IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2600

FEDERAL ELECTION COMMISSION,

Plaintiff-Appellant,

v.

CHRISTIAN ACTION NETWORK, INC., and
MARTIN MAWYER,

Defendants-Appellees.

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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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May 21, 1997

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FEDERAL ELECTION COMMISSION Plaintiff-Appellant, v. CHRISTIAN ACTION NETWORK, INC., and MARTIN MAWYER, Defendants-Appellees.	No. 95-2600 PETITION FOR REHEARING and SUGGESTION FOR REHEARING IN BANC

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, the Federal Election Commission ("FEC" or "Commission") respectfully petitions for rehearing, and suggests rehearing in banc, of the decision issued by a panel of this Court on April 7, 1997. In accordance with Local Rule 40(b), in counsel's judgment the panel decision's holding that the FEC's position was not "substantially justified" under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, overlooked a material legal matter: i.e., that the Supreme Court's decisions interpreting "express advocacy" under the Federal Election Campaign Act (the "Act"), 2 U.S.C. §§ 431-55, had no occasion to address non-verbal communications and therefore set no binding precedent regarding such speech.

BACKGROUND

1. The Act requires public disclosure of all independent expenditures over $250 in connection with federal elections, 2 U.S.C. § 434(c), and generally prohibits corporations and

unions from using treasury funds to finance contributions and expenditures in connection with federal elections. 2 U.S.C. § 441b. The Supreme Court has found § 434(c) constitutional because of the compelling governmental interests in deterring corruption and educating the electorate, Buckley v. Valeo, 424 U.S. 1, 65-68 (1976), and has found § 441b constitutional as applied to independent expenditures by most corporations because " '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).

In upholding these restrictions, the Supreme Court recognized that advocacy of a position on issues can also influence candidate elections and that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." Buckley, 424 U.S. at 42. To avoid this vagueness problem, the Court construed the Act's regulation of independent expenditures "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80 (footnote omitted). This standard was intended to limit the statute's application to independent "spending that is unambiguously related to the campaign of a particular federal candidate," id. at 80, and to exclude from regulation the independent discussion of issues that are closely associated with particular candidates, even if those candidates are mentioned. Id. at 42. See also FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238, 248-49 (1986) (applying "express advocacy" construction to § 441b).

When the Court in Buckley first narrowed the definition of independent expenditures to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," 424 U.S. at 44 (footnote omitted), it gave examples of "communications containing express words of advocacy of election or defeat,"

to which application of the statute was restricted, "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,' " id. at 44 n.52. Although Buckley had no occasion to address any particular expenditure, the MCFL opinion, 479 U.S. at 248-49, agreed with the Commission that a corporate communication contained express advocacy — the first and only Supreme Court decision applying the express advocacy standard to a specific set of facts.

2. In this case, the Commission alleged that Christian Action Network, Inc. ("CAN"), and its president, Martin Mawyer, violated 2 U.S.C. § 441b(a) by using general corporate treasury funds to pay for advertisements advocating the defeat of Bill Clinton in the 1992 presidential election. As the district court found, 894 F. Supp. 946, 948 (W.D.Va. 1995), CAN:

> is a nonprofit corporation ... that seeks to inform the public about issues which it believes affect "traditional Christian family values." During the weeks leading up to the November 3, 1992 presidential election, CAN spent approximately sixty-three thousand dollars, ($63,000.00), from its general treasury fund to produce television and print advertisements. These advertisements assailed what the [appellees] believed to be the militant homosexual agenda of the Democratic candidates for president and vice-president ...

CAN's television ad opens with a color photograph of presidential candidate Bill Clinton's face superimposed upon color images of a rippling American flag (894 F. Supp. at 960).

> Clinton is shown smiling and the ad appears to be complimentary. However, as the narrator begins to describe Clinton's alleged support for "radical" homosexual causes, Clinton's image dissolves into a black and white photographic negative. The negative darkens Clinton's eyes and mouth, giving the candidate a sinister and threatening appearance. [894 F. Supp. at 960-61]. Simultaneously, the music accompanying the commercial changes from a single high pitched tone to a lower octave.

894 F.Supp. at 948. The video then abruptly cuts to various clips of apparently gay men and lesbians participating in a march (id. at 962-66), while the announcer lists purported campaign

proposals by Clinton and Gore to expand the rights of homosexuals. The images include half-naked men wearing black leather and metal-studded clothing and accessories (id. at 964). While the scenes from the march continue, the announcer asks rhetorically, "Is this your vision for a better America?" Id. at 949. The ad then concludes with the same American flag that opened the commercial, but without Clinton's image; instead, the name and address of the Christian Action Network appear over the flag (id. at 967). The narrator then states, "For more information on traditional family values, contact the Christian Action Network" (id. at 949).

3. The district court dismissed the Commission's action, finding that the "advertisements at issue do not contain explicit words or imagery advocating electoral action." 894 F. Supp. at 948. The court held that "[w]ithout 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" (id. at 953). The court found "suspect" the Commission's argument that unambiguous imagery, and not only words, could satisfy the constitutional requirement of "express advocacy" (id. at 955 & n.12), and refused to "accept the FEC's invitation to delve into the meaning behind an image" (id. at 958).

4. On August 2, 1996, a panel of this Court affirmed the district court decision in an unpublished, per curiam decision. On April 7, 1997, the panel held that CAN is entitled to attorney's fees under the EAJA and remanded to the district court for a determination of the amount properly awardable under 28 U.S.C. § 2412(d)(1)(A). Slip op. 30-31. The Court concluded (slip op. 2-4) that the Commission's position was not "substantially justified" within the meaning of § 2412(d)(1)(A):

> Although conceding that the Christian Action Network's advertisements did not employ "explicit words," "express words," or "language" advocating the election or defeat of a particular candidate for public office, the FEC nonetheless contended that the Network's expenditures for these advertise-

> ments violated section 441b(a) because the advertisements "unmistakably" "expressly advocated" the defeat of then-Government Clinton in the presidential election of 1992, through the superimposition of selected imagery, film footage, and music, over the nonprescriptive background language....
>
> Because the position taken by the FEC in this litigation was foreclosed by clear, well-established Supreme Court caselaw, and it is apparent from the Commission's selective quotation from and citation to those authorities that the agency was so aware, we conclude that the Commission's position, if not assumed in bad faith, was at least not "substantially justified" within the meaning of 28 U.S.C. § 2412(d)(1)(A).

ARGUMENT

1. In 28 U.S.C. § 2412(d)(1)(A), EAJA authorizes an attorney's fees award against the government "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." CAN was the prevailing party here, but as a "partial waiver of sovereign immunity," EAJA "must be strictly construed in favor of the United States." Ardestani v. INS, 502 U.S. 129, 137 (1991). Thus, the fact that the government lost on the merits does not mean that its position was not substantially justified, because that presumption "would virtually eliminate the 'substantially justified' standard from the statute." United States v. Paisley, 957 F.2d 1161, 1167 (4th Cir.) (citation and quotation marks omitted), cert. denied, 506 U.S. 822 (1992).

This Court has now found that Buckley and MCFL foreclose the Commission's regulatory authority over corporate independent expenditures except those for communications that use "explicit words of advocacy" (slip op. 7), and the Commission does not seek reconsideration of that decision on the merits. However, under the EAJA, the question now, as the panel noted (slip op. 26), "is only whether the FEC was 'substantially justified' in taking the position it did...." This is an "entirely historical" inquiry, Pierce v. Underwood, 487 U.S. 552, 561 (1988), which must be analyzed "without the advantage of this Court's subsequent

pronouncement on the actual meaning of the law." Trahan v. Brady, 907 F.2d 1215, 1219 (D.C. Cir. 1990). The question, then, is only whether it was reasonable for the Commission to believe — before this Court's decision to the contrary — that the Supreme Court's decisions in Buckley and MCFL did not foreclose the possibility that express advocacy could consist at least partly of imagery that conveys an unambiguous message to elect or defeat a candidate, and to make that argument in this, the very first case in which this legal question has been squarely presented.

2. In presenting this position, it was certainly never the Commission's intent to try to mislead the Court about the focus on the use of language for express advocacy in the Buckley and MCFL decisions. The Commission's brief was written on the assumption that the Court would read the district court decision under review, which itself quoted in full (894 F.Supp. at 951) the Buckley Court's footnote about "express words of advocacy," 424 U.S. at 44 n. 52. The district court explicitly recognized that the Commission's argument was that the prior decisions "are readily distinguishable" because " 'those cases all involved textual communications rather than television advertisements' " and that "a different analysis is appropriate when, as here, a television commercial is at issue" (894 F. Supp. at 955 & n.11, quoting FEC Memorandum). In fact, the Commission actually called attention to some of Buckley's key passages and never attempted to divert the Court's attention from them.[1] Similarly, the Commission candidly conceded (Br. 38) that CAN's television advertisement "contains no literal phrase such as 'Defeat

[1] "When the Supreme Court in Buckley narrowed the definition of independent expenditures, it stated that the term must be construed to apply only to 'communications that in express terms advocated the election or defeat of a clearly identified candidate.' " (Br. 22 (quoting Buckley, 424 U.S. at 44)). On page 15 of the Commission's brief on the merits, a line from the Buckley decision was quoted without noting that a footnote had been omitted. That this was an unfortunate citation error, and not an attempt to divert the Court's attention from footnote 52 of Buckley, as suggested by the panel (slip op. 28), is demonstrated by the fact that the Commission specifically cited the Court to footnote 52 twice in the same brief (pp. 24-25, 34).

Bill Clinton,' " and that its case relied heavily upon the argument that CAN's ad "contains a special kind of charged rhetoric and symbolism that exhorts more forcefully and unambiguously than mere words."[2]

Whether the Commission was "substantially justified" under EAJA turns on whether there existed, before the decision in this case, any reasonable question about whether precedent binding in this Circuit had already held that the express advocacy test could not be satisfied by symbols, images, sounds, and rhetorical devices that are unambiguous enough to function as the equivalent of the literal words discussed by the Supreme Court. The Commission's argument was that the language of the Buckley and MCFL opinions should be construed in a manner consistent with Buckley's rationale: to avoid unconstitutional vagueness by regulating only speech that is unambiguously directed at electing or defeating a federal candidate. Especially because no court had ever before addressed a case involving such non-verbal communications, and because these expressive devices are of exceptional importance in today's political campaigns and therefore in the continuing vitality of the Act, the Commission respectfully suggests that it was not unreasonable for the Commission to present this approach to the rationale of Buckley and MCFL to this Court in a case of first impression.

EAJA "redresses governmental abuse" and "it was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong." Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir.), cert. denied,

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[2] See also Br. 14 ("CAN's video did not use any 'magic' words or phrases such as 'vote against,' ... [but] [t]his unmistakable, unambiguous communication expressly advocated the defeat of Bill Clinton through more powerful — thought marginally less direct — words, images, and sounds.")

510 U.S. 864 (1993). Moreover, "the 'special circumstances' provision of section 2412(d)(1)(A) was in part designed to ' "insure that the Government is not deterred from advancing in good faith ... novel but credible ... interpretations of the law that often underlie vigorous enforcement efforts." ' " Griffon v. United States Dep't of Health & Human Servs., 832 F.2d 51, 53 (5th Cir. 1987) (citation omitted); H.R.Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980). In lawsuits involving first-impression interpretations of statutes, the government is usually substantially justified within the meaning of EAJA if it presents a reasonable legal position on a question being addressed for the first time in the circuit. See Hyatt v. Shalala, 6 F.3d 250, 256 (4th Cir. 1993) ("The Secretary was justified in litigating the issue on appeal because it was still one of first impression in this circuit").[3] Similarly, "[w]hether the case being litigated is or is not materially the same as earlier precedent is frequently the very issue which prompted the litigation in the first place" and "[s]uch questions can be close." Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986) (construing Fed.R.Civ.P. 11).

3. Whether the Commission's view of relevant precedent was reasonable here comes down to the issue framed in United States v. London, 66 F.3d 1227, 1240 (1st Cir. 1995), cert. denied, 116 S.Ct. 1542 (1996), and overlooked by the panel: "[W]hen should [the courts] apply the literal meaning of a word used in a Supreme Court decision to a generic circumstance that was not in controversy before the Court?"

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

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[3] See also TKB Int'l, Inc. v. United States, 995 F.2d 1460, 1468 (9th Cir. 1993); Stebco, Inc. v. United States, 939 F.2d 686, 688 (9th Cir. 1990); De Allende v. Baker, 891 F.2d 7, 12-13 (1st Cir. 1989); Griffon, 832 F.2d at 52-53; Boudin v. Thomas, 732 F.2d 1107, 1116 (2d Cir. 1984); Spencer v. NLRB, 712 F.2d 539, 559 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984).

Id. (quoting Cohens v. Virginia, 6 Wheat. (19 U.S.) 264, 399 (1821)). See also Jean v. Nelson, 472 U.S. 846, 872 (1985) (quoting Cohens); United States v. Buxton Lines, 165 F.2d 993, 995 (4th Cir. 1948) (same).

Before this case, neither the Supreme Court nor any other court had ever directly addressed whether non-verbal communications could function as an equivalent of literal words under the express advocacy test.[4] The Supreme Court has analyzed the "express advocacy" requirement only twice. In Buckley, no specific communications were before the Court — let alone any involving non-verbal expressions. While the Court indeed stated that "express terms" or "express words" were necessary, it also stated that the purpose of the express advocacy requirement was to ensure that "expenditure" was defined to be "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. Moreover, the Supreme Court recognized that a candidate can be "clearly identified" with a non-verbal message such as a "photograph or drawing, or other unambiguous reference," id. at 43 n.51, and explicitly likened its requirement of express advocacy to the "explicit and unambiguous reference to the candidate" required by the Act to make a candidate "clearly identified" (id. at 43 & n.51 (emphasis added)):

> The constitutional deficiencies ... can be avoided only be reading [then] § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly

[4] None of the lower court "string of losses" cited by the panel (slip op. 13) involved the sort of symbolic or non-verbal communications at issue here. The two most recent cases cited were not decided on appeal on "express advocacy" grounds, and the Court omits from this list the cases in which the Commission prevailed on the express advocacy issue: MCFL and FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir.), cert. denied, 484 U.S. 850 (1987). Moreover, it is not correct to say the Commission lost on this issue in Colorado Republican Federal Campaign Comm. v. FEC, 116 S.Ct. 2309 (1996), because the Commission did not argue that the ad in that case contained express advocacy, and the court in FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995), declined to reach the express advocacy issue precisely because it was a close one.

> identified" in [then] § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication.[51]
>
> [51] Section 608(e)(2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identify appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (e.g., FDR), the candidate's nickname (e.g., Ike), his office ...

While this language in Buckley is not conclusive, it does give reasonable support to the Commission's view that the Buckley Court might not have intended to foreclose satisfaction of the express advocacy test by unambiguous non-verbal communications.

In MCFL, the only time the Supreme Court has ever applied the express advocacy standard to a particular set of facts, the communication at issue used written words. Thus, again, the Court had no occasion to consider whether non-verbal communications could constitute express advocacy.

> [W]ords of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.

Armour & Co. v. Wantock, 323 U.S. 126, 132-34 (1944) (Court revisited its previous reference to "actual work" as "physical or mental exertion," and found firefighters' idle or recreational time on duty to constitute work). See also Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979) ("language of an opinion is not always to be parsed as though we were dealing with language of a statute"). Just as the Court explained in Armour and Reiter that its prior definitions had to be understood in the factual context in which they arose, here the Commission presented a reasonable position on a question that the Court in Buckley and MCFL had simply never considered.[5]

[5] As the Second Circuit has noted, "we are dealing with a constitutional concept of 'express advocacy' that is itself not completely unsusceptible to interpretation." United States Defense Comm. v. FEC, 861 F.2d 765, 753 (2d Cir. 1988).

In MCFL, the Court itself suggested that the express advocacy standard, despite its protection for political speech, could encompass communications less direct than might have been thought from some of the language in Buckley. The publication at issue in MCFL did not literally state "vote for" particular candidates. It asked readers to "vote pro-life" and also, on later pages, identified by name and photograph candidates that fit the "pro-life" description. Although the district court in MCFL had found this was not express advocacy under Buckley, the Court found that the publication provided "in effect an explicit directive" and explained that express advocacy could be "marginally less direct" than "Vote for Smith," as long as its "essential nature" was clear (479 U.S. at 249; emphasis added). Without considering non-verbal communications or speculating about future cases, the Court clearly indicated that advocacy less direct than the literal phrases discussed in Buckley, 424 U.S. at 44 n.52, could fall within § 441b.

The panel in this case acknowledged that "[i]t may well be ... that 'it would indeed be perverse to require FECA regulation to turn on the degree to which speech is literal or figurative, rather than on the clarity of its message,' '[g]iven that banal, literal language often carries less force.' " Slip op. 30 (quoting FEC Br. 25-26). Contrary to the panel's conclusion (id.), however, the Buckley and MCFL decisions never addressed this point, let alone rejected it.[6]

The First Circuit confronted a similar issue in United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert. denied, 116 S.Ct. 1542 (1996), when it decided that "reckless disregard" of

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[6] Contrary to the panel's implication (slip op. 29-30), when the Commission argued (Br. 25) that "no words of advocacy" are necessary for express advocacy, its primary focus was on campaign slogans or bumper stickers such as the Supreme Court's example, "Smith for Congress," 424 U.S. at 44 n.52, and "Mondale!" — an example provided in subpart (a) of the Commission's regulation defining "express advocacy," which was not invalidated in Maine Right to Life Comm., Inc. v. FEC, 914 F. Supp. 8, 11 (D.Me.), aff'd, 98 F.3d 1 (1st Cir. 1996), petition for cert. filed (U.S. May 15, 1997) (No. 96-1818). See 11 C.F.R. § 100.22(a) (1996); 60 Fed. Reg. 35,304-05 (1995). Neither of these slogans contains a literal exhortation to take action, yet the action advocated (voting) is unambiguous and unmistakable.

unlawful conduct satisfied the willfulness requirement of a money laundering statute, even though the Supreme Court had previously ruled that "knowledge" of the unlawful act was required, and had even used the phrase "actual knowledge" in one part of its opinion. Despite this language, the First Circuit held that the Supreme Court's silence about "reckless disregard" did not exclude that variation from being treated as part of the definition of "knowledge." Id. at 1240-41. Here, the Commission was substantially justified in taking a similar position for the first time in this Circuit, arguing that an unambiguous non-verbal exhortation to vote for or against a candidate about which reasonable minds could not differ, was tantamount to words such as "vote for" or "vote against" for purposes of the express advocacy test. Moreover, like the First Circuit's reliance on the "wider scope given definitions of 'knowledge' in [other] cases and statutes," id., the Commission also analyzed (Br. 25-37) a broad array of analogous cases showing that in First Amendment jurisprudence, especially in the Establishment Clause area, the courts have recognized that symbols and other non-literal communications can send unambiguous messages (as understood by a reasonable viewer) that may lawfully be restricted under the First Amendment. Cf. FEC v. Furgatch, 807 F.2d at 863 ("The doctrines of subversive speech, 'fighting words,' libel, and speech in the workplace and in public fora illustrate that when and where speech takes place can determine its legal significance.")

4. The limited space allowed for a petition for rehearing prevents the Commission from addressing the numerous instances in which the panel drew unwarranted negative inferences about the presentation of this position by the Commission. As examples, in addition to the items addressed above, we note:

- Contrary to the panel's suggestion (slip op. 3 n.1), the Commission did not "argue[] that the district court accepted the Commission's theory that 'imagery' can constitute 'express advocacy.' " The Commission's Statement of the Case (Br. 9) quoted the district court's finding that CAN's ad did not contain words or imagery advocating electoral

action, but on the very next page the Commission quoted the district court's refusal "to delve into the meaning behind an image" (Br. 10). See also FEC Opp. to Atty. Fees at 5.

- The panel (slip op. 28 n.13) characterizes as "sleight-of-hand" the Commission's quotations (Br. 18) of the Furgatch opinion's concern about "eviscerating" the Act, apparently in the panel's view without sufficient context. At page 25 of the same brief, however, the Commission quotes even more language from the same passage in Furgatch than the panel repeats in its footnote 13.[7]

- The panel refers several times (slip op. 11-12 & n.6) to the Commission's opposition to certiorari in the Furgatch case. Because the Supreme Court reviews judgments, not opinions, the Commission's opposition appropriately focused on why plenary review of the specific judgment below was unwarranted, rather than on the Ninth Circuit's general analysis of express advocacy. But the Commission did not suggest that the Ninth Circuit's analysis was either erroneous or unimportant.

In short, the Commission properly cited and addressed the precedents relied upon by the panel and presented the best arguments it could for its view of the law. See Golden Eagle, 801 F.2d at 1542 (lawyer is not required "in addition to advocating the cause of his client ... to step into the robes of the judge to decide whether ... authority is indeed contrary or whether it is distinguishable").

5. The panel firmly rejected (slip op. 7-12) the Commission's construction of Furgatch as supporting a broader construction of express advocacy, but this is the first case in which Furgatch has been read in this way. No decision before this case had read the Furgatch opinion as "specifically [defining] 'speech' ... as the literal words or text of the communication" (slip op. 9). Furgatch focused on words because the political advertisement in that case consisted entirely of words, but that opinion did not discuss whether unambiguous symbolic speech and non-verbal communications could fall within its test for express advocacy. Thus, the Ninth

[7] See also Furgatch, 807 F.2d at 862 ("Although 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.")

Circuit, like the Supreme Court in Buckley and MCFL, had no occasion to address whether other communication devices could be equivalent to words.[8]

In fact, while the panel found (slip op.10 n.5) that the "Commission's regulatory definition of 'express advocacy' does not parallel" the Furgatch test, the district court in Maine Right to Life that reviewed that regulation found that "[i]t is obvious that subpart (b) of the FEC regulations comes directly from this appellate language [in Furgatch]." 914 F. Supp. at 11-12 (quoting the three-part standard for express advocacy set out in Furgatch, 807 F.2d at 864). Far from finding that Furgatch does not support the Commission's approach, the Maine court rejected the Commission's regulation because that court refused to follow Furgatch.[9] Moreover, on May 15, 1997 the Acting Solicitor General of the United States sought Supreme Court review of the Maine Right to Life decision, arguing that the "decision of the court of appeals conflicts with [Furgatch]" (Pet. for Cert. at 9), and that the "district court recognized that subsection (b) of the Commission's regulation 'comes directly from' the Ninth Circuit's reasoning in [Furgatch]" (id. at 7), and explaining that the reason Supreme Court review was not sought of the merits decision in the instant case was because it was unpublished (id. at 12 n.3).

In sum, before this case and Maine Right to Life, no other court had rejected the Furgatch approach or interpreted its standard to exclude communications that use non-verbal speech to

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[8] Likewise, when the Commission opposed Supreme Court review of the Furgatch decision, its opposition to certiorari had no occasion to address whether express advocacy could consist of non-verbal communications.

[9] Although drafted in general terms to apply to future cases, the Commission clearly intended in good faith to model its regulation on the Furgatch decision (60 Fed. Reg. 35,292, 35,295 (1995)):

> [N]ew section 100.22(b) has been revised to incorporate more of the Furgatch interpretation by emphasizing that the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action.

convey an unambiguous message. Thus, even though this Court has now concluded that the Commission was wrong in arguing that CAN's advertisements constituted "express advocacy," the Commission was nevertheless substantially justified in this case because it was a question of first impression whether CAN's complex video communication could be treated as the functional equivalent of explicit words of advocacy. An award of attorney's fees against the Commission is therefore inappropriate.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing and rehearing in banc of the decision issued by a panel of this Court on April 7, 1997.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 1997, I caused to be served by U.S. Mail, postage prepaid, copies of the foregoing Petition for Rehearing and Suggestion for Rehearing In Banc of the Federal Election Commission in the above-captioned case on the following counsel for appellees:

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