IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2600

FEDERAL ELECTIONS COMMISSION,

Plaintiff-Appellant,

v.

CHRISTIAN ACTION NETWORK, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Virginia
Lynchburg Division, Case No. 94-0082-L

BRIEF OF AMICUS CURIAE DEMOCRATIC NATIONAL COMMITTEE

Joseph E. Sandler
General Counsel
Democratic National Committee
430 S. Capitol Street
Washington, D.C.
(202) 863-7110

Donald B. Verrilli
Paul M. Smith
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6060

Daniel H. Bromberg
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3601

Counsel for Amicus Curiae
Democratic National Committee

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INTEREST OF AMICUS

Amicus Curiae Democratic National Committee is the national political organization of the Democratic Party.[1] It has a strong interest in urging a correct interpretation of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-55, in this case. The issue in this case is whether a corporation can successfully evade the Act's regulation of, and restrictions upon, expenditures expressly advocating the election or defeat of a candidate by simply avoiding the use of specified words. Amicus is particularly concerned that an unduly restrictive interpretation of the "express advocacy" test would allow corporations, using general corporate funds, to participate extensively in federal election campaigns as long as they avoid certain words in their advertisements. Allowing such a practice would skew federal electoral campaigns and severely disadvantage political committees such as amicus, because amicus and other political committees would remain subject to comprehensive regulation of their fundraising and expenditures -- including expenditure limits, disclosure requirements, and prohibitions on the use of contributions from corporate treasury funds (see 2 U.S.C. §§ 434, 441a(d), 441b(a)) -- while corporations would be free to spend corporate treasury funds in unlimited, undisclosed, and unregulated fashion.

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[1] Both the Federal Election Communication and the Defendants have consented to the filing of this brief, and copies of their consents have been lodged with this Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the brief of the Federal Election Commission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), and FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), the Supreme Court held that several provisions of the Federal Election Campaign Act regulating "expenditures" in connection with federal elections apply only to speech that "expressly advocates" the election or defeat of a federal candidate. This case involves the application of the express advocacy test to paid advertisements that were quite obviously aimed at influencing voters to vote against a specific candidate in an imminent presidential election, even though those advertisements did not contain words such as "vote against," "defeat," or "reject" listed in a footnote in Buckley.[2] Because the advertisements at issue here did not contain any of the specified words, the district court held that the advocacy in these advertisements was merely "implied" and thus immune from federal regulation. But such a "magic words" approach is not

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[2] According to the footnote, restrictions on independent expenditures apply only to

> communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Buckley, 424 U.S. at 44 n. 52.

required by the First Amendment and would allow participants in election campaigns to escape legitimate federal regulation through careful choice of words. The concept of "express advocacy" should instead be understood as including "advocacy" such as appellee's -- i.e., any speech that, in context, everyone would understand as urging the election or defeat of a federal candidate, regardless of the particular words used. This conclusion is buttressed by interpretive regulations recently enacted by the Federal Election Commission, which make clear that the express advocacy standard covers the advertisements at issue in this case.

ARGUMENT

I. "EXPRESS ADVOCACY" INCLUDES ADVERTISEMENTS THAT, IN CONTEXT, CAN ONLY BE UNDERSTOOD AS URGING THE ELECTION OR DEFEAT OF A FEDERAL CANDIDATE.

Beginning in late September 1992 and continuing until November 2, 1992, the day before that year's presidential election, appellee Christian Action Network arranged and paid for several hundred television broadcasts of a commercial. See Complaint ¶ 27. The commercial attributed to then-candidate Bill Clinton and his running mate Al Gore a series of pro-gay positions that could only be implemented if they were elected and then asked rhetorically, "Is this your vision for a better America?" Id. ¶ 28. After the commercial was criticized by Democratic Party Chair Ronald Brown, the Christian Action Network followed up with two newspaper advertisements published on October 15 and October 26, 1992. See id. ¶¶ 30-34. These

advertisements, labelled as "open letters" to Brown and to "Gov. Bill Clinton, Democratic Presidential Candidate," stated that the "voting public has a right to know" Clinton's views and that "[w]hen the Clinton/Gore campaign committee publicly and unequivocally retract their commitments to the 'gay rights' community, the Christian Action Network will halt its television campaign." Id. ¶ 31 (quotations omitted). The sole issue in this appeal is whether the district court was correct in holding that these advertisements did not "expressly advocate" the defeat of then-Governor Clinton and thus did not violate the statutory ban on use of corporate general-treasury funds in federal election campaigns, see 2 U.S.C. § 441b(a), as well as reporting and disclosure requirements found elsewhere in the Federal Election Campaign Act.

In Buckley v. Valeo, 424 U.S. 1, 74-82 (1976) (per curiam), the Supreme Court considered, among other things, the FECA's requirement that individuals report expenditures over a certain amount to the Commission. See 2 U.S.C. § 434(c). At that time, expenditures were defined as monies spent "for the purpose of . . . influencing" the nomination or election of candidates to office. 86 Stat. 12. Worried that this definition might make the disclosure regulations "impermissibly broad," the Court construed the term "expenditure to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 80 (footnote omitted). The Court also read the express advocacy standard into the limits on independent expenditures out of

concern that those limits were otherwise unconstitutionally vague. See id. at 41-44; see also id. at 44-54 (finding the expenditure limits unconstitutional on other grounds). The Federal Election Campaign Act was subsequently amended to incorporate the express advocacy standard into the Act's disclosure and (by way of the definition of the term "independent expenditure") reporting requirements. 2 U.S.C. §§ 431(17), 434(c), 441d(a). In MCFL, after discussing the express advocacy standard, the Supreme Court assumed, in order to avoid the sorts of overbreadth problems considered in Buckley, that the express advocacy standard should govern § 441b's prohibition on the use of corporate treasury funds. See 479 U.S. at 248-50.

The express advocacy requirement was discussed most fully in the portion of Buckley considering the Act's limits on independent expenditures. See Buckley, 424 U.S. at 39-51. Prior to Buckley, the Act limited independent expenditures "relative to a clearly identified candidate" to $1,000 per year. Id. at 439. (quotation omitted). Finding the term "relative to" unconstitutionally vague, the Court reasoned that any vagueness problems could be avoided by reading the expenditure limitation as itself "limited to communications that include explicit words of advocacy of election or defeat of a candidate." Id. at 41-44. The Supreme Court also observed in footnote 52 that

> [t]his construction would restrict the application of [the expenditure limit] to communications containing express words of advocacy of election or defeat, such as 'vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Id. at 44 n.52.

The district court's dismissal of the complaint in this case was based on the fact that the neither the television advertisement nor the follow-up newspaper advertisements here contained language such as that listed in footnote 52 of Buckley. See J.A. 19 ("[T]he advertisements were devoid of any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute 'express advocacy' as that term is defined in Buckley and its progeny.") Such an approach gives primary importance to maintaining a "bright line" distinction between regulated political expenditures and unregulated discussion of issues. But, in so doing, it would allow speakers by simply avoiding certain words to advocate the election or defeat of a candidate to their heart's content, with no concern about either restrictions on corporate expenditures or disclosure and reporting regulations.

The alternative approach, reflected in the Ninth Circuit's decision in FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987), would lead to a different outcome in cases such as this one. That approach would treat as "express advocacy" any statements that, taken as a whole and read in context, are unambiguously aimed at urging support or opposition to a given candidate, regardless of whether they contain a particular phrase that does so. In Furgatch, the Ninth Circuit was faced with a newspaper advertisement run one week prior to the 1980 election that made a number of statements critical of

President Carter's conduct in office, and concluded that President Carter was engaged in a supposed

> 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.

807 F.2d at 858. The court of appeals held that, in context, this was an obvious example of advocacy aimed at persuading people to vote against President Carter, and thus fell within the "express advocacy" standard. See id. at 864-65.

The Ninth Circuit reasoned that

> [a]lthough we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. We must read section 434(c) so as to prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act.

807 F.2d at 862. It rejected the "proposition that 'express advocacy' is . . . strictly limited to communications using certain key phrases." Id. at 862-63. Instead, it concluded that application of the "express advocacy" standard should turn on whether the speech in question, when read as a whole and viewed in context is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Id. at 863-64.

This interpretation is perfectly consistent with Buckley. Although the Supreme Court stated in footnote 52 of Buckley that under the express advocacy standard the expenditure limits would

be restricted to "communications containing express words of advocacy or defeat," Buckley, 424 U.S. at 44 n.52, Buckley cannot be read to limit express advocacy to statements containing phrases synonymous with "vote for" and "vote against." As the Supreme Court has repeatedly admonished, it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2751 (1993); see also CBS, Inc. v. FCC, 453 U.S. 367, 385 (1981) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.") (quotation omitted). This is especially true where, as here, the dictum is contained in footnotes -- because the Supreme Court has often "receded from" clear statements in footnotes. See, e.g., NLRB v. Hendrick City Rural Elec. Corp., 454 U.S. 170, 186-88 (1981); McDaniel v. Sanchez, 452 U.S. 130, 141 & n.19 (1981). Thus, Furgatch cannot be deemed inconsistent with Buckley based solely upon dictum in a footnote.

In fact, the approach adopted by the Ninth Circuit in Furgatch is clearly the more appropriate way to interpret and apply the Act. First, as compared to the approach adopted by the district court, it is much more likely to achieve the goals that Congress had in mind. In passing the Federal Election Campaign Act, Congress drew the conclusion that it was important to require disclosure of independent campaign expenditures and to prevent corporations from making such independent expenditures out of their general treasury funds. The Supreme Court in

Buckley and MCFL has upheld the constitutionality of such limitations. See Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 657-61 (1989); Buckley, 424 U.S. at 80-82. But it serves little purpose to regulate expenditures for advertisements that contain certain "magic words" while giving free rein to advertisements that are obviously and unambiguously campaign-related as long as they avoid such words. See Furgatch, 807 F.2d at 863 ("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.").

As this case illustrates, such an approach would allow for a virtually unlimited number of "attack ads" to be aired in the last weeks of a federal campaign, paid for out of corporate treasuries. See Furgatch, 807 F.2d at 863 ("'Independent' campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate."). Corporations would be permitted to expend unlimited corporate treasury funds in undisclosed and unregulated fashion so long as they avoided the use of a few magic words. Political committees such as amicus, by contrast, would remain handicapped in their ability to respond by spending and contribution limits that apply regardless of the content of their advertisements. It hardly makes sense to suppose that Congress intended to create such a slanted playing

field. After all, in so doing, it would have accomplished little or nothing of what it set out to accomplish when it sought to regulate independent expenditures.

Moreover, the First Amendment concerns articulated in Buckley and MCFL do not demand such a wooden application of the "express advocacy" test. One concern expressed by the Court related to the potential overbreadth of the statute's application. See Buckley, 424 U.S. at 80 ("To insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.") (footnote omitted). But if it is constitutional to regulate speech that uses the magic words in footnote 52 of Buckley because that speech "expressly advocates," it must also be constitutional to apply federal regulation to other speech that is unambiguously aimed at influencing voters. After all, the two categories of speech have the same communicative intent and effect. Far from intruding into general discussions of political issues, such a "reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." Id. at 80.

A second concern expressed by the Supreme Court was vagueness. See Buckley, 424 U.S. at 42 ("[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."). Here again, the inclusion in the category of

"express advocacy" of advertisements that unambiguously are intended to support or oppose a clearly identified candidate -- albeit without using terms like "vote for" or "defeat" -- hardly creates a constitutionally significant vagueness problem. In order to qualify for regulation, the speech would have to occur in the context of an election campaign, refer to a specific candidate, and convey an unambiguous message aimed at persuading voters to support or oppose that candidate.

II. UNDER RECENTLY ISSUED FEC REGULATIONS, WHICH GOVERN THIS CASE, THE ADVERTISEMENTS AT ISSUE HERE CONSTITUTE EXPRESS ADVOCACY.

On October 5, 1995, the FEC implemented new regulations which, among other things, define express advocacy. See Implementation of Express Advocacy Rule, 60 Fed. Reg. 52069 (1995). These interpretive regulations confirm that, properly interpreted, the advertisements at issue here constitute express advocacy and therefore provide an alternative and independent basis for reversing the district court's decision.

A. This Court Should Apply the New Regulations.

After a lengthy rulemaking process, the Commission promulgated a final rule defining express advocacy on July 8, 1995, approximately two weeks after the district court issued the opinion below. See Final Rule on Express Advocacy, 60 Fed. Reg. 35292 (to be codified at 19 C.F.R. § 100.22); see also Advance Notice of Proposed Rulemaking, 53 Fed. Reg. 416 (1988) (commencing rulemaking process). As required by the FECA, see 2

U.S.C. § 438(d), the rule was transmitted to Congress. See Implementation of Express Advocacy Rule, 60 Fed. Reg. 52096. After thirty legislative days expired without any resolution disapproving the express advocacy rules, the Commission implemented the rules. See id.

The express advocacy rules should be considered by this Court. It has long been settled that "an appellate court must apply the law in effect at the time it renders its decision." Thorpe v. Housing Authority of Durham, 393 U.S. 268, 281 (1969) (footnote omitted); accord Bradley v. Richmond School Bd., 416 U.S. 696, 711-16 (1974); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.). This rule "applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." Thorpe, 393 U.S. at 282. And there is no retroactivity problem created by applying new "interpretive" regulations to past transactions. See, e.g., Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129, 135 (1936).[3]

B. The New Regulations Are Entitled to Deference.

Under the Supreme Court's seminal decision in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), an agency's interpretation of the statute it is entrusted with administering will be given effect if (1) the

[3] Even if there were a concern with retroactivity, at most imposition of penalties for action taken before the effective date would be barred. There is no barrier to injunctive and declaratory relief governing future conduct.

statute is ambiguous and (2) the agency's interpretation is reasonable. Both conditions are satisfied here.

1. The Term "Express Advocacy" Is Ambiguous.

As a result of the Supreme Court decisions in Buckley and MCFL as well as the subsequent amendment of the FECA, the term "express advocacy" has become a part of the statute. See supra pp. 4-5. But that term is not defined in the FECA, has no established technical meaning, and is on its face ambiguous.

Standard dictionaries define "express" as meaning "directly and distinctly stated or expressed rather than implied or left to inference: not dubious or ambiguous." Webster's Third New Int'l Dictionary of the English Language Unabridged 803 (1981).[4] "Advocacy" is defined as "the action of advocating, pleading for, or supporting." Webster's Third New Int'l Dictionary 32.[5] These definitions preclude any conclusion that express advocacy is limited to a particular set of words or even that express advocacy must be entirely verbal. See, e.g., National R.R. Passenger Corp. v. Boston & Maine Corp, 112 S.Ct. 1394, 1402 (1992) (noting that existence of standard dictionary definitions

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[4] See also Black's Law Dictionary 580 (6th ed. 1990) (defining "express" as "[c]lear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous"); Random House Dictionary of the English Language 683 (2d ed. 1987) ("clearly indicated; distinctly stated; definite; explicit; plain").

[5] See also Black's Law Dictionary 55 ("The act of pleading for, supporting or recommending active espousal.") (citation omitted); Random House Dictionary 22 ("The act or pleading for, supporting, or recommending; active espousal.").

supportive of an interpretation demonstrate the reasonableness of that interpretation).

As discussed earlier, the Supreme Court did not attempt to restrict "express advocacy" to words such as those listed in Buckley. See supra pp. 7-9. Indeed, Buckley recognized that other definitions of the communications subject to regulation under the FECA were possible. When several parties in that case suggested that any vagueness in the expenditure limitations might be cured through a series of advisory opinions, the Supreme Court responded that "a comprehensive series of advisory opinions or a rule delineating what expenditure are 'relative to a clearly identified candidate' might alleviate the provision's vagueness problems." Buckley, 424 U.S. at 40 n.47 (emphasis added).

2. The FEC's Interpretation Is Reasonable and Entitled to Deference.

As the Supreme Court has recognized, the Federal Election Commission is "precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981). Congress has delegated to the Commission primary authority over the administration and enforcement of the FECA, expressly authorized the Commission to formulate policy, and thereby entrusted it with the resolution of issues "charged with the dynamics of party politics" that courts are ill-suited to resolve. Id.; see Buckley, 424 U.S. at 109. Accordingly, if the agency's definition of express advocacy is reasonable and consistent with congressional intent, this Court must defer to it. See FEC v.

DSCC, 454 U.S. at 39; see generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 844-45 (footnote omitted).

The express advocacy regulations contain a list of terms similar to those in the footnote in Buckley and found to be exclusive by the district court. See Final Rule on Express Advocacy, 60 Fed. Reg. at 35304-05. These terms include phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "Smith for Congress," and "Bill McKay in '94." Id. The new regulations, however, also go beyond the "magic words" approach adopted by the District Court. For example, under the regulations, campaign slogans or individual words can constitute express advocacy. See id. at 35305. Thus, a poster or bumper sticker saying "Mondale!" or "Nixon's the One" constitutes express advocacy even though it does not contain words such as vote for, elect, or support. See id. The standard is whether the language "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." Id.

The new regulations also describe the circumstances under which a communication can "go[] beyond issue discussion to express electoral advocacy." MCFL, 479 U.S. at 349; see Final Rule on Express Advocacy, 60 Fed. Reg. at 35295 (discussing "[c]ommunications containing both issue advocacy and electoral advocacy"). Where issue discussion is involved, the express advocacy regulations once again require that the communication "could only be interpreted by a reasonable person as containing

advocacy of the election or defeat of one or more clearly identified candidate(s)." Final Rule on Express Advocacy, 60 Fed. Reg. at 35305. In addition, the regulations require that

> (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.

Id. In other words, speech containing issue discussion will be considered express advocacy whenever a reasonable person would understand the communication to contain advocacy of the election or defeat of a candidate because (1) the "electoral portion of the communication" is unambiguous and (2) the communication clearly advocates the election or defeat of a clearly identified candidate.

It was clearly reasonable for the Commission to extend the definition of express advocacy beyond communications that literally use the words "vote for," "elect," and "support." As Ninth Circuit has observed, the few phrases listed in Buckley "do[] not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." Furgatch, 807 F.2d at 863. Equally reasonable was the Commission's decision to extend the definition of express advocacy to cover visual as well as textual cues. Courts have long recognized the ability of symbols to "convey[] an unmistakable message about a contemporaneous issue of intense public concern." Spence v. Washington, 418 U.S. 405, 410 (1971 per curiam) (citing Tinker v. Des Moines Indep. Community School

District, 393 U.S. 503, 505-14 (1969)). Finally, it was reasonable to include within the definition of express advocacy speech containing some discussion of issues. As mentioned above, the Supreme Court itself has recognized that communications can go beyond issue discussion to express electoral advocacy. See MCFL, 479 U.S. at 250.

Accordingly, it was reasonable for the Commission to define express advocacy to include not only communications containing the "magic words" identified in Buckley but also communications that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." Final Rule on Express Advocacy, 60 Fed. Reg. at 35305.

3. The Express Advocacy Rules Are Consistent with the Supreme Court's Decision in Buckley.

There is no conflict between the Commission's new express advocacy regulation and the Supreme Court's decision in Buckley. As demonstrated above, the Supreme Court did not announce a comprehensive and exclusive definition of express advocacy in Buckley. See supra p. 14. The Court simply narrowed the definition of expenditure under two provisions in the FECA to avoid vagueness and overbreadth problems. See Buckley, 424 U.S. at 40-44, 79-80. Furthermore, nothing in Buckley even remotely suggests that the Supreme Court intended to prevent the Commission from elaborating the definition of express advocacy.

It is not unusual for the Supreme Court to examine the outline of a statutory term but leave its precise definition to

an agency. The Court of Appeals for the District of Columbia Circuit recognized this in a decision issued just last month. In Chamber of Commerce v. FEC, No. 94-5339, (D.C. Cir. Nov. 14, 1995), the District of Columbia Circuit considered a Commission regulation redefining the term "member." See 11 C.F.R. § 114.1(e)(2) (1995).[6] Although the Supreme Court considered the meaning of that term in FEC v. National Right to Work Comm., 459 U.S. 197 (1982), and indicated that "some relatively enduring and independently significant financial or organizational attachment is required," 459 U.S. at 204, the District of Columbia Circuit nonetheless began by analyzing the Commission's regulations under Chevron. See Chamber of Commerce v. FEC, No. 94-5339, Slip op. at 8-10. The District of Columbia Circuit reasoned that the Supreme Court had "clearly recognized, by not attempting an 'exegesis,' that the word has a range of possible meanings."[7] Id. at 9-10. In Buckley, the Supreme did not attempt any extended analysis of the express advocacy requirement. Accordingly, the Supreme Court must be deemed to have recognized that express advocacy has a range of permissible meanings to be elaborated by the Commission.

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[6] The FECA permits membership organizations and corporations to solicit contributions from their members and to make expenditures from corporate treasury funds to influence the votes of those members. See 2 U.S.C. §§ 431(9)(B)(iii), 441b(b)(4)(C).

[7] Ultimately, the District of Columbia Circuit found Chevron deference inappropriate because the Commission's interpretation created constitutional problems. See Chamber of Commerce v. FEC, No. 94-5339, Slip op. at 10. As demonstrated below, see infra 19-21, there are no such problems here.

To be sure, the Supreme Court has stated that "'[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.'" Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992) (quoting Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)). Buckley and MCFL did not, however, purport to fix the definition of express advocacy or to determine the "clear meaning" of the FECA. Those decisions implied the express advocacy requirement into the statute in order to avoid vagueness and overbreadth problems not present in the new regulations. See MCFL, 479 U.S. at 248-49; Buckley, 424 U.S. at 43-45, 79-80. Moreover, nothing in either Lechmere or Maislin suggests that a new and constitutional agency interpretation of an unclear or overbroad statute -- even one that could be deemed to depart from prior Supreme Court interpretation -- should be denied deference.

4. The Express Advocacy Regulations Do Not Create Constitutional Problems.

The definition of express advocacy in the new regulations does not recreate the overbreadth problems that led the Supreme Court in Buckley and MCFL to imply the express advocacy requirement into the FECA. Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (interpretation that creates unnecessary constitutional problems is not reasonable under Chevron). In Buckley, the Supreme Court imposed the express advocacy

requirement to ensure that the Act's reporting requirement was "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." Buckley, 424 U.S. at 80. The new regulations plainly satisfy this requirement. They apply only where a communication "can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)" or "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates." Final Rule on Express Advocacy, 60 Fed. Reg. at 35305. Indeed, the regulations are more narrowly tailored than the Michigan prohibition on corporate expenditures applicable to all communications "in assistance of, or in opposition to, the nomination or election of a candidate" (Mich. Comp. Laws §§ 169.206(2) & .254 (1989)) that the Supreme Court found narrowly tailored in Austin v. Michigan State Chamber of Commerce, 494 U.S. 660-61; see also id. at 655 n.1 (noting that the Michigan law was patterned after § 441b).

Finally, the express advocacy regulations do not create any of the vagueness problems that prompted the Supreme Court to create the express advocacy standard in Buckley. The new regulations are plainly more precise than "relative to," the phrase that the Supreme Court found unconstitutionally vague in Buckley. See id. at 41 ("The use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech . . ..."). More importantly, the new regulations apply only to speech that is

"unmistakable, unambiguous, and suggestive of only one meaning" (60 Fed. Reg. at 35305) -- that is, to speech that any reasonable person would understand to constitute express advocacy. Thus, the new express advocacy regulations do not create any constitutional problems.

C. The Advertisements Constitute Express Advocacy under the New Regulations.

The advertisements at issue here plainly fall within the definition of express advocacy in the new FEC regulations. The advertisements contained an unmistakable reference to the upcoming presidential election: aired during the heart of the Presidential campaign, they specifically referred to both the Democratic candidate and his running mate. See Complaint ¶¶ 27-28. In addition, the advertisements attacked then-candidate Clinton for pro-gay proposals that could only be implemented if he were elected President. See id. ¶ 28. Finally, the advertisement concluded by asking rhetorically, "Is this your vision for a better America?" See id. (quotation omitted; emphasis in original). Thus, the electoral portion of the advertisement was unambiguous, and the advertisement clearly advocated the defeat of Mr. Clinton in order to prevent him from implementing his purported gay rights agenda, which places the advertisement squarely within the new regulation's definition of express advocacy. See supra pp. 15-16. In short, to any reasonable person, the advertisement plainly and unambiguously advocated the defeat of Mr. Clinton.

CONCLUSION

For the foregoing reasons and the reasons stated in the brief of the Federal Election Commission, the decision below should be reversed.

Respectfully submitted,

Joseph E. Sandler
General Counsel
Democratic National Committee
430 S. Capitol Street
Washington, D.C.
(202) 863-7110

Donald B. Verrilli
Paul Smith
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6060

Daniel H. Bromberg
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3601

Counsel for Amicus Curiae
Democratic National Committee

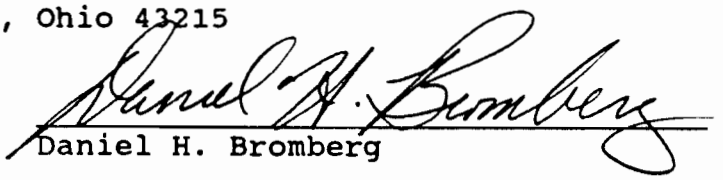
December 4, 1995

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 1995, I caused two (2) copies of the foregoing Brief of Amicus Curiae Democratic National Committee to be sent by U.S. mail, first class, postage prepaid, to each of the following:

Frank M. Northam, Esq.
Webster Chamberlain & Bean
Suite 1000
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20003

David Wm. T. Carroll, Esq.
Sellman & Boone
50 W. Broad Street
Suite 2800
Columbus, Ohio 43215



Daniel H. Bromberg