UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 00-1252, 00-1332

VIRGINIA SOCIETY FOR HUMAN LIFE, INC.,

Appellee,

v.

FEDERAL ELECTION COMMISSION,

Appellant.

On Appeal from the United States District Court
for the District of Virginia, Richmond Division

OPENING BRIEF FOR THE FEDERAL ELECTION COMMISSION

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JURISDICTIONAL STATEMENT

Although the Federal Election Commission contests jurisdiction under Article III, this case is an appeal from a final judgment of the United States District Court for the District of Virginia, disposing of all parties' claims concerning the constitutionality of a regulation. Thus, this Court has jurisdiction under 28 U.S.C. 1291, 1294(1). The district court's jurisdiction was based upon 28 U.S.C. 1331. A timely notice of appeal was filed by the Federal Election

Commission ("Commission") on March 2, 2000 (JA 221).[1] A timely notice of cross appeal was filed by the Virginia Society of Human Life, Inc. ("VSHL"), on March 7, 2000 (JA 224).

STATEMENT OF THE ISSUES

1. Whether the federal courts have jurisdiction under Article III to decide this case.

2. Whether the district court erred in ordering a nationwide injunction against the Commission's enforcement of a regulation, 11 C.F.R. 100.22(b), against persons who have no connection with this case.

3. Whether 11 C.F.R. 100.22(b) is constitutional.

STATEMENT OF THE CASE

The Virginia Society for Human Life, Inc. ("VSHL") brought suit against the Federal Election Commission ("Commission" or "FEC") to challenge the constitutionality of 11 C.F.R. 100.22(b), a Commission regulation that defines "expressly advocating" the election or defeat of a federal candidate under the Federal Election Campaign Act, 2 U.S.C. 431-55 ("Act" or "FECA"). VSHL sought a judgment granting declaratory relief, setting aside the regulation, overturning the Commission's failure to repeal the regulation (in response to

[1] "JA__" references are to the consecutively numbered pages of the Joint Appendix filed with the Commission's brief.

VSHL's petition for rulemaking asking for such repeal), and permanently enjoining the Commission from relying on the regulation in any future enforcement action (JA 105-06, ¶2).

The Commission moved to dismiss VSHL's complaint for lack of standing. The Commission argued that VSHL could not demonstrate an injury in fact, because it cannot be harmed by the regulation in the Fourth Circuit where it operates: this Circuit's decision in FEC v. Christian Action Network ("CAN"), 110 F.3d 1049 (4th Cir. 1997), forecloses application of 11 C.F.R. 100.22(b) in this Circuit because that decision effectively found the substance of the regulation to be invalid. Recognizing this precedent, the Commission has formally confirmed by a unanimous vote of 6-0 that it will not enforce the regulation in the Fourth Circuit unless or until the Circuit law is changed or overruled (JA 132-33).

The Commission's motion to dismiss was consolidated with the parties' cross motions for summary judgment. On January 4, 2000, the district court granted VSHL's motion for summary judgment, and denied the Commission's motion to dismiss and motion for summary judgment. Virginia Society for Human Life, Inc. v. FEC, 83 F.Supp.2d 668 (E.D. Va. 2000).

The district court first found that VSHL has standing to sue. Finding (JA 212), that inter alia, "VSHL has never indicated that it plans to distribute voter guides within the Fourth Circuit exclusively," and that VSHL will "broadcast

radio advertisements ... [that] will certainly be heard by ... residents of the D.C. Circuit," the court ruled that the Commission's non-enforcement policy in the Fourth Circuit did not eliminate VSHL's "reasonabl[e] fears [of] prosecution by the FEC in the District of Columbia" (JA 213). The court also dismissed the Commission's unanimous decision not to enforce the regulation in the Fourth Circuit as a "non-binding decision[]" (JA 215).

On the merits, the district court found 11 C.F.R. 100.22(b) "blatantly unconstitutional" (JA 218). Relying upon Buckley v. Valeo, 424 U.S. 1 (1976), it drew a distinction between "express advocacy" and "issue advocacy," and found that the former required "explicit words of advocacy or defeat" (JA 218). Acknowledging that the Commission's regulation was based on FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987), the court found the regulation "broader than Furgatch, which itself appears to fun afoul of the Buckley test" (JA 219). The court also found (id.) that the regulation's "language clearly permits the FEC to regulate activities at the heart of issue advocacy" and therefore "runs afoul of the First Amendment."

Because the district court (JA 220) was "unwilling to perpetuate the state of uncertainty faced across the land by potential participants in the public arena," the court enjoined the FEC "from enforcing 11 C.F.R. 100.22(b) against the VSHL or

against any other party in the United States of America." The court (JA 221) did "not rule upon the FEC's dismissal of the VSHL's Petition for Rulemaking."

STATEMENT OF FACTS

A. BACKGROUND

The Federal Election Commission is the independent federal agency with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the FECA. Congress empowered the Commission to "formulate policy with respect to" this statute, 2 U.S.C. 437c(b)(1), gave it broad authority to administer the statute, see, e.g., 2 U.S.C. 437g, 438(a), (b), and authorized it to make "such rules ... as are necessary to carry out the provisions" of the statute, 2 U.S.C. 437d(a)(8), 438 (a)(8).

The Act generally prohibits corporations and unions from using general treasury funds to finance contributions and expenditures in connection with federal elections. 2 U.S.C. 441b.[2] In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) ("MCFL"), the Supreme Court held, inter alia, that this prohibition applies only to expenditures for communications that contain "express advocacy" of the election or defeat of a clearly identified candidate for federal

[2] The Act does allow corporations and unions to use general treasury funds to establish and administer a "separate segregated fund to be utilized for political purposes." 2 U.S.C. 441b(b)(2)(C).

office. For its narrowing construction of 2 U.S.C. 441b, the Court relied upon its earlier decision in Buckley v. Valeo, 424 U.S. 1 (1976), 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. In Buckley and MCFL, the Court provided examples of language that would constitute express advocacy of a candidate. 424 U.S. at 44 n.52; 479 U.S. at 249. In MCFL, the Court found that a communication which used "marginally less direct" language than the examples in Buckley contained express advocacy because "its essential nature" went "beyond issue discussion to express electoral advocacy." 479 U.S. at 249.

The Virginia Society for Human Life, Inc. ("VSHL"), is a Virginia non-profit corporation, located in Richmond, "established to educate the general public on issues relating the protection of individual human life..." (JA 107, ¶ 7). VSHL intends to distribute "voter guides" that "tabulate federal candidates' positions on abortion-related issues," but do "not contain any express or explicit words of advocacy of the nomination, election or defeat of any candidate" (JA 108, ¶ 13).

B. THE "EXPRESS ADVOCACY" REGULATION

1. Promulgation of 11 C.F.R. 100.22(b)

Adopted after a lengthy rulemaking in which the Commission received thousands of comments, the express advocacy regulation, 11 C.F.R. 100.22(b), was intended to "provide further guidance on what types of communications constitute express advocacy of clearly identified candidates, in accordance with the judicial interpretations found in Buckley, MCFL, Furgatch, NOW [FEC v. National Organization of Women, 713 F.Supp. 428 (D.D.C. 1989)], and Faucher [v. FEC, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991)]." 60 Fed. Reg. 35,292, 35,293 (1995).

The final rule was "revised to incorporate more of the Furgatch interpretation ..." 60 Fed. Reg. at 35,295. The rule, in its entirety, states:

> *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" 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 of 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 (1996); 60 Fed. Reg. 35,304-05 (1995).[3]

Furgatch concerned a newspaper advertisement critical of President Carter that appeared immediately before the 1980 election. 807 F.2d at 858. After criticizing President Carter's actions, the advertisement stated, "If he succeeds the country will burdened with four more years of incoherencies, ineptness and illusion..." and then concluded, "DON'T LET HIM DO IT." Id. The Ninth Circuit found that this advertisement included express advocacy, and that "the 'express advocacy' language of Buckley and [2 U.S.C.] section 431(17) does not draw a bright and unambiguous line." Id. at 861.

> A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act.

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[3] VSHL did not challenge subpart (a) of the rule, and the district court did not discuss it.

Id. at 863. The Ninth Circuit concluded that express advocacy includes any message that, "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Id. at 864. The court then adopted a three-part test which was the basis for 11 C.F.R. 100.22(b).

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some kind of action.

Id. "[T]he court is not forced under this standard to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of 'express advocacy.' " Id.

2. Judicial Interpretation of 11 C.F.R. 100.22(b)

Two appellate courts have found 11 C.F.R. 100.22(b) invalid.[4] The district court in Maine Right to Life Comm., Inc. v. FEC ("MRTL"), 914

[4] See also Iowa Right To Life Comm., Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999) (affirming preliminary injunction against state regulation modeled upon 11 C.F.R. 100.22(b)).

F.Supp. 8 (D.Me.), aff'd, 98 F.3d 1 (1st Cir. 1996), cert. denied, 522 U.S. 810 (1997), in an opinion essentially adopted by the First Circuit, held that both the holding in Furgatch and the Commission's definition of express advocacy were facially invalid. The court determined that

> Furgatch, the source of subpart (b), is precisely the type of communication that Buckley, Massachusetts Citizens for Life, and Faucher [v. FEC, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991)] would permit and subpart (b) would prohibit....

MRTL, 914 F.Supp. at 12. However, the court specifically rejected the plaintiffs' request for an injunction to prevent the Commission from enforcing 11 C.F.R. 100.22(b). Id.[5]

In CAN, this Court agreed with the First Circuit. 110 F.3d at 1055. CAN was an enforcement action in which the Commission alleged that the defendant corporation had violated section 441b(a) by making corporate expenditures for a television advertisement opposing the election of then Governor Clinton and Senator Gore. FEC v. Christian Action Network, Inc., 894 F.Supp. 946 (W.D. Va. 1995). Although 11 C.F.R. 100.22(b) had not yet been promulgated when the

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[5] The MRTL court incorporated by reference its reasoning for not issuing injunctive relief in a prior case, Faucher, 743 F. Supp. at 70-72. See also Right to Life of Dutchess County, Inc. v. FEC, 6 F.Supp.2d 248, 253 (S.D.N.Y. 1998) (finding 11 C.F.R. 100.22(b) invalid) and Order of July 20, 1998 (unpublished supplemental order clarifying that FEC was enjoined from enforcing 11 C.F.R. 100.22(b) only against plaintiff) (see Addendum).

commercial was aired, the Commission argued that the advertisement constituted express advocacy under the Furgatch reasoning on which that regulation was based. The district court found that the advertisement was not express advocacy and this Court summarily affirmed in an unpublished opinion. FEC v. Christian Action Network, Inc., 92 F.3d 1178 (4th Cir. 1996) (table). In a subsequent published opinion awarding attorney's fees against the Commission, the Court firmly rejected the Commission's definition of express advocacy, and noted that the portion of 11 C.F.R. 100.22 that was rejected in MRTL was "in substance ... the definition the FEC urged upon us." CAN, 110 F.3d 1049, 1055 (4th Cir. 1997). Thus, although 11 C.F.R. 100.22(b) was not directly under review in CAN, the Court made plain that its rejection of the Commission's view of express advocacy applied to that regulation.

C. THE COMMISSION'S ENFORCEMENT OF 11 C.F.R. 100.22(b)

Following the denial of certiorari in MRTL and the Fourth Circuit's decision awarding attorney's fees in CAN, the Commission received a Petition for Rulemaking from the James Madison Center for Free Speech, urging the repeal of 11 C.F.R. 100.22(b). See 63 Fed. Reg. 8363 (Feb. 19, 1998) (JA 6-7). In denying the petition, the Commission relied on the Ninth Circuit's definition of express advocacy in Furgatch and explained that the Supreme Court had recognized that

> an agency is free to adhere to its preferred interpretation in all circuits that have not rejected that interpretation. It is collaterally estopped only from raising the same claim against the same party in any location, or from continuing to pursue the issue against any party in a circuit that has already rejected the agency's interpretation. United States v. Mendoza, 464 U.S. 154 (1984).

63 Fed. Reg. at 8363-64 (JA 6-7). Since then, the Commission has followed the policy of not enforcing 11 C.F.R. 100.22(b) in the First and Fourth Circuits.

On January 11, 1999, VSHL filed a Petition for Rulemaking seeking the repeal of 11 C.F.R. 100.22(b) (JA 18-23).[6] See Notice of Disposition of Rulemaking, 64 Fed. Reg. 27,478 (May 20, 1999) (JA 103). After publishing a Notice of Availability and reviewing comments from the public, the Commission divided 3-3 in voting whether to open a rulemaking. Id. Since an affirmative vote of four members of the Commission is statutorily required for such action, 2 U.S.C. 437c(c), no further action was taken on the petition. Id.

On September 22, 1999, the Commission unanimously adopted a statement formalizing its policy of not enforcing 11 C.F.R. 100.22(b) in the First and Fourth Circuits (JA 132-33). That statement "formally confirm[s] the Commission's position that because 11 C.F.R. 100.22(b) has been found invalid by the United States Court of Appeals for the First Circuit, and has in effect been found invalid

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[6] In its petition, VSHL acknowledged that the Commission does not enforce 11 C.F.R. 100.22(b) in the First Circuit because of the decision in MRTL (JA 22).

in the United States Court of Appeals for the Fourth Circuit, it cannot and will not be enforced in those circuits, unless and until the law of those circuits is changed or overruled." Id.

SUMMARY OF ARGUMENT

The Commission has already formally acknowledged that its "express advocacy" regulation, 11 C.F.R. 100.22(b), has effectively been declared unconstitutional by this Circuit, and that this regulation therefore will not be enforced in this Circuit. VSHL therefore lacks standing to challenge this regulation, since there is no realistic threat that it will be enforced against VSHL's activities. There is also no ripe controversy concerning any concrete application of the regulation against VSHL.

VSHL has also not met its burden of demonstrating facts to support a claim that it faces a credible risk of prosecution outside this Circuit. It has offered only speculation about the possibility of activities outside Virginia, and the district court erroneously found standing on the assumption that VSHL would engage in activity outside this Circuit simply because VSHL had not declared to the contrary.

Even if the district court had jurisdiction, it erred by entering a nationwide injunction against enforcement of the regulation against any person in the country. Injunctive relief must be drafted as narrowly as possible, and no basis was offered

for concluding that an injunction to protect other parties in other jurisdictions was necessary to protect VSHL from any potential injury. This case is not a class action, and VSHL has not even alleged that it would be injured if the regulation is applied to other parties in other jurisdictions. Thus, VSHL lacked standing to seek relief for unknown parties not before the court.

The district court's nationwide injunction prevents the Commission from enforcing the regulation anywhere in the country, usurps the power of other federal circuits to rule on the constitutionality of 11 C.F.R. 100.22(b) themselves, and improperly requires the district court to supervise activities in other jurisdictions and the Commission's internal administrative investigations. The injunction violates the mandate of United States v. Mendoza, 464 U.S. 154 (1984), which encourages the government to engage in intercircuit nonacquiescence in order to further the law's development. The federal circuits are not bound by each other's rulings, yet the nationwide injunction in effect creates a nationwide precedent.

Although both the district court and a panel of this Court are bound by this Court's precedent that 11 C.F.R. 100.22(b) is invalid, the Commission maintains that the en banc Fourth Circuit or the Supreme Court might well find 11 C.F.R. 100.22(b) constitutional. The regulation interprets "express advocacy" in a pointedly narrow way intended to exclude issue advocacy. Following Ninth

Circuit precedent, the regulation excludes a communication from being considered express advocacy unless it has an electoral portion in which advocacy of election or defeat of a candidate is unmistakable, unambiguous, and suggestive of only one meaning. The message must so clearly encourage action to elect or defeat a candidate that reasonable people could not differ on this point. This standard uses an objective test that is consistent with other First Amendment jurisprudence, does not depend upon the varied understanding of listeners, and is faithful to the Supreme Court's objective of applying the statutory requirements only to communications that are unmistakably related to the election campaign of clearly identified candidates.

ARGUMENT

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997) (footnote omitted). This Circuit has already explained why it views the Commission's regulation, 11 C.F.R. 100.22(b), as unconstitutional, and the Commission itself has unanimously recognized that this forecloses enforcement of the regulation in this Circuit. In these circumstances, there is no need or justification for other parties to insist upon relitigating the same issue in this Circuit. Nor is there any justification for permitting a party operating within the

Fourth Circuit to obtain an order from a district court here that has the sole purpose and effect of ensuring that other parties — who have no relation to the plaintiff in this case — are protected by Fourth Circuit precedent in activities undertaken in the jurisdiction of other circuit courts of appeals. This Court should reject the nationwide relief granted by the district court, and conclude that VSHL lacks standing because the established law of this Circuit already ensures that the Commission's regulation causes it no injury in fact.

I. VSHL CANNOT DEMONSTRATE THAT THIS CASE PRESENTS A CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III

The Supreme Court has explained that it is presumed

> that federal courts lack jurisdiction "unless 'the contrary appears affirmatively from the record.' " Bender v. Williamsport Area School Dist., 475 U.S. 534, 546 (1986), quoting King Bridge Co. v. Otoe County, 120 U.S. 225, 226 (1887). " 'It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial power.' " Bender, supra, 475 U.S., at 546, n.8, quoting Warth v. Seldin, 422 U.S. 490, 517-518 (1975).

Renne v. Geary, 501 U.S. 312, 316 (1991). VSHL has failed to meet this burden. It lacks standing to bring this case, and the case itself is not ripe for judicial review.

"Doctrines like standing, mootness, and ripeness are simply subsets of Article III's command that the courts resolve disputes, rather then emit random

advice." Bryant v. Cheney, 924 F.2d 525, 529 (4th Cir. 1991). Here, where the dispute between the parties primarily concerns the appropriate scope of injunctive relief, this principle is particularly apt because the "courts should be especially mindful of this limited role [under Article III] when they are asked to award prospective equitable relief instead of damages for a concrete past harm ...." Id. (citations omitted).

A. STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment de novo." Smith v. Virginia Commonwealth University, 84 F.3d 672, 675 (4th Cir. 1996) (en banc).

B. VSHL LACKS STANDING TO LITIGATE THIS CASE

To establish standing under Article III, VSHL must show three things:

> [first, that it has] suffered an injury in fact ... Second, there must be a causal connection between the injury and the conduct complained of ... Third, it must be likely... that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' " Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982) (quoting

Flast v. Cohen, 392 U.S. 83, 99 (1968)). Besides being "concrete" and "particularized," Lujan, 504 U.S. at 560, the injury must be "actual" or "imminent." Id. at 564 n.2. Accord Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000) (en banc). But here, VSHL has demonstrated no reasonable fear of prosecution under 11 C.F.R. 100.22(b), so VSHL is merely "abstractly distressed" and not "truly afflicted," id.

1. The Commission Does Not, And Cannot, Enforce 11 C.F.R. 100.22(b) In The Fourth Circuit

VSHL asserts that it wishes to publish its voter guides and pay for the publication with funds from its general treasury (JA 109, ¶ 17). It alleges that it is "chilled in its intent to make such communications in the future by the existence of the regulation at 11 C.F.R. 100.22(b)" and the Commission's potential enforcement of the regulation against it (JA 116-17, ¶¶ 47, 48). However, such a claim cannot establish an injury in fact which is "actual or imminent," rather than "conjectural" or "hypothetical," Lujan, 504 U.S. at 560, because the Commission does not enforce 11 C.F.R. 100.22(b) in the Fourth Circuit (JA 132-33).

Pre-enforcement challenges to a statute or regulation confer standing only when the plaintiff "faces a credible threat of prosecution" by the enforcing government agency. North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 710 (4th Cir. 1999), cert. denied, 120 S.Ct. 1156 (2000). In Babbitt v. United Farm

Workers National Union, 442 U.S. 289, 298 (1979), the Supreme Court held that a plaintiff presents a justiciable pre-enforcement challenge "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest ... and there exists a credible threat of prosecution thereunder." Although a chilling effect on speech may in some circumstances constitute an injury in fact in pre-enforcement First Amendment cases, persons having no fears of government enforcement, "except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." Id. (citation omitted).

Here, the Commission has never threatened to bring an action against VSHL and has formally recognized that it is foreclosed by the CAN decision from enforcing this regulation in the Fourth Circuit. Thus, there is no controversy between VSHL and the Commission on that question, and VSHL cannot demonstrate an injury in fact to establish its standing.

A government agency's formal disavowal of any intention to invoke the statute or regulation in question eliminates any credible fear of enforcement. In Babbitt, the Supreme Court specifically noted that the government's failure to disavow its intention of invoking the law against the plaintiffs provided the plaintiffs with "some reason" to fear enforcement. 442 U.S. at 302. Following Babbitt, a number of courts have held that a government agency's affirmative

disavowal of any intention of enforcing a provision against the plaintiff removes that plaintiff's credible fear. "[U]nless and until the [state agency and personnel] or their successors attempt to rescind the exemptions that have been granted to [the plaintiff], the district court should decline to provide an advisory opinion regarding the constitutionality of these provisions." Salvation Army v. Dept. of Community Affairs of the State of New Jersey, 919 F.2d 183, 193 (3d Cir. 1990) (footnote omitted). See also Johnson v. Stuart, 702 F.2d 193, 195 (9th Cir. 1983) (no credible fear of enforcement where state Attorney General "repeatedly disavowed any interpretation of [the law] that would make it applicable in any way to [plaintiffs]"). Compare North Carolina Right to Life, 168 F.3d at 710, 711 (pre-enforcement challenge allowed where state had previously told plaintiff that it would enforce law and only disavowed that position in the litigation); Mobil Oil Corp. v. Attorney General of Virginia, 940 F.2d 73, 76 (4th Cir. 1991) (pre-enforcement challenge allowed where state did not disavow intention of exercising enforcement authority); Right to Life of Dutchess County, 6 F.Supp.2d at 253 (pre-enforcement challenge allowed where FEC did not disclaim intention of enforcing regulation).

In addition, the district court (JA 213-14) relied upon a provision of the FECA that allows a person who files an administrative complaint against a third party to challenge the Commission's dismissal of such complaint, if the

Commission declines to pursue the matter against the third party. See 2 U.S.C. 437g(a)(8). While it is possible under Section 437g(a)(8) for an administrative complainant to acquire a private right of action against a third party, that right can accrue only if the United States District Court for the District of Columbia finds that the Commission abused its discretion or acted "contrary to law" in dismissing the administrative complaint. See 2 U.S.C. 437g(a)(8)(C); FEC v. Akins, 524 U.S. 11 (1998). The court below erred by finding that this possibility gave VSHL a "credible threat of prosecution" (JA 214).

First, the district court ignored the fact that any action under Section 437g(a)(8) against the Commission — though brought in the District of Columbia — would be judging the Commission's decision not to pursue VSHL in the Fourth Circuit. It is hard to imagine how any district judge could find that the Commission had acted "contrary to law" by refusing to prosecute VSHL under 11 C.F.R. 100.22(b) in a circuit that had already found the regulation invalid.[7]

Second, and most important, the district court wrongly assumed the presence of redressability, the third prong of any standing analysis. Specifically, the district court failed to address the fact that the instant lawsuit, including the

[7] Cf. Chamber of Commerce v. FEC, 69 F.3d 600, 603 (D.C. Cir. 1995) (finding standing based on a potential action under 2 U.S.C. 437g(a)(8) where it would be "easy to establish that ... agency action was contrary to law ... [based] on the Commission's unwillingness to enforce its own rule").

relief ordered, is simply powerless to stop the very private action upon which the district court's reasoning depends. The unknown, potential private plaintiffs were not before the district court and are not bound by the relief ordered against the Commission. Thus, this lawsuit cannot stop a (speculative) private right of action that supposedly presents a credible threat of prosecution to VSHL. Essentially the same issue was litigated in Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1187 (7th Cir.), cert. denied, 525 U.S. 873 (1998), where the Seventh Circuit found no redressability in a challenge to a state campaign finance law when it recognized that no order it could issue would bind parties not before the court, who would therefore remain free to sue Wisconsin Right to Life. In sum, any private right of action that could possibly accrue under 2 U.S.C. 437g(a)(8) against VSHL is simply irrelevant in this action against the Commission, because whatever injury such an action might inflict cannot be remedied by any order a court could lawfully enter here.

2. VSHL Has Not Met Its Burden Of Demonstrating Facts To Support A Claim That Its Activities Will Take Place Outside The Fourth Circuit

After the Commission moved for summary judgment, VSHL failed to satisfy the most basic command of Fed.R.Civ.P. 56(e), which "require[d it] to go beyond the pleadings and by [its] own affidavits or [by other means to]... designate 'specific facts showing that there is a genuine issue' " in dispute about the facts

allegedly supporting its claim of standing. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Because the Commission had moved not only to dismiss VSHL's complaint but also for summary judgment, VSHL "c[ould] no longer rest on ... 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." Lujan, 504 U.S. at 561. And " 'the necessary factual predicate may not be gleaned from the briefs and arguments,' " FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990) (citation omitted). On this record, therefore, the district court committed reversible error by failing to enter summary judgment for the Commission.

In its complaint (JA 107-09, ¶¶ 7-17), VSHL made no contention about any actual or imminent plans to engage in activity outside the Fourth Circuit that would likely fall within the definition of expressly advocating in 11 C.F.R. 100.22(b). Before the district court, the only factual evidence it ever presented about any of its plans was the declaration of Louise Hartz (JA 134-35). That declaration contains no statement that VSHL intends to distribute voter guides outside Virginia. Even during oral argument, counsel for VSHL made no proffer of evidence that went beyond Ms. Hartz's statements (JA 168).

The Hartz Declaration does contain a conclusory assertion that VSHL "intends" to produce radio advertisements that "will compare and contrast the

public policy records and positions of candidates" but that will "not contain express or explicit words advocating the nomination, election or defeat of any federal candidate" (JA 134-35, ¶¶ 4-6). The declaration does not, however, give any indication whatsoever why VSHL would reasonably fear that such vaguely described radio ads would fall within the definition of 11 C.F.R. 100.22(b), and it is VSHL's burden to provide specific facts to demonstrate this essential element of its case.[8] In addition, VSHL provided no examples of actual advertisements it has run in the past or plans to run in the future without the supposed threat of 11 C.F.R. 100.22(b).

Furthermore, VSHL's contacts with jurisdictions outside the Fourth Circuit are entirely speculative. VSHL has not alleged that it has ever engaged in any activity outside of Virginia. Hartz states that in the future "VSHL intends to place a radio advertisement on at least one radio station in the northern Virginia radio market, and would consider stations physically located in the District of

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[8] Indeed, the description of VSHL's purported radio advertisements provided by the Hartz Declaration may fall within 11 C.F.R. 114.4(c)(4), which permits corporations to distribute to the "general public the voting records of Members of Congress, provided that the voting record and all communications distributed with it do not expressly advocate the election or defeat of any clearly identified candidate ...." VSHL has not asked the Commission for an advisory opinion about any of its planned activity, a process that could "reduce uncertainty or narrow the statute's reach ... [and] the chill induced by facial vagueness or overbreadth ...." Martin Tractor Co. v. FEC, 627 F.2d 375, 386 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980).

Columbia," and adds that VSHL "intends to select a radio station whose broadcast can be received within the District of Columbia..." (JA 135, ¶¶ 8-9). But Hartz admits that VSHL's intent is to "ensure reaching as wide a segment of the northern Virginia metropolitan area as possible," not to export its message outside the Fourth Circuit (id. at ¶ 9).

The Hartz Declaration is just like the affidavits in Lujan that failed to demonstrate an imminent injury necessary for standing.

> [T]he affiants' profession of an "inten[t]" to return to the places they had visited before ... is simply not enough. Such "some day" intentions — without any description of concrete plans, ... do not support a finding of the "actual or imminent" injury that our cases require.

504 U.S. at 563-64. Like the affiants in Lujan, the Hartz Declaration fails to provide any concrete description of allegedly protected activity that would be imminently chilled by the Commission's regulation. Nor, of course, does Hartz allege that the Commission has ever taken action against VSHL, or any similarly situated party, because of the kind of activity VSHL actually plans to take in the future.

Contrary to the district court's decision (JA 213), it is also entirely speculative that the Commission would bring an enforcement action against VSHL in the District of Columbia, just because its radio ads might reach some residents outside Virginia. VSHL is a Virginia corporation whose main goal — to the

extent it has alleged any plans — is to spread its message in Virginia to Virginians. In its twenty-five year history, the Commission has never brought an enforcement action in a jurisdiction where the only contact was a broadcast transmission that incidentally spilled over from another jurisdiction, and VSHL's attempt in the court below to suggest otherwise relied upon other litigation that is easily distinguishable.[9]

Finally, the district court erred by assuming facts for which there is no evidence and for which it is VSHL's burden to prove. The court found (JA 212), for example, that VSHL "plans to broadcast … from a radio station in the District of Columbia" when in fact Hartz only declared (JA 135, ¶ 8; emphasis added) that VSHL "would consider stations physically located in the District of Columbia." The court also found (JA 212-13) that VSHL's broadcasts may "possibly [be heard] by residents of the Third Circuit (Pennsylvania)," even though VSHL neither alleged nor proved any such fact. Most importantly, the court reversed the applicable legal presumption by assuming that VSHL would act outside the Fourth Circuit because it did not allege anything to the contrary: "VSHL has never

[9] Even if the Commission were to bring such an action in the District of Columbia, it would again be speculative to assert that the litigation would remain there instead of being transferred to Virginia. If VSHL could demonstrate a genuine factual basis for its alleged concern about being sued in the District of Columbia, then it should have brought this action in that venue.

indicated that it plans to distribute voter guides within the Fourth Circuit exclusively, nor that its other communications would not reach federal circuits in which the FEC is enforcing the regulation" (JA 212). Even if the district court had been ruling only on a motion to dismiss, VSHL would still have had the burden to make affirmative allegations, and the court would have been wrong to infer even a general allegation based on silence. See Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990).

However, this case was also decided on cross motions for summary judgment, and

> [i]n ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint.... The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."

Id. at 888. "It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade..." Id. at 889. By ignoring these presumptions and requirements of Article III, the district court erroneously found that VSHL has standing in this case.

C. THE CONSTITUTIONALITY OF 11 C.F.R. 100.22(b) IS NOT A RIPE, JUSTICIABLE CONTROVERSY

For many of the same reasons that VSHL cannot demonstrate an injury in fact necessary to establish standing, this case is not ripe for judicial review. The "basic rationale" of the ripeness doctrine is

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967) (emphasis added). VSHL has not alleged how 11 C.F.R. 100.22(b) is concretely affecting its specific plans, and the Commission has taken no action against VSHL. " 'Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.' " Renne v. Geary, 501 U.S. at 323 (quoting Longshoremen's Union v. Boyd, 347 U.S. 222, 224 (1954)). See also Defenders of Wildlife, 497 U.S. at 891 ("regulation is not ordinarily ... 'ripe' for judicial review ... until the ... [controversy's] factual components [have been] fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him").

Although the plaintiffs in Renne did not present a ripe controversy, they at

least presented a stronger case for justiciability than VSHL has here. Renne also involved a First Amendment challenge to an alleged restriction on political speech: the California Constitution's prohibition of political parties' endorsements of candidates for nonpartisan office. The Renne plaintiffs at least alleged a specific "plan and intention of the Republican Committee to endorse candidates for nonpartisan offices in as many future elections as possible" and their desire to have such endorsements "publicized by endorsed candidates in their candidate's statements in the San Francisco voter's pamphlet...." Id. at 317. The Supreme Court, however, found that these plans were not enough (id. at 320-21):

> Respondents have failed to demonstrate a live dispute involving the actual or threatened application of § 6(b) to bar particular speech.... The affidavit provides no indication whom the ... committee wished to endorse, for which office, or in what election. Absent a contention that § 6(b) prevented a particular endorsement, ... this allegation will not support an action in federal court.

Here, VSHL has not demonstrated which election it wishes to make expenditures in connection with, or for which candidates its expenditures could plausibly be "expressly advocating" under 11 C.F.R. 100.22(b) .

The Supreme Court in Renne also focused on the lack of a credible threat that the provision at issue would be enforced against the respondents (id. at 322):

> The record also contains no evidence of a credible threat that § 6(b) will be enforced, other than against candidates in the context of voter pamphlets. The only instances disclosed by the

> record in which parties endorsed specific candidates did not, so far as we can tell, result in petitioners taking any enforcement action.

Given the FEC's formal vote not to enforce 11 C.F.R. 100.22(b) in the Fourth Circuit, VSHL faces even less of a credible threat of prosecution than did the respondents in Renne. In addition, VSHL has presented no evidence that the Commission has attempted to enforce 11 C.F.R. 100.22(b) in the First and Fourth Circuits since their respective decisions in MRTL and CAN.

II. EVEN IF THE DISTRICT COURT HAD JURISDICTION OVER VSHL'S CLAIM, IT ERRED BY ORDERING A NATIONWIDE INJUNCTION AGAINST THE COMMISSION'S ENFORCEMENT OF 11 C.F.R. 100.22(b)

After finding 11 C.F.R. 100.22(b) unconstitutional, the district court, with little explanation (JA 220), entered a nationwide injunction against the Commission:

> In addition, First Amendment protections do not cease at the boundaries of the Eastern District, and the Court is unwilling to perpetuate the state of uncertainty faced across the land by potential participants in the public arena. The FEC is hereby ENJOINED from enforcing 11 C.F.R. 100.22(b) against the VSHL or against any other party in the United States of America.

As we explain below, this injunction violates basic principles of equitable relief, could not be entered on behalf of parties not before the district court, and improperly intrudes upon the jurisdiction of courts outside the Fourth Circuit (see infra pp. 39-49). One district court in Virginia is now poised to interfere in every

FEC case in the nation concerning "express advocacy," even if it has no jurisdiction over the parties in question. It is also usurping the right of other federal circuits to decide for themselves whether 11 C.F.R. 100.22(b) is constitutional. Just as it would be wrong for a district court in California to order the Commission to apply the Furgatch analysis throughout the country, so too did the district court err by imposing its view of express advocacy on every other jurisdiction. VSHL's attempt to leverage this Circuit's reasoning about express advocacy into an indirect nationwide precedent must be denied.

A. STANDARD OF REVIEW

Although permanent injunctions are reviewed for abuse of discretion, "[i]n applying this standard, [this Circuit] accept[s] the factual findings of the district court unless they are clearly erroneous and review[s] the district court's application of legal principles de novo." Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 939 (4th Cir. 1995). Here, there were no factual findings in dispute related to the district court's decision to enter a nationwide injunction, and the district court's errors were purely legal. Thus, this Court's review of the decision to enter a nationwide injunction is de novo.

B. EVEN IF VSHL WAS ENTITLED TO INJUNCTIVE RELIEF, THE DISTRICT COURT ERRED BY GRANTING NATIONWIDE RELIEF FOR PARTIES NOT BEFORE THE COURT

The Commission recognizes that this Court is bound by the decision in CAN, which essentially found 11 C.F.R. 100.22(b) invalid. Although for purposes of further judicial review, the Commission explains below (infra Section III) why 11 C.F.R. 100.22(b) is constitutional, the Commission did not request the district court to defy Circuit precedent, which must be obeyed until modified or overruled.

The Commission did argue below, however, that no injunctive relief was necessary. "Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.' " Madsen v. Women's Health Center, Inc., 512 U.S. 753, 765 n.3 (1994) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). Given this Circuit's decision in CAN, the district court's redundant finding that the regulation is invalid, and the Commission's formal vote not to enforce it in the Fourth Circuit, VSHL would have been amply protected by both stare decisis and collateral estoppel — without an injunction. VSHL presented no evidence to support the proposition that an injunction was necessary to ensure that the Commission would abide by the district court's declaration, let alone that there is a danger of a "recurrent violation" by the Commission.

Nevertheless, even if an injunction were appropriate for the benefit of VSHL, the district court erred as a matter of law when it enjoined the Commission from enforcing 11 C.F.R. 100.22(b) "against any other party in the United States of America" (JA 220).

1. The District Court Should Have Limited Its Injunction To Protect VSHL, The Only Party Before It Seeking Relief

The district court violated the well-established legal rule "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). "Carroll [v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968)], for example, requires that an injunction be 'couched in the narrowest terms that will accomplish the pin-pointed objective' of the injunction." Madsen, 512 U.S. at 767. Accord Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993) ("An injunction 'should be tailored to restrain no more than what is reasonably required to accomplish its end' ") (citation omitted), cert. denied, 520 U.S. 1116 (1997).

Here, enjoining the Commission from enforcing 11 C.F.R. 100.22(b) against VSHL — but only against VSHL — would have narrowly provided complete relief to VSHL. Nothing else was required. VSHL itself would have lost no protection whatsoever if the district court had not enjoined the Commission from

enforcing 11 C.F.R. 100.22(b) against "any other party in the United States of America." The district court erred by issuing the broadest imaginable injunction, thereby unnecessarily burdening the FEC and every circuit court outside of the Fourth Circuit.

The district court provided no legal basis for reaching far beyond the plaintiff in this case, except to state that it was "unwilling to perpetuate the state of uncertainty faced across the land by potential participants in the public arena." No other parties, however, have complained about "uncertainty," and if such parties exist and have concrete complaints, they can seek their own relief. As the district court itself recognized, its injunction reaches "potential participants," not actual participants facing concrete injuries with standing under Article III. Moreover, as explained below (infra pp. 39-49), the "uncertainty faced across the land" is an integral part of this nation's legal system, namely, that circuit courts are not bound by each other's decisions.

2. The District Court's Injunction Should Not Have Protected Parties Who Were Not Before The Court

The only plaintiff in this case is VSHL. This case is not a class action, and VSHL neither sought standing as an organization on behalf of its members nor asserted any basis for representing people or organizations in other jurisdictions (see JA 106, ¶ 5).

> A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court.... The district court must, therefore, tailor the injunction to affect only those persons over which it has power.

Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983). Here, the district court erred by broadly casting its injunction to protect every person in the country.

In Davis v. Romney, 490 F.2d 1360 (3rd Cir. 1974), the Third Circuit found that the district court had improperly failed to narrowly tailor its injunction because it had enjoined the defendants from insuring certain home mortgages even though the plaintiffs had not alleged any intent to purchase homes under such mortgage programs.

> [P]laintiffs are entitled only to redress of their personal grievances. Injunctions, which carry possible contempt penalties for their violation must be tailored to remedy the specific harms shown rather than to "enjoin 'all possible breaches of the law.' " Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945); Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

Id. at 1370. Here, the district court erroneously reached out to protect any person in the country without any showing whatsoever from parties other than VSHL that they will engage in conduct arguably prohibited under the FECA.[10]

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[10] See also Meinhold v. Department of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994) ("Effective relief can be obtained by directing the Navy not to apply its regulation to Meinhold based only on his statement that he is gay.... DOD should not be constrained from applying its regulations to ... all other military personnel.").

The injunctive language enjoining the Commission from "enforcing 11 C.F.R. 100.22(b) against the VSHL" was sufficient to protect VSHL anywhere in the country.

> In general the jurisdiction of equity to avoid multiplicity of civil suits at law is restricted to those cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. It does not ordinarily extend to cases where there are numerous parties and the issues between them and the adverse party — here the state — are not necessarily identical.

Douglas v. City of Jeannette, 319 U.S. 157, 165 (1943) (citation omitted). Thus, even if an injunction is necessary to protect VSHL, there is no equitable justification for broadening the injunction to cover other parties whose identity and campaign expenditures are currently unknown.

Although this Circuit has sometimes allowed broad injunctive relief within its own geographical jurisdiction for individual plaintiffs without certifying a class action, those cases have involved claims of discrimination that could not be remedied without altering the systemic practices of the defendant.[11] For example, in Thomas v. Washington County School Bd., 915 F.2d 922 (4th Cir. 1990), the Court enjoined defendant's discriminatory nepotism and word-of-mouth hiring

[11] In addition, nationwide relief has been upheld when there has been a plaintiff representing its nationwide membership. See Richmond Tenants Organization, Inc. v. Kemp, 956 F.2d 1300, 1302 (4th Cir. 1992) (national association of tenants' organizations).

practices, thereby helping not only the plaintiff but other black applicants who would otherwise be shut out of the system. Similarly, in Sandford v. R.L. Coleman Realty Co., 573 F.2d 173, 178-79 & n.10 (4th Cir. 1978), the Court found that class certification was not necessary to enjoin a defendant from discriminatory acts such as "coding" black applicants' housing applications. As explained in Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 306 (4th Cir. 1982), an "injunction warranted by a finding of unlawful discrimination is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class." In such cases the " 'very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated.' " Zepeda, 753 F.2d at 728 n.1 (quoting Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963), cert. denied, 376 U.S. 910 (1964)).[12] In this case, however, this principle is completely inapplicable, since VSHL can receive complete protection with an injunction for itself. The Commission's case-by-case enforcement decisions have nothing in

[12] See also McKenzie v. Chicago, 118 F.3d 552, 555 (7th Cir. 1997) ("Sometimes a judge may overhaul a statutory program without a class action; in reapportionment and school desegregation cases, for example, it is not possible to award effective relief to the plaintiffs without altering the rights of third parties."). It should also be noted that Thomas, Sandford, and Evans did not involve nationwide activities or raise issues regarding intercircuit nonacquiescence (see infra pp. 39-49).

common with an employer or realtor choosing among competing applicants from a single, comprehensive pool, so it is unnecessary to enjoin the Commission from acting against everybody in order to protect VSHL.

3. VSHL Lacks Standing To Request Relief For Parties Who Are Not Before The Court

Even if VSHL has standing to request relief for itself (see supra pp. 16-27), it clearly lacks standing to seek relief for third parties. VSHL has not even attempted to prove that it has been injured, or faces imminent injury, because other unknown parties elsewhere in the country might face prosecution under 11 C.F.R. 100.22(b). Yet, " 'the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.' " Lujan, 504 U.S. at 563 (citation omitted).

In Madsen, the Supreme Court held that protesters who were subject to an injunction lacked standing to challenge another part of a court order that applied to people who were not before the court:

> Petitioners also challenge the state court's order as being vague and overbroad. They object to the portion of the injunction making it applicable to those acting "in concert" with the named parties. But petitioners themselves are named parties in the order, and they therefore lack standing to challenge a portion of the order applying to persons who are not parties.

512 U.S. at 775. Similarly, in Bender, the Supreme Court found that an individual member of a school board could not invoke the board's interest in the case to

confer standing upon himself. 475 U.S. at 536. In both Madsen and Bender, however, the parties that lacked standing to seek certain remedies had at least some connection with the party whose interest they sought to protect. Here, VSHL has made no such argument, as it cannot: the district court's nationwide injunction protects everyone in the country.

> The fundamental problem with this injunction is that plaintiffs lack standing to seek — and the district court therefore lacks authority to grant — relief that benefits third parties. "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

McKenzie, 118 F.3d at 555.

C. BY ENTERING A NATIONWIDE INJUNCTION, THE DISTRICT COURT HAS USURPED THE POWER OF OTHER FEDERAL CIRCUITS

The effect of the district court's nationwide injunction is to preclude the FEC from applying 11 C.F.R. 100.22(b) anywhere else in the United States. As long as the injunction is in place, the Commission is unable to ask another circuit to rule on the regulation's validity. Instead, the district court has opened its own doors to any person in the nation who seeks to prevent the Commission from

enforcing 11 C.F.R. 100.22(b), potentially enjoining civil prosecutions in other federal courts if the court believes the Commission has violated its injunction.[13]

As we explain below, this nationwide injunction not only violates basic rules of judicial comity, but effectively prevents other circuits from interpreting 11 C.F.R. 100.22(b) themselves, thus effectively binding all other jurisdictions to the district court's view of the law. The injunction thus contravenes fundamental principles of stare decisis and the government's right to engage in intercircuit nonacquiescence.

1. The Nationwide Injunction Imposes The District Court's View Of The Law On The Rest Of The Nation

It is fundamental in the federal judicial system that a "court of appeals in one circuit owes no obedience to decisions of a court of appeals in another circuit...." Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997) (quoting 1B J. Moore, Moore's Federal Practice, ¶ 0.401 (2d ed. 1996)). "In the absence of a controlling decision by the Supreme Court, the

[13] Indeed, the language of the injunction is so broad that it could be construed to cover administrative enforcement investigations of the Commission. Under the Commission's statutory enforcement provision, 2 U.S.C. 437g(a), the Commission investigates certain allegations of unlawful acts under the FECA. These investigations are conducted confidentially and the General Counsel provides legal analysis and recommendations to the Commission. Under the district court's injunction, any respondent in the country who believes that the Commission or its staff is inappropriately relying upon 11 C.F.R. 100.22(b) could try to invoke the district court's jurisdiction to enjoin the Commission's internal deliberations.

respective courts of appeals express the law of the circuit." Hyatt v. Heckler, 807 F.2d 376, 379 (4th Cir. 1986) (citation omitted), cert. denied, 484 U.S. 820 (1987). As one Fourth Circuit judge has explained, "I am bound by the law of but one circuit." Department of Energy v. FLRA, 106 F.3d 1158, 1166 (4th Cir. 1997) (Luttig, J., concurring), abrogated on other grounds, 174 F.3d 393 (4th Cir. 1999).

The district court's nationwide injunction, however, effectively denies judges from other circuits the power to determine or follow the law of their own circuits. Because the same court that issues an injunction has the authority and responsibility to enforce it, any FEC action subject to the injunction would be decided in the first instance by the court below. Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452 (1932); Feller v. Brock, 802 F.2d 722, 728 (4th Cir. 1986). Thus, for example, if the Commission were to notify a party that it had decided to bring an enforcement action in Illinois arguably based on 11 C.F.R. 100.22(b), the defendant could begin contempt proceedings in the Richmond district court to enforce the injunction to bar the Illinois action. The Seventh Circuit would never have a chance to rule on the constitutionality of 11 C.F.R. 100.22(b) if the district court in Richmond enjoined the Illinois action.

This preemption is particularly egregious in the Ninth Circuit, which is entitled to determine for itself whether or not the Commission's regulation is supported by that court's reasoning in Furgatch. The nationwide injunction thus

effectively overrules Furgatch. Indeed, the district court here apparently intended to do just that, for it explicitly stated its conclusion (JA 219) that not only the reasoning, but even the holding of Furgatch appeared to contravene its interpretation of Buckley. Similarly, the district court's injunction would preclude the Seventh Circuit from deciding how to interpret express advocacy, even though that court explicitly reserved judgment on this difficult issue after this Court's decision in CAN, explaining that "Furgatch and [CAN] give different answers not because they disagree about whether Buckley and [MCFL] 'apply' but because these decisions do not give unambiguous answers to the myriad situations that arise." Wisconsin Right to Life, 138 F.3d at 1186.

Moreover, the nationwide injunction unnecessarily expands the district court's role in enforcing the Act, both for itself and the federal courts in general. As the Supreme Court explained in the analogous context of federal court supervision of state court proceedings, the nationwide injunction

> would require ... the continuous supervision by the federal court over the conduct of the [government officials] in ... future ... proceedings .... Presumably, any member of [the] class who appeared as an accused ... could allege and have adjudicated a claim that [the government officials] were in contempt of the federal court's injunction order, with review of adverse decisions in the Court of Appeals and, perhaps, in this Court. Apart from ... the significant problems of proving noncompliance in individual cases, such a major continuing intrusion of the equitable power of the federal courts ... is in sharp conflict with the principles of equitable restraint which this Court has recognized ....

O'Shea v. Littleton, 414 U.S. 488, 501-02 (1974).[14] This entanglement could become particularly disturbing given the substance of the regulation. In a close case, such as the facts in Furgatch itself, the Commission might rely upon the general definition of independent expenditure in 2 U.S.C. 431(17), or upon subpart (a) of 11 C.F.R. 100.22. A defendant who believed that the Commission's position "really" reflected the substance of subpart (b) might come to the district court for relief, asking the court to evaluate the basis for the Commission's conclusion. Such a strategy could also be attempted to disrupt the Commission's administrative investigations and internal deliberations, including its administrative discovery, settlement tactics, and even its exercise of prosecutorial discretion — all of which may involve evaluating the strength of various legal

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[14] See also National Organization for Women v. Operation Rescue, 914 F.2d 582, 586 (4th Cir. 1990) ("We also reject NOW's contention that the district court abused its discretion in limiting the injunction to Northern Virginia and in declining to extend the injunction indefinitely."), affirming, 726 F. Supp. 1483, 1497 (E.D.Va. 1989) ("Plaintiff's request for nationwide injunctive relief is overbroad. Even assuming, arguendo, that plaintiffs have shown a need for such expansive relief, the practical problems of enforcement for violations in far-off locations ... militate convincingly against granting such relief."), reversed in part and vacated in part on other grounds, Bray v. Alexandria Women's Health, 506 U.S. 263, 285 n.16 (1993); Suggs v. Brannon, 804 F.2d 274, 279 (4th Cir. 1986). But cf. Richmond Tenants Organization, 956 F.2d at 1308-09 (upholding nationwide injunction to protect national association of tenants' organizations, as interpreted to leave to the discretion of local district judges its application in cases arising in their jurisdictions).

theories concerning express advocacy that the Commission could pursue if it were to initiate a civil enforcement action. These potential complications, involving a federal judge in the exercise of prosecutorial discretion the Constitution assigns to the executive branch, are yet another reason why the district court should not be supervising the Commission's enforcement of 11 C.F.R. 100.22(b) throughout the country.

2. The Nationwide Injunction Improperly Prevents The Commission From Litigating The Constitutionality Of 11 C.F.R. 100.22(b) In Other Circuits, And Deprives The Supreme Court Of The Benefits of Intercircuit Conflicts

The Supreme Court has held that the government, after losing an issue in one federal circuit, has the right to relitigate that same issue in another circuit. United States v. Mendoza, 464 U.S. 154 (1984). In doctrinal terms, nonmutual collateral estoppel does not apply to the federal government. Id. at 164. The district court's nationwide injunction improperly forecloses the very intercircuit nonacquiescence that the Supreme Court has encouraged.[15]

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[15] Intercircuit nonacquiescence should not be confused with "intracircuit" nonacquiescence. As explained below, the former is a well-established corollary to the doctrine of stare decisis and refers to the government's relitigation of the same issue in different circuits, which are not bound by each other's decisions. Intracircuit nonacquiescence — which the Commission has explicitly disavowed in this case — is a controversial doctrine that refers to the government's refusal to follow a circuit precedent within the circuit itself, except as it applies to the actual litigants. See generally S. Estreicher & R. Revesz, Nonacquiescence by Federal

In Mendoza, the Supreme Court reasoned (464 U.S. at 160) that, unlike with private litigants, "[g]overnment litigation frequently involves legal questions of substantial public importance" and to prevent the government from relitigating such issues "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."

The Court noted several reasons for this rule. First, "[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." Id. Indeed, the Court specifically noted that its practice of waiting for a conflict to develop among the circuits before granting certiorari depends upon the government being able to relitigate its position in multiple courts of appeals. Id. (citing Sup. Ct. R. 17.1). See also E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals.").

The Mendoza Court also explained that the government faces different constraints in conducting its litigation than do private litigants. The government may have reasons for not appealing a lower court decision which have nothing to

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Administrative Agencies, 98 Yale L.J. 679 (1989); Department of Energy v. FLRA, 106 F.3d at 1164-67 (Luttig, J., concurring).

do with the merits of the case, such as limited resources and crowded court dockets. Mendoza, 464 U.S. at 161. Making adverse decisions binding on the government in all future cases would force the government to appeal every case, abandoning these other considerations. Id. Finally, the Court recognized that the decision to pursue a case involves policy implications for the government that a private litigant does not face. Id. Thus, the Court concluded that permitting the government to test its interpretations of the law in multiple circuits will "better allow thorough development of legal doctrine." Id. at 163.

For all these reasons, it is now "well-settled that the government need not acquiesce, on a nationwide basis, in one circuit's construction of federal law adverse to the government's interpretation" since "[s]uch a 'first in time' rule would ... be contrary to the structure of our federal judicial system," United States v. One Parcel of Real Property, 960 F.2d 200, 211 (1st Cir. 1992). Accord Georgia Department of Medical Assistance v. Bowen, 846 F.2d 708, 710 (11th Cir. 1988) ("It is clear, of course, that an agency of the United States is not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States.... In [Mendoza] ... the Court extolled the virtues of what has been referred to as 'percolation.' ") (citations omitted); Railway Labor Executives' Ass'n v. ICC, 784 F.2d 959, 964 (9th Cir. 1986) ("The courts do not require an agency of the United States to accept an adverse determination of the agency's

statutory construction by any of the Circuit Courts of Appeals as binding.... It is standard practice for an agency to litigate the same issue in more than one circuit ....") (citations omitted); American Medical Int'l, Inc. v. Secretary of HEW, 677 F.2d 118, 123 (D.C. Cir. 1981).

If district courts routinely issued the kind of nationwide injunction as the court did below, intercircuit conflicts would never arise. Instead, there would be a tremendous incentive for litigants to race to their courthouse of choice, knowing that the first decision would effectively set the precedent for the entire nation. As other courts have recognized, "[s]uch a rule would tend to give undue authority to the first appellate court to decide an issue and chill advocacy." Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 131 (3rd Cir. 1993). Accord American Medical Int'l, 677 F.2d at 121 ("The broader and more serious implication of such a holding is that the first court to hear a case raising a public law issue litigable only with the Federal Government would — if it ruled against the Government — rigidify the law to be applied by every court in every case presenting that issue.") (footnote omitted).

The Mendoza analysis applies here. The Commission is entitled to pursue its interpretation of the law in all circuits that have not rejected its view, especially in light of the abstract legal question at issue, which concerns a purely interpretative regulation. Indeed, the Ninth Circuit's decision in Furgatch was the

basis for the language in 11 C.F.R. 100.22(b), and that court is entitled to determine for itself whether the regulation is consistent with its interpretation of Buckley and MCFL. The district court's injunction foreclosing the Commission from testing its regulation in the Ninth Circuit effectively overrules the Ninth Circuit's own interpretation of the law. Likewise, the Seventh Circuit has reserved judgment on this issue and is entitled to decide it by itself.

Moreover, Congress knows how to limit judicial review of Commission decisions to a single circuit, but it chose not to do so regarding the Commission's regulations. Under 2 U.S.C. 437g(a)(8)(A), an administrative complainant seeking review of the Commission's dismissal of that person's administrative complaint must file suit before the United States District Court for the District of Columbia. But the Commission's regulations are reviewed under the Administrative Procedure Act, and review is not limited to any one circuit. "[U]nder some statutory schemes, Congress has made a judgment that quick and authoritative resolution is more important than the benefit that might result from intercircuit dialogue." Estreicher & Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. at n.277 (citing 42 U.S.C. 7607(b)(1), requiring D.C. Circuit to review certain Clean Air Act regulations). Congress's decision not to limit the circuits that review the Commission's regulations is further support for

overturning the district court's attempt to foreclose other circuits from reaching their own conclusions regarding 11 C.F.R. 100.22(b).

As concluded by the Seventh Circuit in its discussion of express advocacy as defined under a state law, "[i]t would also be obnoxious to threaten [government] officials with penalties for contempt of court if at some future time they were to interpret Buckley and Massachusetts Citizens for Life differently from the way the district court interprets it." Wisconsin Right to Life, 138 F.3d at 1187. The Commission has recognized that, unless it is changed, this Court's decision in CAN is controlling in this Circuit, but the Commission is not required to acquiesce nationwide in one circuit's conclusion. "Under our legal system, authoritative decisions of that nature are left to the United States Supreme Court." Fristoe v. Thompson, 144 F.3d 627, 630 (10th Cir. 1998).

III. THE COMMISSION'S REGULATION IS CONSTITUTIONAL

The express advocacy regulation is an interpretative regulation designed to clarify the Commission's interpretation of the Act's provisions requiring that independent campaign expenditures be disclosed and that unions and corporations not use their general treasury funds to finance such campaign expenditures. See 2 U.S.C. 434(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) (citation omitted).

The Commission recognizes that every panel and district court in this Circuit is bound by CAN, which, in effect, found the substance of 11 C.F.R. 100.22(b) to be invalid. Thus, the Commission did not argue below that the constitutionality of 11 C.F.R. 100.22(b) was a relevant dispute before the district court. It can only become a live issue in this case if this Circuit hears the matter en banc, or if the Supreme Court grants a petition for a writ of certiorari. Of course, because of the nationwide impact of the district court's injunction, such further review would become acutely important if this Court upholds the nationwide injunction. Thus, to preserve this issue for further judicial review, and to explain the district court's errors, we explain below why the regulation is constitutional.

A. STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment de novo." Smith v. Virginia Commonwealth University, 84 F.3d at 675.

B. THE EXPRESS ADVOCACY STANDARD WAS FORMULATED TO AVOID UNCONSTITUTIONAL VAGUENESS AND OVERBREADTH

In Buckley, 424 U.S. at 39-44, 80-84, the Supreme Court adopted the express advocacy standard as a narrow construction of two provisions of the Act in order to avoid problems of vagueness and overbreadth in regulating public

political discourse. Before Buckley, then section 608(e)(1) of the Act prohibited any person from making an independent expenditure "relative to a clearly identified candidate during a calendar year" that exceeded $1,000. Id. at 39-40. The Court found that "so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech" (id. at 41). Thus, to "preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Id. at 44 (footnote omitted). Similarly, in its discussion of the Act's reporting requirements for campaign expenditures, the Court ensured that the reach of those requirements would not be "impermissibly broad" by narrowing the definition of "expenditure" as applied to independent expenditures by individuals and groups other than political committees. Id. 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.

C. THE COMMISSION'S REGULATION NARROWLY INTERPRETS "EXPRESSLY ADVOCATING" WITHOUT RENDERING THE ACT INEFFECTIVE

The Supreme Court has cautioned that "[i]n construing [a statute] narrowly to avoid constitutional doubts, we must ... avoid a construction that would

seriously impair the effectiveness of the [statute] in coping with the problem it was designed to alleviate." United States v. Harriss, 347 U.S. 612, 623 (1954). The Commission's regulation was designed to follow this approach.

1. The Regulation Is Extremely Narrow And Does Not Include Issue Advocacy In Its Definition

Subpart (b) of the Commission's regulation is an extremely narrow provision that is highly protective of First Amendment interests. It precludes application of the Act unless a communication has an "electoral portion" in which advocacy of election or defeat of a candidate is "unmistakable, unambiguous, and suggestive of only one meaning" (emphasis added). Contrary to the district court's analysis (JA 219), the regulation also requires that the electoral message encourage action "to elect or defeat" a candidate rather than encourage "some other kind of action," and that this message be so clear that reasonable people "could not differ" on this point. In this manner, the regulation is consistent with Furgatch's requirement that there be a "clear plea for action," 807 F.2d at 864. Although the district court in MRTL felt constrained by precedent to invalidate 11 C.F.R. 100.22(b), the court nevertheless agreed (914 F.Supp. at 11) with the Commission that

> [o]ne does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. Subpart (b) appears to be a very reasonable attempt to deal with these vagaries of language and,

> indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message.

The regulation implements the Court's requirement in Buckley that regulation of independent expenditures be "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate," 424 U.S. at 80, and incorporates the distinction at the heart of Buckley "between discussion of issues and candidates and advocacy of election or defeat of candidates," id. at 42. This is enough to warrant upholding the Commission's regulation under the established standard of review on a facial challenge like this one, which would not foreclose future challenges as applied to particular facts.[16]

Although the Supreme Court held in MCFL that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b," 479 U.S. at 249, the Court demonstrated in that case that the statute could be applied to a communication containing issue advocacy as long as express

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[16] "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."

Rust v. Sullivan, 500 U.S. 173, 183 (1991) (citation omitted). See also Reno v. Flores, 507 U.S. 292, 300 (1993); Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797-98 (1984).

advocacy were present as well. The newsletter in that case contained both issue advocacy and electoral advocacy, but the Court did not find that the inclusion of issue advocacy immunized the newsletter from regulation. Rather, the Court concluded that, even though its language was not as direct as the examples of express advocacy listed in Buckley, the newsletter was not a "mere discussion of public issues" because its "essential nature" went "beyond issue discussion to express electoral advocacy," and therefore fell within the prohibition of Section 441b even though it also addressed issues. 479 U.S. at 249.

The Supreme Court has long recognized that because rules are written to provide general guidance about future events, they cannot possibly anticipate every situation that will arise. SEC v. Chenery Corp., 332 U.S. 194, 201-02 (1947). Although subpart (a) of the regulation provides examples of express advocacy, it articulates no principle for deciding which new linguistic variations will meet the standard. In subpart (b), the Commission has explained to the public how it will analyze the facts in difficult cases that have yet to come forward. But subpart (b) makes it very clear that unanticipated fact patterns will only be found to involve express advocacy if their electoral message is "unmistakable, unambiguous, and suggestive of only one meaning," and if "reasonable minds could not differ" about whether specific electoral action is encouraged.

2. Under the Express Advocacy Test, The Speaker's Message Must Be Taken As A Whole With Limited Reference To External Events, As It Would Appear To A Reasonable Person

In Furgatch 807 F.2d at 863, the Ninth Circuit explained why it could not simply isolate individual words or phrases and analyze them separately, and instead held that the "proper understanding of the speaker's message can best be obtained by considering speech as a whole."

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

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

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

Id. at 863-64. See also Deal v. United States, 508 U.S. 129, 132 (1993) ("fundamental principle of ... language itself" that the "meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

In MCFL, the Supreme Court refused to read the exhortation "vote pro-life" in isolation. That message, by itself, makes no reference to specific candidates. But because later pages of the same newsletter clearly identified some candidates who were "pro-life," the Court found that the newsletter as a whole "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." 479 U.S. at 249.[17]

Indeed, the examples of "express advocacy" used in Buckley, 424 U.S. at 44 n.52, confirm the unavoidable role of context. An exhortation to "Support Smith" 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. 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. As the district court in MRTL explained (914 F.Supp. at 11), " '[l]imited reference to external events' is hardly a radical idea. It is required even by the Buckley terminology."

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[17] The MCFL Court further demonstrated that it would not elevate form over substance when it refused to allow the newsletter's disclaimer to negate the express advocacy. 479 U.S. at 249. The disclaimer stated that the newsletter "does not represent an endorsement of any particular candidate." Id. at 243.

In addition, contrary to the district court's conclusion (JA 219) that 11 C.F.R. 100.22(b) regulates "advocacy based upon the understandings of the audience," the regulation is no different from other First Amendment tests that use an objective, "reasonable person" standard. While the Supreme Court has cautioned against putting a speaker at the mercy of the subjective "varied understanding of his hearers," 424 U.S. at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)), a "reasonable person" standard is an objective test that does not vary depending upon the sensitivity or special knowledge or ignorance of particular listeners.[18] Moreover, here the regulation not only uses an objective test, but uses an extremely demanding one, because it requires that reasonable minds "could not differ" as to whether electoral action is advocated.

Similar "reasonable person" or "ordinary observer" standards have been adopted in analogous contexts concerning the interpretation of language and symbols. In County of Allegheny v. ACLU, 492 U.S. 573, 599-600 (1989), the

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[18] Courts routinely apply "reasonable person" tests and consider them objective standards. See, e.g., Wyatt v. Cole, 504 U.S. 158, 166 (1992) (qualified immunity for certain government officials depends upon a "wholly objective standard" based on whether a "reasonable person" would have known of clearly established statutory or constitutional rights) (citation omitted); Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

Supreme Court stated that "[n]o viewer could reasonably think that [the crèche] occupies this location without the support and approval of the government. Thus, ... the county sends an unmistakable message." In short, as in other areas of the law, the express advocacy test does not require the Court to be "blind to what all others can see and understand." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 486 (1985) (citations and quotation marks omitted).

More generally, wooden literalism has not characterized the Supreme Court's treatment of cases in which it is necessary to draw lines between regulable conduct and conduct the First Amendment shields from regulation. In areas as diverse as obscenity (see Miller v. California, 413 U.S. 15 (1973)), fighting words (see Brandenburg v. Ohio, 395 U.S. 444 (1969); Hess v. Indiana, 414 U.S. 105 (1973)), and religious expression (see County of Allegheny), the Court has eschewed mechanical tests and has instead evaluated the interests at stake with sensitivity for the context and the nature of the expression at issue.

In sum, if the express advocacy requirement is read too narrowly, the prohibitions of 2 U.S.C. 441b will require little more than careful diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections, and from doing so without disclosing to the public the source of the influence. As Justice Kennedy recently explained, "[i]ssue advocacy ... is unrestricted, ... while

straightforward speech in the form of financial contributions ... subject to full disclosure and prompt evaluation by the public, is not." Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897, 914 (2000) (Kennedy, J., dissenting). Construing express advocacy in a rigid and unrealistic manner would foster an unnecessary expansion of this "covert speech" that, in Justice Kennedy's view, "mocks the First Amendment" (id.).

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal for lack of jurisdiction, remand the case, and order the district court to dismiss VSHL's complaint. In the alternative, the Court should vacate the district court's injunction and limit prospective relief solely for the benefit of VSHL.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Because of the important and complex constitutional questions involved in this appeal, the Commission respectfully requests oral argument.