"). The case stands for the opposite proposition. In *NRA 1983*, the NRA challenged the adequacy of the FEC's statutorily mandated conciliation efforts. The court said,

> [F]our steps are required under Section 437g of the Act, including:
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> (1) a determination that reasonable cause to believe a violation has occurred or is about to occur, and the provision of notice and an opportunity to comment to the respondent;
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> (2) investigation of the allegations by the FEC;
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> (3) a determination of probable cause that a violation has occurred or is about to occur after receiving a brief from general counsel and a response from the alleged violator; and
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> (4) an attempt for at least 30 days to correct or prevent the alleged violation by informal means of "conference, conciliation, and persuasion."
>
> Then, *only after the FEC exhausts these steps*, and affirmatively votes, by at least 4 of its members, may the FEC "institute a civil action for relief...."

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[8] Which reads:

> If the Commission, upon receiving a complaint ... or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act ..., the Commission shall, through its Chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

553 F. Supp. 1331 at 1332, 1333. Therefore, the failure of a "reason to believe" finding be a constitutional Commission destroys the jurisdiction for this action.

The Commission's ratification of its actions taken by its unconstitutional body are demonstrated by the FEC's own exhibits to be pro-forma and without real consideration of the underlying issues.[9] Assuming it could reconstitute itself without benefit of Congress, the alleged ratification was a nullity.

The FEC argues that if the Motion is granted on this ground, the FEC may simply redo its process and bring the action again. Defendants hope that a second time around, someone on the Commission will exercise common sense and recognize that the FEC's case lacks merit, particularly on the express advocacy issues.[10]

V. Conclusion.

The FEC's Memorandum fails to identify *any* "explicit words of advocacy of election or defeat" in either the CAN video or the CAN newspaper advertisement. For

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[9] The FEC takes issue with the Defendants' statements that the Commission ratified its previous actions en mass. Defendants' statements were based upon the information General Counsel supplied by letter of May 9, 1994, copies of the letter and attachments are attached as Exhibit A, in response to Defendants' specific request for the alleged ratification actions. The letter did not include the alleged specific April 19, 1994, ratification that was attached to the FEC's brief.

[10] The FEC's brief suggests that there is no reason to believe that a different result would occur if the case were returned to the Commission. Is the exercise of common sense by the Commission really too much to hope for?

The FEC also says, inaccurately, that its conciliation efforts were quickly rebuffed. Despite its demonstrably unreasonable demands, CAN presented two written counter-proposals. However, the FEC demanded that CAN make false admissions and pay extortionate sums of money (enough to bankrupt CAN), neither of which CAN would or could do. As to the gratuitous "quickly rebuffed" remark, see also the cover letter in attached Exhibit A.

FEC regulation, explicit words of advocacy (whether or not in the *Buckley* list) are required by the test established by the Supreme Court in *Buckley* and approved in *MCFL* and followed by every court considering the question with the possible exception of *Furgatch* which still required "unambiguous" electoral advocacy admitting of "no other reasonable interpretation."

The CAN video and the CAN newspaper advertisement meet neither the *Buckley* nor the *Furgatch* test.

Because this is a penal action, the Federal Election Campaign Act where ambiguous must be construed in favor of Defendants. In this case, the Act's exemption for commentary "distributed through the facilities" of the broadcasting and newspaper media, if not otherwise clear, should be construed in Defendants' favor to dismiss the complaint.

The FEC's unconstitutional composition taints this entire proceeding, because the Commission could not validly make the prerequisite "reason to believe" finding. As to the makeup of the Commission, it is unlikely that under the *Carter* test, the unconstitutional *ex officio* members could be severed from the sentence to make the Commission constitutional, without Congressional action, given the clearly expressed desire of Congress to have its representatives participate in the Commission's proceedings.

This case should be dismissed on any or all of the stated grounds.

Dated: March 6, 1995

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CERTIFICATE OF SERVICE

On March 6, 1995, a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, upon Robert W. Bonham III, Senior Attorney, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463, Attorney for the Federal Election Commission.

David Wm. T. Carroll